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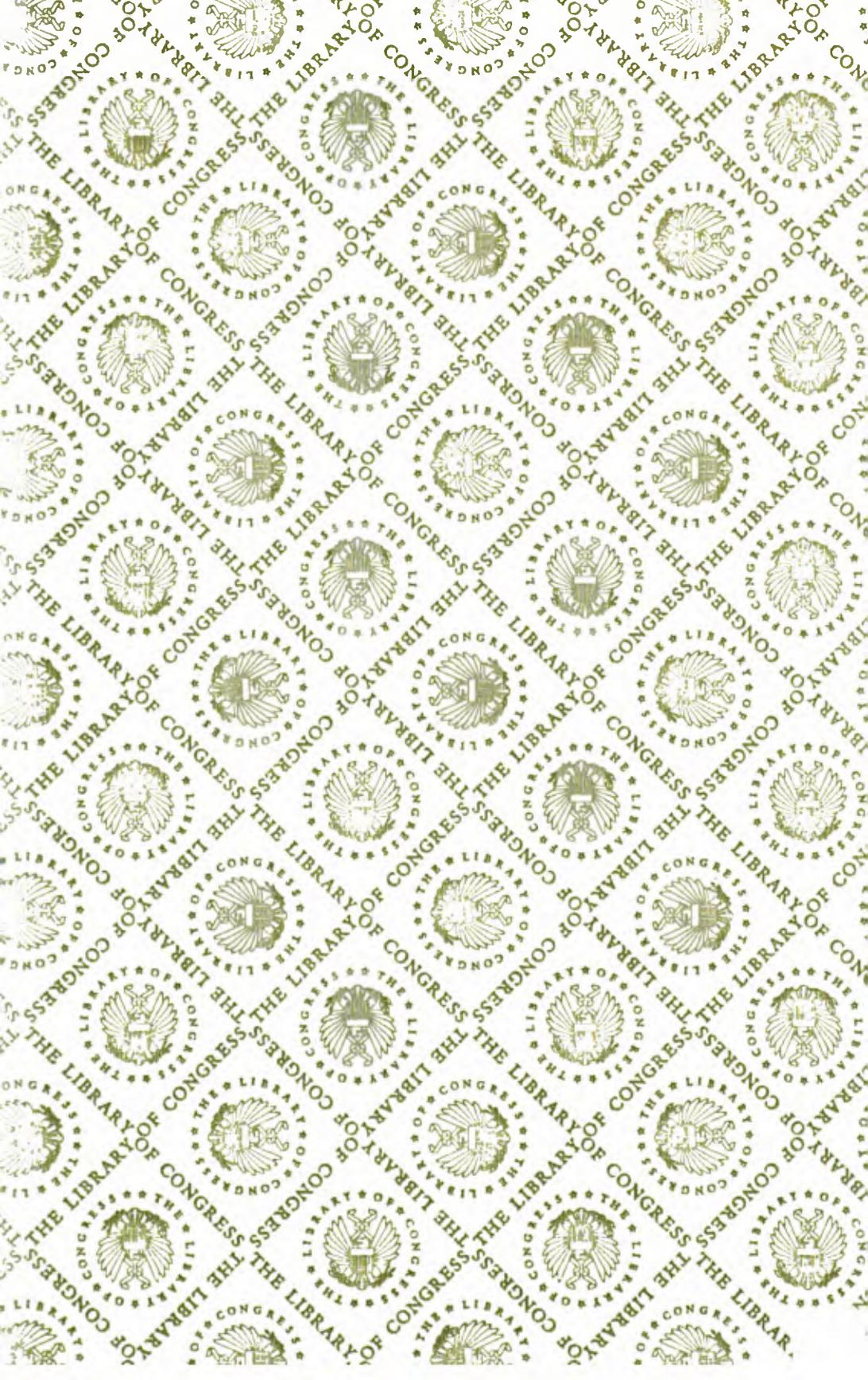
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**FINAL REPORT OF THE COMMISSION ON
STRUCTURAL ALTERNATIVES FOR THE
FEDERAL COURTS OF APPEALS**



HEARING
BEFORE THE
SUBCOMMITTEE ON COURTS AND INTELLECTUAL
PROPERTY
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTH CONGRESS
FIRST SESSION

JULY 22, 1999

Serial No. 68



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FINAL REPORT OF THE COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS

THURSDAY, JULY 22, 1999

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS AND
INTELLECTUAL PROPERTY,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to call, at 2:50 p.m. In Room 2237 Rayburn House Office Building, Hon. Howard Coble [chairman of the subcommittee] presiding.

Present: Representatives Howard Coble, Bob Goodlatte, Edward A. Pease, James E. Rogan, Howard L. Berman, John Conyers, Jr., Zoe Lofgren, and William D. Delahunt.

Staff Present: Mitch Glazier, Chief Counsel; Blaine Merritt, Counsel, Eunice Goldring, Staff Assistant; Bari Schwartz, Minority Counsel; and Cori Flam, Full Committee Minority Counsel.

OPENING STATEMENT OF CHAIRMAN COBLE

Mr. COBLE. Good afternoon, ladies and gentlemen. The subcommittee will come to order. The best-laid plans of mice and men, you know, sometimes go awry. I apologize to you all for the belated commencement of the hearing, but we had very important votes on the floor, and for that reason, we are belatedly beginning.

Good to have all of you with us.

Today we will discuss the findings and recommendations of the Commission on Structural Alternatives for the Federal Courts of Appeals. Most of you will recall that last term, at this committee's insistence, the Congress created the mission to study our Nation's circuit court operations with special attention accorded to the ninth. While I doubt that every member of our subcommittee has the same impression of the final report under consideration, I think I speak for most of us by noting that we are grateful for the industriousness and professionalism exhibited by the Commission members and their staffs as they labored to complete their work in 1 year's time.

The report predictably has generated controversy. Some individuals endorse its simple recommendation that we reorganize the ninth into adjudicative divisions that can function as a template for other circuits as they become larger. A second group of observers prefer that we split the ninth outright and create a new twelfth cir-

cuit. And still a third contingent favors the status quo augmented by occasional administrative change developed by the ninth itself.

We will hear from all sides in this matter, and I am looking forward to the discussion.

Now, Mr. Berman and I have discussed this in the interim and it is my belief that some people believe that simply because the Commission was created at our insistence, that it will be a rubber stamp. It may be a rubber stamp; it may be total rejection. That is the purpose of this hearing today, to hear from all sides.

I am now pleased to recognize my good friend from California, the ranking member, Mr. Berman.

Mr. BERMAN. Thank you very much, Mr. Chairman. I join you in apologizing to our very distinguished panel for what must be a delay that probably really messed up your schedules. In the exercise of our subcommittee's jurisdiction over the Federal courts, it is appropriate that we meet today to review the report of the Commission on Structural Alternatives for the Federal Courts of Appeal.

On any number of subjects that we consider in the subcommittee, I can say that I look forward to testimony that will illuminate issues on which I have not yet reached a conclusion. But today's subject is hardly new to me, and I would not try to con anyone into thinking that I don't already have strong views.

My very first term in Congress, when I joined the subcommittee, proposals were already being circulated to split or to reorganize the ninth circuit. I opposed those proposals then, as I do now, while I stand ready to entertain any and all innovations, such as en banc reforms, that may improve the administration of justice within the unitary ninth circuit. I think I am right in saying that I believe Senator Feinstein has proposed some en banc reforms in this area.

Proponents of the Commission's recommendations take pains to emphasize the national scope of the Commission's work. Yet we know that the Commission scuttled its original recommendation for a mandatory divisional structure for all circuits comprised of more than 17 judges in the face of opposition from the other circuits.

Last year when then Governor Pete Wilson's Legal Affairs Secretary testified before the Commission on behalf of Governor Wilson, he didn't mince words. In opposing a split of the ninth circuit, he said it "appeared to be motivated by judicial gerrymandering, so as to cordon off some judges from others. That can never be a legitimate basis for circuit realignment."

Critics of the circuit have often cited the circuit's reversal rate in the Supreme Court. I want to note for the record, however, that while the reversal rate was very high in the past, in the most recent 1998-1999 term, the ninth circuit's reversal rate of 61 percent was actually lower than the average reversal rate for all lower courts of 67 percent.

But even at that, what exactly does the reversal rate signify? Consider the recent trio of cases handed down by the Supreme Court last month, holding that under the 11th amendment, critical Federal rights cannot be vindicated when they are violated by the States—decisions that stunned jurists and lawyers around the country, and this subcommittee no less in view of our jurisdiction over our Nation's patent and trademark laws. When we in Con-

gress are still reeling from the magnitude of the Court's actions, can we sit here and truthfully say that our lower courts can perfectly anticipate the Supreme Court's views?

I do believe that the Commission members, including our witnesses here today, undertook their task in complete good faith and attempted to address the issues at hand on their merits. So will I. But as I review the Commission's recommendation that the circuit be divided into two semiautonomous administrative divisions that would split California, I am struck by the enormously harmful consequences that I think that may pose for my home State.

Governor Gray Davis has observed in a letter, that I would like to submit for the record, that the proposal "creates a separation between northern and southern California that is inimical to what I am attempting to accomplish as governor. Furthermore, splitting California between two divisions would likely result in inconsistent Federal rules on important California laws—one ruling covering the north, a different ruling covering the south. As a result, businesses operating in California would be subject to conflicting State laws, making it more costly to do business in California."

His predecessor, Pete Wilson, is no less opposed to the administrative division proposal than he was to the split, contending that it would, "promote forum shopping and foster confusion over the application of Federal law in California, impacting litigation ranging from admiralty to the decennial redistricting of California," (the latter being a deep and abiding interest of Pete Wilson and mine).

That said, I want to welcome some old friends and encourage the esteemed proponents of the Commission's recommendations to have a go at convincing me. I apologize for lengthier than usual remarks, but this is an issue of great interest to me.

And I thank you, Mr. Chairman.

Mr. COBLE. This is close to home. I told someone yesterday, Howard, I didn't have a dog in this fight. What I meant by that was that I don't live in California nor in the ninth circuit. I did not mean that I was not interested.

We are pleased to have been joined by Mr. Delahunt, the gentleman from Massachusetts. Did you have a statement to make?

Mr. DELAHUNT. No, I don't, Mr. Chairman. I certainly don't have a dog in this fight either, but I would raise—I had an opportunity to review some of the materials prior to this hearing, and I note that there still exist a number of vacancies in this particular court and if the problem is—if the issue is case load, delay, inability to process appeals in a timely fashion, if that is how we are going to define the problem, I wonder if the problem can be traced to the fact that a disproportionate number of vacancies in terms of the size of the court itself continue to exist. And I yield back.

Mr. COBLE. I thank the gentleman.

Upon their respective requests, I am going to begin with the gentleman from Alaska, Senator Murkowski. He will be followed by the gentelady from California, the Honorable Senator Feinstein.

Tom, with your permission, since he is visiting from Mt. Olympus, we will recognize Senator Kyl as the third speaker.

Folks, we are easy to get along with here, but we are on a short leash. When that red light illuminates in your eye, that is your signal that your 5 minutes have elapsed. Now, we will examine writ-

ten testimony in detail. It has been done; it will be done again. But I ask you all if you will be ever-vigilant when that red light comes on. The sergeant at arms is not here ready to take you out in leg irons, but we will be looking sternly at you.

The gentleman from Alaska.

**STATEMENT OF HON. FRANK MURKOWSKI, A U.S. SENATOR
FROM THE STATE OF ALASKA**

Mr. MURKOWSKI. Thank you, Mr. Chairman. Knowing of your background in the United States Coast Guard, I know you will be on time.

Let me, on behalf of Senator Gorton who was here and had to leave, thank you. We introduced bill 253 adopting the recommendations of the White Commission. It is my hope that members of the House will introduce similar legislation.

This is not an issue of the other States vis-a-vis California in the ninth circuit. Congress has attempted to reorganize the ninth circuit since World War II, so this is nothing new. The time for action is long overdue. Justice bears the price for Congress's inaction.

In 1997, Congress mandated the White Commission to once and for all try and resolve the severe problems of the ninth circuit. The House supported a thorough study and strongly endorsed the concept of the White Commission. Well, now we have the results of that study. For the good of the people of the ninth circuit I hope we can act in a bipartisan manner to support its findings.

Mr. Chairman, the restructuring of the ninth circuit, as in the White report, Chart 1, is warranted in the charts over on your right for three important reasons. Its size and population, its case load, and its astounding reversal rate by the United States Supreme Court. The size is gigantic, by far the largest of the 13 circuits encompassing, on the West Coast, some 6,000 miles from the Arctic border to Mexico. It is bigger than 1, 3, 4, 5, 6, 7, and 11 combined; see Chart Number 2, if you will—gives you some idea. Population: Over 50 million people are served by the ninth circuit, almost 60 percent more than the next largest circuit, if you look at Chart Number 3.

Case load, the ninth circuit docket is daunting, last year over 9,000 new filings, over a thousand more than the largest courts. You have got a problem in size. The result, the cases are decided slowly, prompting many to forgo the entire appellate process.

In brief, the ninth circuit is a circuit where justice is not always swift and not always served. The reversal rate speaks for itself. A gigantic case load means it is nearly impossible for judges to keep up with the legal developments inevitably resulting in inconsistent decisions and high reversal rate. The ninth circuit Judge Andrew Kleinfeld said at a Senate hearing last week that the inconsistent decisions in the ninth circuit are out of control. He cited two death penalty cases in California in different regions that are completely irreconcilable with one another.

Now, if you look at Chart 4, it tracks the ninth's reversal rate. Look at 1997, where the Supreme Court reversed an astounding 19 of 20 circuit court cases; that is a 95 percent reversal rate. Chart 5, between 1997 and 1999, the ninth circuit was responsible for 33 percent of all cases reversed by the Supreme Court. I don't mean

any disrespect to the distinguished Chief Justice of the ninth circuit by citing these figures. I believe that he and the circuit are simply overworked, in need of relief; and obviously he doesn't want to break up the ninth on his watch.

Why is the reversal rate so high? The circuit is too big. The ninth circuit judges are unable to keep up with the daunting 9,000 cases. The majority of the Supreme Court judges, the majority want the circuit divided. Of the five Supreme Court justices who wrote to the Commission, all were of the opinion that the ninth circuit must be changed. Chief Judge Rehnquist strongly endorsed the Commission report. I would ask that his quote be entered into the record, as read.

Mr. COBLE. Without objection.

Mr. MURKOWSKI. What about the critics? Well, some say more judges is going to resolve the problem. More is not better. In the words of one of our respected colleagues, a former Alabama Supreme Court Judge, Howell Heflin, former Senator, quote, "The addition of judges decreases the effectiveness of the court and potentially diminishes the quality of justice."

Now, judges do oppose this split. It is estimated that about a third of the ninth circuit judges have indicated that they oppose a split—excuse me. Some judges oppose a split. One-third of the ninth circuit judges strongly favor this legislation, and it is suggested if they were asked by secret ballot, that number would be substantially more. If you go back in history and recognize what happened when the fifth circuit was broken up, there was a decision made as to how justice could best be served and they decided against going en banc. That was a decision made in the fifth and a different decision was made in the fifth.

They decided to go this particular route. They have had an opportunity to experience it, and that experience has not been entirely satisfactory. So, Mr. Chairman, Congress must remember that it is a congressional duty to restructure jurisdictions to ensure that justice is not hindered, and let's not forget that duty. That is our duty. Indeed, there is nothing unconstitutional or antijudicial or anti-ninth circuit about fixing the problems of the ninth circuit.

Final points: It is a cost-effective bill by retaining one administrative office. No new courthouses are needed. More importantly, the White report is a blueprint of case load management of the ninth circuit.

I understand that my colleague, Senator Feinstein, has introduced her own bill on the ninth circuit, and I appreciate her recognition that there are problems in the ninth. But I think the complaints with the White report are about dividing California and not about creating sensible regional divisions that will ease the overworked ninth circuit.

Let's not throw the baby out with the bathwater, Mr. Chairman. The question is not what is good for California. It is what is good for justice in the ninth circuit, and that is the issue. There is no magic recipe for the divisions in the White report. California can stay united, as far as I am concerned, but we have an obligation in Congress to do what is right in the name of justice.

Mr. Chairman, I cannot stress strongly enough, some form of regional divisions are imperative. The people of the ninth circuit de-

serve consistency and predictability of law. Senator Gorton and myself believe this legislation is a good start.

Lastly, I want to personally thank the members of the Commission, their sense of duty, their sense of diligence and wisdom is reflected in this report and this is it, Mr. Chairman. It should not be taken lightly by any means, because it was a significant effort to address a very, very significant problem.

I thank you for the time. I wish you a good day and I would ask that I might be excused.

[The prepared statement of Senator Murkowski follows:]

PREPARED STATEMENT OF HON. FRANK MURKOWSKI, A U.S. SENATOR FROM THE STATE OF ALASKA

Mr. Chairman, thank you for this opportunity to testify. As you know, Senator Gorton and I introduced S. 253, legislation adopting the recommendations of the White Commission. It is my hope that members of the House will introduce similar legislation.

Congress has attempted to reorganize the 9th Circuit since World War II. The time for action is long overdue—justice bears the price for Congress' inaction.

In 1997, Congress mandated the White Commission to *once and for all* resolve the severe problems of the 9th Circuit.

- The House supported a thorough study and strongly endorsed the White Commission.
- Well, now we have the results of the study. For the good of the people of the 9th Circuit, I hope we can act in a bipartisan manner to support its findings.

Mr. Chairman, the restructuring of the 9th Circuit as in the White Report (Chart #1) is warranted for 3 important reasons:

1. It's *size and population*
2. It's *caseload*
3. It's *astounding reversal rate* by the U.S. Supreme Court

1. SIZE AND POPULATION.

A. Size. The 9th Circuit is gigantic—by far the largest of the 13 circuits—encompassing nine states and stretching from the Arctic Circle to the border of Mexico. It's bigger than the 1st, 3rd, 4th, 5th, 6th, 7th and 11th Circuits combined! (See Chart #2)

B. Population. Over 50 million people are served by the 9th circuit, almost 60 % more than the next largest circuit. By 2010, the 9th Circuit's population is expected to explode by over 40%. (See Chart #3)

2. CASE LOAD

The 9th Circuit's docket is daunting—last year over 9,000 new filings (over 1,000 more than the next largest circuit).

The result? Cases are decided slowly, prompting many to forego the entire appellate process. In brief, the 9th Circuit is a Circuit where justice is not always swift and not always served.

3. REVERSAL RATE

The gigantic caseload means it's nearly impossible for judges to keep up with legal developments—inevitably resulting in:

- 1) inconsistent decisions; and
- 2) a high reversal rate.

1. 9th Circuit Judge Andrew Kleinfeld said that inconsistent decisions in the 9th Circuit are out of control. He cited me two death penalty cases in California that are completely irreconcilable with each other.

2. Mr Chairman, Chart #4 tracks the 9th's reversal rate. Look at 1997, where the Supreme Court reversed an astounding 19 of 20 Ninth Circuit cases—that's a 95% reversal rate!

3. (Chart #5)—Between 1997 and 1999, the 9th Circuit was responsible for 33% of all cases reversed by the Supreme Court.

NOTE: I do not mean any disrespect to the distinguished Chief Judge of the Ninth Circuit by citing these figures—I believe that he and the Circuit are simply overworked and in need of relief.

Why is the reversal rate so high? The circuit is simply too big.

- 9th Circuit Judges are unable to keep up with the daunting 9,000 cases. As the report reflects, *only about half of 9th Circuit judges are able to read most published opinions.*

Majority of Supreme Court Judges Want the Circuit Divided. Of the five Supreme Court Justices who wrote to the Commission, all were of the opinion that the 9th Circuit must be changed!

Additionally, Chief Justice Rehnquist strongly endorsed the Commission's report:

"I share many of the concerns expressed by my colleagues . . . The proposal to create 3 divisions in the 9th Circuit appears to me to address head-on most of the significant concerns raised about that court and would do so with minimal to no disruption in the circuit's administrative structure."

What about the critics? Opponents of our bill argue:

1. *More judges will resolve the problem.* Well, more is not better. In the words of our former colleague and former Alabama Supreme Court Justice, Howell Heflin, "the addition of judges decreases the effectiveness of the court and potentially diminishes the quality of justice."
2. *Some Judges oppose a split.* Well, 1/3 of the 9th Circuit judges strongly favor S. 253. And, with due respect to the judicial bench who oppose a division—the judges of the 5th Circuit were not originally in favor of Congress dividing that court either.

Mr. Chairman, Congress must remember that it is Congress' *Constitutional duty* to restructure jurisdictions to ensure that justice is not hindered. Let's not forget that duty.

- Indeed, there is nothing unconstitutional, anti-judicial or "anti-9th Circuit" about fixing the problems of the 9th Circuit.

TWO FINAL POINTS:

Our bill is *cost effective*—by retaining one administrative office—*no new court-houses are needed.*

Most importantly, the White Report is a blueprint for caseload management for the Ninth Circuit and other growing Circuits.

CONCLUSION

I understand that my colleague, Senator Feinstein has introduced her own bill on the Ninth Circuit. I'm glad she recognizes that severe problems exist in the 9th Circuit.

But I think her complaints with the White Report are about dividing California—and not about creating sensible regional divisions that will ease the overworked 9th Circuit.

Let's not throw the baby out with the bathwater. Let's not miss this opportunity to fix the Circuit. There is no magic recipe for the Divisions in the White Report—California can stay united.

But, Mr. Chairman, I cannot stress strongly enough—some form of regional divisions are imperative! The people of the Ninth Circuit deserve consistency and predictability of law—Senator Gorton and my legislation will give them that.

Lastly, I want to personally thank the members of the Commission. Their sense of duty, diligence and wisdom is reflected in this report (Hold up report). I only ask that Congress has the prudence to follow its thoughtful recommendations.

Mr. COBLE. In typical Coast Guard fashion you beat the red light.

Mr. MURKOWSKI. I worked on it.

Mr. COBLE. Senator Feinstein, before I recognize you, when I refer to you all as visiting us from Mt. Olympus, Senator Kyl looked sternly at me. I was not in any way saying that in a disparaging way.

Senator Feinstein, good to have you with us.

**STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR
FROM THE STATE OF CALIFORNIA**

Ms. FEINSTEIN. Thank you very much, Mr. Chairman, and other House Members as well.

On behalf of Senator Harry Reid, I would like to inform the committee that the Senator from Nevada was unable to remain. He was here earlier, and he will be submitting a statement for the record; I hope that is acceptable. He asked me to inform you that he is an original cosponsor of my legislation, S. 1403, because he believes that this legislation addresses challenges faced by the ninth circuit in a reasonable manner without instituting the sweeping, unnecessary changes recommended by the White Commission.

And now, Mr. Chairman, let me begin my statement by first of all thanking you for holding this hearing. It is clear that the matter is on the front burner, and this is actually the second of two hearings. I was ranking and able to stay for the entire hearing in the Senate last Friday, and you are going to hear virtually the same witnesses, including the Chief Judge Procter Hug, Judges Wiggins, Rymer, O'Scannlain, Browning, and Attorney Ronald Olson.

I want to say this. All are excellent advocates and each brings some very interesting points of view. After listening to them all, I understood fully that this is not an easy subject; it is a very complicated subject.

It is complicated to a certain extent by precedent. All circuits are at least three States, and by the fact that you have one very large State, California which is 60 percent of the case load of the circuit. I represent that State and I sit on the Judiciary Committee of the Senate, and I have given it a good deal of thought. During the past months, I have received a barrage of letters and comments from scholars, from lawyers, from judges, from political figures. They are virtually unanimous in their opposition to a ninth circuit split or a division of the circuit, as proposed by the White Commission. Governor Davis, former Governor Wilson, Attorney General Lockyer, the United States Department of Justice, which incidentally is the largest user of the ninth circuit, all voiced strong opposition to the White Commission report. The State Bar of California, the California Academy of Appellate Lawyers, and virtually every single bar association in my State, including Los Angeles, San Diego, San Francisco, Beverly Hills, and Alameda County Bar Associations, and all oppose the White Commission's proposal.

Of particular concern is the White Commission's proposal to split the State in half. I think every member of your committee can understand that that kind of a split has implications far beyond legal implications. Practitioners have informed me of their very serious and grave concerns about disparate interpretations of California law. If the underlying principal of Federal circuits is to harmonize the interpretation of Federal laws among multiple States, this proposal does the opposite by dividing California. That is unacceptable to me for a number of reasons, most of them pointed out by others and particularly the governors of California.

The opposition is strong regardless of how the White Commission's divisions are cobbled together. Each approach, as Governor Wilson notes, would lack the balance and objectivity, the geo-

graphical diversity that a multistate circuit would offer, although, for me, keeping California as a single circuit, I believe draws less opposition.

So why is this restructuring needed? The White Commission goes to considerable pains on page 6 of their report to say the following: "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 a constitutional dimension and requires no less." And I do not doubt that their considerations and their recommendations are based on anything other than the beliefs in their report.

However, I do believe that much of the opposition is based on the reversal rate. And let me say one thing, and then quickly, if you will just allow me 1 quick minute, because I am the only representative from California on this panel—

Mr. COBLE. I think the gentleman to your left.

Ms. FEINSTEIN. Oh, I am sorry.

Mr. COBLE. That means we don't need to give you extra time.

Ms. FEINSTEIN. I will be very quick.

No matter how you keep score, the ninth circuit had a lower reversal rate last year than the fifth, seventh and eleventh circuits. And I want to leave that on the record.

Let me just quickly point out legislation I have introduced, which is cosponsored by the two Senators from Nevada and my colleague, Senator Boxer, from California. We try to push the circuit to institute some reforms, which I believe corrects some of the problems that have been raised. We would reduce the number of judges required to request an en banc hearing to 40 percent of the active service judges on the circuit.

I would like to submit a chart which will show you what that would do. This past year 17 cases were heard en banc. This would increase them by 11, meaning a total of 28 cases would be heard en banc; and you can see that from years going back. We would increase the size of en banc panels from 11 judges to a majority of the circuit, 15 judges. We would impose a system of regional calendaring, at least one judge from each geographic region where the case arises would be assigned to that case.

Mr. COBLE. We have all that in writing.

Ms. FEINSTEIN. That concludes my remarks. I will ask that the rest be put in the record, and I thank you for your forbearance.

Mr. COBLE. Without objection.

[The prepared statement of Senator Feinstein follows:]

PREPARED STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE
STATE OF CALIFORNIA

Mr. Chairman. Thank you for holding this hearing.

This is the second of two hearings in the past week on the Ninth Circuit. Last Friday, many of these same witnesses testified before the Senate Committee on the Judiciary, including Chief Judge Proctor Hug, Jr., Judge Charles E. Wiggins, Judge Pamela Rymer, Judge Diarmuid O'Scannlain, Judge William Browning, and attorney Ronald Olson.

They are excellent advocates, and I value their insights into this complex issue. I am confident that you, too, will find their statements illuminating.

For now, I will offer you my perspective as a Senator from the State of California and as a member of the Senate Judiciary Committee.

Over the past several months, I have received a barrage of letters and comments from scholars, lawyers, and judges of California. They are nearly unanimous in their opposition to a Ninth-Circuit split or a division of the Circuit as proposed by the White Commission.

Governor Davis, former Governor Wilson, Attorney General Lockyer, and the United States Department of Justice have all voiced strong opposition to the White Commission Report.

The State Bar of California, the California Academy of Appellate Lawyers, and virtually every single Bar Association in the State (including Los Angeles, San Diego, San Francisco, Beverly Hills, and Alameda County) oppose the White Commission proposal.

Of particular concern is the White Commission's proposal to split California in two. These practitioners informed me of their "grave concerns about disparate interpretations of California law." If the underlying principle of Federal circuits is to harmonize the interpretation of Federal laws among multiple states, this proposal does the exact opposite by dividing California. That is unacceptable to me for a number of reasons all of them pointed out by others—particularly the two Governors of California.

This opposition is strong regardless of how the White Commission's "Divisions" are cobbled together. Each approach, as Governor Wilson notes, "would lack the balance and objectivity that geographical diversity in a multi-state circuit would offer." Although keeping California as a single circuit, I believe, draws less opposition.

So why is this extreme restructuring needed? Proponents of altering the Ninth Circuit cite the Ninth Circuit's reversal rate in cases taken by the Supreme Court. The year cited, however, is the 1996-1997 term when the Supreme Court reversed 27 out of 28 cases. More recent years tell a different story.

The *American Lawyer* recently reported on the reversal rates of the Ninth Circuit in its 1998-1999 term. It reported that the reversal rate fell to 78%, barely above the national average of 70%. The Ninth Circuit's own calculations show an even more favorable result—just 11 out of 18 cases were reversed by the Supreme Court. The difference arises because four cases were reversed in part and affirmed in part.

No matter how you keep score, the Ninth Circuit had a lower reversal rate last year than the Fifth (80%), Seventh (80%), and Eleventh (88%) Circuits. In fact, in 1997, both the Fifth and the Eleventh Circuits again had higher reversal rates than the Ninth Circuit. And yet nobody is suggesting that the Eleventh or Fifth Circuit be broken up.

I think these statistics show that the Ninth Circuit is operating more effectively than many would have us believe. However, the Ninth Circuit can and should be improved. Reversal rates should be lower, and the public needs to have confidence in the job the Ninth Circuit is doing.

In testimony submitted to the White Commission, the Justice Department noted: "We begin with the observation that all available means of non-structural reform should be attempted and assessed before structural changes are imposed on the Federal courts." I couldn't agree more.

Joined by Senators Reid, Bryan, and Boxer, I recently introduced legislation that will enact targeted, non-structural reforms to the Ninth Circuit. Entitled "The Ninth Circuit Court of Appeals En Banc Procedures Act of 1999", this legislation would institute three major changes to Ninth Circuit procedures.

- It reduces the number of judges required to grant an en banc hearing;
- It increases the size of en banc panels from 11 judges to a majority (15) of the Circuit; and
- It imposes a system of regional calendaring in which at least one judge from the geographic region where the case arises, would be assigned to that case.

This legislation offers an appropriate, targeted solution to the problems the Ninth Circuit faces. I look forward to working with my Senate and House colleagues on this proposal.

Effect of Allowing En Banc Review with Less than a Majority of Affirmative Votes

Year	Number of Judges Voting	En Banc Ballots	No. of Cases Taken En Banc	No. of Cases That Got 45% Or More	No. of Cases That Got 40% Or More	No. of Cases That Got 1/3 Or More
1994 ¹	25-26	31	8	6	7	8
1995	23-26	27	8	2	4	8
1996	22-24	25	14	2	3	5
1997	17-20	41	19	2	5	11
1998	17-22	44	17	8	11	15
Total		168	66	20	30	47

¹ Ballot data incomplete.

Mr. COBLE. And, Senator, if you and Senator Kyl—I failed to ask Senator Murkowski if—you all will convey our apologies to Senator Gorton and to Senator Reid. I think they understand the gig, but if you will convey that, I will appreciate that.

Ms. FEINSTEIN. We will. Thank you.

Mr. COBLE. Senator Kyl, good to have you with us.

STATEMENT OF HON. JON KYL, A U.S. SENATOR FROM THE STATE OF ARIZONA

Mr. KYL. Thank you very much, Mr. Chairman, members of the panel. It is great to be back in the House.

Let me say that I think the three Senators who have testified here represent very generally the three different points of view in the Senate. And I haven't heard Representative Campbell, so I am sure he will speak for himself on this, but I think you get the flavor of the three different views with the three of us. And there are some overlaps between our views, but there is difference as well.

It seems to me there are essentially three questions here. Is the circuit too big? And I think the answer to that is yes. Is a division of the adjudicatory function the proper way to resolve the question? I agree with the White Commission report that it is a—it is probably the best of the ideas that I have seen with respect to how to deal with this. The third question is, is the specific plan that they recommended the right way to divide? On this, I say no, not at all and I would like to primarily address that.

Let me first say, though, that while it is true to some extent—and I know you have had fun with the phrase “no dog in the hunt,” it is also true that there are important precedents being created here, as well as this being an important national issue anyway, as you pointed out, Mr. Chairman; and in some respects, this division concept could represent the way that we will all solve our problems in the future because in 50 years all of us are going to have huge circuits, and we are going to have to find a way out of it.

The idea of having many, many, many circuits with the divisions of the circuits being split and having 20 or 30 different circuits doesn't appeal to very many people. The idea of having so many

different conflicts that you end up having to have an intermediate court of appeals because the U.S. Supreme Court can't handle them, that doesn't appeal to a lot of people. This concept of divisions for the adjudicatory function of the court, leaving the administrative functions alone in one big circuit, may well be the answer for the future for a lot of circuits. So I think that the White Commission has an idea well worth studying.

My interest is from the State that has the second highest number of appeals and cases and population in the circuit, Arizona. I practiced before the ninth circuit for 20 years. I know the issues well. And I would note that while Representative Delahunt suggested that maybe filling the vacancies would solve the problem, that is only part of the problem. Indeed, while more judges would obviously help with the backlog, part of the problem is the large number of judges. Testimony before the committee has noted that the collegiality necessary begins to dissipate when you get a court this big. As Justice O'Connor wrote, the circuit is simply too large, and some division or restructuring of the ninth circuit seems appropriate and desirable.

Let me move on to this concept of the divisions. As I said, it seems to me that it is a good way of resolving the issue, because the administration of the court remains intact as it is, but it essentially divides into panels to decide cases, geographic panels. Now, I sort of facetiously said, rather than arguing geography, maybe we ought to argue seasons and divide the circuit by seasons. In the winter, you can come to Arizona or southern California and in the summer we can go to Montana or Alaska. Unfortunately, I don't think you can do it that way. You have to figure out some way to divide it.

There is little to commend the Commission's recommendation with respect to its specific recommendation, it seems to me. By creating this southern division which has the three cities of Los Angeles, San Diego, and Phoenix in it, three of the most populous and fastest-growing cities in the country, you quickly create a situation where you are going to have to redivide this part of the circuit not long after you create it. This southern division of Arizona and central and southern California has 47 percent of the circuit's case load and 46 percent of the population and growing. By the time we put it into effect it obviously would be well over 50 percent. So clearly it is, at best, a very short-range solution and because of the extreme growth of the southern part of the circuit, it obviously isn't going to be workable for very long.

So then you get to the question of how should it be divided. I tend to think that for both political and practical reasons, we ought to seriously consider keeping California intact. As Senator Feinstein said, she would be much less opposed if there were a division that consisted of just the State of California. Without getting into all the reasons for it, I tend to think there is much to commend that approach.

And I have in the past supported dividing the circuit into two parts, California and then everyone else in the circuit. That would be about a 60/40 split the day you began, with California being 60. But others don't like that idea.

So there are other ideas, and in my testimony, I suggest a couple, one of which would have Arizona go to the tenth circuit. Unfortunately, the tenth circuit doesn't want Arizona, so that may not be practical.

Another solution is a four-way division, and this may actually have a lot to commend it, although it would result in the division of California in half.

Bottom line, Mr. Chairman, members of the committee, I think this will require a lot more discussion, and people of goodwill, I think, can come to a conclusion in time to resolve this question before it gets any worse.

Mr. COBLE. I thank you, Senator.

[The prepared statement of Senator Kyl follows:]

PREPARED STATEMENT OF HON. JON KYL, A U.S. SENATOR FROM THE STATE OF ARIZONA

I. OVERVIEW

I would like to thank Chairman Hyde for holding the hearing.

As a Senator from Arizona (the state which generates more appeals than any other Ninth Circuit state except California), a member of the Judiciary Committee, and as someone who practiced law in the Ninth Circuit for nearly 20 years, I have a keen interest in matters affecting the Ninth Circuit. It seems clear that the Ninth Circuit has problems. I agree with Justice White and the Commission that changes are warranted.

Indeed, in a letter to the Commission, Chief Justice Rehnquist noted, as an example, a case that the Supreme Court was about to hear: *Hughes Aircraft v. Jacobson*. The case was argued and submitted to the Ninth Circuit in November 1993. The Ninth Circuit opinion deciding the case was not filed until January 1997. The petition for rehearing was denied by the Ninth Circuit in October 1997—nearly four years after oral argument!

Additionally, in a letter to the Commission, Justice O'Connor—who is the Circuit Justice for the Ninth Circuit—stated that “the circuit is simply too large” and that “some division or restructuring of the Ninth Circuit seems appropriate and desirable.” She pointed out that the Ninth Circuit resolved only eight out of 4,841 cases en banc in the twelve month period ending September 30, 1997. During that same period, the Supreme Court granted hearing on 25 Ninth Circuit cases, and *summarily* decided 20 more! As she wrote, “these numbers suggest that the present system in the Ninth Circuit is not meeting the goals of en banc review.”

Perhaps the most telling are the statistics in Justice Scalia's letter. During a recent five-year period, the Ninth Circuit disposed of an average of 17.2 percent of all Circuit Court cases, but Ninth Circuit cases occupied an average of 25.3 percent of the Supreme Court's docket—a share that is larger by almost half. Additionally, Justice Scalia noted that for a recent six-year period, the Ninth Circuit's reversal rate by the Supreme Court was 81 percent, and the average for all other courts was 57 percent.

II. COMMISSION REPORT AND THE NINTH CIRCUIT

At the outset, I would like to compliment the Commission for its thoughtful, constructive recommendations. I think that the Commission's report will be helpful to Congress. My principal concern is that, while the Commission's proposal of organizing the Ninth Circuit Court of Appeals into regional adjudicative divisions is good in concept, the proposed divisions are deficient because they provide at best a short-term solution.

Additionally, from the Commission's report, it is unclear why the Commission configured the divisions the way it did. Ultimately, the question of reconfiguration depends on what factors are assigned the highest value—for example, caseload, population, contiguity, keeping California intact, geographic affinity, having no more than three divisions, etc. The Circuit could be *divided* or *split* many ways depending on which factors are the driving considerations.

III. COMMISSION PROPOSAL IS A SHORT-TERM SOLUTION

I would like to briefly discuss my concern that the Commission's proposal provides only a short-term solution. Under the Commission's proposal, the Southern Division—which contains the Districts of Arizona and Central and Southern California—has 47 percent of the Circuit's caseload and 46 percent of its population. The Southern Division would be bursting at the seams from day one—and the situation would quickly grow worse.

Consider the following: Southern California is the Circuit's fastest growing region in terms of caseload. From 1987 to 1997, the appeals from the Southern District of California increased 143.8 percent and appeals from the Central District increased 74.5 percent. Further, Los Angeles, San Diego, and Phoenix are the Circuit's three most populous cities and are, respectively, the second, sixth, and seventh most populous cities in the nation. Also, Arizona and Nevada contain seven of the nation's 22 fastest growing cities. In short, putting Arizona and Southern California—two of the most rapidly growing regions—in the same division would seem to provide, at best, a temporary solution, and prove unworkable in the near future.

Very soon, these components of the proposed Southern Division would have to be divided into two roughly equal parts. That seems impossible without a reconfiguration of all divisions.

IV. CALIFORNIA

In any plan to restructure the Ninth Circuit, California is the key component. If it is important to keep California intact, then perhaps it would be best for California to constitute a separate division or a separate circuit. With more than 60 percent of the Ninth Circuit's caseload, California would still be one of the nation's largest circuits in terms of caseload and population—and the remainder of the circuit would be a reasonable size.

Finally, I am aware of the oft-expressed view that a circuit should be comprised of at least three states to maintain a federalizing and regionalizing function. But it might be more prudent to have a state such as California its own circuit or division. Indeed, if California were its own circuit or division, it would have a larger caseload than seven of the remaining eleven circuits. Perhaps concerns about bifurcation should outweigh fealty to a "three-state" rule. Having one state comprise a circuit or a division seems reasonable considering that in many circuits one state dominates.

V. ARIZONA

I would like to conclude by discussing my home state of Arizona. Arizona is in a unique position. As I mentioned at the beginning of my remarks, the Commission noted that Arizona generates more appeals than any other Ninth Circuit state except California. Additionally, Arizona is in an interesting geographic position, as it borders California and the Tenth Circuit (as well as Mexico).

The Commission discussed three alternate proposals which had merit. In one of these, Arizona is moved to the Tenth Circuit. In a letter I sent to the Commission after its draft report was issued, I asked the Commission examine the feasibility of moving Arizona to the Tenth Circuit. Unfortunately, the Final Report contains the same two-sentence discussion that was in the draft report.

I would also like to discuss the possibility of a four-way division with Arizona and Nevada in the same division.

4-Way Proposal	Caseload	Population
<i>Northern Division:</i> Northwest, Hawaii, Guam, NMI	23.9%	25.1%
<i>Middle Division:</i> Northern & Eastern California	23.7%	25.6%
<i>Southern Division:</i> Central & Southern California	38.0%	37.0%
<i>Western Division:</i> Arizona and Nevada	14.4%	12.0%

For a more enduring partition, this approach seems reasonable. No division would come close to the 47 percent caseload in the Commission's proposed Southern Division, and (given the rapid increase in population and caseload in Arizona and Nevada) the Western Division would soon have at least 21 percent of the Circuit's caseload—a percentage that the Commission has deemed acceptable.

VI. CONCLUSION

In sum, I think that the division concept is good, but the specific plan which puts Arizona with Southern California is not workable because population and caseload statistics show that it is at best a short-term fix. Additionally, California should not be divided unless it is going to result in some permanently and roughly equal caseload distribution; the Commission's recommendation does not accomplish that.

As Justice Kennedy wrote in his letter to the Commission, "[a] court which seeks to retain its authority to bind nearly one fifth of the people of the United States by decisions of its three-judge panels, many of which include visiting Circuit or District Judges, must meet a heavy burden of persuasion." Clearly, the time is now for some change. We need to continue this discussion to come to some resolution for the future.

Mr. COBLE. We are now pleased to recognize our colleague from California, Mr. Campbell.

STATEMENT OF HON. TOM CAMPBELL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. CAMPBELL. Thank you, Mr. Chairman.

If I were still a colleague of yours on this subcommittee, I would ask the Commission two additional questions, and here they are. First, a lot of the debate over the delay in getting judgments out of the ninth circuit focuses on the vacancies, and yet the rebuttal is—because there are seven vacancies, the rebuttal is, the ninth circuit has a very large number of senior judges who—out of the goodness of their heart, Lord knows, because it doesn't pay them an extra dime—volunteer.

What we don't yet have, and I would love to ask—and I wrote this out in the prepared testimony—is a measurement of the vacancies per circuit divided by the numbers of judges actually taking cases per circuit; and if a senior judge is taking half a load, then figure that in at 50 percent. That is not in the report and it is really necessary before we can conclude anything about the delay.

If the delay is due to the absence of judges, then we have an easy answer. But you don't know that till you factor in the senior judges. That is my first request.

The second is much more complex, but I think it would intrigue you, Mr. Chairman, and I hope it does the colleagues. You know, the reason why you get reversals at the Supreme Court could be because you get more certioraris taken to the Supreme Court. Now, if the reason you get more certioraris taken to the Supreme Court is because the court is taking cases purely that are a conflict of the circuits, that is not a pathology at all. Because the ninth, being so large, it is a lead pipe certainty it is going to have one opinion on record on any circuit split almost all the time. Do you follow me?

The only time that it would be a pathology is if the cases that were taken up for cert from the ninth were not conflict of the circuit cases, but were clearly erroneous, anomaly types of cases.

Now here's where you should hire extensive numbers of law professors, Mr. Chairman, and put them to work analyzing that number. The number of reversals by itself doesn't tell you anything.

To repeat my second main point, what we need to know before we can conclude that the ninth has an unusually high reversal rate is whether the reversal rate is higher than the certiorari rate, and if it is, then we may have a problem. If it is equal to its certiorari rate, it might still be a problem if the cases taken up from the ninth are not conflict of the circuits; but if they are conflict of the circuits, that is absolutely a statistical attribute. Nothing to be worried about.

Two other quick suggestions, and I am done. I would like to know what the ninth circuit judges think; I would like to have that secret ballot. I guess we can't really compel it, there being a separation between the three branches. But I will tell you what doesn't help me very much. It doesn't help me very much to learn, as I do in the White report—and I had the extreme honor to clerk for Justice White, so whatever he does is impeccable; and I have the highest regard for Judge Pam Rymer, who participated so much.

But what doesn't help me is to know an overall number of judges, what they think the optimal number for the court of appeals should be. You might remember that statistic. I think 76 percent say the optimal number is between 11 and 18. Well, that is great. If you are any judge outside the 1st or the ninth, you have between 11 and 18, you are telling me nothing except that you are happy. And so what would be meaningful is to know what the ninth circuit judges believe, and maybe that could be by secret ballot.

And lastly, the reading of opinions. Here might be a problem. I just want to be candid; I don't know, but it might be a problem. Sheer volume will diminish the judge's likelihood of reading a colleague's opinion. It is a fact, just too many to read. Our faculty gets larger, I have to read more colleagues' articles even if I am not interested in the field. And rebuttal might be, well, no problem, because you have more judges and each judge is going to be reading more opinions.

But that doesn't work if you think for a second. What makes a judge read an opinion by a colleague? I bet it is the same sort of thought process for a most liberal judge as for a most conservative judge. It is the head notes and what do you think of the judge in question, whether he or she is a good guy or bad guy—pardon me for being so colloquial—so that if the judges are making the same screen, you don't get any bang from there being more numbers; they are all reading the same 57 percent, and the 43 don't get read.

Do I have a suggestion? Sure. First of all, I was intrigued by Senator Feinstein's bill. I haven't read it, so maybe that has got some good proposals. But one possibility, and this has to be done informally, make sure somebody is routinely reading, just assign somebody another judge's opinions; or you are obliged to read all the opinions that come out of these three judges this time, and it will rotate next. The point being that there is one arithmetic problem, mathematical problem, which does stem from size alone; and that is, you can't read everybody else's opinions, but you might solve that if you give people assignments. I know you can't read everybody's, but you at least would be responsible for reading these three judges this year, and the next, you pull up three others.

My entire testimony is written. I would appreciate it would be made part of the record.

Mr. COBLE. Unlike Senator Murkowski, you did not beat the red light, but you are a law professor, so we will cut you some slack. [The prepared statement of Mr. Campbell follows:]

PREPARED STATEMENT OF HON. TOM CAMPBELL, A REPRESENTATIVE IN CONGRESS
FROM THE STATE OF CALIFORNIA

SUGGESTED FURTHER QUESTIONS FOR THE COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, RELATIVE TO THE NINTH CIRCUIT, BY CONG. TOM CAMPBELL

- 1.) The seven unfilled slots on the Ninth Circuit are offered as a likely explanation for the delay in assigning cases to panels. However, there is a large number of senior circuit judges who actively take assignment in the Ninth Circuit. In order to measure whether the delay in assigning cases to panels is due to the size of the Ninth Circuit, or due to its percentage of unfilled judgeship slots, we need to compare the ratio of unfilled judgeships to the total number of judges, active and senior who are hearing cases, in all circuits. The number of senior judges should be weighted by whether they are taking a full or reduced case load.
- 2.) What is the opinion of the Ninth Circuit's own judges on whether the present en banc system is satisfactory? Page 29, fn. 72 reports data from a survey of all circuit judges. Seventy-four percent of judges responding favor a number between 10 and 18. However, except for the First Circuit whose judges work with a lower number, and the Ninth Circuit, whose judges work with a higher number, judges of none of the other circuits have experience with a number other than between 10 and 18. This discounts the value of their opinion somewhat.
- 3.) It was reported that 57% of Ninth Circuit judges report they did not read all the opinions of the Ninth Circuit. How does this number compare with other circuits? To me, this is the most likely area of concern from a large circuit. The sheer volume of decided cases makes it difficult for any one judge to read them all. And, since there is no understanding, formal or informal, to assign some share of opinions to each judge, it is likely that the system for selecting which cases to read will be similar between chambers. This offsets the effect that the Ninth Circuit has more total judges reading more cases: if each reads less than 100%, and selects the number he or she reads more or less on the same criteria, the probability of opinions escaping notice of others on the court rises simply with the size of the court.
- 4.) The Ninth Circuit is reported to have a higher reversal rate than other circuits. However, the meaning of this statistic depends entirely on whether the reversal rate is higher than the rate of certiorari, and the basis for certiorari. The higher reversal rate might simply be due to the fact that more cases are taken for cert. from the Ninth, proportionately, than from other circuits. If the basis for certiorari being taken is a conflict in the circuits, this is not a pathology. Rather the Supreme Court is doing what it should in seeking to resolve differences between the circuits, and, because of the simple volume of cases in the Ninth, there will almost always be a Ninth Circuit case on one side or the other of a split in the circuits. To test this, we need to have an analysis along the following lines:
 - a) what is the reversal rate compared with the certiorari rate? If the reversal rate is higher, there might be a problem.
 - b) if the reversal rate is no higher than the certiorari rate, there might still, be a problem if the cases taken are NOT of the conflict of circuit kind.
 - c) if the reversal rate is no higher than the certiorari rate, and the cases taken are NOT of the "conflict of the circuits" variety, there is no necessary pathology here.
- 5.) Should the answers to the foregoing questions point, toward a need to split the Ninth Circuit, no split should be effectuated that would divide California. The testimony of Governor Davis and former Governor Wilson is compelling that California should not be split between circuits, or between "administrative divisions." The prospect of conflicting interpretations of identical California laws, pending a resolution by the "intermediate review panel," is undesirable. One essential rule of circuit line-drawing should be never to split a state, even through the use of administrative divisions.

- 6.) If necessary to split the Ninth, California standing alone is an acceptable option. Those who speak of the necessary "federalizing" function of having more than one state in a circuit ignore the unique diversity of California. Also, putting any other state in a circuit with California, in a configuration smaller than the existing Ninth, threatens to swamp the smaller state or states.

Conclusion: The report does not justify a split of the Ninth. The answers to additional questions might bolster that decision or conflict with it; but there are necessary questions to ask that have not yet been asked. On present evidence, however, I would urge the Committee not to support a split of the Ninth Circuit.

Mr. COBLE. Gentlemen, thank you both for being here. I think it is customary, we will not submit questions to you all. We may call on you later.

Mr. CAMPBELL. I always waive my custom, but if you have other witnesses, I respect that.

Mr. COBLE. Thank you.

We have another panel upcoming. You all bear with me; this is going to take some time. I think we all need to know about the background and the credentials of the witnesses who will next appear, so I will introduce the second panel and if you all will line up in the order in which your names are called, and then we will receive testimony from you in that order.

We will wait till the people adjourn. We will suspend for a moment.

The first witness on panel one is Chief Judge Procter Hug, Jr., who was appointed a ninth circuit judge by President Jimmy Carter. Chief Justice Hug graduated from the University of Nevada in 1953. He then served 2 years as an officer in the United States Navy. Following his service in the Navy, he enrolled in the Stanford School of Law and was graduated with a J.D. degree in 1958.

Our next witness is the Honorable Charles E. Wiggins who is a senior circuit judge on the ninth circuit. Prior to that, Judge Wiggins served for 12 years in the House of Representatives. His primary committee assignment was the Judiciary Committee, where he served for a number of years on the Courts and Intellectual Property Subcommittee.

Welcome home, Judge. Good to have you back.

He attended the University of Southern California at Los Angeles, where he received his B.S. and law degrees and served as editor of the USC law review.

Our next witness is the Honorable Pamela Ann Rymer, who is a circuit judge of the court of appeals for the ninth circuit and a commission member. Judge Rymer was appointed May 24, 1989, and she earned her A.B. from Vassar College in 1961 and her LL.B. in 1964 from Stanford University.

Our next witness is the Honorable Diarmuid O'Scannlain.

Judge, I am sorry I have missed you the first couple of times you came to call on me. Good to see you.

Judge O'Scannlain is a circuit judge of the ninth circuit court of appeals, earned his B.A. Degree from St. John's University and his J.D. Degree from the Harvard School of Law. He also earned the LL.M. Degree in judicial process at the University of Virginia Law School in Charlottesville.

Our next witness is the Honorable William D. Browning, who is a senior United States district judge for the District of Arizona and

a Commission member. He earned his B.A. in 1954 and his LL.M. in 1960 from the University of Arizona.

The Honorable David R. Thompson is our next witness. Judge Thompson is a senior circuit judge of the United States Court of Appeals for the ninth circuit. He is also chairman of the Ninth Circuit Court of Appeals Evaluation Committee. The Evaluation Committee was created by the ninth circuit in response to perceived concerns raised by the White Commission report.

Next to Judge Thompson will be Eleanor Acheson, who is currently the Assistant Attorney General for Policy and Development at the Department of Justice. At the Department of Justice, Ms. Acheson is responsible for a broad range of policy initiatives, assisting Attorney General Reno with defining and implementing policies regarding crime, violence against women, welfare reform, and access to justice. Ms. Acheson was graduated from Wellesley College and the National Law Center at George Washington University. She served as a law clerk for the late Judge Edward D. Gignoux of the United States District Court in Portland, Maine.

Our next witness is Mr. Arthur Hellman, who is not unknown to us. The professor has been with us before.

Good to see you again, Professor.

Professor Hellman is a professor at the University of Pittsburgh School of Law. He is the Nation's leading academic authority on the ninth circuit and one of the leading authorities on the Federal courts of appeals generally. Professor Hellman has appeared before our subcommittee, as I said, many times throughout the years and we value his counsel. He received his B.A. Magna cum laude from Harvard College and his J.D. From the Yale School of Law.

Next to Mr. Hellman will be Ronald L. Olson who is a partner in the office of Munger, Tolles & Olson. His field of specialization is commercial litigation. Mr. Olson received his B.S. Degree from Drake University and his J.D. Degree from the University of Michigan and a diploma in law from Oxford University in England at which time he was the recipient of a Ford Foundation fellowship.

Our final witness on this panel is Mr. William N. LaForge, who is a chairman of the Committee on Government Relations at the Federal Bar Association and an attorney with the law firm of McGuiness, Norris & Williams here in Washington. Mr. LaForge specializes in Federal Government relations and represents businesses with public policy interest before the United States Congress and the executive branch agencies. Mr. LaForge earned his law degree from the University of Mississippi School of Law and his LL.M. in international law from Georgetown University and studied international law at Cambridge University. He received a fellowship to study government and public policy in the European Union and at the Kennedy School of Government at Harvard University.

We have written statements from all the witnesses on this panel, and I ask unanimous consent that they be submitted into the record in their entirety.

Again, folks, I apologize to you all for our delay, but I think you all understand the routine will hold us harmless therefore. I will reiterate my request. Nobody is going to be hauled away in leg irons or keelhailed, but please be aware of the red light. I am con-

fidant we will be interrupted prior to the conclusion of this panel to have to go to the floor to vote. I don't know precisely what time. Judge Hug, why don't you kick us off?

**STATEMENT OF PROCTER HUG, JR., CHIEF JUDGE, NINTH
CIRCUIT COURT OF APPEALS**

Mr. HUG. Thank you, Mr. Chairman. I appreciate the opportunity to be here to be able to testify about the White Commission report.

I think that the Commission provided some valuable information, some information that will be useful not only putting things in historical perspective, but also will be helpful to the circuit courts in administering those circuits.

There were two significant conclusions that I would like to call to your attention. First, the Commission stated, "There is no persuasive evidence that the ninth circuit, or any other circuit for that matter, is not working effectively or that creating new circuits will improve the administration of justice in any circuit or overall. Accordingly, we do not recommend to the Congress and the President that they consider legislation to split the circuit." That certainly is in agreement with the great majority of the judges and lawyers in the ninth circuit and political leaders.

The other conclusion I would like to mention is this, quoting the Commission: "Maintaining the Court of Appeals of the Ninth Circuit, as currently aligned, respects the character of the West as a distinct region. Having a single court interpret and apply Federal law in the western United States is a strength of the circuit that should be maintained."

Well, despite the latter conclusion, the Commission has recommended a structural change in the Ninth Circuit Court of Appeals that would impede the consistent and coherent interpretation of the law throughout the ninth circuit.

Now, I wholeheartedly agree with the Commission that no split of the ninth circuit should take place, but I disagree with the divisional concept. I have prepared a detailed analysis which is attached to my statement that is before you. Two-thirds of our court approved that at a meeting of the court, and thus I feel that I can represent that I do speak for the majority of the members of our circuit court of appeals.

The analysis stressed several key points. First, there was no need really shown by the Commission. The objective and subjective evidence demonstrated very little difference between the ninth circuit and other circuits. Secondly, two-thirds of the judges and lawyers in our circuit, as well as the key political leaders in our States, are convinced the circuit is working well and oppose splitting or structural change.

Eight other circuits responded to the Commission's idea of a divisional structure. All of them were opposed to the structure for their circuits. They said the advantages were greatly outweighed by the disadvantages of this kind of a structural change into divisions.

I demonstrate in the analysis how the structural change will impede maintaining coherent and consistent law throughout the circuit. The main points are that there is no panel stare decisis. The panel opinion of one of these autonomous divisions is not binding

in either of the other two divisions. Thus we only have a panel decision that is in effect in this one autonomous division. The divisions have individual en bancs. There is no circuit-wide en banc to take care of both conflicts and important issues where a panel decision may have gotten it wrong from the standpoint of the majority of the court.

The circuit division, which is designed only to reconcile conflicts, will not take care of unifying the law of the circuit at all because of the fact that it will only take care of square, direct conflicts between opinions in the three divisions. If we have a situation where there is something that is not a square conflict, or that has only been ruled upon by one division, it is not going to receive anything from the circuit division at all unless there is a decision in conflict from another division; and that, I can see, will lead to further litigation before the circuit division as to what is in fact a direct conflict.

Well, I see the red light is now on and thus I will submit.

[The prepared statement of Judge Hug follows:]

PREPARED STATEMENT OF PROCTER HUG, JR., CHIEF JUDGE, NINTH CIRCUIT COURT OF APPEALS

SUMMARY

The Commission on Structural Alternatives for the Federal Courts of Appeals concluded that the Ninth Circuit should *not* be split. The great majority of the judges and lawyers in the Ninth Circuit agree.

The Commission stated: "There is no persuasive evidence that the Ninth Circuit (or any other circuit, for that matter) is not working effectively." It also stressed that maintaining a consistent body of federal appellate law in the Western States and Pacific Rim is a strength of the circuit that should be maintained.

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

The proposed legislation would require a revised method of operation for the Ninth Circuit Court of Appeals through three semi-autonomous adjudicative divisions, with the State of California being split between two divisions. There would be an additional court of 13 judges selected from the divisions to resolve only direct conflicts between divisions. This structure has serious disadvantages.

- Neither the panel decisions nor the en banc decisions of any division would bind the other divisions. A circuit-wide en banc hearing for any purpose other than resolving direct conflicts would be abolished. The maintenance and development of consistent circuit law would be seriously hampered.
- The proposed Circuit Division would add an additional level of appeal before finality, resulting in additional expense and delay for litigants.
- The proposal would eliminate the present participation of all judges circuit-wide in resolving circuit law, and would impose serious practical problems in randomly assigning judges among the divisions for three-year terms.
- The likelihood of inconsistent interpretations of federal law would exist throughout the circuit and would not be adequately addressed by the proposed conflict resolution mechanism of the Circuit Division. Because California would be split between two divisions, there would be different interpretations and enforcement of the law in California.

My view that the disadvantages far outweigh any advantages of the proposed restructuring is shared by a great majority of the judges on the Ninth Circuit Court of Appeals, the Ninth Circuit Judicial Council, the Association of District Judges of the Ninth Circuit, and the United States Department of Justice. The Chief Judges

of eight other circuits state that their courts oppose a divisional structure for their circuits.

STATEMENT

Mr. Chairman, Members of the Subcommittee:

Thank you for the opportunity to discuss with you the Final Report by the Commission on Structural Alternatives for the Federal Courts of Appeals. My name is Procter Hug, and I am the Chief Judge of the United States Courts for the Ninth Circuit. I have been a member of the Ninth Circuit Court of Appeals for 21 years.

The Commission was created in the wake of a bill to split the Ninth Circuit into two circuits. Its mission was to study not only the Ninth Circuit but the entire intermediate appellate court structure between the trial courts and the Supreme Court. In undertaking its task, the Commission was concerned with how the circuit courts of appeals were operating, whether the Ninth Circuit or any circuit, should be split, and formulating recommendations for other possible structural changes.

I think that the Final Report the Commission rendered has made a valuable contribution to the understanding of the federal appellate court system. The research placed the current appellate court structure in historical perspective, and gathered important statistical information affecting the courts. It also compiled a thorough profile of the method of operation of each of the circuit courts of appeals, so that each of our circuit courts can benefit from the creative ideas from other circuits.

The Commission developed several important conclusions that have been reflected in its Final Report.

There is no persuasive evidence that the Ninth Circuit (or any other circuit, for that matter) is not working effectively, or that creating new circuits will improve the administration of justice in any circuit or overall. Furthermore, splitting the circuit would impose substantial costs of administrative disruption, not to mention the monetary costs of creating a new circuit. Accordingly, we do not recommend to Congress and the President that they consider legislation to split the circuit.

* * *

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.

* * *

Maintaining the Court of Appeals for the Ninth Circuit as currently aligned, respects the character of the West as a distinct region. Having a single court interpret and apply federal law in the western United States, particularly the federal commercial and maritime laws that govern relations with the other nations on the Pacific Rim, is a strength of the circuit that should be maintained.

* * *

Any realignment of circuits would deprive the west coast of a mechanism for obtaining a consistent body of federal appellate law, and of the practical advantages of the Ninth Circuit administrative structure.

The Commission concluded that the Ninth Circuit not be split. That conclusion corresponds with the overwhelming opinion of the judges and lawyers in the Ninth Circuit, as well as statements of others concerned with this issue who submitted written statements or gave oral testimony before the Commission. Among those opposing the division of the Ninth Circuit were the following:

- 20 out of the 25 persons testifying at the Seattle Hearing of the Commission.
- 37 out of 38 of the persons testifying at the San Francisco Hearing of the Commission.
- The Governors of the States of Washington, Oregon, California, and Nevada.
- The American Bar Association.
- The Federal Bar Association.
- The United States Department of Justice and the United States Attorneys within the Ninth Circuit.
- All of the Public Defenders within the Ninth Circuit.
- Respected scholars: Charles Alan Wright, Arthur Hellman, Anthony Amsterdam, Erwin Chemerinsky, Judy Resnik, Jessie Choper, and Margaret Johns.
- The past Director of the Federal Judicial Center, Judge William Schwartz.

- The chairman of Long-Range Planning for the U.S. Federal Courts, Judge Otto Skopil.
- A great majority of the judges and lawyers in the Ninth Circuit.

Having strongly opposed splitting the Ninth Circuit, the Commission proceeded further to recommend legislation for a revised method of operation for the Ninth Circuit Court of Appeals through intra-circuit adjudicative divisions that amounts to a *de facto* split of the court of appeals. The essential question then becomes whether the suggested revision of the operation of the court of appeals accomplishes the acknowledged goal of having a single court interpret and apply federal law in the nine Western United States and the Island Territories in an efficient and effective manner, better than its present method of operation. It clearly does not.

When a whole new concept of operation of the courts of appeals is proposed, the burden should be upon those proposing the change to show that a particular proposal will operate more efficiently, effectively, and better advance the cause of justice than the time-tested procedures that have been in operation for many years. "Circuit restructuring should occur only if compelling empirical evidence demonstrates adjudicative or administrative dysfunction in a court so that it cannot continue to deliver quality justice and coherent, consistent circuit law in the face of increasing workload." *Long Range Plan of the Federal Courts* (1995). That burden has not been carried.

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

The Commission has proposed that the Ninth Circuit Court of Appeals be divided into three semi-autonomous adjudicative divisions, with the State of California being split into two separate divisions. Panel decisions decided in one division would not be binding precedent in either of the other divisions, and each division would have an independent en banc procedure that would have no precedential effect in the other two divisions. There would be an additional court of 13 judges selected from the divisions to resolve only direct conflicts between the divisions. The likelihood of inconsistent interpretations of federal law would exist throughout the circuit and would not be adequately addressed by the proposed conflicts resolution mechanism. Because California would be split into two divisions, there would also be a substantial risk of different interpretations and enforcement of the same state law in California.

In January of 1999, I prepared an *Analysis of the Final Commission Report*, in which I expressed wholehearted agreement with the Commission's major conclusion that the Ninth Circuit should not be split, but serious disagreement with the divisions recommended for the Ninth Circuit Court of Appeals. I submitted this *Analysis* to a meeting of our active and senior judges on January 11, 1999. Of the 35 active and senior judges voting, 25 judges voted to approve the *Analysis*, 4 judges voted to approve the Commission's recommendation of the creation of divisions for the court of appeals, 4 judges voted for a circuit split, and 2 judges abstained.

I am drawing my remarks today from the *Analysis*, and I am thus confident that I speak for the great majority of the judges of our circuit court. I have attached a copy of that *Analysis* to my written statement and it provides more detail than I am able to discuss in this oral presentation. On March 31, 1999, I sent a letter to each member of Congress, in which I enclosed a copy of the *Analysis*. With your extremely busy schedules, you may or may not have had an opportunity to review it. What I point out in the *Analysis* is that this is a major change in the operation of the circuit court of appeals, it is not justified by the findings of the Commission, and is a *de facto* split of the Ninth Circuit Court of Appeals. It frustrates the very important goal acknowledged by the Commission, to maintain a consistent body of law throughout the nine Western United States and the Island Territories.

In its draft report, the Commission recommended legislation to implement this divisional approach not only for the Ninth Circuit, but for the other circuits when the number of judges on their courts of appeals exceeded 17 active judges. I think it was most significant that the Chief Judges of the First, Second, Third, Fourth, Seventh, Eighth, and DC Circuits responded with a joint letter expressing strong opposition of their circuit courts to any such divisional restructuring. They said, "The whole concept of intra-circuit divisions, replete with two levels of en banc review, has far more drawbacks than benefits." The Chief Judge of the Fifth Circuit sent in a separate letter, expressing the concern and reservations that circuit has about the divisional approach. The Chief Judge of the Second Circuit sent in an additional separate letter, emphasizing the strong opposition of that court. Thus, all of the

other circuits that responded to the Commission expressed their opposition to the divisional approach. This, no doubt, resulted in the Commission's modifying its draft report and proposed legislation to eliminate the mandatory requirement for the creation of divisions in the other circuits. The requirement became strictly optional for the other circuits, leaving the Ninth Circuit conscripted as the *guinea pig* to implement this untested drastic change that we believe is seriously flawed.

There were many others who responded opposing the divisional structure, as I have detailed in the *Analysis*. Some of these were by:

The United States Department of Justice
 Senator Dianne Feinstein
 Former California Governor Pete Wilson
 (present California Governor, Gray Davis, recently announced a similar view)
 The Ninth Circuit Court of Appeals
 The Ninth Circuit Judicial Council
 The Association of District Judges of the Ninth Circuit
 The Federal Bar Association
 The Sierra Club Legal Defense Fund
 The Los Angeles County Bar Association
 The Chief Judges of the First, Second, Third, Fourth, Fifth, Seventh, Eighth, and DC Circuits
 The New York City Bar Association
 The Federal Bar Council's Committee on the Second Circuit Courts
 The Chicago Council of Lawyers

The response of the United States Department of Justice, which participates in 40% of the litigation in the federal courts, bears particular note. It responded to the Commission, vigorously opposing the divisional restructuring of the Ninth Circuit or any circuit. It stated, "That proposal would have potentially adverse repercussions for the administration of justice in the Ninth Circuit and, ultimately, across all federal courts of appeals."

The Commission acknowledged that there is no persuasive evidence that the Ninth Circuit is not working effectively. It emphasized the importance of maintaining consistent circuit law throughout the nine Western United States and the Island Territories. Yet, it proposed structural changes that will impede that important objective, which neither the Ninth Circuit nor any other circuit wants to adopt. It is thus very important to examine the reasons why this radical change in structure was necessary or desirable for the Ninth Circuit.

The Commission stated that it had reviewed all of the available objective data routinely used in court administration and found that while there are differences among the courts of appeals, it is impossible to attribute them to any single factor, such as size. In considering the subjective data, the Commission noted that the district judges of the Ninth Circuit do not find the law any more unclear than the judges in other circuits. The Commission then noted that the lawyers of the Ninth Circuit found "somewhat" more difficulty in discerning circuit law and predicting outcomes of appeals than lawyers elsewhere. Thus, the Commission acknowledges that the conclusion of a need for a major structural change in the Ninth Circuit Court of Appeals is not based upon any objective findings. The subjective findings only identified rather minor differences expressed by the Ninth Circuit judges and lawyers, compared to the judges and lawyers of other circuits. This hardly justifies such a radical change.

It is not realistic to believe that consistent law can be maintained in the Ninth Circuit under the divisional structure when panel decisions are not binding throughout the circuit, and when there are three separate en banc courts with no participation of judges throughout the circuit in those decisions. The 13-judge Circuit Division that resolves only direct conflicts between divisions cannot maintain consistent circuit law. Under the present structure, panels are *bound* to follow the precedent of other panels, and they try their best to do so. Under the proposed system, there is no obligation to follow the precedent of the panels of the other two-thirds of the court. This is certain to develop greater inconsistency in panel decisions. The law of the divisions will inevitably drift apart with little hope of keeping the consistent circuit law that we now enjoy in the Ninth Circuit or restoring it if the legislation is enacted and found to be a serious mistake.

Under the present structure of the court of appeals, we have a viable mechanism that maintains the consistency of law throughout the entire circuit. Panel decisions of all of the judges are binding throughout the entire circuit. The limited en banc procedure provides a mechanism whereby all judges participate in the en banc proc-

ess by the "stop clock" procedure, requests for en banc, memos circulated to the entire court arguing for and against en banc review, and by a vote of all of the active judges on whether to take a case en banc. There is full participation of all our judges in resolving circuit law.

When a case is taken en banc, the en banc court reviews the full case for purposes of clarifying the circuit law, resolving conflicts, or considering questions of exceptional importance to establish the law of the circuit. There is no additional level of appeal, as there would be with the divisional approach, and there is no litigation upon whether an opinion reflects a direct conflict between divisions or merely distinguishes cases involved, as there would be with the divisional approach.

Our circuit court has the advantage of the diversity and background, experience, and geographical identity of a large number of judges that provide important insights into the applications and development of the federal law throughout the nine Western United States and Island Territories. The stated advantages asserted for the divisional approach are heavily outweighed by the disadvantages.

The disadvantages may be summarized as follows:

- There is no participation of all judges circuit-wide in resolving the circuit law as at present. The only participation is within the division.
- Resident judges within a division that are assigned to another division would not participate in panels within the resident division for a three-year period and would, for that period, have no say in the en banc consideration of panel decisions within the division of their residence.
- The proposed Circuit Division court would be an additional level of appeal before finality, involving additional expense and delay.
- The resolution of conflicts by the Circuit Division court would be by 13 judges, not representative of the full court or proportionately representative of the divisions. The Circuit Division would create a category of what, in effect, would be Super Court Judges, for three-year terms with greater power in determining the law of the circuit.
- There would be no participation of judges throughout the circuit in the decisions of the Circuit Division, as to whether it should take a case or not take a case or let a panel decision stand.
- There are statutory problems lurking in the new procedure, two of which I identify in the Analysis but others in an untested procedure could well surface in the future.
- The practical operation of the divisional approach becomes administratively complex in the manner in which the judges are designated to be assigned among divisions, and the manner in which the Circuit Division is to operate, as I have shown in the Analysis.

It is gratifying that the Commission recommended that the Ninth Circuit not be split and recognized the importance of having a single court interpret and apply federal law in the Western United States. However, the evidence does not justify the recommended change to a divisional structure of the Ninth Circuit Court of Appeals. The disadvantages of such a structure far outweigh the claimed advantages and do not justify disrupting a court that the great majority of judges and lawyers within the circuit are convinced is operating efficiently and effectively. The Ninth Circuit has always been willing to re-evaluate itself, its performance, and to experiment with innovations that would lead to greater efficiency and effectiveness. The annual evaluation of the Ninth Circuit's long range plan is specifically designed to do so. Concerns that have surfaced in the Final Report of the Commission can be addressed with far less disruption than a whole new divisional structure. At the present, they are being addressed by a special Evaluation Committee that I appointed specifically for that purpose.

The Committee, chaired by Senior Circuit Judge David Thompson, is composed of Ninth Circuit judges from different regions of the circuit, as well as a representative from the district court bench, a prominent scholar of the federal appellate courts, and an experienced appellate practitioner. The Committee has met over the past several months on numerous occasions and has made a special effort to meet with representatives of the bench and bar throughout the Ninth Circuit in order to get a wide spectrum of participation in the evaluation process.

In conclusion, with the Commission having acknowledged, after extensive study, that there is no persuasive evidence that the Ninth Circuit is not working effectively. There is no justification for mandating this drastic change in structure that will impede, not enhance, the continued development of consistent circuit law throughout the nine Western United States and the Island Territories. The other

circuits have all opposed the divisional structure and it has been made optional for them. The Ninth Circuit should be treated the same as the other circuits and should be given the same option.

[Note: The *Analysis* included with this prepared statement is in the files of the House Judiciary Committee's Subcommittee on Courts and Intellectual Property.]

Mr. COBLE. I appreciate that, Judge.

Folks, keep in mind when the red light appears, that does not mean that your written testimony is going to be tossed over the side. It will be studied thoroughly, I assure you.

Thank you Judge Hug.

Judge Wiggins?

STATEMENT OF CHARLES E. WIGGINS, SENIOR CIRCUIT JUDGE, NINTH CIRCUIT COURT OF APPEALS

Mr. WIGGINS. Thank you, Mr. Chairman. It is good to be back.

I am a Senior Judge on the ninth circuit. I have served for 15 years on the circuit; prior to that, 12 years in Congress, where I sat where you are sitting, as the ranking minority member of this committee; and 12 years before that, I practiced law. I am unable to read my remarks, but I will summarize them; but I will emphasize two points only. I want to emphasize the argument made that the circuit is too big, and secondly, I want to discuss quickly the reversal rate that is pinned on the ninth circuit by the President and by others.

First of all, is the circuit too big? I have concluded that it is not too large, but I understand that one judge on our court, who lives in Anchorage—who lives in Fairbanks, Alaska, maintains that it is too big because he must travel a long way. I think it is selfish and somewhat arrogant for a judge on our court to come before Congress, when you are the most air-traveled people in the world, and maintain that he has to travel too far. I regret that he has. I wouldn't like to lose him; he is a fine judge, but if necessary, he ought to consider moving to a more convenient place than Fairbanks, Alaska.

There is no evidence that the circuit is too large in terms of our ability to transact business effectively. It is only the suggestion that the size of the circuit produces excessive travel. I think that argument doesn't stand up.

The other point I want to emphasize is the reversal rate. It is commonly mentioned that the circuit has an excessive reversal rate before the United States Supreme Court. Let me give you a few statistics. The circuit has filed 980 petitions per cert before the Supreme Court. That means the Supreme Court has the right to reverse us 980 times. The Supreme Court accepts roughly 20 cases—that is on the average—20 cases from the circuit.

They are accepting roughly 1 percent of the cases; they are confirming that 99 percent are decided properly, but they are questioning 1 percent of the cases only. Of that number, we have a high percentage rate, but you are talking about a high percentage of 1 percent. There are roughly 16, 17 cases reversed from the Supreme Court. That is four-tenths—four—that is less than 1 percent, the number I am seeking. That is less than 1 percent of the cases decided by the ninth circuit. That statistic does not make sense, and I urge you to reject it.

Finally, and let me conclude, this is an important issue and it is important to me. I am a proud member of the ninth circuit. I have fine colleagues from all over the circuit. I would submit any case that arises in the ninth circuit to them for an impartial decision. The regionalization of the circuits, as proposed by the legislation before you, is contrary to the interest of the Nation and contrary to the notion of a uniform one law across the Nation. I urge you, strongly urge you to reject the view that the circuit should be divided or regionalized.

Thank you, Mr. Chairman.

Mr. COBLE. Thank you, Judge Wiggins.

[The prepared statement of Judge Wiggins follows:]

PREPARED STATEMENT OF CHARLES E. WIGGINS, SENIOR CIRCUIT JUDGE, NINTH CIRCUIT COURT OF APPEALS

SUMMARY

The Ninth Circuit operates well with its present structure and boundaries. The drive to split the circuit is animated by political concerns, not by a desire to improve the federal appellate courts. Therefore, I oppose the White Commission's restructuring of the circuit as well as any other plan that would divide the circuit.

The argument that the circuit is just "too big" collapses under scrutiny. As the White Commission made clear, there is no reason to believe that the circuit is too large to administer justice fairly and effectively. In addition, modern technology has shrunk the circuit. Modern jets cover large distances in minutes or hours. We also can communicate instantaneously across vast distances, rendering face-to-face meetings less important. Finally, splitting the circuit would do little to ease the travel burden that remains.

One of the prime factors motivating proponents of a split is provincialism—the belief that judges from a state should decide cases that originate in that state. Provincialism is inconsistent with the purpose of the federal court system, which strives to interpret and apply national law uniformly. Federal law should not mutate to satisfy local constituents; federal law is the same nationwide.

Political philosophy is another factor motivating proponents of a split. This is an illegitimate motive. Tampering with the federal courts because of the political or judicial philosophies of particular judges is inconsistent with the separation of powers doctrine and the independence of the judiciary.

My name is Charles Wiggins, and I'm a Senior Judge on the Ninth Circuit, where I have served for the last fifteen years. Prior to that, I served twelve years in the House of Representatives. My primary committee assignment was the Judiciary Committee, where I served for a number of years as the ranking Republican member on the Courts and Intellectual Property subcommittee. As a member of the Judiciary Committee, I was given the privilege of serving on a variety of important, special commissions; most relevant to this hearing, I served 25 years ago as a member of the Hruska Commission. Thus, I have devoted a quarter of a century to the careful study of the jurisdiction and boundaries of the several circuits. Over this time, with the benefit of subsequent study and experience, I have concluded that some of the conclusions of the Hruska Commission were erroneous, and I can no longer support them.

I have concluded, as a result of extensive study of the subject, that the overall functioning of our appellate system will not be improved by adding further circuits to the present structure, but that the problems with the present structure are traceable to the growth in population and the expansion of subject matter jurisdiction for the circuits.

Accordingly, we must direct our efforts to narrowing the subject matter jurisdiction of the circuits, and we should attempt to reduce the number of circuits, making them larger, not smaller. Therefore, I oppose the recommendations of the White Commission, as well as any other proposals that would further subdivide the existing circuits, and I urge this body to file the White Commission's recommendations without taking action.

I will not analyze the particular shortcomings of the Commission's recommendations. Other witnesses will adequately engage in that analysis. Instead, I am going to undertake an explanation of why this Commission's recommendations are before you at all. I am satisfied that there are no cogent reasons to tamper with the phys-

ical size of the Ninth Circuit, except that it is perceived to be in the political interests of its sponsors.

I. IS THE CIRCUIT TOO BIG?

As a starting point, let me confront the foremost argument for a Division, namely that the Ninth Circuit is just "too big." Proponents of a Ninth Circuit split frequently justify their position by asserting that the circuit is just that—"too big." This, of course, begs the question: too big for what? The key question should be whether the Ninth Circuit is too large to administer justice fairly and effectively. The answer to this question is easy—it is not. As the White Commission proclaimed "there is no persuasive evidence that the Ninth Circuit is not working effectively or that creating new circuits will improve the administration of justice in any circuit or overall."

The other potential argument is that the Ninth Circuit is "too large," not because it is unable to carry out its mission, but because administering justice over such a large territory is burdensome on both judges and litigants. I disagree with this assessment as well. Over the past century the circuit has operated effectively despite its massive boundaries, and, today, the circuit's large territory imposes fewer hardships on judges and litigants than ever before. We live in a shrunken world. As technology continues its giant leaps forward, our old way of looking at large distances becomes increasingly obsolete. Our judges no longer traverse the circuit's large distances via horseback. In the early years of this century, travel was a significant burden. For example, it took about three days to travel from Los Angeles to San Diego, yet this is a minor distance in comparison to the circuit as a whole. Likewise, a trip from San Francisco to Sacramento was itself a journey of a couple of days. But at that time there was no outcry against the size of the circuit. Only now, after we have managed to shrink, practically speaking, the distances that separate one part of our country from another, do we hear that the circuit is "too big." But this argument cannot coexist with the high technology world around us. Not only has our modern system of air travel made it easier to cover large distances, but the importance of travel itself diminishes as technology advances. Judges in San Diego or Los Angeles can communicate easily and instantaneously with judges in Boise and Fairbanks via electronic mail, fax machines, conference calls and videoconferencing. With time, many of our traditional ways of conducting court business, relying as they do on face-to-face communication, will become obsolete.

It is also important to understand that splitting the circuit does very little to reduce what travel burden remains. Clearly, lawyers and judges in rural parts of Alaska, Montana or Idaho bear a more significant travel burden than do judges or lawyers in San Francisco or Los Angeles. Nevertheless, the travel burden on these parties will remain significant even after the unveiling of a circuit split. It is difficult to travel to court meetings or oral arguments from rural Alaska. But it is only marginally more difficult to travel from rural Alaska to San Francisco than it is to travel from rural Alaska to Portland, Oregon. The relatively minor additional travel time is grossly insufficient to justify a fundamental transformation of the federal appellate system.

For these reasons, I believe the cry that the circuit is "too big" collapses under close scrutiny.

II. THE PROBLEM OF PROVINCIALISM

Another primary motive animating many proponents of a split I label provincialism. This is the belief that Judges from State X should decide cases from State X. Some of the key proponents of a split argue that California judges should not be deciding cases from Alaska, or Montana, or other Northwestern states. Under scrutiny, this argument shows itself, not only flawed, but even illegitimate. The United States Court of Appeals is charged primarily with interpreting and applying national law, not regional law, not state law. There is only one national law, enacted in D.C., under authority derived from the U.S. Constitution. The proponents' theory only makes sense if we believe that judges in Alaska should interpret the Constitution or federal statutes in an Alaska-friendly manner, and that California judges should interpret the same law in a California-friendly manner. But this is not the purpose of the federal judiciary. The U.S. Constitution is the same in California as it is in Alaska, it's the same in New York as in Florida. This is equally true of federal statutory law. For example, Congress did not pass, and the President did not sign, separate Americans with Disabilities Acts for Alaska and California. Thus, federal law is the same, region to region, and state to state. The goal of the federal judiciary is to achieve uniformity in interpretation, without splintered interpretations designed to favor the local constituency. National law is not an appropriate

forum for regional experimentation; this is the proper exercise of state law. Where the Constitution entrusts matters to the federal government, the law applies to all and should apply uniformly to all. The uniform application of national law is harmed, not helped, when the courts of appeals are splintered into smaller adjudicative bodies in order to tailor their views to local constituencies.

Splitting a circuit to appease regional interests deprives a circuit of the diversity of background that circuits need in order to interpret and apply national law in a uniform manner. Proponents of a Ninth Circuit split often argue that judges from other parts of the circuit, particularly California, are insufficiently familiar with life in the Pacific Northwest to decide cases arising in the northwest. I disagree, first, with the claim that California judges lack sufficient familiarity with their northern neighbors to adjudicate disputes from the northern states. It is true that no judge can be intimately familiar with the culture, background, and lifestyle of every party that comes before his or her court. Some judges that have an intimate understanding of logging or fishing in the rugged northwest may be unfamiliar with the lives of inner-city Los Angelinos. The reverse is often true as well. But let us remember, federal law is not designed to appeal to a small segment of the nation, it is written to apply to all Americans. Thus, we have long recognized that more diversity, not less, is necessary for a healthy circuit. A political generation ago, the Hruska Commission was given the task of exploring the state of the circuit courts, including their boundaries. In laying out the general principles through which decisions on the circuit courts should be made, the Hruska Commission articulated a truth that we must not lose sight of today: provincialism is a danger, not a benefit, to the courts of appeals. The Hruska Commission warned that we must avoid circuit courts that "lack the diversity of background and attitude brought to a court by judges who have lived and practiced in different states." 62 F.R.D. 223, 237. The Commission rightly noted that "such diversity is a highly desirable, and perhaps essential, condition in the constitution of the federal courts." *Id.* As the White Commission report makes clear, this Hruska Commission finding still rings true. See White Commission Report at 49. The federal appellate courts cannot cater to local tastes or interests if they are to satisfy their function of applying a uniform body of law uniformly. That being the case, the circuit courts should be composed in a way that best accomplishes that goal, by having judges from different parts of the country and different backgrounds working together to create truly national interpretations of our national law.

The key, then, is not to break the circuit courts into small bodies that cater to local tastes. The key is to ensure that the circuit courts are comprised of judges that represent the full diversity of the circuit. The proper question is whether the different regions of the circuit are adequately represented on the court by judges from the different regions. I would argue that the present Ninth satisfies this goal. But if it does not, the remedy is to appoint and confirm judges that ensure that all regions of the circuit are adequately represented, the remedy is not to splinter the circuit into smaller bodies that cannot effectively represent broad viewpoints.

It is also important to remember that the Ninth Circuit is not the only circuit that is growing rapidly. The Judicial Conference of the United States projects that the number of filed appeals will multiply by a factor of seven in the next twenty years. See Lloyd D. George, *The Split of the Ninth Circuit: Is It Really Our Best Option?*, 6-Jun Nev. Law. 5. Thus, to maintain smaller 12-15 judge circuits, while still maintaining viable caseloads per judge, would require up to 40 circuits by the year 2020. *Id.* Maintaining uniformity in the federal law would be an almost-impossible task with such a large number of circuits. Thus, it is necessary to readjust our thinking about the federal circuit courts. The circuit courts of the future, whether we like it or not, will be large circuits. Our only hope for an effective court of appeals system lies in finding ways to make large circuits work better; the answer is not to ignore the clear growth trends and stubbornly demand the small circuits that are, more and more, becoming a relic of the past.

Furthermore, smaller circuits cannot allay the concerns expressed by many proponents of a split. Many split proponents, particularly those from the Northwest, claim that their states are dominated by California. Again, I disagree with this assertion. But even if they are right, splitting the Ninth Circuit sets a bad precedent for those smaller states that are concerned with the dominance of a larger neighbor. Splitting the Ninth may remove Alaska from under California's real or imagined dominance, but only at the expense of those smaller states left in the Ninth. Whatever states remain tied to California, most likely Nevada, Arizona, maybe Hawaii, will be more dominated by California than Alaska or Montana ever were, because the other smaller states that once comprised the circuit have left, taking their judges with them. The only answer to large state dominance in the circuits is larger circuits, where many smaller states can balance one large one.

The Ninth is not the only rapidly growing circuit. Soon Congress will have to decide whether to divide a number of others. If Congress is concerned with the dominance of large states, it must set an important precedent by keeping the Ninth Circuit together. Otherwise, many other small states may soon find themselves in splintered circuits of their own, joined with a large and dominant neighbor and without any other small states that can provide balance to their circuit.

I. POLITICAL PHILOSOPHY

The final motivation behind a circuit split is even more troublesome than provincialism. There is a perception among many conservatives that our circuit is a "liberal" circuit that is out-of-touch with the Supreme Court and the other circuits. I strongly believe that this characterization is unfair. As one intimately familiar with the judges on the Ninth Circuit, I can say with confidence that our circuit is diverse, with a few liberals, a few conservatives, and many moderates. But however you view the philosophy of the Ninth, splitting the circuit for political reasons is illegitimate and would, in any case, be ineffectual in promoting the political philosophies of its proponents.

Let me first address the illegitimacy of a political restructuring of the circuit. We have long recognized, ever since President Roosevelt's attempt to pack the Supreme Court with favorable justices, if not before, that it is illegitimate for the political branches to alter fundamentally the character of the federal judiciary for political reasons. The Constitution is clear; the federal judiciary is an apolitical body, separate and equal to the political branches and unaccountable to them. Article III serves as a constant reminder that the federal judiciary cannot be played with to accomplish political whims, it cannot be punished because of a judge's political views. Elected officials have come and gone. As the old were replaced by the new, the prevailing political views on Capitol Hill often changed. Time has had the same effect on the federal judiciary. As old judicial personalities were replaced by new judges, prevailing judicial philosophies have often changed. What has remained constant throughout the century is the effectiveness with which the Ninth Circuit has administered justice. To alter significantly the structure of the federal judiciary because of disagreements with some judges' political views cuts to the heart of judicial independence, and fundamentally strains the separation of powers that animates our Constitution. Under our constitutional system, it is the interplay between the President and the Senate that places federal judges on the bench and, consequently, gives a district, a circuit, or the Supreme Court a liberal, conservative, or moderate character. These elected officials must then live with the results of the political process until they can alter the character of the courts through this political process. Over the long term, this process serves the country well.

Second, speaking practically, and setting aside the illegitimacy of restructuring the federal judiciary for political reasons, splitting the Ninth Circuit because of its perceived "liberal" character will not achieve the goals of its conservative proponents. Splitting the circuit does not replace "liberal" judges with "conservative" judges. The same judges will still occupy the appellate bench, and they will still produce decisions consistent with their judicial views. Thus, a split for political reasons cannot reduce the number of "liberal" decisions, nor can it increase the number of "conservative" ones. The theory, then, must be that a split will create a new circuit with a more conservative bent in the Northwest, while leaving California to its liberal judges. This theory is fundamentally flawed. Speaking as one intimately familiar with the court and its judges, I can say with a great deal of certainty that a Northwestern circuit will have a character very similar to that of the Ninth Circuit as it presently stands. There is no Mason-Dixon line in this circuit. Chopping California off from the Northwest will create two circuits, but it will not create a conservative circuit and a liberal circuit.

CONCLUSION

In conclusion, the White Commission's recommendations, and any other plan to split the Ninth Circuit, are inherently flawed. First, because of a rapidly increasing population, the demand for circuit judges will continue to rise dramatically. If we are to maintain uniformity in our federal appellate system, the circuit courts of the future will be large circuits; splintering our appellate system into a multitude of small circuits can only increase conflict, not uniformity. Thus, we must search for ways to make large circuits work better, primarily by reducing the subject matter jurisdiction of the circuit courts to make case loads more manageable. Second, the reasons given for a Ninth Circuit split collapse under scrutiny. The circuit is not "too big." Though large, it allows for the fair and effective administration of justice. And practically speaking, the circuit gets smaller every day with every technological

leap forward. Finally, the motives animating circuit split proposals are illegitimate. Provincialism is a misguided motive because it jeopardizes the federal courts' duty to administer national law uniformly. Likewise, splitting a circuit because of the political philosophies of some federal judges threatens the separation of powers upon which our governmental system is based. I therefore urge the Committee to maintain the circuit's present structure.

Mr. COBLE. Judge Rymer.

STATEMENT OF PAMELA ANN RYMER, CIRCUIT JUDGE, NINTH CIRCUIT COURT OF APPEALS

Ms. RYMER. Thank you very much, Mr. Chairman, members of the subcommittee. I very much appreciate the opportunity to testify this afternoon on behalf of the Commission on the Structural Alternatives for the Federal Courts of Appeals.

As, of course, you know, the Congress created the Commission, chaired by retired Supreme Court Justice Byron R. White, in large part because the ninth circuit urged you to call for an independent study; and the Commission concluded two things of equal importance. The ninth circuit, which is an administrative entity with no adjudicative functions, ain't broke and does not need fixing, but the Court of Appeals for the Ninth Circuit is broke and does need fixing, but cannot be fixed without structural change. The reason is that the court of appeals is simply too large to function well as a single decision-making unit.

Unlike any other appellate court in the Nation, its judges do not sit together as a full court en banc to develop and maintain a coherent and consistent body of law. Instead, that critical function is consigned to a limited en banc court which is randomly constituted on a case-by-case basis.

Nor do the judges in the court sit with each other regularly enough on panels to understand fully each other's jurisprudence, and the court's output is too large to read, let alone personally keep abreast of, think about, digest, and influence. Inevitably, over time, there is a toll on coherence and consistency, predictability, and accountability; and for this reason, a majority of the Justices of the United States Supreme Court unequivocally say that it is time for change.

The Commission unanimously agreed. The problem with the ninth circuit's Courts of Appeals has nothing to do with goodwill or good administration. No amount of either—and the court has both—no amount of either can make it possible for 30 or 40 or 50 or more judges to decide cases together. It simply cannot be done, and that is the problem.

The problem is not that the court does not work well. If that were the problem, then different administration, new technology, and ideas for operational improvement might make a difference, but it isn't. Nor is the problem reversal rate. That is not something that the White Commission thought was important. I completely agree that it should not be a factor.

Nor is the problem the number of judges who sit on the limited en banc court or the threshold for going en banc. To reform that is simply a cosmetic change which doesn't address the real problem.

And this misses the mark. Courts are not legislative bodies. They are not representative bodies. Courts are composed of judges with

article III responsibilities, each one of them; and full court means full bench, that is, no fewer than 28. And 28 judges, let alone 33 or 40, simply cannot work together as a full court.

The divisional structure that the Commission recommends will reduce the adjudicative units to manageable proportions, each with seven to eleven judges who can sit regularly with each other and can sit together as a full court when they need to. The divisions may, of course, diverge in their interpretation of the law over time, but this is very important: in the main, this won't matter because lawyers and judges in each division will only need to worry about the law of that division, unlike today; when even subtle differences between panels circuit-wide do matter because all district courts are bound to follow and, thus, to try to figure out what the law of the entire circuit is.

But on those issues in which uniformity itself is the compelling interest, if there is substantial and square conflict, then the Circuit Division can resolve it. On that issue the circuit division judges will not be super judges, far less "super" judges than limited en banc judges are now, because they will have no authority to resolve issues of exceptional importance or to correct panel results. These are true en banc functions that the Commission believes should only be reposed in the divisions, that will sit together as a full bench or in the United States Supreme Court.

Nor will the Circuit Division be an extra layer of appeal. There are three now. There will be three then.

Finally, the toughest question, without question, is what to do about California. While I personally agree with Justice Stevens that there is no problem putting parts of California into different divisions, the important thing is the particular arrangement is not at all central to the Commission's concept. California can be its own division for a while, and the White Commission's structural arrangement will work fine if that is done.

I appreciate the opportunity to present the Commission's proposal to you.

Mr. COBLE. Thank you, Judge Rymer.

[The prepared statement of Judge Rymer follows:]

PREPARED STATEMENT OF PAMELA ANN RYMER, CIRCUIT JUDGE, NINTH CIRCUIT COURT OF APPEALS

I appreciate the opportunity of testifying in support of the recommendations of the Commission on Structural Alternatives for the Federal Courts of Appeals which, with respect to the Ninth Circuit, are reflected in S.253, the "Ninth Circuit Reorganization Act," that provides for restructuring the Court of Appeals for the Ninth Circuit into adjudicative divisions. I was privileged to serve on the Commission chaired by retired Supreme Court Justice Byron R. White, and to work with N. Lee Cooper, the immediate past President of the American Bar Association; Hon. Gilbert S. Merritt, former Chief Judge of the Sixth Circuit and Chair of the Executive Committee of the Judicial Conference of the United States; and Hon. William D. Browning, who was Chief Judge of the District of Arizona as well as a member of the Judicial Conference of the United States and the Judicial Council of the Ninth Circuit.¹

¹ While I am testifying as a member of the White Commission, I am also a United States Circuit Judge for the Ninth Circuit and was a district judge for the Central District of California. I currently serve on the Executive Committee of the Court of Appeals and am Administrative Unit Judge for the Southern Unit as well as a member of the Judicial Council for the Ninth Circuit. I have previously been a member of the Executive Committee of the Ninth Circuit Judicial Conference and was its Chair.

In the wake of decades of concern about the size of the Ninth Circuit and a rider to the Appropriations Bill in 1997 that would have split the circuit,² the Commission was established to study structural alternatives for the federal courts of appeals—with particular reference to the Ninth Circuit. Although the Ninth Circuit was a special focus of the Commission's work, its charge was broader and our recommendations with reference to the Ninth Circuit grew out of the study we undertook of the federal appellate system as a whole, its present condition and future capacity.

The most significant fact that emerged is the growth in caseload that federal courts across the country have experienced in recent years. Appellate courts have been disproportionately affected because the number of circuit judges has not kept pace with the growth. To an extent, caseload pressures are exacerbated by unfilled vacancies, but the problem is more systemic than that.

Better case management is a band-aid that helps alleviate, but does not cure, the problem. Appellate courts (including, in particular, the Ninth Circuit's) have responded to increased demand by adding staff support, tracking cases differently depending upon their difficulty, providing ADR, borrowing judges, and taking advantage of technology to coordinate consideration of related issues. At the same time, fewer appeals are orally argued and fewer result in fully reasoned, published dispositions. With all that has been accomplished, however, most courts appear close to the limit of their ability to manage the caseload more effectively and efficiently—yet still render decisions that are, and are perceived to be, fairly and fully considered by Article III judges.

Curtailing jurisdiction could also relieve caseload pressure. Indeed, all members of the Commission believe that restoring and retaining a more appropriate balance of federal and state jurisdiction is critical to enabling the federal courts to perform their core constitutional functions in the future. That said, we cannot realistically count on changes in jurisdiction to solve the caseload problem.

Another palliative is to increase the number of judges, but the problem with this solution is that at some point an appellate court becomes too large to function effectively as a single judicial decision-making unit. Unlike judges on a district court, appellate judges must work together to develop the law of the court's jurisdiction. Two-thirds of the circuit judges throughout the country (including one-third of my colleagues on the Court of Appeals for the Ninth Circuit) believe that the maximum number of judges for an appellate court to function well lies somewhere between eleven and seventeen. Beyond this range there are too many judges

- To sit together as a full court en banc
- To read the court's output
- To sit with each other regularly
- To take steps such as pre-filing circulation of proposed opinions to assure coherence and consistency, predictability and stability; and
- To hold each judge accountable for decisions that are rendered in the name of the court.

Historically, when the number of circuit judges needed to deal with a circuit's increasing caseload has gone beyond a tolerable number, the circuit has been split and two new circuits have been created, each with an acceptable number of judges to handle the caseload of the newly aligned circuit (at least for a while). This happened with the "old" Fifth and Eighth Circuits earlier in the century. Inevitably until now, splitting the circuit has been seen as the way to solve the conundrum of the Ninth Circuit, thought by many to be too large in terms of judges, caseload, and population.

But there are downsides—and limits—to circuit splitting. For one thing, to make more, smaller circuits tends to Balkanize federal law and adversely to affect the federalizing function of a federal court of appeals. For another, everyone to look at the question has agreed that no regional circuit should have fewer than three states. This is so for reasons both of policy and practicality: a federal appellate court should be more than a single state court since it declares *federal* law that speaks beyond state boundaries; as such, its judges should come from, and be appointed by and with the consent of senators who are concerned about the interests of, more than one or two states. In addition, the only forum where inter-circuit conflict can be resolved is the United States Supreme Court. This makes splitting a single large state (California, for example) between two different circuits especially undesirable. Fi-

²The rider, passed by the Senate, would have split the Circuit by establishing a new Twelfth Circuit of Alaska, Arizona, Hawaii, Idaho, Montana, Oregon, Washington, Guam and the Northern Mariana Islands, leaving California and Nevada in the "old" Ninth.

nally, there are obvious costs, both to the fiscal and legal order, in creating an entirely new, essentially duplicative, apparatus.

Thus the question Congress posed to the Commission: Are there structural alternatives for the federal courts of appeals, in particular the Court of Appeals for the Ninth Circuit? The answer is yes. Instead of splitting a circuit that "ain't broke," fix the appellate court that is.

A court of appeals is different from the circuit, and the difference is critical to the White Commission's analysis. Even though an appellate judge is a "circuit" judge and the court of appeals is commonly called the "circuit" court, the circuit is not the court of appeals or vice versa. A circuit is an *administrative* entity that is the governance mechanism for all courts and judges within the geographic area it covers—district courts, bankruptcy courts, and magistrate judges as well as the court of appeals. A circuit has no *adjudicative* role; adjudication is entirely a *court* function. Therefore, to the extent there are perceived problems with a court of appeals on account of the fact that it has grown too large or would be too large if an adequate number of judges were appointed to handle the caseload, the *court of appeals* can be restructured without the *circuit* being split to achieve it.

In the case of the Ninth Circuit, no one seriously questions how the *circuit* performs its administrative functions. The circuit's size allows for flexibility in assignment, economies of scale, and a common body of law for the Pacific Rim and the western part of the United States—all of which are positive values. But many circuit judges, lawyers who practice within the circuit, and a majority of justices on the United States Supreme Court question how the *court of appeals* performs its adjudicative functions.³ It is significantly larger than any other collegial court in this country,⁴ and there are serious concerns about creeping inconsistency, lack of predictability, and the absence of review of decisions by all judges on the court.

Alone among the circuits, the Ninth Circuit's Court of Appeals does not sit together en banc, as a full court, to develop and maintain a coherent and consistent body of law. By statute, federal appellate courts may go en banc for three purposes: to decide issues of exceptional importance, to resolve intra-circuit conflict, and to avoid inter-circuit conflict. Instead of a full court en banc, the Ninth Circuit's appellate court has a "limited en banc." The limited en banc court is constituted on a case-by-case basis, consisting of the Chief Judge and ten judges who are randomly drawn for the particular case. Whatever the limited en banc court decides is the law of the circuit, unless a majority of the full court votes for a rehearing by the full court—a possibility that exists in theory but has never happened in practice. In addition to limiting full court review of panel decisions to eleven judges, only 57% of the Ninth Circuit's appellate judges read all or most of the opinions of the court. This is a far lower percentage than in other circuits with smaller courts.

I believe a smaller court that can sit together regularly in panels, that can convene as a full bench to correct panel error and to maintain a body of coherent and consistent law, and that can monitor all of its output, is better for the administration of justice than a bigger court that cannot. The benefits of a smaller tribunal can be obtained without splitting the circuit, but it will take structural change to make it happen. S.253 appropriately requires the Court of Appeals for the Ninth Circuit to be restructured into adjudicative divisions, as the White Commission recommends.

The proposed arrangement creates a Northern Division for the Districts of Alaska, Idaho, Montana, Oregon, and Eastern and Western Washington; a Middle Division for the Districts of Northern and Eastern California, Guam, Hawaii, Nevada, and the Northern Mariana Islands; and a Southern Division for the Districts of Arizona and Central and Southern California. Each division will consist of seven to eleven judges,⁵ a majority of whom are resident within the region served by the division. Judges can be drawn at random from outside the division to provide judge-power as needed, and to cross-pollinate the divisions with judges from around the circuit.⁶

³ Letters written by the Chief Justice and by Justices Stevens, O'Connor, Scalia, Kennedy and Breyer to the Commission are available on the Commission's web site but are attached for convenience as Exhibit A to this statement. Survey results are summarized in the Commission's Working Papers.

⁴ "Collegial" in this context does not mean friendly or sociable or enjoying one another's company. Nor does it connote that judges get along personally or agree on the law. Rather, a "collegial" court is one that must work together, over time, to develop a consistent, coherent, and predictable body of law for the jurisdiction.

⁵ You may wish to consider whether a cap of 13 is preferable given the size of the caseload and its distribution within the circuit.

⁶ Judges drawn for out-of-division service would not move to that division; they would simply travel to that division's place of holding court, as circuit judges do now when they are assigned to an argument calendar that convenes at a location where they do not live.

Thus, each division will have a regional connection without losing a federal perspective. At the same time, each division is small enough for every judge to read every decision and for the division to sit comfortably together as a full bench en banc, thereby authoritatively declaring the law (and correcting errors) for districts within the division. Because this might eventually lead to divergence among divisions, the Commission recommends (and S.253 provides for) a Circuit Division to maintain circuit-wide uniformity on issues where consistency is important to the circuit but on which the divisions have taken squarely conflicting positions.⁷ In this respect the Circuit Division has discretion only to break a "tie" in the interest of consistency. The Circuit Division has no discretion to rehear issues of exceptional importance or to avoid inter-circuit conflict; these functions repose solely in the divisions, sitting en banc, or in the United States Supreme Court where certiorari would be available (as it is now) from panel decisions, from divisional en banc decisions, and from Circuit Division decisions.

I believe this structure responds to the principal concerns expressed about the "Ninth Circuit." It reduces the size of the judicial decision-making unit, and replaces the circuit-wide limited en banc—which does not work like a true en banc works—with a full division en banc in which all division judges have a voice and a vote. With these changes, each judge will no longer be "charged" with the output of the whole court, but can concentrate on the output of the division. All circuit judges can again be expected to read all decisions that speak for them. In this way, inconsistency and lack of predictability will be less likely and coherent development of the law more likely.

In addition, the divisional structure accomplishes three other objectives that the Commission believes are worthwhile. First, it preserves flexibility for the future. Unlike circuits, divisions and their composition can change up, down or sideways as changes in caseload require. Second, the divisional structure produces a judicial unit of suitable size yet provides a mechanism for maintaining uniform law on issues where consistency throughout the west is important. Finally, it makes the federal appellate court in the Ninth Circuit less remote to those whose lives and fortunes depend on its decisions. To some extent tension between the regional roots of circuit organization and the federalizing function of its court of appeals is inevitable, but the structure proscribed in S.253 goes a long way toward reconciling the two.

The divisional structure is sensible and workable. For sure, it has not been tried before in the form proposed and there is understandable reluctance on the part of bench and bar alike to experiment with any structural alternative.⁸ After all, we were brought up on stare decisis. However, the important thing is what furthers the administration of justice in the long run. The Commission's is not a perfect solution. Nor can there be one, with a state as large as California as part of the mix. However, it is a viable solution that is preferable to splitting the circuit or to letting the court of appeals grow to 40, 50, 60 or more judges. No one suggested during the course of our study how that many judges can decide cases *as a court*, for panels speak with authority for the court as a whole only so long as the full court is perceived to be capable of speaking for itself if it disagrees.

I am, of course, familiar with the concerns that have been expressed about how the divisional concept would work. I understand where they are coming from, because a known quantity—even a flawed one—may seem safer than an unknown one, which surely is imperfect as well. However, I disagree that the "disadvantages" are genuine difficulties.⁹ In reality they are strengths of the divisional structure that correspond to weaknesses of the status quo. In my view, the "disadvantages" do not come close to outweighing the advantages of the divisional structure.

The perceived disadvantages are that divisional decisions would not bind other divisions and the circuit-wide en banc would no longer exist to maintain and develop circuit law; that the Circuit Division would be an additional and cumbersome level of appellate review, resulting in additional expense and delay; the present participation of all appellate judges circuit-wide in resolving circuit law would be eliminated,

⁷The Circuit Division would be composed of the Chief Judge and six to twelve other judges drawn equally but randomly from each division. They would serve on the Circuit Division for a term of three years as well as their own division.

⁸As the Commission's Final Report explains, the Ninth Circuit's previous experiment with regional calendaring was so totally different that no pertinent conclusions can be drawn from it. Likewise, the "old" Fifth Circuit's experience is dissimilar in that it operated through divisions only in transition. But the step is nevertheless not radical in the Ninth Circuit, for it already has Administrative Units, Northern, Middle and Southern.

⁹Chief Judge Hug has succinctly summarized them in his Analysis of the Final Commission Report (January 11, 1999), which I believe has been circulated to your Committee and to other members of Congress.

and practical problems of assignment would ensue; and "splitting" California would produce different interpretations and enforcement of the law within the state. However, as I see it:

1. A circuit-wide en banc process is not effective and is not necessary to the divisional concept, since the divisions will sit as full courts to decide issues of exceptional importance and to maintain coherent and consistent law within the division. Divisional decisions should not bind other divisions because otherwise, the Court of Appeals for the Ninth Circuit is back to square one: All circuit judges would have to try to read and monitor all decisions of all divisions, and participate in the rehearing process for all of the court's output (at least up to the time a case goes to a limited en banc court).

2. The divisional structure replaces the circuit-wide limited en banc for issues of exceptional importance with a full court divisional en banc in order to *increase* participation of judges in that function. The limited en banc process permits no participation in the outcome by judges who are not drawn for a limited en banc court. Because not all judges have a say in it, the limited en banc is too limited to result in a decision that truly speaks for all judges on the court. It is also a time-consuming process that is regarded by some judges as not worth the candle, particularly since the composition of the limited en banc court (unlike a true en banc) is not known when voting occurs. By contrast, under the divisional structure every divisional judge will both participate in the en banc process and be on the en banc court. In this way issues of exceptional importance will be resolved for the division by every judge on the division. This generates greater participation *and* closer attention to the outcome. While judges will presumably continue to review petitions for rehearing and be able to make *sua sponte* calls for en banc rehearing, circulate memoranda in support of or in opposition to going en banc, and (if active) vote on whether to take the case en banc, their participation will not stop at this point as it may do now. For under the divisional structure, if a matter does go en banc, each judge will be assured a place on the bench.¹⁰

3. Although the Circuit Division may appear at first glance to add a new level of review, it really doesn't. Today in the Ninth Circuit, a panel decision may be reheard by the panel, by a limited en banc court, and by the full court (something which hasn't happened, but could). All of this can take place without the parties wishing it to, and they can be asked to file supplemental briefs and must show up for reargument—which adds expense, and the process can unfortunately take a long time—which means delay for the litigants. Under the divisional structure, a panel decision may be reheard by the panel, by the full division, and by the Circuit Division but only if the panel decision (left in place by the full division) or the en banc decision squarely conflicts with the settled law of another division. In other words, there are precisely the same number of possible layers of review under the divisional structure as under the present limited en banc system.

In any event, if the Circuit Division takes a reasonable view of its mission—which we must assume that it will—then it is unlikely to have that much to do, for it will be the rare case that qualifies.¹¹ Inconsistency alone is not sufficient for Circuit Division review. There must be square and significant conflict. Each division will take care of its own inconsistencies, and inconsistencies between divisions are inconsequential (because they are not precedential outside the division) unless they directly (and deliberately) occur with respect to issues on which uniformity throughout the circuit is important. Thus, the Circuit Division's jurisdiction will not be triggered unless some division creates a square conflict on an issue where consistency matters.¹² Even then, additional work for the parties (and the Circuit Division)

¹⁰ Chief Judge Hug's Analysis suggests a related disadvantage, that resolution of conflict by the Circuit Division would be by thirteen judges, not representative of the full court or even proportionately representative of the divisions. The short answer is that 13 out of 28 is more "representative" than 11 out of 28, which is how the limited en banc court is currently composed. But the real point is that the Circuit Division (unlike the present limited en banc court) will have limited power—its only authority will be to weigh in on one side or the other of a square conflict. *That* assignment could well be done by fewer even than 13 because two entire divisions will already have fully considered the issue.

¹¹ Only 10% of limited en bancs in the last ten years have been to correct a conflict.

¹² The Commission assumed that all divisions will be bound by current Ninth Circuit law even though S.253 does not require continuation of Ninth Circuit precedent, because it is reasonable to suppose that the Ninth Circuit Court of Appeals would so provide by rule.

The Chief Judge's Analysis suggests there may be two other, related glitches in the statutory scheme. One is the inability of the Circuit Division to modify the first conflicted case when it has become final. However, this is no different from an en banc court's power under the present regime. A limited en banc court may only decide the case in front of it, but once it does it overrules prior inconsistent authority. The same would be true of a Circuit Division decision that adopts the second inconsistent opinion; that rule would become the law circuit-wide and prior

should be minimal because the petition for rehearing in the division will have raised the conflict and the Circuit Division will already have the benefit of a fully developed record and two reasoned (but conflicting) opinions.

Accordingly, the Circuit Division is not at all a collection of "Super Circuit Court Judges."¹³ While serving on it, judges may have to read more petitions for rehearing than their colleagues, and upon occasion will get to break a tie. But if anything, a judge serving on the Circuit Division will be far less of a "super judge" than a judge who serves on a limited en banc court at present. Unlike limited en banc judges, Circuit Division judges will have no power to reconsider issues that are exceptionally important, or to correct wrong decisions; that will be for the divisions to do, sitting together in a true en banc.

4. At first, the divisional structure will no doubt be more complicated to staff because it is different. But there should be no more difficulty in randomly assigning a judge from Billings to Pasadena for eight panels per year for three years than in sending him randomly to Pasadena, or San Francisco, or Portland, or Seattle, or sometimes Anchorage or Honolulu during the same period. In either case that judge will have to be scheduled along with other members of the panel.¹⁴

The same support the Clerk's office now provides to the Court of Appeals for the Ninth Circuit will sustain the new divisional structure as well. Some internal adjustments will no doubt have to be made, but they are minor and have no significant effect on the way the court of appeals does business. Rules will be the same circuit-wide. Motions, screening, and calendaring will also be essentially the same except for being reorganized by division. The clerk's ability to identify related issues will continue to be helpful to divisional panels, especially to the extent they try to avoid conflict—as they should. Divisions would sit (and hear argument) where the court now does and the Clerk would have offices where she has offices now.

The particular divisional arrangement in S.253 works logistically. It might work better with a 13 judge cap because the caseload could be more evenly apportioned, and of course it would be easier with 33 judges than 28. But assignments are necessarily complicated at present, and making them more permanent should not add to the burden.

5. As Justice Stevens points out, the problem of splitting California between two circuits is "seriously exaggerated." It follows that the problem of putting parts of California into different divisions is also "seriously exaggerated." Justice Stevens explains:

It is, of course, true that occasionally there will be conflicting interpretations of both State and Federal issues that will require resolution either by use of the certification process for the former, or by our Court's review of the latter, but such temporary uncertainty is not new to the law. It would differ only in degree from the comparable uncertainty that attends conflicting rulings on state court questions in different California jurisdictions, conflicting rulings on federal questions in different federal districts within California and in different federal circuits today. In my considered opinion, the importance of this concern pales in comparison with the disadvantages associated with a circuit that is so large that even the most conscientious judge probably cannot keep abreast of her own court's output.

In short, to put parts of California into different divisions does nothing to California that California does not do to itself. California's system allows for the same incon-

authority (including the first conflicted case) would be overruled. The second problem has to do with what happens if a division overrules an existing precedent, in that it would not be binding circuit-wide unless there is a case in another division that is in conflict and can be modified. However, the division that overruled existing Ninth Circuit precedent (that is binding elsewhere) would itself create a conflict that the Circuit Division could resolve.

¹³ See Analysis of the Final Commission Report by Chief Judge Procter Hug, Jr. (January 11, 1999), p. 22.

¹⁴ The Chief Judge's Analysis suggests two other problems. First, that resident judges within a division who are assigned to another division would have no say in the en banc consideration of panel decisions within the division of their residence. While true, this doesn't matter. Where a judge's chambers is located is irrelevant to the law of the division on which that judge serves. Each division will speak for every judge sitting on the division and every judge sitting on the division will have a say in its decisions. It will also be the case under the divisional structure that a majority of the judges on each division will always be a resident in the division, yet no individual judge is (or should be) guaranteed a spot on the division in which he or she lives. The second problem has to do with designation of the presiding divisional judge, which might turn out to be a brand new judge or a judge who is not a division resident. However, the senior active judge traditionally presides on all panels, no matter how recently confirmed. Since presiding at divisional en bancs is the divisional presiding judge's only role, it seems logical for the senior active judge within the division to be so designated.

sistency and the same forum shopping that it is said the divisional arrangement would foster. One state court of appeal is not bound by the decisions of another state court of appeal. Therefore, state law (and state court determinations of federal law) can be different depending upon where in the state one lives or does business. By the same token, the federal system has itself long tolerated inconsistent determinations of federal law by different circuits. These inconsistencies survive until settled by the United States Supreme Court, but in the meantime persons who travel or do business in different circuits simply deal with the problem. The divisional concept is unremarkable in this respect. It would neither create a forum-shopping opportunity that does not currently exist, nor subject Californians to the possibility of disagreement on the law (including constitutionality of state-wide initiatives) that does not happen already.

Even though it is possible that resolving an intra-state inter-divisional conflict might entail an extra step in the unusual situation where one of the California divisions refuses to defer to a prior divisional decision on point, the conflict *would* get resolved and, I believe, efficiently. Today, if a federal district court in Los Angeles decides an issue of state or federal law differently from a federal district court in San Francisco, and if the issue is appealed, it can be resolved by the Court of Appeals for the Ninth Circuit, although it may take a limited en banc court to do it. Under the divisional structure, if the same conflict were to persist after divisional review, it could be resolved by the Circuit Division. As seems clear, no alternative involving California is perfect because the "big state" problem is not easily solved.¹⁵ Ultimately I do not believe that it can be solved without structural change, for it is unlikely that California's contribution to caseload will greatly change. The options are at least equally, if not more unattractive. To split California between two *circuits* leaves the United States Supreme Court as the only forum for resolving inconsistency, whereas to put the state in different *divisions* of the *same circuit* allows for the conflict to be resolved within the circuit. Similarly, to make California its own division is problematic because the caseload and number of judges required to handle it would start the "California" division off at (or over) the top of the maximum number of judges a decisional unit should have to function well. However, recognizing the disparate caseload impact that would follow, in the short run it would be possible to make California a single division, with Arizona and Nevada in another, and the remaining states and territories a third.

No matter how configured, the divisional proposal resolves the debate about the Ninth Circuit. As the Chief Justice says of the divisional proposal for the Ninth Circuit Court of Appeals, it is "better than merely a compromise between those who have advocated a split of the circuit and those who argue for the status quo. It appears to me to address head-on most of the significant concerns raised about that court and would do so with minimal to no disruption in the circuit's administrative structure."

I therefore urge your favorable action on S.253.

[Note: The exhibits submitted with this prepared statement are on file with the House Judiciary Committee's Subcommittee on Courts and Intellectual Property.]

Mr. COBLE. Judge O'Scannlain.

STATEMENT OF DIARMUID O'SCANNLAIN, CIRCUIT JUDGE, NINTH CIRCUIT COURT OF APPEALS

Mr. O'SCANNLAIN. Mr. Chairman and members, I would like to begin by stating that as a sitting active circuit judge for over 12 years, I support the White Commission's findings, and I am in general agreement with Judge Rymer's comments. I won't repeat my written remarks, but I request that you have the appendix in front of you, starting on page 21.

First and foremost, this never-ending judicial saga of "what to do about that judicial Goliath," the ninth circuit, an epic that dates back to at least World War II, must be brought to closure and decisively. The White Commission of 1998, like the Hruska Commis-

¹⁵ California produces approximately 4,000 appeals annually, or 60% of the circuit's appellate work. Thirteen of the authorized judgeships are held (or may be held if present nominees are appointed) by California residents.

sion of 1973, each came to the same conclusion. Regardless of which party controlled Congress when created, both study commissions concluded that the ninth circuit needs restructuring.

The White Commission's proposal is the most carefully crafted and sophisticated legislative solution thus far, and hopefully, should be the vehicle to resolve the ninth circuit's future once and for all. And let me remind my colleagues, the Chief Judge and Judge Wiggins, you asked for the Commission to be created as an alternative to the outright split bill that passed the Senate in 1997. Its recommendations cannot be ignored; they must be given serious consideration.

I first became interested in judicial administration issues when I was studying for my LL.M. in Judicial Process at the University of Virginia Law School between 1990 and 1992. Since then, I have become a public proponent of the Hruska Commission's recommended restructuring.

When I was appointed in 1986, I was opposed to any change to our circuit whatsoever, the position advanced by the Chief Judge today. As Senator Hatfield and Senator Gorton would recall, I refused to support their efforts through the 1980's to split our court because of the general perception that such efforts may have been motivated by dissatisfaction with some environmental law cases that were decided.

Mr. Chairman, we have moved past those inappropriate concerns. The more I consider the issue from the judicial administration perspective today, the more I appreciate the benefits of the White Commission's restructuring proposal. Not only will the creation of smaller judicial decision-making units in the form of divisions promote consistency in law, predictability, and collegiality, but the divisions will bring us into closer conformity with the judicial structure of the rest of the country. That is exactly what we need now.

Mr. Chairman, there is nothing sinister, immoral, fattening, politically incorrect, or unconstitutional about restructuring judicial circuits. This is simply the natural evolution of the Federal appellate system. As courts grow too big, they evolve into more manageable judicial units.

When the circuit courts of appeals were created in 1891, there were only nine regional circuits, and for a long time no circuit had more than four judges. Since then, the District of Columbia circuit has been created. The tenth circuit was split off from the eighth. The eleventh circuit was split off from the fifth. In due course I have no doubt either the ninth circuit will be restructured along the lines of the White Commission plan or a new twelfth circuit will be split off from the ninth.

No circuit, not even mine, Mr. Chairman, has a God-given right to an exemption from the laws of nature. There is nothing unique about the ninth circuit which makes its boundaries sacrosanct, compared to the fourth or the fifth or the tenth or any other circuit. On the contrary, it smacks somewhat of elitism. "We are special; if you touch us, you are political."

Frankly, I am mystified by the relentless refusal of some of my colleagues, including my beloved Chief and my Brother Wiggins to contemplate the inevitable. If large circuits are the wave of the fu-

ture, why don't we start merging circuits, like yours, Mr. Chairman, the fourth, with your neighbor to the south, the eleventh; Richmond and Atlanta really aren't that far apart.

But the problem with the circuit can be summarized quite simply. We are too big now and getting bigger every day. And although everybody knows we are officially allocated 28 judges, we currently have 21 active judges and 19 senior judges. In other words, there are 40 judges on our court today. And when the seven existing vacancies are filled, our court will have 47 judges. This really makes Congressman Campbell's point that he was raising in his testimony.

And I have compiled a roster, Mr. Chairman, of the ninth circuit judges in Exhibit A, which is page 21, which you may find quite revealing; and I ask that you turn to it. As you can see, it is a remarkable array of judge power, more judges on one court than the entire Federal judiciary when the circuit courts of appeals were created.

Chart 2 on page 24 reveals that the ninth circuit has about double the number of total judges, when the senior judges are taken into account, as the next largest circuit.

Mr. Chairman, in conclusion, do not be deterred by nitpicking criticisms of the Commission's proposal. Most importantly, don't count on our court to fix these problems by ourselves. Our problems will not go away. They will only get worse. You must force us to restructure one way or another, so we can end the distractions caused by this never-ending debate.

Thank you, Mr. Chairman.

Mr. COBLE. Thank you, Judge.

[The prepared statement of Judge O'Scannlain follows:]

PREPARED STATEMENT OF DIARMUID O'SCANNLAIN, CIRCUIT JUDGE, NINTH CIRCUIT COURT OF APPEALS

EXECUTIVE SUMMARY

The strains from the size and ever-increasing caseload of the Ninth Circuit present us with a fundamental choice: do nothing and let the circuit become even more unwieldy, or restructure the circuit into more manageable regional entities. The White Commission, recognizing the need for smaller decisional units to promote consistency and predictability in adjudication, concluded that the first option is not responsible and that the latter option is inevitable. I agree. The Commission was prescient in its recognition of the Ninth Circuit's problems, and its creative recommendations deserve careful consideration.

The natural evolution of the federal appellate court system entails the evolution of circuits in response to changes in population and workload. As courts grow too big, they are restructured into more manageable judicial units. No circuit, not even mine, has a God-given right to an exemption from inevitable restructuring. The only legitimate consideration is the optimal size and structure for judges to perform their duties. Although it has been suggested that we can fix the problems plaguing the Ninth Circuit by tinkering at the edges, I agree with the Commission's implicit finding that a more significant overhaul is needed. I commend the Commission's divisional restructuring approach. With fewer judges in each division, collegiality of adjudication within divisions will rise, and consistency of law will be improved. In addition, each division will be more connected to the various regions involved.

The same phenomena that counsel for the divisional restructuring approach also counsel for a split. I think that we should implement the White Commission's recommendation, which is a step in the right direction. However, if it does not work or if the obstructionists prevent the passage of this proposal, then there should be an outright split of the circuit, which is probably inevitable anyway. Most of all, we should end the guerilla warfare and let us get back to judging.

Good morning, Chairman Coble and Members of the Subcommittee. My name is Diarmuid O'Scannlain, and I am a judge on the United States Court of Appeals for the Ninth Circuit with chambers in the Pioneer Courthouse in Portland, Oregon. Thank you for inviting me to appear before you today to discuss the future of the Ninth Circuit, an issue of great significance to the federal judiciary as a whole.

I

Having served as a federal appellate judge for over a dozen years on what has long been the largest court of appeals¹ in the federal system and having written repeatedly on issues of judicial administration,² I welcome the chance to offer my perspectives as a member of the court in this never-ending saga of "what to do about that judicial Goliath," the Ninth Circuit. I have heard my colleague Judge Rymer's persuasive presentation, and I have read the Commission's report and most of its accumulated testimony. I support the Commission's findings and am in general agreement with Judge Rymer's comments, but I will emphasize certain points in particular. This judicial epic which has been going on since at least World War II must be brought to closure, and decisively. The White Commission of 1998, like the Hruska Commission of 1973, came to the same conclusion. Regardless of which party controlled Congress, when each was authorized, each study commission concluded that the Ninth Circuit needs restructuring. The White Commission's proposal is the most carefully crafted and sophisticated legislative solution thus far and, hopefully, should be the vehicle to resolve the Ninth Circuit's future once and for all. Your choice is either to implement the Commission's proposal, probably with some adjustments in details, or to order an outright split. Congress can no longer afford to luxuriate in passivity over the future of this lumbering judicial entity.

I first became interested in judicial administration issues when I was studying for my LL.M. in judicial process at the University of Virginia in studies between 1990 and 1992. Since then, I have become a public proponent of the Hruska Commission's recommended restructuring plan. When I was appointed in 1986 I was opposed to any change whatsoever. As Senator Hatfield and Senator Gorton would recall, I refused to support their efforts throughout the 1980s to split our court because of the perception that the efforts may have been motivated by dissatisfaction with some environmental law case decisions. Mr. Chairman, we have moved beyond those inappropriate concerns. The more I consider the issue from the judicial administration perspective today, the more I appreciate the benefits of the White Commission's restructuring proposal. By creating smaller judicial-decision making units in the form of divisions, the Commission's proposal will promote consistency in law, predictability, and collegiality, and these appellate divisions will certainly be more connected to the various regions involved. This is exactly what we need now.

When the circuit courts of appeals were created over one hundred years ago by the Evarts Act of 1891, there were only nine regional circuits. Today, there are twelve. For a long time, each court of appeals had at most three judges each; indeed, the First Circuit was still a three-judge court when I was still in law school. Over time, courts grew to six, seven, seventeen, and eventually, to a high of twenty-eight judges for my court. As circuits became unwieldy because of size, they were restructured. The District of Columbia Circuit can trace its origin as a separate circuit to a few years after the Evarts Act was passed.³ The Tenth Circuit was split off from the Eighth in 1929. The Eleventh Circuit was split off from the Fifth Circuit in 1981.⁴ And, in due course, I have absolutely no doubt, either the Ninth Circuit will be restructured along the lines of the White Commission's proposal or a new Twelfth Circuit will be created out of the Ninth.

And there is nothing sinister, immoral, fattening, politically incorrect, or unconstitutional about the restructuring of judicial circuits. This is simply the natural evolution of the federal appellate court structure responding to population changes. As courts grow too big, they evolve into more manageable judicial units. No circuit, not even mine, has a God-given right to an exemption from the laws of nature. There is nothing sacred about the Ninth Circuit's keeping essentially the same boundaries for over one hundred years. The only legitimate consideration is the optimal size

¹ I have previously served as Administrative Judge for the Northern Unit of our court and two terms as a member of our court's Executive Committee.

² See Statement of Diarmuid F. O'Scannlain, *Hearing Before the Committee on the Judiciary, United States Senate*, S. Hrg. 104-810, at 69-77 (Sept. 13, 1995); Diarmuid F. O'Scannlain, *A Ninth Circuit Split Commission: Now What?*, 57 *Montana L. Rev.* 313 (1996); Diarmuid F. O'Scannlain, *A Ninth Circuit Split is Inevitable, But Not Imminent*, 56 *Ohio St. L. J.* 947 (1995).

³ The original name of this court was the Court of Appeals for the District of Columbia. In 1934, this court was renamed the United States Court of Appeals for the District of Columbia.

⁴ This is not to mention the Federal Circuit, which was created in 1982.

and structure for judges to perform their duties. We certainly have no vested interest in retaining a structure that may not function effectively, and Congress has a responsibility through its oversight to prod the judiciary to keep up with the changing times.

The White Commission was prescient in its recognition of the Ninth Circuit's problems, and its creative recommendations deserve careful consideration and sensible adjustments towards the ideal. Judge Rymer has well articulated the real problems and a sound solution which will either be the model for all large circuits or an interim step toward eventual split into two or three circuits. Frankly, I am mystified by the relentless refusal of some of my colleagues, including my beloved Chief and my brother Wiggins to contemplate the inevitable; as loyal as I am to my own circuit, I cannot oppose the logical evolution of our judicial structure as we grow to colossus size.

The problem with the Ninth Circuit can be stated quite simply: we are too big now, and getting bigger every day. This is so whether you measure size in terms of number of judges, caseload, or population. Even though we are officially allocated 28 judges, we currently have 21 active judges and 19 senior judges. In other words, regardless of our allocation, there are *forty* judges on our court *today*. And when the seven existing vacancies are filled, our court will have 47 judges.⁵ I have compiled a roster of Ninth Circuit judges in Exhibit A, page 21, which you may find quite revealing. To put the figure of 47 in perspective, consider the fact that this is almost double the number of total judges of the next largest circuit (the Sixth Circuit) and *more than quadruple* that of the smallest (the First Circuit).⁶ As you can see from Charts I and 2, pages 23-24, it is a remarkable array of judge power—more judges on one court than the entire federal judiciary when the circuit courts of appeals were created. With every additional judge that takes senior status, we grow even larger. Indeed, if we get the five new judgeships that Judge Rymer mentioned we have asked for, there will be 52 judges on the circuit, while the average size of all other circuits today is 14 active judges.⁷

Chart 3, page 26, gives a sense of the enormity of the Circuit's population relative to other circuits, and caseload tracks population quite closely. Last year, we handled 9,070 appeals—over double the average and almost 1,000 more than the next busiest court (the Fifth Circuit).⁸ Looking at population, the Ninth Circuit's nine states and two territories, which range from the Rocky Mountains to the Sea of Japan and from the Mexican Border to the Arctic Circle, contain over 52 million people—or 21 million more than the next largest circuit (the Fifth).⁹ Together the charts reveal that the Ninth Circuit has *double* the average number of judgeships, handles *double* the average number of appeals, and has *double* the average population.¹⁰ In essence, the Ninth Circuit already is two circuits in one.

Is the extraordinarily large size of our court of appeals and of our population a cause for concern? The White Commission thought so. And so do I. After careful analysis, the Commission concluded that any court with more than eleven to seventeen judges lacks the ability to render clear, circuit-consistent, and timely decisions. I agree that a court with as many judges as the Ninth cannot continue to function well. Courts of appeals have two principal functions: correcting errors on appeal and declaring the law of the circuit. Having more judges helps us keep up with our error-correcting duties, but, as Judge Rymer has outlined, it *hampers* our law-declaring role by making it more difficult to render clear and consistent decisions.

The White Commission found that what an appellate court needs for consistency and predictability in adjudication—values fundamental to the effective administration of justice—is small decision-making units. Consistency of law in the appellate context requires an environment in which a reasonably small body of judges has the opportunity to sit together frequently. Such interaction enhances understanding of one another's reasoning and decreases the possibility of misinformation and misunderstandings. Because the Ninth Circuit has so many judges, the frequency with

⁵ See Exhibit A; Table 1. With the exception of three judges—one of whom is no longer accepting calendar assignments, one of whom is recuperating from cancer surgery, and one who is temporarily sitting only on screening calendars, *all* of our senior judges carry a substantial load ranging from 100 percent to 25 percent of a regular active judge's load.

⁶ See Table 2; Chart 2.

⁷ If senior judges on other circuits are factored in, the average is 21 total judges per circuit.

⁸ See Table 3. There may be slight variations in terms of the summary statistics reported here and those reported elsewhere as a result of differences in sources. I use caseload statistics provided by the Administrative Office of the United States Courts in a report entitled *Judicial Business of the United States Courts: Annual Report of the Director* and population statistics compiled by the United States Census Bureau.

⁹ See Table 3.

¹⁰ See Tables 2 and 3.

which any pair of judges hears cases together is quite low, thus making it difficult to establish effective working relationships in developing the law.

Furthermore, as several Supreme Court Justices have commented, the risk of intracircuit conflicts is heightened in a court which publishes as many opinions as the Ninth.¹¹ In addition to handling his or her own share of the 9,000 appeals filed last year, each judge is faced with the Sisyphean task of keeping up with all his colleagues' opinions. Frankly, we are losing the ability to keep track of our own precedents. As Judge Rymer reported, only about half the Ninth Circuit judges read all or most published opinions, which is as embarrassing as it is intolerable. It is imperative that judges read opinions as they are published, since this is the only way to stay abreast of circuit developments as well as to ensure that no intra-circuit conflicts develop and that, when they do (which, alas, is inevitable as we continue to grow), they be reconsidered en banc. This task is too important to delegate to staff attorneys.

As consistency of law falters, predictability erodes as well. The Commission pointed out that a disproportionately large number of lawyers indicated that the difficulty of discerning circuit law due to conflicting precedents was a "large" or "grave" problem in the Ninth Circuit. From my own experience since 1986, I can tell you that this problem has worsened notably as the court has grown in size. Predictability is difficult enough with 28 active judgeships. But this figure understates the problem because it does not count either the senior judges who participate in the court's work (most very actively) or the large numbers of visiting district and out-of-circuit judges who are not counted in our present 40-judge roster.

The White Commission recommended a restructuring of the circuit in part because of its finding that the circuit's en banc process is not working correctly. As a member of the court, I can tell you that, although the en banc process, in theory, promotes consistency in adjudication by resolving intra-circuit conflicts once and for all, this has not been the case in the Ninth Circuit. All courts of appeals other than the Ninth Circuit convene en banc panels consisting of all active judges. The Ninth, however, uses limited en banc panels comprised of eleven of the twenty-eight active judgeships. This limited en banc system appears to work less well than other circuits' en banc systems; because each en banc panel contains fewer than half of the circuit's judges and consists of a different set of judges, en banc decisions do not incorporate the views of all judges and thus may not be as effective in settling conflicts or promoting consistency. Relatedly, several Supreme Court Justices have commented that the Ninth Circuit fails to hear cases en banc often enough to settle intra-circuit conflicts or to correct wrongly decided cases.¹²

The Ninth Circuit's problems do not just hinder judicial decision-making, but also create administrative difficulties and waste. Because of the circuit's geographical reach, judges must travel, on a regular basis, from faraway places throughout the circuit to attend court meetings and hearings. For example, in order to hear cases, my colleague Judge Kleinfeld must, many times a year, fly from Fairbanks, Alaska to distant cities including San Francisco and Pasadena. In addition, he must travel on a quarterly basis to attend court meetings generally held in San Francisco. Obviously, all this travel entails not only time, but a considerable amount of cost. Either the divisional restructuring plan or an outright circuit split would do much to curtail this extensive travel and expense.

II

At 52 million people and counting, we are faced with a fundamental choice: either do nothing and let the court of appeals become even more unwieldy, or restructure the circuit into more manageable regional entities. The White Commission recognized that the first option is not responsible, and the latter option is inevitable. I agree. Even Senator Feinstein, who has not endorsed the White Commission's specific recommendation, nevertheless recognizes the fundamental problems which she intends to correct through a bill which she may already have introduced.

On this point, however, my Chief Judge and I appear to disagree, although with the greatest of respect. My Chief has circulated a report vigorously opposing any restructuring of the circuit in which he emphasizes that the White Commission recommended that the Ninth Circuit not be split. With respect, this misses the point

¹¹ See Commission on Structural Alternatives for the Federal Courts of Appeals, *Final Report* 33 (Dec. 18, 1998) (hereafter "White Commission Report").

¹² See Letter from Justice Sandra Day O'Connor to Justice Byron R. White, Chair, Commission on Structural Alternatives for the Federal Court of Appeals 2 (June 23, 1998); Letter from Justice Anthony M. Kennedy to Justice Byron R. White, Chair, Commission on Structural Alternatives for the Federal Court of Appeals 3 (August 17, 1998).

and, frankly, obfuscates the real defects of the court of appeals. Rather, the Commission's principal findings are:

1. that a federal appellate court cannot function effectively with more than eleven to seventeen judges;
2. that decision-making collegiality and the consistent, predictable, and coherent development of the law over time is best fostered in a decision-making unit smaller than what we now have;
3. that a disproportionately large proportion of lawyers practicing before the Ninth Circuit deemed the lack of consistency in the case law to be a "grave" or "large" problem;
4. that the outcome of cases is more difficult to predict in the Ninth Circuit than in other circuits; and
5. that our limited en banc process has not worked effectively.

In light of these many problems—and notwithstanding the Ninth Circuit's longstanding official position that everything is working just fine—the White Commission unequivocally recommended a substantial restructuring of the circuit's adjudicative operations. The *Commission's main finding* was that the Ninth Circuit Court of Appeals is not functioning effectively, *not* that creating divisions is inherently bad.

My Brother argues that we need to keep the court of appeals together so that we can retain a consistent law for the West generally and the Pacific Coast specifically. Mr. Chairman, you live on the Atlantic Coast, where there are five separate circuits. Have you noticed whether freighters are colliding more frequently off Cape Hatteras or Long Island than the Pacific Coast because of the uncertainties of maritime law on the East Coast? Frankly, and with respect, the need to preserve a single circuit for the Pacific Coast is absurd. The same goes for the call for a single circuit to adjudicate the law of the West. What about the law of the South? Mr. Chairman, you live in the Fourth Circuit, and the Fifth and Eleventh Circuits are also in the South. I simply cannot imagine that having three circuits has been deleterious to the development of the law of the South.

My Chief reports that there is strong opposition to restructuring among the federal judiciary. Specifically, he characterizes the fact that the chief judges of eight other circuits have expressed opposition to the Commission's divisional restructuring plan as evidence of strong disapproval to reforming the circuit. Again, however, with respect, my Brother misreads the actual details. What these chief judges are opposed to is the creation of intra-circuit divisions in their own circuits, *none* of whom have our problems, and frankly they're absolutely right.

As a judge on the Ninth Circuit, I must also take issue with my Chief's assertion that "[t]he view that the serious disadvantages of the restructuring proposal outweigh any possible advantages is shared by an overwhelming majority of the judges on the Ninth Circuit Court of Appeals." Again with respect, this is simply untrue. A large proportion of judges on our court favor restructuring, many strongly so. As Judge Rymer reported, approximately one third of judges said so in response to a survey by the Commission. We had a court meeting on January 21 in which an actual vote on the White Commission Report was taken, and I leave it to my Chief to decide if he may wish to make public the minutes which would disclose the exact vote tally and identities of those voting. In any event, I am authorized to tender the attached letter (Exhibit B, page 22) bearing today's date on behalf of nine Ninth Circuit judges including four Californians who are willing to "go public" in support of reorganization. And I have reason to believe that there are many Ninth Circuit judges, including other Californians, who, if given the opportunity, would vote *today* for an outright split off of five Northwestern states into their own circuit. And while we're at it, I should mention that many district court judges agree as well. Mr. Chairman, you should have received a letter on behalf of the majority of judges on the United States District Court for the District of Oregon strongly favoring outright split for the reasons offered by the White Commission Report. Finally, I would note that conspicuously absent from my Chief Judge's report is the fact that the five Supreme Court Justices who commented on the Ninth Circuit in letters to the Commission "all were of the opinion that it is time for a change."¹³ The Commission itself reported that, "[i]n general, the Justices expressed concern about the ability of judges on the Ninth Circuit Court of Appeals to keep abreast of the court's jurisdiction and about the risk of intracircuit conflicts in a court with an output as large as that court's."¹⁴

¹³ White Commission Report at 38.

¹⁴*Id.*

After denying that anything is wrong, our official court position straddles the fence by arguing that we can alleviate any problems we have simply by making changes at the margin. In response to the Commission Report, our Chief appointed an Evaluation Committee, which has since suggested various quick fixes. I must disagree, respectfully once again, that any problems with our circuit can be solved by tinkering at the edges. The time has come when cosmetic changes will no longer suffice and a significant restructuring is necessary. I am not, however, saying that our circuit as a whole is already broke. I would emphasize that our Chief Judge and the Clerk of the Court are presently doing a marvelous job of administering this fifteen-court circuit as a whole, but my instant focus is on where we go from here. If the Ninth Circuit Court of Appeals is not yet broke, it's certainly on the verge.

III

How, then, *should* the Ninth Circuit be restructured? Frankly, I think that the toughest issue facing the long-term planner is what to do with California, which is, in itself, larger than any existing multi-state circuit in terms of population. What are the options? One option is to make California a circuit by itself. A second is to align it with other states. A third is to place California within two or more circuits or divisions.

I would like to emphasize what is perhaps the most significant of the White Commission's well-considered findings: that decisions of the district courts within the same state may indeed be reviewed by different appellate divisions without difficulty. This finding comports with the conclusion of the Hruska Commission over 25 years ago, which recommended that two of California's four district courts be included in a newly created Twelfth Circuit. California now represents over 60 percent of the total workload of our nine-state and two-territory circuit.¹⁵ Whatever Congress decides to do—be it an outright circuit split or the creation of divisions—it should no longer be deterred from entertaining the possibility that appeals from the four districts within California be allocated to different appellate courts. If, however, it is not *politically* feasible, let's explore other alignments.

Critics argue that placing California within two different divisions would encourage forum shopping and subject Californians to diverging lines of federal authority. I specifically agree with Judge Rymer and the White Commission that the potential for forum shopping would increase only marginally because California litigants *already* can choose in which district to file and because any "division conflicts" could be quickly and expeditiously resolved. Like Judge Rymer, I was struck by the comments of Justice Stevens, Justice Scalia, and Justice Kennedy that the consequences of splitting California between two circuits have been seriously exaggerated.¹⁶

IV

I am not here to defend the White Commission's proposal in minute detail, but I do urge the Committee to give serious consideration to doing *something* to address the many problems I have outlined. The divisional restructuring embodied in the present bill is most certainly worthy of consideration. If we go with the Commission's plan, we can, of course, make adjustments to the divisional structure as necessary to cope with political realities, perhaps for example, placing California in its own division and making other adjustments as necessary.

In the event that Congress receives too much resistance to the Commission's divisional approach in particular, then, as the only other alternative, it should specifically consider an outright split along the lines of the three alternative reorganization plans outlined by the Commission on pages 54–57 of the Report—Option A (Variation on the "classical split"), Option B ("Classical split" plus realignment of Tenth Circuit to reduce size of new Ninth), and Option C (Division of California between two circuits to reduce size of new Ninth). My personal preference would be Option C, which approximates the reorganization plan recommended by the Hruska Commission. This plan has a number of concrete benefits, resulting principally from the fact that it would create an even sharing of the Ninth Circuit's current caseload, although all three options are meritorious. At the same time, I am also sensitive to political concerns which may cause delay before putting part of the same state

¹⁵ See Tables 4, 5.

¹⁶ See Letter from Justice John Paul Stevens to Justice Byron R. White, Chairman, Commission on Structural Alternatives for the Federal Court of Appeals 1 (August 24, 1998); Letter from Justice Antonin Scalia to Justice Byron R. White, Chairman, Commission on Structural Alternatives for the Federal Court of Appeals 1–2 (August 21, 1998); Kennedy, *supra* note 14, at 3.

in two separate circuits for the first time. But this simply counsels in favor of trying the Commission's divisional approach. Let's give it a chance to work.

v

Finally, Mr. Chairman, please do not be deterred by nit-picking criticism of details of the Commission's proposal. Men and women of good will can fashion modifications to the plan to satisfy the greatest number. And if the obstructionists wear you down, then go ahead and split us—permanently into two or more circuits as the alternative. Otherwise, the Ninth Circuit's problems won't go away they will only get worse.

We've been engaged in guerilla warfare on this circuit split issue for much too long. What we need to do is get back to judging. You must force us to restructure now, one way or another, so that we can concentrate on our sworn duties and end the distractions caused by this never-ending controversy.

vi

Thank you, Mr. Chairman, for allowing me to appear before you today. I would be happy to answer any questions you may have.

EXHIBIT A
ALL NINTH CIRCUIT JUDGES BY SENIORITY
 (as of July 16, 1999)

Judge	Appointed by	State	City	Status (Active/Senior)
1. Browning	Kennedy	California	San Francisco	ACTIVE
2. Wright	Nixon	Washington	Seattle	Senior
3. Choy	Nixon	Hawaii	Honolulu	Senior
4. Goodwin	Nixon	California	Pasadena	Senior
5. Wallace	Nixon	California	San Diego	Senior
6. Sneed	Nixon	California	San Francisco	Senior
7. Hug	Carter	Nevada	Reno	ACTIVE (Chief Judge)
8. Skopil	Carter	Oregon	Portland	Senior
9. Schroeder	Carter	Arizona	Phoenix	ACTIVE
10. Fletcher, B.	Carter	Washington	Seattle	Senior
11. Farris	Carter	Washington	Seattle	Senior
12. Pregonson	Carter	California	Woodland Hills	ACTIVE
13. Alarcon	Carter	California	Los Angeles	Senior
14. Ferguson	Carter	California	Santa Ana	Senior
15. Nelson, D.	Carter	California	Pasadena	Senior
16. Canby	Carter	Arizona	Phoenix	Senior
17. Boochever	Carter	California	Pasadena	Senior
18. Reinhardt	Carter	California	Los Angeles	ACTIVE
19. Beezer	Reagan	Washington	Seattle	Senior
20. Hall	Reagan	California	Pasadena	Senior
21. Wiggins	Reagan	Nevada	Las Vegas	Senior
22. Brunetti	Reagan	Nevada	Reno	ACTIVE
23. Kozinski	Reagan	California	Pasadena	ACTIVE
24. Noonan	Reagan	California	San Francisco	Senior
25. Thompson	Reagan	California	San Diego	Senior
26. O'Scannlain	Reagan	Oregon	Portland	ACTIVE
27. Leavy	Reagan	Oregon	Portland	Senior
28. Trott	Reagan	Idaho	Boise	ACTIVE
29. Fernandez	Bush	California	Pasadena	ACTIVE
30. Rymer	Bush	California	Pasadena	ACTIVE
31. T.G. Nelson	Bush	Idaho	Boise	ACTIVE
32. Kleinfeld	Bush	Alaska	Fairbanks	ACTIVE
33. Hawkins	Clinton	Arizona	Phoenix	ACTIVE
34. Tashima	Clinton	California	Pasadena	ACTIVE
35. Thomas	Clinton	Montana	Billings	ACTIVE
36. Silverman	Clinton	Arizona	Phoenix	ACTIVE
37. Graber	Clinton	Oregon	Portland	ACTIVE
38. McKeown	Clinton	Washington	Seattle	ACTIVE
39. Wardlaw	Clinton	California	Pasadena	ACTIVE
40. W. Fletcher	Clinton	California	San Francisco	ACTIVE
41. [Berzon]	[Clinton]	[California]	[San Francisco]	Nominee
42. [Paez]	[Clinton]	[California]	[Pasadena]	Nominee
43. [Gould]	[Clinton]	[Washington]	[Seattle]	Nominee
44. [Goode]	[Clinton]	[California]	[San Francisco]	Nominee
45. [Fisher]	[Clinton]	[California]	[Pasadena]	Nominee
46. [Duffy]	[Clinton]	[Hawaii]	[Honolulu]	Nominee
47. [Wash. seat]	[Clinton]	[Washington]	[Seattle/Spokane]	Nominee

SUMMARY: Authorized Judgeships

28

ACTIVE Judges

21

Senior Judges

+ 19

Sitting Judges

40

Vacancies

7

Total, including nominees

47

EXHIBIT B
UNITED STATES COURT OF APPEALS
for the NINTH CIRCUIT

July 22, 1999

The Honorable Henry J. Hyde
 Chairman
 House Judiciary Committee
 2237 Rayburn House Office Building
 Washington, D.C. 20515

RE: Final Report on Structural Alternatives for the Federal Courts of Appeals

Dear Chairman Hyde:

We are active and senior judges of the United States Court of Appeals for the Ninth Circuit who are delighted to learn that your Committee has scheduled hearings on the Final Report of the Commission on Structural Alternatives for the Federal Courts of Appeals. Having reviewed the report, we agree with the Commission that the optimum size of a federal appellate court is between seven and eleven active judges. While each of us may have some quibbles with the specific proposal, we are pleased that there is now an appropriate legislative vehicle within which to discuss the future of the Ninth Circuit.

Each of us is convinced that a split of the Ninth Circuit is inevitable. Indeed, we are persuaded that the same compelling reasons which support the Commission's recommendation for divisions even more forcefully compels the need for a formal split of the Ninth Circuit itself. Whether legislation results in restructuring into divisions somewhat along the lines of the Commission report, or in an outright split into two or more circuits, we feel that the underlying findings of the Commission are irrefutable. The Pacific Northwest states should remain intact either as a division or as the keystone for one of the realigned new circuits and we endorse options A, B and C on pages 54 - 57 of the Report to that extent.

Sincerely,

Eugene A. Wright
 Senior United States Circuit Judge
 Seattle, Washington

Joseph T. Sneed
 Senior United States Circuit Judge
 San Francisco, California

Robert R. Beezer
 Senior United States Circuit Judge
 Seattle, Washington

Cynthia H. Hall
 Senior United States Circuit Judge
 Pasadena, California

Diarmuid F. O'Scannlain
 United States Circuit Judge
 Portland, Oregon

Ferdinand F. Fernandez
 United States Circuit Judge
 Pasadena, California

Thomas G. Nelson
 United States Circuit Judge
 Boise, Idaho

Andrew J. Kleinfeld
 United States Circuit Judge
 Fairbanks, Alaska

CHART 1

NUMBER OF JUDGESHIPS BY CIRCUIT

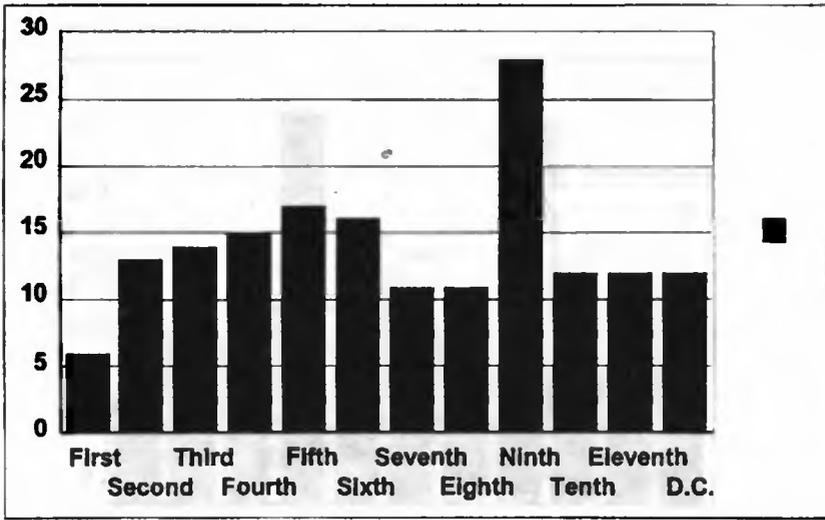


CHART 2
NUMBER OF TOTAL JUDGES
(ACTIVE JUDGESHIPS + SENIOR JUDGES)
BY CIRCUIT

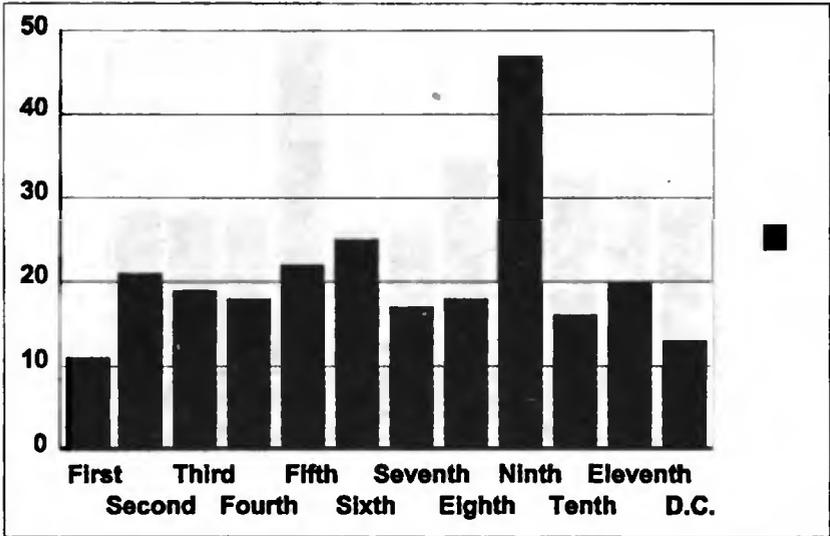


CHART 3 POPULATION BY CIRCUIT

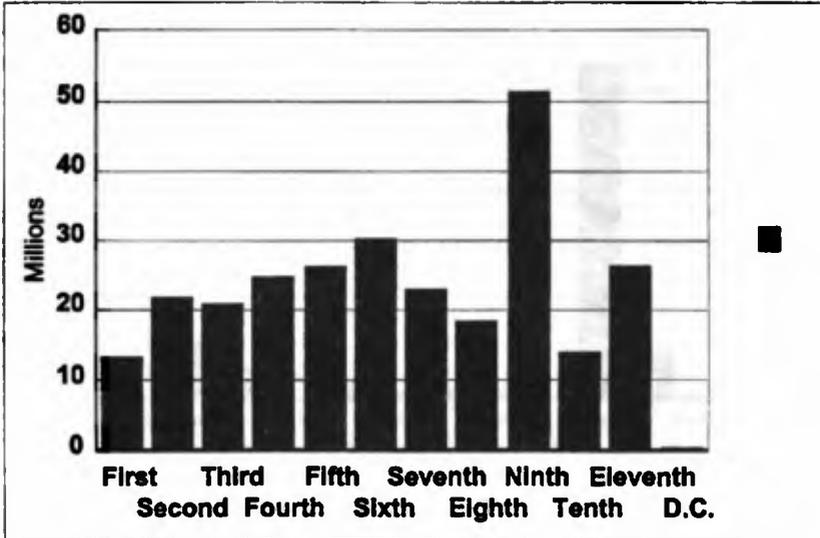


CHART 4 POPULATION BY STATE WITHIN NINTH CIRCUIT

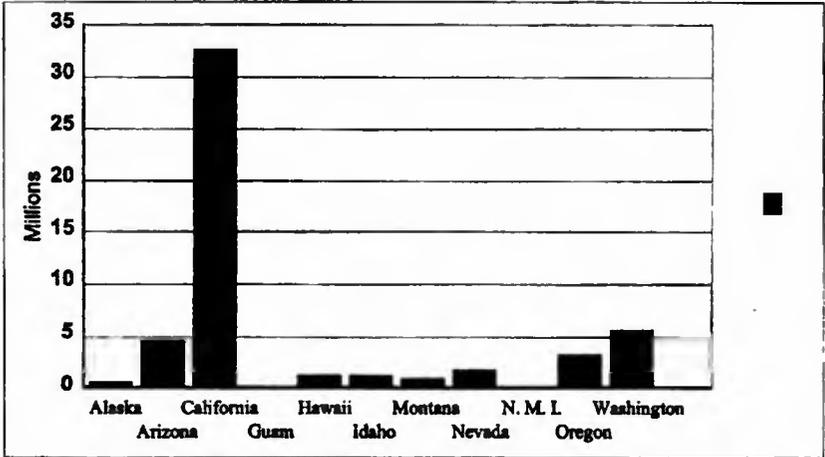


CHART 5 NUMBER OF APPEALS BY STATE WITHIN NINTH CIRCUIT

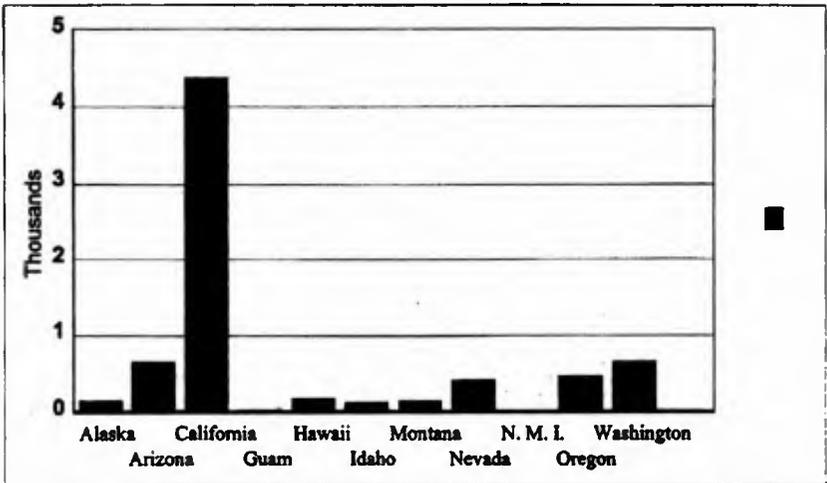


TABLE 1
ACTIVE NINTH CIRCUIT JUDGES BY SENIORITY
(as of July 16, 1999)

Judge	Appointed By	District	City	Division Under White Commission Proposal
Hug	Carter	Nevada	Reno	Middle
Browning	Kennedy	N.D. California	San Francisco	Middle
Schroeder	Carter	Arizona	Phoenix	Southern
Pregetson	Carter	C.D. California	Woodland Hills	Southern
Reinhardt	Carter	C.D. California	Los Angeles	Southern
Brunetti	Reagan	Nevada	Reno	Middle
Kozinski	Reagan	C.D. California	Pasadena	Southern
O'Scannlain	Reagan	Oregon	Portland	Northern
Trott	Reagan	Idaho	Boise	Northern
Fernandez	Bush	C.D. California	Pasadena	Southern
Ryzner	Bush	C.D. California	Pasadena	Southern
Nelson, T.G.	Bush	Idaho	Boise	Northern
Kleinfeld	Bush	Alaska	Fairbanks	Northern
Hawkins	Clinton	Arizona	Phoenix	Southern
Thomas	Clinton	Montana	Billings	Northern
Tashima	Clinton	C.D. California	Pasadena	Southern
Silverman	Clinton	Arizona	Phoenix	Southern
Graber	Clinton	Oregon	Portland	Northern
McKeown	Clinton	W.D. Washington	Seattle	Northern
Wardlaw	Clinton	C.D. California	Pasadena	Southern
Fletcher, W.	Clinton	N.D. California	San Francisco	Middle
[Berzon]	[Clinton]	[N.D. California]	[San Francisco]	[Middle]
[Paez]	[Clinton]	[C.D. California]	[Pasadena]	[Southern]
[Gould]	[Clinton]	[W.D. Washington]	[Seattle]	[Northern]
[Goode]	[Clinton]	[N.D. California]	[San Francisco]	[Middle]
[Fisher]	[Clinton]	[C.D. California]	[Pasadena]	[Southern]
[Duffy]	[Clinton]	[Hawaii]	[Honolulu]	[Middle]
[Washington seat]	[Clinton]	[W.D./E.D. Wash.]	[Seattle/Spokane]	[Northern]

TABLE 2
NUMBER OF JUDGES
BY CIRCUIT
 (as of March 1999)

Court	Headquarter City	Appellate Judgeships	%	Senior Judges	%	Total Judges*	% U.S.
First	Boston, MA	6	3.6%	5	6.3%	11	4.5%
Second	New York, NY	13	7.8%	8	10.0%	21	8.5%
Third	Philadelphia, PA	14	8.4%	5	6.3%	19	7.7%
Fourth	Richmond, VA	15	9.0%	3	3.8%	18	7.3%
Fifth	New Orleans, LA	17	10.2%	5	6.3%	22	8.9%
Sixth	Cincinnati, OH	16	9.6%	9	11.3%	25	10.1%
Seventh	Chicago, IL	11	6.6%	6	7.5%	17	6.9%
Eighth	St. Louis, MO	11	6.6%	7	8.8%	18	7.3%
Ninth	San Francisco, CA	28	16.8%	19	23.8%	47	19.0%
Tenth	Denver, CO	12	7.2%	4	5.0%	16	6.4%
Eleventh	Atlanta, GA	12	7.2%	8	10.0%	20	8.1%
D.C.	Washington, DC	12	7.2%	1	1.3%	13	5.3%
Total		167	100%	80	100%	247	100%

* Total judges includes authorized judgeships and senior judges.

SOURCE: 28 U.S.C. § 44; Administrative Office of the United States Courts, *United States Court Directory* 5-74 (March 1999).

**TABLE 3
POPULATION AND CASELOAD
BY CIRCUIT**

Court	Population* (1998 figures)	% Pop.	Number of Appeals (10/1/97-9/30/98)	% Appeals
First	13,421,910	4.9%	1,437	2.7%
Second	22,040,253	8.0%	4,796	8.9%
Third	20,978,065	7.6%	3,613	6.7%
Fourth	25,119,764	9.2%	4,897	9.1%
Fifth	26,880,673	9.8%	8,096	15.0%
Sixth	30,393,855	11.1%	4,704	8.7%
Seventh	23,168,021	8.4%	3,297	6.1%
Eighth	18,603,862	6.8%	3,330	6.2%
Ninth	52,182,464	19.0%	9,070	16.9%
Tenth	14,264,347	5.2%	2,582	4.8%
Eleventh	26,910,186	9.8%	6,356	11.8%
D.C.	523,124	0.2%	1,627	3.0%
Total	274,486,524	100%	53,805	100%

* State figures as of July 1, 1998; territorial figures as of 1998.

SOURCE: Administrative Office of the United States Courts, *Judicial Business of the United States Courts: Annual Report of the Director* 90 (1998); U.S. Census Bureau, State Population Estimates and Demographic Components of Population Change: July 1, 1997 to July 1, 1998 <www.census.gov/population/estimates/state/st-98-1.txt> (visited July 9, 1999); U.S. Census Bureau, County Population Estimates and Demographic Components of Population Change: July 1, 1997 to July 1, 1998 <www.census.gov/population/estimates/county/co-98-1/98C1_06.txt> and <www.census.gov/population/estimates/county/co-98-1/98C1_53.txt> (visited July 9, 1999); U.S. Department of Commerce, *Statistical Abstract of the United States* 810 (1998).

TABLE 4
POPULATION AND NUMBER OF APPEALS BY DISTRICT WITHIN NINTH
CIRCUIT

Court	City	Authorized District Judgeships	Population (1998 figures)	% Pop.	Appeals (10/1/97 - 9/30/98)	% Appeals
D. Alaska	Anchorage	3	614,010	1.2%	139	2.2%
D. Arizona	Phoenix	8	4,668,631	9.0%	654	9.0%
C.D. California	Los Angeles	27	16,405,141	31.4%	2133	29.2%
E.D. California	Sacramento	6	6,195,612	11.9%	705	9.7%
N.D. California	San Francisco	14	7,141,154	13.7%	927	12.7%
S.D. California	San Diego	8	2,924,643	5.6%	634	8.7%
D. Guam	Agana	1	146,000	0.3%	46	0.6%
D. Hawaii	Honolulu	3	1,193,001	2.3%	171	2.3%
D. Idaho	Boise	2	1,228,684	2.4%	139	1.9%
D. Montana	Helena	3	880,453	1.7%	167	2.3%
D. Nevada	Las Vegas	4	1,746,898	3.3%	422	5.8%
D. N. Mariana Is.	Saipan	1	67,000	0.1%	12	0.2%
D. Oregon	Portland	6	3,281,974	6.3%	466	6.4%
E.D. Washington	Spokane	4	1,267,071	2.4%	140	1.9%
W.D. Washington	Seattle	7	4,422,192	8.5%	528	7.3%
TOTAL		97	52,182,464	100%	7,303*	100%

* Excludes the following cases: bankruptcy (323), tax court (87), NLRB (40), administrative agencies (1,173), and original proceedings (144).

SOURCE: 28 U.S.C. § 133; Administrative Office of the United States Courts, Judicial Business of the United States Courts: Annual Report of the Director at 106 (1998); U.S. Census Bureau, State Population Estimates and Demographic Components of Population Change: July 1, 1997 to July 1, 1998 <www.census.gov/population/estimates/state/st-98-1.txt> (visited July 9, 1999); U.S. Census Bureau, County Population Estimates and Demographic Components of Population Change: July 1, 1997 to July 1, 1998 <www.census.gov/population/estimates/county/co-98-1/98C1_06.txt> and <www.census.gov/population/estimates/county/co-98-1/98C1_53.txt> (visited July 9, 1999); U.S. Department of Commerce, Statistical Abstract of the United States 810 (1998).

TABLE 5
POPULATION AND NUMBER OF APPEALS BY STATE WITHIN
NINTH CIRCUIT

State	Authorized District Judgeships	Population	% Pop.	Appeals	% Appeals
Alaska	3	614,010	1.2%	159	2.2%
Arizona	8	4,668,631	8.9%	654	9.0%
California	56	32,666,550	60.2%	4,399	63.0%
Guam	1	146,000	0.3%	46	0.6%
Hawaii	4	1,193,001	2.3%	171	2.3%
Idaho	2	1,228,684	2.4%	139	1.9%
Montana	3	880,453	1.7%	167	2.3%
Nevada	4	1,746,898	3.3%	422	5.8%
N. Mariana Islands	1	67,000	0.1%	12	0.2%
Oregon	6	3,281,974	6.3%	466	6.4%
Washington	11	5,689,263	10.9%	668	9.1%
TOTAL	97	52,182,464	100%	7,383*	100%

* Excludes the following cases: bankruptcy (323), tax court (87), NLRB (40), administrative agencies (1,173), and original proceedings (144).

**TABLE 6
POPULATION AND NUMBER OF APPEALS UNDER
WHITE COMMISSION'S DIVISIONAL RESTRUCTURING PLAN**

Division	Appellate Judgeships	Population	% Pop.	Appeals	% Appeals
Northern Division-- 6 District Courts: Alaska, Idaho, Montana, Oregon, E.D. Washington, W.D. Washington	9	11,694,384	22.4%	1,599	21.9%
Middle Division-- 6 District Courts: E.D. California, N.D. California, Guam, Hawaii, Nevada, N. Mariana Is.	7	16,489,665	31.6%	2,283	31.3%
Southern Division-- 3 District Courts: Arizona, C.D. California, S.D. California	12	23,998,415	46.0%	3,421	46.8%
TOTAL	28	52,182,464	100%	7,303*	100%

**TABLE 7
POPULATION AND NUMBER OF APPEALS UNDER OPTION A**

Circuit	Appellate Judgeships	Population	% Pop.	Appeals	% Appeals
Southwestern Circuit-- 6 District Courts: Arizona, C.D. California, E.D. California, N.D. California, S.D. California, Nevada	18	39,080,079	74.9%	5,475	75.0%
Northwestern Circuit: 9 District Courts: Alaska, Guam, Hawaii, Idaho, Montana, N. Mariana Is., Oregon, E.D. Washington, W.D. Washington	10	13,100,385	25.1%	1,828	25.0%
TOTAL	28	52,182,464	100%	7,303*	100%

* Excludes the following cases: bankruptcy (323), tax court (87), NLRB (40), administrative agencies (1,173), and original proceedings (144).

TABLE 8
POPULATION AND NUMBER OF APPEALS UNDER OPTION B

Circuit	Appellate Judgeships	Population	% of Pop. in Remaining Ninth Circuit	Appeals	% of Appeals in Remaining Ninth Circuit
Southwestern Circuit-- 8 District Courts: C.D. California, E.D. California, N.D. California, S.D. California, Guam, Hawaii, Nevada, N. Mariana Is.	16	35,819,449	75.4%	5,050	76.0%
Northwestern Circuit: 6 District Courts: Alaska, Idaho, Montana, Oregon, E.D. Washington, W.D. Washington	9	11,694,384	24.6%	1,599	24.0%
Total for Remaining Ninth Circuit:	25	47,513,833	100%	6,649*	100%
New Tenth Circuit: Arizona, Colorado, Kansas, New Mexico, Oklahoma, Utah, Wyoming	15	18,932,978	-	3,236	-

TABLE 9
POPULATION AND NUMBER OF APPEALS UNDER OPTION C

Circuit	Appellate Judgeships	Population	% Pop.	Appeals	% Appeals
Southwestern Circuit-- 7 District Courts: Arizona, C.D. California, S.D. California, Guam, Hawaii, Nevada, N. Mariana Is.	15	27,151,314	52.0%	4,072	55.8%
Northwestern Circuit: 8 District Courts: Alaska, E.D. California, N.D. California, Idaho, Montana, Oregon, E.D. Washington, W.D. Washington	13	25,031,150	48.0%	3,231	44.2%
TOTAL	28	52,182,464	100%	7,303*	100%

* Excludes the following cases: bankruptcy (323), tax court (87), NLRB (40), administrative agencies (1,173), and original proceedings (144).

Mr. COBLE. Judge Browning.

**STATEMENT OF WILLIAM D. BROWNING, DISTRICT JUDGE FOR
THE DISTRICT OF ARIZONA**

Mr. BROWNING. Mr. Chairman, I too thank you for the opportunity to come on behalf of the Commission. As you noted in your introduction, I was a member of the Commission with Judge Rymer, and I will start out by saying that we at no time during our deliberations of approximately a year nor in our report arrogate onto ourselves any infallibility. We recognize that there are perhaps different and better ways to build this mousetrap, but we have given you a mousetrap that will work and that will solve the problems of the ninth circuit.

You should note that I think that the work of the Commission was more than just the five of us getting together and talking, exchanging ideas. We had a tremendously beneficial 2-day meeting with academics throughout the country of whom Professor Hellman, who will testify in a moment, was but one. We had some eight or ten, some with conflicting views, some with agreement with their colleagues.

One of those was Professor Tom Baker, who is now at Drake University in Iowa, formally from Texas Tech University in Lubbock, Texas. Professor Baker was a doubter regarding the division of the ninth circuit. He is no longer one and he has recently published adopting and approving of the divisional concept which we have heard discussed today.

Our Executive Director is a distinguished professor from the University of Virginia, now retired, Daniel Meador. Professor Meador has impeccable academic credentials throughout this country. He served in the Carter administration as the Assistant Attorney General for the Department of Justice and adopted without question the Commission's recommendations to the Congress and the President.

So we come to you not just with some ideas, but with some basis for those ideas. Six out of nine Supreme Court Justices, the only six who responded to our query, adopt a circuit split or a divisional concept. Let me quickly say that the three who did not respond do not come out in favor of the status quo in the ninth circuit. None of the sitting Supreme Court favors that.

So when you talk about reversal rates, you must look, I think, not at a moment frozen in time, like a given year, because years can look bad. We saw 1997 where the reversal rate was 98 percent. The fact of the matter is the ninth circuit over the past 5 or 6 years—and to this I cite you to Justice Scalia's letter, which is appended to the written statement of Judge Rymer.

The ninth circuit was the most-reviewed court. It was the most-reversed court among courts of appeals, judging it in relationship to its contemporaries. It was the most-reversed court, unanimously, by the United States Supreme Court and it was the court where the least number of dissenting opinions were filed when it was reversed. Justice Scalia gives chapter and verse of those figures over a 5-year span—I believe it is a 5-year span, perhaps 4—and I commend his observations to you.

I also note that while the majority of the Court, I am told and I believe—I have no reason to disbelieve—opposes a split, what I think is involved is, one, some sentimentality regarding this circuit, some vested interest in keeping this circuit, which they have worked so hard to make work together.

I think that there is implicit in the response some institutional bias against change, and I plead guilty to that as much as anyone. I don't know of any group of people more than lawyers and judges who resist change; I think we are right out in front. So I think there is that institutional bias against it.

I think there is also, unfortunately, a feeling on the part of the ninth circuit judges that implicit in this report is a criticism of their work ethic. Nothing could be further from the truth. The report nowhere can be taken to say or imply that that is the case. These judges are fine judges. They are hard workers and no one in the Court says differently.

I see that my time is up, but let me summarize—or not summarize, but conclude—Mr. Chairman, by saying I am struck by Judge Learned Hand's observation, which I would hope would guide you as it guided me in the months of the preparation of this report. What he said was, "The greatest commandment in the law is 'Thou shalt not ration justice,'" and I think the people of the ninth circuit today are receiving a rationed form of justice.

I hope that you will enact the Commission's report or some facsimile of it. Thank you.

Mr. COBLE. Thank you, Judge Browning.
Judge Thompson.

STATEMENT OF DAVID R. THOMPSON, CIRCUIT JUDGE, NINTH CIRCUIT COURT OF APPEALS

Mr. THOMPSON. Mr. Chairman, members of the committee, my name is David Thompson. I am a Senior Circuit Judge from the Ninth Circuit Court of Appeals, and I am the Chair of its Evaluation Committee. That committee was formed to respond to perceived concerns in the White Commission report.

At the outset, I want to put to rest, once and for all, the charge that the formation of the committee proves there are problems in the ninth circuit. That simply is not so. The White Commission found that the circuit as a whole was functioning effectively. The White Commission found that with regard to the court of appeals, there was no objective evidence that it was not functioning effectively. What the White Commission expressed were perceived concerns among some judges and some lawyers, a number of judges being from outside the ninth circuit, judges who had never sat on a large circuit court of appeals.

Nevertheless, our court decided to respond to the perceived concerns and to take them seriously, to give them serious consideration. We determined it would have been inappropriate to do otherwise. So we decided to see if the concerns were valid, and if they were, what to do about them.

There are four areas into which these concerns break down: consistency of decision, collegiality in a large circuit, regional sensitivity and the en banc process. Because of the time constraints, I will speak of only two, consistency of decisions and the en banc process.

There is a perception that the ninth circuit is too big, there are too many opinions for its judges to read and to be able to spot conflicts. Well, the circuit is large and there are a lot of opinions to read, but that is not the issue. The issue is whether or not there are inconsistencies in the decisions of the ninth circuit, and if there are, how to spot them.

Our committee, the Evaluation Committee, has enlisted the assistance of our staff attorneys to help us determine whether there are inconsistencies and if there are inconsistencies, then to act upon that information. Now, of substantial importance is that the White Commission stated it did not have the time to do this necessary study. It concluded nevertheless that there was no evidence that there actually are inconsistent decisions in the ninth circuit.

Notwithstanding that conclusion, the recommendation of the Commission was that the ninth circuit be split into institutional divisions, adjudicative divisions; and by that recommendation, the Commission institutionalizes the creation of conflicts and inconsistency in the circuit. It also requires an additional layer of appeal. There was another subcommittee here you may have some familiarity with "additional level of appeal" in the bankruptcy context. The bill, that I think was sponsored by Congressman Gekas, took the position that you should do away with two levels of appeal in the bankruptcy context. Congressman Conyers knows what I am talking about.

Why would you then return to two levels of appeal in this context?

Let me speak a minute about the California concern of inconsistent decisions and that it isn't a problem. I practiced law in California for 28 years before I went on the circuit court. The inconsistent decisions among the districts in California and the intermediary courts of appeal are a substantial problem. The people in California put up with it. The citizens of the United States in the ninth circuit do not have to put up with it.

About the en banc process, we are going to make some recommendations next week at our court meeting to change the number of judges on our en banc court and to change the method by which we take cases en banc.

In sum, let me state it has been asserted that due to the size of the Ninth Circuit Court of Appeals its judges are unable to maintain a consistent and cohesive body of law in the region the court serves. Is this perception reality or myth? The White Commission could not say, but it answered the question anyway by recommending the structural division of the Ninth Circuit Court of Appeals. That recommendation, with all respect to the distinguished commission and the wonderful judges on it, was based on myth. We urge this committee to act on fact.

[The prepared statement of Judge Thompson follows:]

PREPARED STATEMENT OF DAVID R. THOMPSON, CIRCUIT JUDGE, NINTH CIRCUIT COURT OF APPEALS

Mr. Chairman, Members of the Subcommittee:

My name is David Thompson. I am a Senior Circuit Judge of the United States Court of Appeals for the Ninth Circuit. My chambers are located in San Diego, California. I am also Chairman of the Ninth Circuit Court of Appeals' Evaluation Committee, and it is in that capacity that I appear before you today.

The Evaluation Committee was created by the Ninth Circuit in response to perceived concerns raised by the White Commission Report. The Committee's task, however, is part of the Ninth Circuit's ongoing annual reevaluation of its practices and procedures pursuant to its Long Range Plan. The White Commission Report simply focused the task of the Committee.

It is not the task of the Committee to quibble with the White Commission Report. The strengths and deficiencies of that report have been pointed out and analyzed by others. The task of the Evaluation Committee is to accept the perceived concerns expressed in the White Commission Report and by others and to respond to those concerns.

The Committee's mission statement was developed at its first meeting on March 23, 1999. That mission is,

To examine the existing policies, practices and administrative structure of the Ninth Circuit Court of Appeals, in order to make recommendations to its judges to improve the delivery of justice in the region it serves.

The Committee—consisting of Ninth Circuit judges from different regions within the Circuit, as well as a representative from the district court bench, a prominent scholar of the federal appellate courts, and an experienced appellate practitioner—has met on a number of occasions over the past months. The Committee has considered a wide variety of issues within the following categories of subjects:

CONSISTENCY OF DECISIONS
REGIONAL SENSITIVITY AND OUTREACH
COLLEGIALITY
PRODUCTIVITY
THE EN BANC PROCESS

The work of the Committee is ongoing. None of the foregoing subjects has been exhausted, although the Committee has considered and given varying degrees of study and evaluation to each.

CONSISTENCY OF DECISIONS

There is no objective evidence—none whatsoever—that decisions rendered by the Ninth Circuit Court of Appeals are infected with inconsistency to a degree greater than any other circuit. Because of the Ninth Circuit's size, however, the perception is that there must be inconsistencies in its decisions. How could there not be with so many panels issuing so many opinions? The answer is that there is not a significant number of inconsistencies in decisions and any conflicts that have occurred have been resolved by the Circuit's en banc process. The task of the Committee, however, is to increase the Circuit's ability to recognize potential or perceived conflicts early on and deal with them immediately. To do this the Committee is considering methods that will enable judges of the district courts and practitioners to bring perceived conflicts to the Court's attention. These methods include establishing an "electronic mailbox" to receive such communications, and participating in outreach programs to contact the bench and bar throughout the Circuit through meetings and focus group encounters.

In addition to increasing the Court's awareness of any potential conflicts in *filed* decisions, the Committee is experimenting with gathering data from all opinions *before* they are filed. To do this, the Committee will draw upon the expertise of the Ninth Circuit's staff attorneys. These attorneys are divided into areas of expertise—criminal law, environmental law, immigration law, to name a few. The staff examines all opinions sent to the clerk's office for filing—before the opinions are filed. The staff has been asked to identify any case that (a) expressly distinguishes one or more Ninth Circuit precedents; (b) expressly rejects one or more precedents of other circuits; (c) has a dissent; (d) holds a federal statute unconstitutional; (e) holds a state statute or initiative measure unconstitutional; or (f) holds invalid a published regulation of any agency or department of the federal government. The idea is to give the staff attorneys objective criteria with which to spot potential conflicts and sensitive decisions and call those to the court's attention. Members of the Evaluation Committee, on an individual judge volunteer basis, will examine reports from the staff to determine whether a conflict appears to be real or more likely falls within those classes of cases in which a panel typically points out differences between existing authority and the present case.

Currently, judges of the Court review opinions when they are first published in slip opinion form. Conflicts may be discovered by this process. It is anticipated, however, that the specialized work of the staff attorneys applying objective criteria will increase the Circuit's ability to identify any conflicts.

REGIONAL SENSITIVITY AND OUTREACH

Responding to regional sensitivity, the Committee is experimenting with the regional assignment of judges. Under this process, at least one judge from the three administrative units in the Circuit—southern, middle and northern—will sit on a three-judge panel hearing cases that arise within that judge's "home" administrative region. Whether such a regional assignment of judges will prove to be a good or a bad idea we do not know. Those who think it's a good idea argue that it is important to have a judge from the area where a case arises sit on a panel that decides the case. Those who think it's a bad idea argue the concept of regional assignment violates the principle of random selection of judges, and that the law federal judges are called upon to apply is uniform national law.

Regional sensitivity also covers outreach to the communities served by the Ninth Circuit. For years, the Court has, on occasion, sat in various cities throughout the Circuit where the Court ordinarily does not sit. Those sittings, however, because of a lack of facilities and the difficulty in gathering enough cases from a particular region to fill a week's argument calendar, have not occurred as often as they might have. The Court is currently experimenting with holding more Court sittings in more cities. The intention is to combine these sittings with bench-bar activities to develop communication with all areas of the circuit and find out if there are problems which the Court should confront.

COLLEGIALITY

In addressing the subject of collegiality, the first task is to define what we mean by that term. If the meaning is derived from the usual comment made of a large circuit that there are too many judges to permit the growth of a warm and fuzzy feeling among them, that, to put it bluntly, is ridiculous. To the contrary, judges in a larger circuit are not thrown together as often as in smaller circuits, thus reducing occasions for potential tension between differing and strong personalities.

If we mean by "collegiality" the ability of judges to enjoy each other's company at social gatherings, that is a non-problem because even the most ardent opponents can hit it off with one another for a limited time when they are not called upon to come to grips with issues of substance that divide them.

More aptly, I believe the issue of collegiality can be defined as the ability of judges to hammer out opinions, with knowledge of the idiosyncracies of each other enhanced by having sat together frequently. I believe this is the concept of collegiality expressed in the White Commission Report. It assumes that the law of a circuit will be more consistent (either consistently right or consistently wrong) if the judges of that court over a period of time come to some common understanding of what it will take to get at least two of three judges on a panel to agree to an opinion. This seems to be the aspect of collegiality that we, as a Committee, should be studying. In any event, we are proceeding with defining the term (which the White Commission referred to as "elusive") and determining how we should respond to the concern that collegiality, whatever it means, is lacking in a large circuit, and if it is, whether it impacts the delivery of justice to any significant degree.

PRODUCTIVITY

It has been said that to accomplish a big job doesn't necessarily require more people to do the work; it requires people to work smarter. The Ninth Circuit has taken this view to heart as it has coped with extreme vacancies in the number of its active judges. For a good portion of the past few years, the Court has operated with two-thirds or less of its full, active judge complement. The Court has 28 active judgeship slots, and only 21 are currently filled. Regardless of where the blame lies for this failure to provide the Ninth Circuit with the judges it needs to do its work, the Court has held its own. Are the Ninth Circuit judges working hard? You bet they are! The Ninth Circuit is among the fastest, if not the fastest, in filing decisions following oral argument. The challenge, however, is to work smarter.

The Evaluation Committee has under consideration the possibility of mounting an "assault" on the volume of pending cases. To do this, the Circuit would assemble panels of judges to attack certain batches of cases, those with similar issues or at least those falling within the same category of law. Panels would decide one after another of these cases as quickly as possible, perhaps hearing oral argument in combined cases which raise common issues. The Court is already doing this to some extent in its calendaring process, but the assault would involve a major effort by all judges of the Court, senior and active alike. The obvious downside of this is that to move judges from what they are currently doing to a new task may not result in any net gain. This proposal is currently under consideration.

Using some features of the "assault" concept, the Committee is currently experimenting with increasing the identification of cases with similar issues and assigning a lead case or cases to a particular panel, notifying the parties in all of the following cases that a decision affecting their case will be made by the lead case. We anticipate lawyers for parties in following cases may participate in sharpening the briefing and argument in the lead case. The lead-case concept concentrates the decisional process in one three-judge panel, rather than defusing it among a number of judges on different panels. Once a decision in the lead case is made, the following cases should settle, or at least they could be disposed of without extensive disposition time.

Increased productivity has already been achieved in the Ninth Circuit by the use of the Court's motions and screening calendars. Each month, a special screening panel of three judges sits in San Francisco. These special panels are deciding an average of 340 motions, and disposing of 140 appeals on the merits, every month. This is in addition to the Court's regular work. If the Court had more judges, it could increase this output. Without more judges the Court seems to be at its limit in this area, but the Committee is nonetheless trying to figure out some way to increase this aspect of the Court's productivity.

THE EN BANC PROCESS

As you know, the Ninth Circuit has a limited en banc. When a case is taken en banc, 11 judges of the Court sit as the en banc court. With the current active judge complement of 21 judges, this represents a majority of the active judges of the Court. But it does not include all of the active judges. A perceived concern is that because all of the active judges do not sit on the en banc court, the en banc decision does not reflect the views of all judges.

In considering this perceived concern, the Committee enlisted the assistance of academic experts. These experts were drawn from a variety of disciplines. They are: Professor Linda Cohen, Department of Economics, University of California, Irvine; Professor John Ferejohn, Hoover Institute, Stanford, California; Professor Lewis Kornhauser, New York University School of Law; Professor Matt McCubbins, Department of Political Science, University of California, San Diego; and Professor Roger Noll, Department of Economics, Stanford University, California. We provided this distinguished group of scholars with copies of the White Commission Report, together with the rules, procedures and statistics relating to the Ninth Circuit's en banc court process. The findings of this group were that the Court could achieve approximately 93% representation of the views of all judges of the court if the limited en banc Court consisted of 7, yes seven judges. Increasing that number to 11 achieved a representative percentage of approximately 95%, and increasing the number to 13 increased the percentage to about 96%. This scientific report indicates there would be little to gain from the standpoint of statistical reliability by increasing the number of judges on the en banc court.

Nevertheless, the Evaluation Committee recognizes that the perception of justice is as important as justice itself. If the perception is that there should be more judges on the en banc court, increasing the number of judges on the en banc court is something the Court should consider and act upon. The Committee intends to make a recommendation to the Court on this subject at the Court's next meeting on July 27, 1999.

Another facet of the en banc process is the ease, or lack thereof, by which a case is taken en banc. Justice O'Connor has suggested that the Ninth Circuit should take more cases en banc. One way to achieve this would be to decrease the number of judges required to vote for en banc. Currently, to take a case en banc requires the affirmative vote of at least a majority of the active judges of the Court. By contrast, in the Supreme Court, certiorari is granted on the vote of four of the nine justices. Question: Should the Ninth Circuit consider adopting a formula by which four-ninths (roughly 45%) of the votes of its active judges, or some other percentage, would be enough to take a case en banc? This would require a statutory change, but the Committee is considering something along this line. As we consider the issue, however, we have in mind that increasing the number of cases taken en banc as well as increasing the number of judges on the en banc court will most assuredly increase the judges' workload—on a Court already operating one-third below its authorized strength. This increased workload might be offset to some extent by choosing judges to sit on an en banc court to hear several cases at one time, rather than choosing judges to sit on separate en banc courts for each en banc case. To this end, the Court has adopted a procedure, on an experimental basis, for the en banc court to sit approximately quarterly throughout the year, hearing a number of cases, rather than having a different en banc court selected to hear each en banc case.

CONCLUSION

There is no "conclusion" to this statement. As stated at the outset, the work of the Evaluation Committee is ongoing. The Ninth Circuit has always been willing to re-evaluate itself and its performance, and to experiment with innovations that would lead to greater efficiency and effectiveness. Through its Evaluation Committee, this is exactly what the Ninth Circuit is doing. This can be addressed by the Circuit with far less disruption, and at far less cost, than a whole new divisional structure.

Mr. COBLE. Thank you, Judge Thompson.

You mentioned Mr. Conyers. We have been joined by the ranking member of the full committee, the gentleman from Michigan, Mr. Conyers.

Good to have you with us.

Mr. CONYERS. Thank you, Mr. Chairman.

Mr. COBLE. And, Ms. Lofgren, you came before we started, from California.

Ms. Acheson, good to have you with us today.

STATEMENT OF ELEANOR ACHESON, ASSISTANT ATTORNEY GENERAL, OFFICE OF POLICY DEVELOPMENT, U.S. DEPARTMENT OF JUSTICE

Ms. ACHESON. Thank you. I am here representing the views of Department of Justice. We are the most frequent litigator in the Federal courts of appeals, appearing in some 40 percent of the cases, and we strongly oppose the recommendations of the White Commission report.

We share the views of the Commission that structural change is not required for the ninth circuit, and we believe that reasons that they cite for that conclusion also counsel that this idea of decisional regional divisions should be rejected, at least at this point as well, so that the kinds of things that Judge Hug, that Judge Thompson, that Senator Feinstein has proposed in her legislation, and that we have detailed in our long written statement be considered first.

There is much talk about there being too many judges on the ninth circuit, the logistics of operating the circuit, too many decisions to read, et cetera. In our view, these arguments are only relevant to the extent they affect the ability of the circuit to accomplish three goals that any circuit should aim to achieve: consistency, predictability and coherence of circuit court decisions; reducing the time it takes to get decisions; and ensuring that the decisions of the circuit panels represent the considered views of the entire circuit, that is—that last point is what we referred to in our testimony as representativeness.

I do not mean, as I think Judge Rymer suggested, that we think this is some representative body. We think this is a large circuit that has a responsibility to look at its own decisions and the decisions of the circuit courts across the Nation when there are common questions and come to a responsible decision. And I don't mean that perjoratively; I mean that as a judicial decision-making process point.

We believe that that has not happened with the current situation in the ninth circuit the lack of consistent decisions will only be multiplied if, in fact, you go with this regional approach. By creating three regional divisions, none of which is bound by the others'

precedent, the Commission's proposal is likely to spur—instead of curtail—the development of intracircuit splits.

Although the Commission's proposal creates a circuit division mechanism to resolve such splits, it doesn't authorize the circuit division to review a case until there is a square conflict. With this narrow mandate, the circuit division, unlike the ninth circuit's current en banc court, would not be able to review cases of exceptional national importance, decisions that conflict with the decisions of other circuits, decisions that involve disagreements between the regional divisions, but which are not square conflicts, or decisions that are just plain erroneous and need to be corrected. As a result, these cases would be decided at the divisional level without further circuit review.

Now, the Commission report suggests that the Supreme Court is somehow going to reach down into these divisional courts and take such cases for review. It seems to me the Supreme Court has made infinitely clear in the last decade that it wants to hear fewer cases, not more, and that it wants the courts of appeals to consider these issues first. The Courts of Appeals essentially are the final court.

The White Commission has said that, and yet it proposes a situation that would call upon the Supreme Court to take on some super-nanny kind of role for these regional division decisions in the ninth circuit that do not constitute a square conflict with some other decision, and we think that is not appropriate and not fair, and it will not lead to justice for litigants in the ninth circuit.

This whole situation, of course, is even more intense with the proposal concerning California, which the White Commission would split between two regional divisions. Splitting California between two divisions that are not bound by each other's precedent would yield different interpretations of State and Federal law for citizens living in different areas of the same State. We think that is an intolerable situation from the point of view of the administration of justice. Keeping California together, of course, would be a big challenge because it accounts for 60 percent of the ninth circuit cases, so it would seem that that too is perhaps not an arrangement to go to directly.

The proposed addition of another layer of appellate review, the circuit division, will, we are concerned, only lengthen the appeals process and slow down the circuit's responsiveness; and we are particularly concerned about that in criminal cases and in immigration cases. The ninth circuit produces 50 percent of immigration law precedent in this country. It is an important area of the law, and we cannot afford to have the decisions concerning it delayed further.

We also believe that this idea that judges will have to do less work and somehow there will be better justice is probably not, practically, going to work out because judges will have to know the law of their division that they are assigned to and of the division they reside in, and it would seem to me, naturally they would want to know what is going on in other parts of the circuit.

We also believe that the needs of commerce and trade and individual rights are moving in the other direction, and we should not be narrowing the regions in which various kinds of law apply, but we should be determining a way to sort of expand them and make

the circuit, as it is now structured, more efficient, more coherent, and more legitimate with the kinds of reforms which have been referred to as "cosmetic." We don't happen to think they are, and we see no reason in not trying them first, the kinds of reforms that have been alluded to here by Judge Thompson, that Senator Feinstein is working toward, because we are afraid if they are not tried now and we head now in the direction of the White Commission report, we will be on an inevitable course to divide the circuit.

Thank you.

Mr. COBLE. Thank you, Ms. Acheson.

[The prepared statement of Ms. Acheson follows:]

PREPARED STATEMENT OF ELEANOR ACHESON, ASSISTANT ATTORNEY GENERAL,
OFFICE OF POLICY DEVELOPMENT, U.S. DEPARTMENT OF JUSTICE

Good afternoon. I appreciate the opportunity to appear before the Subcommittee on the Courts and Intellectual Property to express the views of the United States Department of Justice on the final report of the Commission on Structural Alternatives for the Federal Courts of Appeals. The Department opposes the principal recommendations contained in the Commission's report.

INTRODUCTION

In 1997, Congress created the Commission on Structural Alternatives for the Federal Courts of Appeals to study, for one year, "the present division of the United States into the several judicial circuits" and "study the structure and alignment of the Federal Court of Appeals system, with particular reference to the Ninth Circuit."¹ The five-member Commission, chaired by retired Supreme Court Justice Byron White, provided the Justice Department and other interested parties two opportunities to submit ideas concerning these subjects, once at the beginning of the Commission's work and again in response to the Commission's draft report. The Department appreciated the opportunity to contribute to the Commission's work. A copy of the Department's official comments to the Commission on Structural Alternatives has been submitted for the record and are incorporated as part of the Department's testimony.

In its final report, the Commission made recommendations in four general areas regarding the structural reorganization of the courts of appeals: *First*, the Commission specifically rejected the suggestion that the Ninth Circuit be split, noting that there was "no persuasive evidence" supporting a realignment of the circuit.² Instead, the Commission recommended that the Ninth Circuit be divided into three semi-autonomous decisional regions. Under this novel arrangement, none of these regional divisions would be obligated to follow the others' precedents and any "square conflicts" in their decisions could be resolved by a Circuit-wide division called the Circuit Division. *Second*, the Commission recommended that each other federal Court of Appeals be granted the statutory authority to divide into regional divisions and to establish a Circuit Division once its bench reached 15 or more active judges. *Third*, the Commission urged that the Courts of Appeals be granted the authority to experiment with appellate panels consisting of two judges, instead of the three-judge panel that is the norm. *Fourth*, the Commission recommended that the Courts of Appeals be permitted to use panels consisting of two federal District Court judges and one federal Circuit Court judge when resolving cases that involve the routine application of well-settled law or that involve certain subject matter areas. The Senate is now considering a bill, the Ninth Circuit Reorganization Act (S. 253), that incorporates all four of the Commission's major recommendations.

Our written testimony before this Subcommittee draws from the comments submitted to the Commission by the Department.

GENERAL VIEWS OF THE DEPARTMENT OF JUSTICE

The structural reforms proposed by the White Commission have serious, far-reaching implications for the structure and functioning of the federal courts. The Justice Department approaches these issues from our perspective as a frequent litigant in the federal system—a participant in over 40 percent of the cases heard in

¹ Sec. 305(a)(1)(B)(i, ii), Pub. L. No. 105-119, 111 Stat. 2491 (1997).

² White Commission Final Report (hereafter "Final Report") at 29.

the federal courts of appeals—which must reconcile tensions in the results and reasoning of decisions in order to assess how to proceed in federal investigations and prosecutions, to give advice to client agencies, and to consider whether to seek review of decisions adverse to the government.

We begin with the observation that all available means of non-structural reform should be attempted and assessed before structural changes are imposed on the federal courts. In our comments to the White Commission, we expressed the view that structural changes should be undertaken only if a pervasive and well-documented problem exists, that problem cannot be addressed within the existing structure, and a workable solution can be devised whose advantages outweigh its immediate and potential detriments. Guided by those principles, we agree with the White Commission's recommendation that there is no basis for a split of the Ninth Circuit.³ In our view, the lack of any compelling evidence supporting a circuit split also counsels against what we view as the principal recommendation contained in the Commission's report—the mandated creation of divisions for the Ninth Circuit and the recommended extension of this proposal to other large circuits. That proposal would have potentially adverse repercussions for the administration of justice in the Ninth Circuit, and ultimately across all federal courts of appeals.

The touchstone of any assessment of any proposal to modify the Circuit's procedures should be its ability to enhance the uniformity of the Circuit's interpretation of federal law. We are mindful of arguments that the Ninth Circuit has too many judges or that the logistics of operating a large Circuit are difficult. These are valid considerations, but only insofar as they adversely affect the clarity of Circuit law. They are not reasons by themselves to reorganize the Circuit.

We believe that mechanisms short of a split (divisional or otherwise) should be tried first—particularly since the proposals contained in the White Commission's final report would likely exacerbate, rather than ameliorate, the main problem we perceive: an above-average number of inconsistent decisions that could be remedied by employing adequate mechanisms to review and reconcile panel decisions that conflict or are in tension with one another, or that require correction by the court as a whole. Therefore, before recommendations such as those contained in the Commission's report are enacted, we urge the adoption of the non-structural reforms suggested in this testimony and our earlier submissions to the White Commission.

In this vein, we note and applaud the Ninth Circuit's current efforts to evaluate its own processes to determine how it can enhance more consistent decision-making and reduce docket backlog. We understand that the Chief Judge recently created a Ninth Circuit Evaluation Committee to consider these issues, solicit public comment, and make recommendations to the Court. We believe that the Circuit should be afforded an opportunity to consider and implement changes proposed as a result of these processes before Congress acts.

We now provide our views on the White Commission's major recommendations.

REGIONAL DIVISION OF THE 9TH CIRCUIT

The White Commission would divide the Ninth Circuit into Northern, Middle and Southern Divisions, with California split between the Middle and Southern Divisions. Between seven and eleven active judges would serve in each division, with the presiding judge of each division chosen in the manner that currently exists for the selection of a circuit's chief judge. A majority of judges serving on each division would be residents of the districts over which that division has jurisdiction, but each division would also include some judges not residing within the division, assigned randomly or by lot for terms of at least three years. Judges from each division would hear appeals arising from district courts within the division's geographic boundaries. Each division would use an en banc procedure to rehear cases from within the division. One division's decisions, whether panel or en banc, would not "bind any other division" but would be accorded "substantial weight."⁴ Finally, a non-regional "Circuit Division" consisting of thirteen judges would be formed. The Circuit Division panel would include the Chief Judge of the Circuit, plus four randomly selected judges from each of the three regional divisions. The 13-judge Circuit Division would have discretionary jurisdiction to review "square interdivisional conflicts," but only after a panel decision had been reviewed by the division en banc or had been denied divisional en banc review.⁵ The Circuit Division would not have the jurisdiction to review decisions for error, decisions that conflict with another circuit's decision, or decisions involving issues of exceptional importance.

³ Final Report at 29.

⁴ Final Report at 43.

⁵ Final Report at 45.

In our view, this proposal is not likely to significantly advance, and instead is likely to detract from, the goals the Ninth Circuit Court of Appeals strives to achieve—consistency of decisions, efficiency in resolving cases, and the appearance that all of its decisions reflect the views of the Court as a whole. Indeed, this proposal is likely to create greater confusion in Ninth Circuit law, further delay the resolution of appeals, and undermine the representativeness (and thus, the legitimacy) of the Court's decision-making process. We outline our specific concerns below.

Uniformity and Consistency of Decisions

A basic tenet of American jurisprudence is that federal law should be applied as uniformly as possible within and across circuits. National uniformity and predictability are particularly important to the Department of Justice, which must enforce federal law and advise federal agencies about the meaning of that law throughout the country. The Department also plays a special role in the process of unifying the meaning of federal law: as the most frequent litigant in the federal courts, the Department, through the Solicitor General, exercises considerable restraint in choosing which cases the United States brings to the courts of appeals.

It is of paramount importance that federal law be interpreted consistently regardless of the location of the court or the composition of the judicial panel. Rather than reduce the amount of intra- and inter-circuit conflicts created by Ninth Circuit decisions, we believe that the White Commission's proposed divisional structure would effectively validate, and even encourage, the development of such conflicts. Indeed, the proposal is explicit that "[t]he decisions made in one division would not bind any other division."⁶ The proposal's attempt to mitigate this divisional autonomy by requiring the divisions to give "substantial weight" to others' precedent is only likely to complicate matters: Regional divisions would still not be required to follow the precedent of sister divisions (so uniformity would not be assured), and this arrangement might generate collateral litigation over whether a division gave insufficient weight to a decision of another division.

The White Commission proposal purports to delineate a way of resolving conflicts among divisions through the mechanism of a "Circuit Division." The Circuit Division's only role, however, would be to resolve "conflicts on . . . issue[s] of law" between the regional divisions. It is unclear from the legislation what a "conflict" is and how a conflict is different from the existence of other decisions that are difficult to reconcile but which nonetheless point the law in different directions. Often, the creation of a conflict is not clear, much less immediately clear. And because the decisions of other divisions are not binding precedents, judges would be less likely to distinguish, discuss, or even cite decisions from outside their division. Overall, the Circuit Division mechanism, as proposed, does not provide an effective mechanism for the resolution of the many intra-circuit inconsistencies that the semi-autonomous division system would produce.

The inability of the Circuit Division to review cases not involving inter-divisional conflicts on issues of law may have a further pernicious effect—insulating many decisions from Supreme Court review. The Circuit Division's narrow jurisdictional mandate would effectively preclude Circuit-wide review of matters of exceptional importance, cases that conflict with decisions of other circuits, and cases in which the intra-circuit disagreement is significant but does not rise to the level of a "conflict." Such cases would be decided solely at the divisional level, and those decisions would not be binding circuit-wide. That structure would inevitably multiply the number of decisions within the Ninth Circuit that conflict with decisions of other circuits, while simultaneously creating a possible impediment to Supreme Court review. It is uncertain whether Supreme Court Justices would vote to grant certiorari in cases that present conflicts between only one division of the Ninth Circuit (rather than the Circuit as whole) and another circuit. The discretionary nature of certiorari jurisdiction suggests that parties opposing review will argue that the Supreme Court should give the Ninth Circuit as a whole an opportunity to overturn a divisional decision so as to bring the division into harmony with the other circuit's decision. The proposed divisional structure therefore might serve to insulate decisions of the Ninth Circuit from further review, effectively isolating it from the rest of the federal court system.⁷

⁶Final Report at 43.

⁷That concern is not theoretical. In the area of criminal law, the Supreme Court in recent Terms has reversed decisions of the Ninth Circuit in which that Circuit alone has held the particular view of the issue presented and been in conflict with every other circuit to have considered that issue. See *United States v. Ramirez*, 118 S. Ct. 992 (1998), rev'g, 91 F.3d 1297 (9th Cir. 1996); *United States v. Hyde*, 520 U.S. 670 (1997), rev'g, 92 F.3d 779 (9th Cir. 1996); *United*

The probability that the Commission's proposed divisional structure could spawn greater inconsistency in Circuit law would be particularly problematic in California. Under the proposal, the State of California would be split between the Middle and Southern Divisions of the Ninth Circuit, neither of which would be required to follow the precedent of the other. We do not support dividing any State in this manner, because, as much as possible, federal rights and responsibilities should be the same for all citizens within a State. Splitting California between two divisions that are not bound by each other's precedent would yield different interpretations of federal and state law, and could result in inconsistent federal court rulings regarding the constitutionality of the same California law.⁸ For the reasons discussed above, Supreme Court review and resolution of these inconsistencies might be rare and, at a minimum, protracted, particularly with the requisite added layer of Circuit Division (following divisional en banc) review. In addition, the existence of different divisions within one State could encourage forum shopping among those seeking to assure a more favorable audience to adjudicate questions of federal and state law, as well as delays in the reconciliation of conflicting decisions.⁹

Efficient Resolution of Cases

The interest in achieving an expeditious appellate process is important for all kinds of cases, but it is particularly acute in two areas in which the Ninth Circuit has large caseloads: criminal cases, in which the defendant's liberty, as well as the victim's and public's interest in finality, are at stake; and immigration cases, in which the Ninth Circuit currently reviews as much as 50 percent of the nationwide caseload and in which delay defers a determination of the alien's status and can encourage new case filings. A swifter and less cumbersome process in such matters is in the interest of both the government, which must enforce the law, and the individual, whose resources typically cannot sustain vigorous multi-tier litigation.

By adding another layer of review, the Ninth Circuit restructuring suggested by the White Commission would delay the completion of the judicial process for litigants. Following an adverse panel decision, an aggrieved litigant could seek en banc review by the Division en banc court, as would now be true of the Circuit as a whole. A denial of such a petition would, in many cases, precipitate a further request for rehearing at the Circuit Division level.¹⁰ The evaluation of a case for al-

States v. Watts, 519 U.S. 148 (1997), rev'g, 78 F.3d 1386 (9th Cir. 1996) and 67 F.3d 790 (9th Cir. 1996); *United States v. Armstrong*, 517 U.S. 456 (1996), rev'g, 48 F.3d 1508 (9th Cir. 1995) (en banc); *United States v. Mezzanato*, 513 U.S. 196 (1995), rev'g, 998 F.2d 1452 (9th Cir. 1993); *United States v. Shabani*, 513 U.S. 10 (1994), rev'g, 993 F.2d 1419 (9th Cir. 1993); *United States v. X-Citement Video*, 513 U.S. 64 (1994), rev'g, 982 F.2d 1285 (9th Cir. 1992); *United States v. Padilla*, 508 U.S. 77 (1993), rev'g, 960 F.2d 854 (9th Cir. 1992); see also *Almendarez-Torres v. United States*, 118 S. Ct. 1219 (1998) (overruling *United States v. Gonzalez-Medina*, 976 F.2d 570 (9th Cir. 1992)); *Neal v. United States*, 516 U.S. 284 (1996) (overruling *United States v. Muschik*, 49 F.3d 512 (9th Cir. 1995)). A process that insulated from Supreme Court review those types of erroneous division panel decisions that conflicted with other circuit decisions would be unfortunate. In our view, rather than creating a structure that might insulate such decisions from Supreme Court review, the Ninth Circuit should employ a more vigorous en banc procedure to address those types of conflicts and erroneous decisions.

⁸We have not had an opportunity to assess completely to what extent the proposed geographical divisions, including dividing California, would create the possibility of conflicting jurisprudence on a range of substantive areas of law of particular interest to the United States. However, the federal government's unique docket, which includes issues involving public lands and ecosystem management, wildlife and marine resource issues, and Native American rights and interests. Those issues do not neatly fit into, but transcend, the boundaries of the proposed geographic divisional structure and may be adversely impacted by any inconsistent interpretation of federal law that would result from the proposed division of the Ninth Circuit into geographic divisions.

⁹Although splitting California between two regional divisions makes S. 253 all the more objectionable, keeping California in the same division does not remedy our general concerns that the proposed restructuring of the Circuit would increase the number of inconsistent decisions, delay the appellate process, and decrease the representativeness of the Circuit's decisions. Placing California in one division would, moreover, implicate several other problems including, most notably, the size of any division with sufficient judges to handle California's immense appellate volume (which currently accounts for 60% of the cases within the Ninth Circuit). It is difficult to see how any "California division" that would decide 4,000 or more cases with 18 or more judges would offer significant advantages in terms of size as compared to the existing Ninth Circuit. Indeed, such a division would probably have to employ some form of limited en banc review and would undercut the Circuit Division's representativeness (at least if its membership was comprised of equal numbers of judges from each regional division).

¹⁰Although it is difficult to demonstrate a "conflict" between two or more judicial decisions, our experience opposing petitions for a writ of certiorari in the Supreme Court suggests that a large number of litigants nonetheless will try. It seems likely that the Circuit Division will

Continued

leged conflicts with a decision of another panel would only add to what is already a protracted period for finally resolving cases.

The White Commission justified this divisional structure partly on the grounds that smaller decisional units might increase efficiency by reducing the volume of precedent judges would be required to consult and monitor (thereby saving these judges time). We doubt that the creation of smaller decisional units would save much time or that Circuit judges will deem it advisable to disregard the development of law in the other divisions of the Circuit. Because the Commission's proposal contemplates that a number of judges would be assigned outside their division of residence for substantial periods of time, it is unlikely that judges would benefit substantially over the long run by ostensibly being relieved of the burden of monitoring other divisions' opinions. While serving outside their division of residence, they would presumably be expected to keep abreast of the decisions of at least two divisions—their division of permanent residence and their division of temporary assignment. And if, over a three-to-five year period, they might be assigned to all three divisions, that monitoring responsibility would be hindered by a failure to have kept up with the output of all three divisions. Whatever benefit might accrue to individual judges with respect to the burden of monitoring opinions, therefore, is likely to be only modest and incomplete, at best.

Indeed, the use of smaller decisional units may not only be ineffective as a means of reducing delay, but may also have undesirable collateral effects. By creating a smaller pool of judges from which panels would be selected, litigants would be able to better predict the identity of a panel's judges. But it is precisely to discourage litigants from attempting to tailor their arguments for particular judges that many circuits do not publicly announce the judges on the panel until shortly before argument. And under the proposed divisional plan, predictability may encourage forum shopping (especially within California) or tactics to delay pursuit of an appeal to await either the periodic change in judicial composition within a division or the resolution of a pending case raising the same issue in a different division. A unified circuit avoids those anomalies.¹¹

Appearance of Legitimacy

As the Supreme Court has recognized time and again, the authority of the judicial branch is tied to its legitimacy. One important aspect of a court's legitimacy is the perception of the public and the bar that when a judge or a panel of judges speak, they speak for the entire court of which they are members. More to the point, the views of a panel of judges on the Court of Appeals should represent the views of the entire Circuit Court. In all other Circuits but the Ninth, this is always the case because all of the judges on the Circuit have either implicitly approved of the decisions of the three-judge panels (by opting not to rehear the case en banc) or have reheard the case en banc with all of the non-recused, active judges on the Circuit participating. The Ninth Circuit, however, employs a limited en banc procedure under which the Circuit's en banc panel is comprised of 11 judges—the Chief Judge and 10 other judges selected at random. As a result, the Ninth Circuit's en banc panel involves fewer than a majority of the Circuit's 28 active judgeships. Thus, the Ninth Circuit has been criticized on the ground that its en banc decisions are not representative of even a majority of the judges on its court.

Instead of making the court more representative, the White Commission's proposal is likely to reduce the representativeness of the Ninth Circuit's decisions. Once a three-judge panel issues an opinion, each regional division would have the opportunity to rehear the case en banc. This en banc process would involve every active judge on the regional court. However, given that the divisional court would consist of only 7 to 11 judges, at least two of whom joined the majority decision being challenged, a litigant would likely face an uphill battle in obtaining divisional en banc review. In those rare instances where en banc review were granted, the decisions issued within any regional division would be representative of the views of the judges in that region. This representativeness at the regional division level does not reach the Circuit level, however. At the Circuit level, the Commission's proposal would create the Circuit Division to replace the limited en banc structure currently employed by the Ninth Circuit. While the Circuit Division is slightly more representative than the limited en banc because it increases the number of judges from

forgo review in several cases while awaiting for inter-division conflicts to become sufficiently clear to warrant Circuit division review and resolution. This may further delay the time for consistent Circuit precedent to be established.

¹¹ Filling existing vacancies on the Circuit, or creating new judgeships, as S. 1145, the Federal Judgeship Act of 1999, would do, would be preferable ways to reduce judicial workload and thereby increase the speed with which appeals are decided.

11 to 13, the 13 Circuit Division judges still do not constitute a majority of the 28 judges on the Ninth Circuit and are not selected randomly for each en banc case (they are instead assigned by lot for three year terms). The Circuit Division would only operate where there is a "conflict" on a legal issue, however. In every other case, the decision of the regional en banc court (of 7 to 11 judges) would be the final word of the 28-judge Circuit. As a result, the White Commission's proposal would appear to undermine the representativeness, and hence the legitimacy, of the Ninth Circuit's decisions.

Our serious reservations about implementing the White Commission's primary proposal regarding the Ninth Circuit are magnified by the recognition that the move to any divisional structure would likely be irreversible.¹² Once regional divisions are created—and differences in divisional law are permitted to flourish—the Ninth Circuit would have little ability to reunify. Instead, the restructuring compelled by this proposal would lead in only one direction—to an eventual split of the Circuit. But this result is precisely what the White Commission found to be unwarranted and unworkable. Rather than proceed down this inevitable path to split of a Circuit viewed by its users (and its evaluators) as operating reasonably well, we respectfully suggest that Congress should instead, at least as a first effort, direct the Ninth Circuit to study and implement constructive changes in relation to the specific areas of concern identified by the White Commission and the Department.

Alternatives to Divisional Re-structuring

From our perspective as litigants, the Ninth Circuit's primary shortcoming is traceable not principally to its large number of judges or geographical size, but rather to its failure effectively to address erroneous panel decisions in important cases and to review cases in which a meritorious claim of conflict is presented. This problem is already being mitigated in the light of the recent upswing in the number of cases that the Ninth Circuit has voted to hear en banc. The problems that continue to persist, while admittedly difficult to quantify, nonetheless appear susceptible to amelioration by nonstructural means, as suggested in our submissions to the White Commission. Indeed, the Circuit's en banc mechanism, if modified, is particularly well suited to solving many of these problems. If that course is followed, structural changes might ultimately prove to be unnecessary and their attendant difficulties and dislocations avoided. After a period of experience with non-structural alternatives and an assessment of legal and demographic trends, the need for any structural reforms might become clearer.

Improving the opportunity for en banc review. There are a number of discrete but effective ways to increase the opportunities for en banc review of panel decisions. In particular, Congress might consider granting the courts of appeals a dispensation to lower the statutory requirement that a majority of the Circuit's active-service judges must vote affirmatively to rehear a case en banc. The success of the Supreme Court in exercising its discretionary review based on the votes of less than a majority is a model that should be studied for application in the courts of appeals' en banc process. A similar "4/9s" rule might well work at the Circuit level.

Other actions could better alert Circuit judges to the need for en banc review. For example, the recently amended Federal Rule of Appellate Procedure 35(b)(1) now requires litigants to set forth at the outset of any petition requesting en banc rehearing a summary statement regarding why the case creates an inter-Circuit or intra-Circuit split or involves a question of exceptional importance. In addition, opinions to be published that distinguish or disagree with existing precedent should be circulated among the judges of the Circuit for review before publication. Staff personnel could be deployed to act as an additional check in the review of panel decisions for potential conflict with other circuit decisions.

Although a system of increased availability of rehearing en banc would require some investment of judicial resources, it seems likely that time expended en banc in clarifying the law of the circuit and resolving issues of exceptional importance would in the long run be repaid by a corresponding reduction in litigation and an enhanced ability of the Ninth Circuit as a whole to speak through the en banc procedure. The short-term costs of increased en banc review may well pay substantial long-term dividends.

Improving the representativeness of the en banc panel. The Ninth Circuit should also consider methods of enhancing the representativeness of its en banc panel. The most direct way to do so is to increase the number of judges who sit on the en banc panel from 11 judges to 15. With 15 judges, the Circuit's en banc decisions would

¹² Creating regional divisions on an experimental basis would, for the reasons described in the text, be equally irreversible. Thus, a "sunset" provision would not remedy our concerns.

properly represent the views of a majority of the Circuit's active membership. Except for the Chief Judge, these judges should be selected at random. Judges who call for en banc rehearing or who authored the three-judge panel's opinion should not automatically be placed on the en banc panel, for that might skew the representativeness of the panel, and the legitimacy of the resulting en banc opinion.

In the long term, we recognize that demographic changes in the Nation's population may well necessitate structural changes in the court of appeals system. If and when that occurs, the analysis contained in the White Commission's final report will provide valuable insight on the potential options to be considered. At this time, however, we believe that these non-structural alternatives should be explored first and that any structural reforms should be reserved for a time when these other alternatives are no longer workable.

REGIONAL DIVISION OF OTHER CIRCUITS

The White Commission also recommends that all appellate courts with more than 15 authorized judgeships be granted discretion to adopt a divisional arrangement such as the one set out for the Ninth Circuit. These courts would be permitted to organize themselves into two or more adjudicative divisions, each capable of rehearing cases en banc. Each judge would be assigned to a specific division for a substantial period of time, and each division would exercise exclusive jurisdiction over the appeals assigned to it. Any Circuit that opted to reorganize itself would be required to create a Circuit Division modeled on the one set out for the Ninth Circuit, involving no more than 13 judges and convened solely to resolve "square interdivisional conflicts."

The Department of Justice does not support the recommendation that the remaining circuits be permitted to split themselves into semi-autonomous adjudicative divisions when they reach a certain number of judgeships. We do not believe such a significant change in the federal appellate structure is justified, particularly before non-structural alternatives of the type we have suggested are implemented and their effects evaluated.

The implementation of a nationwide adjudicatory divisions plan would create for each circuit the types of problems we have identified in our discussion of the proposed changes to the Ninth Circuit. Moreover, widespread enactment ultimately would result in a completely restructured system overall, adding a fourth layer of review throughout much of the federal judicial system, creating differing paths of access to the Supreme Court depending on geography, and allowing varying bodies of law to be developed by numerous mini-courts of appeals in relative isolation from one another.¹³

As an alternative to section 2A, we recommend implementing experimental non-structural changes of the type described above with regard to the Ninth Circuit. At a minimum, we suggest that section 2A be deleted from S. 253 until such time as the existence of systemic problems in other circuits sufficient to warrant such a change has been found and to allow litigants and judges an opportunity to assess whether the proposed structural changes would improve the quality of justice.

TWO-JUDGE PANELS

The White Commission would authorize federal appellate courts to use two-judge panels, and to allow the courts to designate by rule those case types suitable for such disposition. The legislation leaves it entirely to the court to determine when a case assigned to a two-judge panel should be referred to a three-judge panel for hearing or decision.

The Department's experience with various screening procedures employed by the courts of appeals, including summary affirmance, leads us to question whether it is necessary for Congress to authorize two-judge panels and whether such panels would actually conserve judicial resources. We have further questions regarding

¹³ In addition, this proposal to create divisions in the courts of appeals may result in the development, over time, of even more complex and varied local rules of procedure. The Department has worked extensively with the Advisory Committee on Appellate Rules to develop simplified, centralized rules of appellate procedure and to reduce the number and range of local appellate rules. The proposal gives considerable flexibility to the courts of appeals in creating independent divisional systems. Thus, we remain concerned that the proposed structural rearrangement could derail efforts to develop nationally uniform procedural rules.

Moreover, the considerable leeway afforded to circuits other than the Ninth to develop divisions does not foreclose the possibility that circuits might create special subject-matter divisions. For the reasons the Department set forth in its submissions to the White Commission, we would be concerned about the creation of subject-matter divisions. Such a possibility would add an element of potentially great variability in practice and procedure among different areas of practice.

whether this provision ensures both adequate procedures for assessing how cases are selected for decision by such panels and necessary safeguards for determining how a third judge is to be brought into the process when the two-judge panel reaches an impasse. We are also concerned about how this provision would affect the public's perception of the administration of justice by the courts. If the two-judge panel provision is to be adopted at all, we believe it would best be implemented as an experiment for a limited duration in a few courts to allow Congress, courts, and litigants an opportunity to assess the change.

DISTRICT COURT APPELLATE PANELS (DCAP)

The White Commission would also authorize judicial councils to create a "district court appellate panel service" with district and circuit judges from the circuit. The judicial council would specify categories of cases appropriate for DCAP jurisdiction and the panel would have exclusive jurisdiction over those cases. The Commission observes that diversity cases would be likely prospects for DCAP jurisdiction, as well as sentencing appeals and cases that "generally require the reviewer to apply well-settled legal rules to varying fact patterns."¹⁴ Panels created from the DCAP service would consist of two district judges and one circuit judge designated by the chief judge of the circuit. District judges would not review judgments from the courts on which they serve. Further review of decisions by a DCAP would be discretionary in the court of appeals. In addition, the panel itself could transfer a case to the court of appeals if disposition involved a determination of a question of law it deemed appropriate for the court of appeals.

In our view, the use of DCAP services in the Courts of Appeals would likely result in a net cost to litigants and to the judicial system as a whole, even if it produced an incidental reduction in the burdens on the courts of appeals. Accordingly, we are not persuaded that the creation of DCAPs is warranted or desirable.

First, the use of DCAPs would not reduce the overall judicial workload—instead, it would simply divert much of the workload for some appeals from busy appellate judges to busy district court judges. Although the factual justification underlying this legislative proposal is unstated, it may be a response to the statistical trends recorded in Table 2-3 of the White Commission's final report, which suggest that in the past century the per-judge caseload for circuit judges has increased five-fold while that for district judges has only doubled.¹⁵ Without a more careful analysis of the workload of district judges, however, it would be premature to base conclusions on those numbers alone. The statistics do not capture the increasing complexity of time-consuming pre-trial practice, trials, and sentencing proceedings, as well as district judge assignments to court of appeals cases. Absent more definitive data, it seems unwarranted to conclude that district judges are sufficiently underutilized that they may absorb the extra work contemplated by this provision. Indeed, overall the proposal may require even more judicial resources than are now required at both the district court and court of appeals level, because in at least some instances the court of appeals would grant permission to take a further appeal after a DCAP decision and would in any event have to consider requests for the exercise of discretionary review. Thus, the courts (as well as the parties) could incur the expense of conducting two appeals instead of just one before seeking Supreme Court review.

Second, third proposal calls for judicial councils, rather than Congress, to determine the class of cases to be adjudicated by DCAPs. That assessment, however, involves policy decisions about the nature of the underlying legal disputes, including a substantive evaluation of the applicable law. Such significant policy decisions, such as whether diversity cases should be handled in a distinctive manner, should be made by Congress, rather than by the judicial councils.¹⁶

Moreover, we question whether the administration of justice would be served by creating a class of appellate courts inferior to circuit courts of appeals and assigning cases deemed to be less significant to them. Certainly service on such courts is not made to seem attractive as described in the White Commission's reports, since it seems unlikely that a circuit judicial council would assign the most interesting classes of cases to any court other than its own court of appeals. Finally, this proposal would make the final decisions of district court appellate panels subject to discretionary review by the court of appeals. Such discretionary review raises the possibility that a litigant might be foreclosed from having the right to seek Supreme Court review of a decision that the court of appeals declined to review.

¹⁴ Final Report at 64.

¹⁵ Final Report at 14.

¹⁶ Section 3 does not contain any formal recommendation concerning how diversity cases should be treated, so we have not included an analysis of that issue in this testimony.

For the foregoing reasons, the Department opposes the creation of District Court Appellate Panels. At a minimum, this provision should be adopted only as a temporary pilot project that would operate in a single court, in carefully and explicitly designated categories of cases selected by Congress, and only for a limited period of time.

CONCLUDING REMARKS

I have outlined the more important of the concerns of the Justice Department based upon its review of the White Commission's final report. The White Commission has performed a valuable service in studying the United States court of appeals system and proposing ideas for its future organization. We are not, however, convinced that either its conclusions or any other data evidence a need for the structural reforms contained in the report. As we noted above, the provisions contained in the final report themselves risk creating greater inconsistencies in the law, greater delay in the resolution of cases, and greater challenges to the representativeness and legitimacy of the courts of appeals. Accordingly, while circumstances may one day warrant the adoption of structural changes, other measures should be tried first. We are committed to working with this Subcommittee and the Ninth Circuit to develop and, where appropriate, implement such proposals.

I thank you for the opportunity to submit the views of the Department of Justice to this Subcommittee.

Mr. COBLE. Professor Hellman?

STATEMENT OF ARTHUR HELLMAN, PROFESSOR OF LAW, UNIVERSITY OF PITTSBURGH SCHOOL OF LAW

Mr. HELLMAN. Thank you, Mr. Chairman. I appreciate this opportunity to express my views on the final report of the White Commission.

There is a great deal in the report that I agree with, but this proposal that we have been talking about here, for adjudicative divisions, is an ill-considered remedy for a problem that has not been shown to exist. I think the easiest way to see that is to focus on some of the key propositions in the report itself. And the first of these is stated at the very outset of the report.

"The Ninth Circuit Court of Appeals"—and I am quoting here—"should continue to provide the West a single body of Federal decisional law." That is the end of the quote. If you agree with that proposition from the Commission report, you should reject the Commission plan because under the Commission plan, the Ninth Circuit Court of Appeals would not continue to provide the West a single body of Federal decisional law. Far from it.

Now, in my written statement, you will find a detailed analysis of this point, which I hope you will read, but I am not going to go into it here because it seems to me that those supporting the Commission plan have basically conceded the point that each division would be a law unto itself. You would have occasional decisions from the Circuit Division that would resolve square conflicts, but other than that, circuit-wide law would be gone.

But why do this? The Commission report is very straightforward about that. This is the second key proposition I would like to talk about today. "The law declaring function of appellate courts requires groups of judges smaller than the present Ninth Circuit Court of Appeals." Now, in support of that proposition, the Commission advances two principal arguments.

The first has to do with opinion monitoring. Now, the problem with the Commission's argument about opinion monitoring, I think, is that it lumps together two very different activities: keeping up with the law of the circuit, which is something that individual

judges do, and monitoring panel opinions, which is something that the court does as an institution. Keeping up with the law of the circuit in order to avoid conflicts does not require that every judge read every opinion.

Suppose we had an opinion last week, for example, on the Petroleum Marketing Practices Act. Most judges will not see a PMPA case for months or perhaps years. They don't need to read the opinion today to avoid a conflict when they do have such a case.

Opinion monitoring, on the other hand, does not depend on there being a current case before any of the judges or in the pipeline. We are interested in consistency with past decisions. But effective monitoring does not require that every judge read every opinion. And in this respect it seems to me—Congressman Campbell said almost what I am saying here, but I think in the ultimate conclusion he is wrong about the effect of having more judges because the eighth circuit and the ninth circuit, for example, last year issued about the same number of opinions. The ninth circuit, of course, has more judges to monitor them. I think the ninth circuit can do that more easily. The reason is that each judge will have his or her own areas of interest or expertise, and the more judges you have looking at the same number of opinions, the greater the odds that a particular error or inconsistency will strike the interest of one judge.

And finally, the evidence leaves no doubt that ninth circuit judges can and do monitor opinions.

In any event, monitoring is not an end in itself, but a means to an end, and the end is consistency. Now, the Commission insists ninth circuit law is full of inconsistency, contradiction, conflict, and so forth. Where do they get this conclusion? Well, they talk about perceptions. I think that when they are talking about perceptions, they are referring to the survey, the excellent survey, that the Commission itself conducted of lawyers and district judges. I hope you will read the detailed findings of that survey in the working papers of the Commission because you will find that the difference between the ninth circuit and other circuits is not nearly as great as you might expect.

What is even more telling is that on the particular survey questions the Commission cites, the ninth circuit is on a par with the Federal circuit, a court of 12 judges, all of whom have their chambers in the same building here in Washington. So in the end, the survey findings provide little support for the conclusion that the ninth circuit is performing badly because of its size, and that is the critical question. And that survey is the closest the Commission comes to objective evidence.

I will conclude by making this suggestion. There are really two Commission reports. There is a small one which contains the recommendations; there is a larger one called the Working Papers that contains the facts. I think that if you read the larger one, you will reject the smaller one. Thank you.

Mr. COBLE. Thank you, Professor.

[The prepared statement of Mr. Hellman follows:]

PREPARED STATEMENT OF ARTHUR HELLMAN, PROFESSOR OF LAW, UNIVERSITY OF PITTSBURGH SCHOOL OF LAW

SUMMARY

1. Although the Commission states that the Ninth Circuit Court of Appeals "should continue to provide the West a single body of federal decisional law," its plan subverts that goal by abandoning circuit-wide stare decisis. This radical step would authorize, if not encourage, the creation of intracircuit conflicts.

2. The proposed "Circuit Division" would do little to preserve uniformity. The Commission's plan places substantial constraints on the Division's authority. In all likelihood, decisions of the Circuit Division would be so infrequent, and their effect on the law of the division so limited, that "the law of the circuit" would shrink to near-insignificance.

3. The Commission plan is thus not a compromise. Those who want to divide "the Ninth Circuit" have never cared about the circuit as such; what they have sought is a division of the court of appeals. And that, for all but a handful of cases, is what the Commission plan would give them.

4. The rationale for the Commission plan is that "the law-declaring function of appellate courts requires groups of judges smaller than the present Ninth Circuit Court of Appeals." But the arguments offered in support of the rationale do not stand up under scrutiny.

5. The Commission insists that judges on a large appellate court cannot adequately monitor other judges' decisions. The flaw is that the Commission lumps together two very different activities: keeping up with circuit law, which is something done by individual judges, and monitoring panel opinions, which is done by the court as an institution.

(a) Judges today need not keep up with circuit law in order to make use of opinions when they are relevant. And reading an opinion today will not help in avoiding a conflict when the judge confronts a similar issue months or years from now.

(b) Effective monitoring does not require that all judges keep up with all opinions. The evidence indicates that Ninth Circuit judges can and do monitor the opinions rendered by their colleagues.

6. The Commission argues that "large appellate units have difficulty developing and maintaining consistent and coherent law." But it disdains empirical research and relies instead on "perceptions" and its own (unspecified) experience. That is far too little to justify the radical restructuring that it proposes.

STATEMENT

Mr. Chairman and Members of the Subcommittee:

I appreciate your invitation to express my views at this oversight hearing on the Final Report of the Commission on Structural Alternatives for the Federal Courts of Appeals (White Commission). The principal focus of the Commission report is the largest of the federal judicial circuits, the Ninth. The Commission recommends legislation that would keep the circuit intact but divide the Ninth Circuit Court of Appeals into three "semi-autonomous" adjudicative units.

The Commission's plan gives the appearance of compromise and moderation. But appearances are deceiving. The Commission plan is not a compromise; it gives one side almost everything it wants. And far from being moderate, it embodies a novel approach to federal appellate structure that is flawed both in conception and in execution.

This leap into the unknown might be justified if the Commission had demonstrated the existence of a problem of serious dimensions that could not be dealt with in any other way. On the contrary, in explaining its key conclusion—that "the law-declaring function of appellate courts requires groups of judges smaller than the present Ninth Circuit Court of Appeals"—the Commission offers remarkably little in the way of proof. The Commission simply does not make the case for the radical restructuring that it proposes.

INTRODUCTION

Five experiences have shaped my views on S. 253 and the White Commission report. First, from 1973 through 1975 I served as deputy executive director of the Commission on Revision of the Federal Court Appellate System (Hruska Commission). In that capacity I drafted the report that recommended that the Ninth Circuit be divided into two new circuits. (For a discussion of why that recommendation is no longer persuasive, see Hellman, *Dividing the Ninth Circuit: An Idea Whose Time Has Not Yet Come*, 57 Mont. L. Rev. 261, 264-74 (1996).)

Second, in 1978-79 I was the director of the central legal staff of the Ninth Circuit Court of Appeals. My responsibilities included devising and implementing procedures that would assist the court to do its work more effectively, and in particular to meet the new needs created by the expansion of the court from thirteen to twenty-three active judges.

Third, in the late 1980s I directed a study by fourteen legal scholars and political scientists of the structural and procedural innovations implemented by the Ninth Circuit during the period 1976-1988. The fruits of that study were published by Cornell University Press in 1990; the title of the book is *RESTRUCTURING JUSTICE: THE INNOVATIONS OF THE NINTH CIRCUIT AND THE FUTURE OF THE FEDERAL COURTS*.

Fourth, as stated by the Federal Judicial Center in the report submitted to Congress on *Structural and Other Alternatives for the Federal Courts of Appeals*, I have conducted "the only systematic study of the operation of precedent in a large circuit." This research has been published in several articles, including *Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court*, 56 U. Chi. L. Rev. 541 (1989).

Finally, earlier this year, Chief Judge Hug appointed me to a 10-member Evaluation Committee whose mission is "to examine the existing policies, practices and administrative structure of the Ninth Circuit Court of Appeals, in order to make recommendations to its judges to improve the delivery of justice in the region it serves."

It is an honor to serve on the Evaluation Committee and to work with the Ninth Circuit Court of Appeals in seeking better ways of carrying out the processes of appellate adjudication. However, I do not speak for the court or any other institution; the views expressed here are my own.

I. THE COMMISSION'S PLAN: CONTRADICTIONS AND CONUNDRUMS

The Commission offers a plan that would retain the Ninth Circuit but divide its court of appeals into three "semi-autonomous" divisions. The plan contains four elements:

1. *Regional jurisdiction over appeals.* The present Ninth Circuit Court of Appeals would be reorganized into three regionally based adjudicative divisions." Each division would hear the appeals filed from that geographical area.
2. *Regional assignment of judges.* Each division would include seven to eleven court of appeals judges in active status. "A majority of [the] judges serving on each division would be residents of the districts over which that division has jurisdiction, but each division would also include some judges not residing within the division, assigned randomly or by lot for specified terms of at least three years."
3. *Regional performance of the law-declaring function.* "Each regional division would function as a semi-autonomous decisional unit." This entails two changes from the current arrangement. The circuit-wide en banc process would be abolished; the functions now performed by the Ninth Circuit's en banc court would be performed by en banc courts for each division. More important, divisional decisions—whether by panels or by the en banc court—would be binding only within the division.
4. *Conflict resolution by a "Circuit Division."* In addition to the three regional divisions, the Commission plan would establish a "Circuit Division . . . whose sole mission would be to resolve conflicting decisions between the regional divisions." The Circuit Division would be composed of the chief judge of the circuit and twelve active judges—four from each of the regional divisions—who would be selected by lot and who would serve for staggered three-year terms.

The Commission argues that its plan "is the most principled and effective way to resolve the debate about the Ninth Circuit and its court of appeals." (Final Report at 57.) However, analysis of the various elements leads to a very different conclusion. The Commission may be correct in saying that its proposal "addresses the adjudicative concerns that have animated calls to split the circuit." But its confidence that the plan "will achieve the legitimate ends of . . . those who seek to preserve [the circuit]" is sorely misplaced.

A. Abandonment of circuit-wide stare decisis

The most radical aspect of the Commission's proposal is the abandonment of circuit-wide stare decisis. Today, the Ninth Circuit, like all of the other federal courts

of appeals, follows the rule that panel decisions are binding on all subsequent panels unless overruled by the Supreme Court or by the court of appeals en banc. Under the Commission's plan, decisions handed down in one division would be binding only within that division.

If there was any doubt about the Commission's commitment to this element of its plan, it is eliminated by the Commission's response to the comments by Chief Judge Hug on the preliminary draft of the Commission report. Judge Hug, speaking for a majority of the judges of his court, urged the Commission to modify its plan by making panel decisions binding throughout the circuit "unless . . . overruled by a circuit-wide en banc court." The Commission emphatically rejected this suggestion, stating that this modification "would leave the court of appeals essentially unchanged as an adjudicative body, and would defeat the purpose of the divisional structure that we recommend."

Abandonment of circuit-wide stare decisis would be a logical step if the Commission were recommending that the Ninth Circuit be kept intact solely for administrative purposes and that three separate courts be created within the circuit for adjudication. But that is not the Commission's plan, nor does the Commission reject the premise that the law within the Ninth Circuit should be uniform. On the contrary, the Commission states at the outset that the Ninth Circuit Court of Appeals "should continue to provide the West a single body of federal decisional law." (Final Report at iii.)

How, then, can the Commission propose a regime under which "[d]ecisions made in one division would not bind any other division"? The Commission gives two answers, perhaps three (with the third buried in a footnote).

First, the report contemplates that decisions of other divisions would "be accorded substantial weight as the judges endeavor to keep circuit law consistent." As a prediction of judicial behavior, this is well grounded in experience. Circuit judges today generally respect the decisions of other circuits, and there is no reason to think that judges in a restructured Ninth Circuit would not accord similar weight to decisions of other divisions.

On the other hand, there is a difference between respecting precedent and being obliged to follow it. I have no doubt that judges today often follow precedents they do not like, simply because it is their obligation to do so. If stare decisis did not operate circuit-wide, judges would be free simply to reject precedent from another division. The Commission plan would thus authorize, if not encourage, the creation of intracircuit conflicts.

This brings us to the Commission's second and more important response: the creation of a "Circuit Division." The Commission insists that the Circuit Division—"a small, stable, but still representative subset of the court's judges . . . focused on conflict resolution"—can insure the maintenance of "desirable circuit-wide uniformity." (Final Report at 51.) This response raises two questions. What does the Commission mean by "desirable circuit-wide uniformity"? And how much uniformity would the Circuit Division bring? To those questions I now turn.

B. Jurisdiction and authority of the Circuit Division

The keystone of the Commission plan is the Circuit Division. Without the Circuit Division, there could be no pretense that the Ninth Circuit Court of Appeals remained intact in anything but name. Each of the regional divisions would be totally autonomous except for the cumbersome process of rotating judges among the regions. Thus, it is essential to understand how the Circuit Division would operate.

The first thing that stands out is the extraordinary constraints the Commission's plan places on the authority of the Circuit Division. The jurisdiction of the Division would be limited to resolving "square" conflicts between the regionally organized divisions. Further, the Circuit Division could not take any case on its own motion; it could act only in response to an application for review filed by a party.

1. Only "square" conflicts

What does the Commission mean by "square" conflicts? One plausible interpretation is that the Commission refers to situations in which one division explicitly refuses to follow a decision handed down in another division. Explicit rejection is the only treatment of circuit precedent now forbidden to court of appeals panels. It would be logical to say that when a panel does take advantage of the freedom conferred by the divisional arrangement, the decision would be subject to review by the Circuit Division to eliminate the disagreement.

Suppose, though, that the panel (or the regional en banc court) distinguishes a decision from another division that reached a contrary result in a similar case. The losing litigant argues that, notwithstanding the purported grounds of distinction,

the panel's resolution conflicts with the other division's ruling. Could the Circuit Division find that a square conflict exists and accept the application for review?

If the answer is "yes," that is an invitation to tiresome wrangling over whether two decisions really are in conflict. In this regard, it is instructive to consider the experience of the Florida Supreme Court. That court is vested with jurisdiction to review "any decision of a district court of appeal . . . that expressly and directly conflicts with a decision of another district court of appeal . . . on the same question of law." Commentators describe the jurisdiction as "disputatious" and note that "the existence of conflict often is not so certain, meaning that a brief [seeking review] must engage in a lengthier and more convoluted argument to establish the Court's discretion to hear the case." See Gerald Kogan & Robert Craig Waters, *The Operation and Jurisdiction of the Florida Supreme Court*, 18 *Nova L. Rev.* 1151, 1225, 1238 (1994). That is hardly a model to be emulated.

What makes the arrangement even more problematic in the Ninth Circuit context is that the judges of the Circuit Division would be questioning the good faith or competence of their own colleagues. If the Circuit Division agrees to review a decision that has distinguished an opinion handed down by another regional division, that would be tantamount to saying that the later panel has failed to recognize that the earlier opinion involved the same issue and required the same result. I suspect that the Circuit Division judges, taking into account the effect of such a declaration on collegiality within the circuit and on the legitimacy of the system, would be reluctant to take that step.

These considerations suggest that the jurisdiction of the Circuit Division would be limited to acknowledged conflicts—conflicts created by the explicit refusal of one regional division to follow the precedent established by another division. That limitation, however, would substantially undercut the effectiveness of the mechanism. Indeed, the Circuit Division would be far less able than the existing limited en banc court to maintain uniformity within the circuit—a mechanism that the White Commission finds wanting.

Under the existing arrangement, Ninth Circuit judges can and do grant rehearing en banc to resolve tensions in circuit law caused by inconsistencies in doctrines or outcomes less blatant than explicit rejection. See, e.g., *Hale v. Arizona*, 993 F.2d 1387, 1389 (9th Cir. 1993) (en banc) ("We consider these questions en banc to resolve the tension between [two panel decisions]."); *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1365 (9th Cir. 1990) (en banc) (overruling panel decision, thus obviating need to maintain "unstable and awkward" distinction drawn by later case).

When the Commission issued its draft report in October 1998, it was unclear whether the narrower or broader interpretation of the Circuit Division's jurisdiction was intended. The Final Report appears to endorse the narrower reading. In explaining how the arrangement it proposes "will ensure clearer, more consistent circuit law," the Commission states that "conflicts . . . between divisions will be more sharply highlighted," and that the Circuit Division will "choose between *articulated conflicting points of view*." (Final Report at 49; emphasis added.) This language implies that the Circuit Division would be limited to cases in which a panel explicitly rejected the "point of view" adopted by one of the other divisions. As long as the panel found grounds of distinction—even "unstable and awkward" grounds—the Circuit Division would stay its hand.

This interpretation is confirmed by the testimony of Judge Pamela Ann Rymer, a member of the Commission, at a hearing of a Senate Judiciary subcommittee on July 16, 1999. Speaking on behalf of the Commission, Judge Rymer said that "it will be the rare case that qualifies" for review by the Circuit Division. She added: "*Inconsistency alone is not sufficient* for Circuit Division review. There must be square and significant conflict." (Emphasis added.)

2. Only upon litigant request

The authority of the Circuit Division would be further constrained by the Commission's insistence that the jurisdiction of the Division could be invoked only by a party to a case—and "only after the panel decision had been reviewed by the division en banc or a divisional en banc had been sought and denied." Here, too, the Commission plan casts aside one of the mechanisms used by the Ninth Circuit today to maintain uniformity: the *sua sponte* panel-initiated en banc call.

Recent decisions illustrate the utility of this procedure. In 1998, the court took a group of cases en banc *sua sponte* "to rethink our previous decisions" on the pre-emption of state tort claims by the Airline Deregulation Act. *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259 (9th Cir. 1998). The en banc opinion explained, "Because of the need to clarify the law in this area, these cases were taken en banc after they were assigned to a three-judge panel, but prior to the panel's rendering

a decision." The en banc court issued a unanimous opinion overruling two panel decisions and establishing the law for the entire circuit. This process would not have been possible under the Commission's plan. More recently, the court accepted a panel's sua sponte en banc call to resolve "an irreconcilable conflict in this circuit's case law regarding the standard of review for rulings on the prosecution's use of peremptory challenges." *Tolbert v. Gomez*, —F.3d—(9th Cir. 1999) (No. 97-55004). The court eliminated the inconsistency without waiting for a litigant's request and without waiting for the panel to issue an opinion.

C. The Commission's narrow vision of uniformity

Supporters of the Commission plan are caught on the horns of a dilemma. If the Circuit Division can review decisions even when the regional panel insists that the other division's ruling is distinguishable, it opens the door to time-consuming and uncollegial disputation over whether the new case creates a "square" conflict. But if the Circuit Division is limited to hearing cases in which one division has explicitly rejected another division's precedent, it will be powerless to eliminate less blatant inconsistencies of the kind that arouse concern today.

Is there any escape from this quandary? The White Commission gives what it may regard as a partial answer. In a little-noticed footnote—not included in the October 1998 draft report—the Commission reveals that its vision of "uniformity" is a narrow one. The Commission's text refers to "conflicts on issues for which circuit-wide (or state-wide) uniformity is important." (Emphasis added.) The footnote explains:

[W]e envision that [the function of the Circuit Division] will be focused on maintaining uniformity on issues of law that matter to the entire circuit or to a state (such as California) that is in more than one division. For example, it would be highly undesirable if the Northern and Southern Divisions established different rules on an admiralty issue. On the other hand, it would not appear to matter whether all divisions had the same rule of law with respect to the factors to be considered in granting an adjustment for abuse of trust under the Sentencing Guidelines. (Final Report at 44 n.99.)

Although the Commission does not generalize from its two examples, this passage implicitly draws a distinction emphasized by the Federal Courts Study Committee in its analysis of conflicts between circuits. The Study Committee recognized that not all intercircuit conflicts are "intolerable," and it posited that one criterion for identifying "intolerable" conflicts is that they "impose economic costs or other harm to multi-circuit actors." The White Commission's examples suggest that it draws the line in the same way.

In the aftermath of the Study Committee report (and at the request of Congress), I conducted a study of unresolved conflicts between federal judicial circuits. The study concluded that, more often than not, unresolved conflicts do not pose a serious threat to the activities of multi-circuit actors. Indeed, on many issues the subject matter alone virtually forecloses any effect on multi-circuit actors. This is true of sentencing issues, as suggested by the White Commission; it is also true of most civil rights issues and most issues involving the elements of federal crimes. In disclaiming the importance of circuit-wide uniformity on these issues, the Commission is implicitly telling us that the Circuit Division need not resolve even "square" conflicts in large and important areas of federal law.

Two other aspects of the distinction also warrant mention. First, "square" conflicts on issues affecting multi-circuit actors are probably less common than "square" conflicts on issues such as the interpretation of federal criminal statutes or sentencing guidelines. Second, the concerns that underlie the desire for uniformity between divisions on matters of admiralty law and other issues affecting multi-circuit actors apply equally to uniformity between circuits. For that reason, these concerns often guide the Supreme Court in the exercise of its certiorari jurisdiction. If the Circuit Division is confined to resolving "square" conflicts on issues affecting multi-circuit actors, it will have little to do, and that little may well be overtaken in short order by Supreme Court decisions.

D. The shriveled "law of the circuit"

In sum, there is less to the Circuit Division than meets the eye. The Circuit Division would resolve only "square" conflicts—a category apparently limited to cases in which one division has explicitly rejected another's precedent. It would act only upon the request of a party, and it would probably limit itself to issues that affect the operations of multi-circuit actors—a circumstance that is the exception rather than the rule. In all other respects, the law in each division would be left to develop separately.

One other element of the Commission plan comes into play here. The Commission contemplates that after granting review, "the Circuit Division will simply resolve *the issue in conflict*, and return the case to the regional division for such other proceedings as are necessary." (Final Report at 46; emphasis added.) This too suggests a narrow view of the Circuit Division's field of operation, and it reinforces the supposition that the Circuit Division would confine itself to discrete issues on which there is an explicit disagreement.

What would the consequences of this arrangement be? I believe that, before very long, the three divisions would be carrying out their law-declaring functions almost as separate courts. Decisions of the Circuit Division would be so infrequent, and their effect on the law of the division so limited, that "the law of the circuit" would shrink to near-insignificance.

E. Isolation of the divisions

The scenario I have described is made even more likely by the probable fate of another element of the Commission's plan, the long-term random rotation of judges among the divisions. Here is what the Commission has to say about the rotation feature in its report:

A majority of judges serving on each division would be residents of the districts over which that division has jurisdiction, but each division would also include some judges not residing within the division, assigned randomly or by lot for specified terms of at least three years. (Final Report at 43.)

The draft statute is somewhat more open-ended:

A majority of the judges assigned to each division shall reside within the judicial districts that are within the division's jurisdiction . . . ; provided, however, that judges may be assigned to serve for specified, staggered terms of three years or more, in a division in which they do not reside. Such judges shall be assigned at random, by means determined by the court, in such numbers as necessary to enable the divisions to function effectively. (Final Report at 94.)

Even here, there is some ambivalence about long-term cross-division assignment of judges. (Compare "would" in the report text with "may" in the draft statute.) And when Senator Murkowski (joined by Senator Gorton) introduced the legislation implementing the Commission proposal, he offered the "strong suggestion" that the Senate Judiciary Committee eliminate the rotation requirement altogether.

I believe that if the Commission plan were to be enacted into law, the Murkowski view would prevail. I say this because there is simply no constituency for the long-term random rotation of judges among divisions. The northwestern senators—who until now have been the most ardent advocates of splitting the circuit—have already made clear their opposition to this feature. And the circuit judges, most of whom do not want any division of the circuit or the court, would be equally opposed to long-term cross-division assignment. A judge living in Alaska would hardly relish the prospect of flying to Pasadena or Phoenix for every argument calendar for three long years. A judge from Los Angeles would not want to hear all of his or her cases in the northwest.

I am not suggesting that judges would hear cases only in their own region. On the contrary, short-term cross-division assignment of judges would certainly be a feature of the arrangement, if only because caseloads will seldom be proportional to the number of judges residing in each of the regions. But that is little different from current use of, for example, district judges and senior judges from other circuits. The judges regularly sitting in each division would be the judges who reside there.

F. Conclusion: the compromise that isn't

What happens when you put all of this together? In all likelihood, the result would be something like this. In each division, cases would be adjudicated largely by a self-contained group of judges bound only by the precedents they themselves have handed down. The Circuit Division would intervene to provide circuit-wide law only on the rare occasions when a panel or en banc court in one division has explicitly rejected another division's precedent on an issue that affects multi-circuit actors. In many—perhaps most—areas of the law, each division would develop its own line of precedent. The "law of the circuit" would become almost an irrelevance.

This analysis explains why the Commission plan is not a compromise. Those who want to divide "the Ninth Circuit" have never cared about the circuit as such. It is a matter of indifference to them whether the circuit council, the Bankruptcy Appellate Panel, the circuit conference, and other circuit institutions remain as they

are. What they have sought is a division of the court of appeals. And that, for all but a handful of cases, is what the Commission plan would give them.

II. THE COMMISSION'S FAULTY DIAGNOSIS

Notwithstanding its flaws and limitations, the divisional structure plan might be worth pursuing if the Commission had identified a serious problem in the Ninth Circuit Court of Appeals that could be solved only through reliance on smaller adjudicative units. But on the evidence of the Commission report, no such problem exists.

The rationale for the Commission plan is that "the law-declaring function of appellate courts requires groups of judges smaller than the present Ninth Circuit Court of Appeals." This rationale rests in turn on two overlapping arguments. First, judges in a large appellate court are unable "to monitor all the decisions the entire court of appeals renders." Second, "large appellate units have difficulty developing and maintaining consistent and coherent law." Neither argument stands up under scrutiny.

A. Monitoring of panel opinions

Central to the Commission's vision of effective appellate adjudication is the "monitoring" of panel opinions by other judges of the court. The Commission puts it this way:

Courts of appeals rely on their judges to monitor the decisions of all panels of the court so that their own decisions are consistent with earlier decisions of the court and so that the court can identify and correct any misapplication or misstatements of the law. "The volume of opinions produced by the Ninth Circuit's Court of Appeals and the judges" overall workload combine to make it impossible for all the court's judges to read all the court's published opinions when they are issued. (Final Report at 47.)

For several reasons, the Commission's reliance on this theory is misplaced.

First, as Chief Judge Hug and his colleagues have aptly stated, the assumption that judges cannot keep sufficiently abreast of circuit law without reviewing opinions as they come out "is a relic of the pre-computer era." Before computers, opinions would not appear in the advance sheets for weeks or months; digests, citators, and other research tools lagged even further behind. On a large court, the only way a judge could avoid an inadvertent conflict with another panel's decision was to read opinions as they came out, sort them into piles by subject matter, and perhaps keep a personal index of important rulings.

Today, conditions are very different. If a judge is considering a case involving NEPA or FOIA or *Miranda* or *Noerr* or any other issue, all of the court's decisions on point, no matter how recent, can be accessed in seconds through Westlaw and Lexis. In addition, the Ninth Circuit has its own computerized case inventory tools. A judge may scan newly filed opinions simply to get a sense of what is going on in the court, but to collect cases in an effort to replicate the computerized databases would be a waste of time.

Second, the Commission lumps together two very different activities: keeping up with circuit law and monitoring panel opinions. Keeping up with circuit law is something done by individual judges; it is an activity that looks to the future. With all circuit law now easily retrievable by computer when it is needed, there is no particular reason for individual judges to acquire familiarity with decisions that have no relevance for any of their current cases. And reading an opinion today will not help in avoiding a conflict when, months or years from now, the judge does confront a case presenting a similar issue.

Monitoring panel opinions, in contrast, is something that the court does as an institution. The purpose of monitoring, as the Commission suggests, is to identify panel decisions that conflict with earlier decisions of the court or that misstate the law. But effective monitoring does not require that all judges keep up with all opinions. As long as each opinion receives some scrutiny by off-panel judges, the objectives can be met.

Third, the Commission goes off track by referring to "[t]he volume of opinions produced by the Ninth Circuit's Court of Appeals." (Emphasis added.) What the Commission fails to mention is that the volume of published opinions does not correlate with circuit size. In 1998, three other circuits produced a larger number of published opinions than did the Ninth Circuit.

(The analysis is limited to published opinions because only published opinions contribute to the law of the circuit. Also, I recognize that 1998 may have been aberrational for the Ninth Circuit, in that the court's output of published opinions was

probably reduced by its high vacancy rate. However, it is not uncommon for other circuits to approach or exceed the output of the Ninth Circuit.)

One would think that, other things being equal, an annual output of 800 opinions could be monitored more easily by 28 judges than by 14. Opinions are not fungible, and neither are judges. The larger the number of judges engaged in the monitoring process, the greater the likelihood that a particular error or inconsistency will catch the eye of at least one member of the court.

Finally, the evidence leaves no doubt that the judges of the Ninth Circuit Court of Appeals engage in a substantial amount of opinion monitoring. In the four-year period ending in 1997, there were more than 300 cases in which an off-panel judge initiated en banc activity. (This figure includes only cases in which the off-panel judge formally invoked the en banc procedures of the court's General Orders. It does not include cases—perhaps quite numerous—in which the off-panel judge communicated only with the panel members.) Even when the court did not vote on an en banc call, the off-panel judge's comments often resulted in modification of the panel opinion and sometimes in a modification of the disposition.

In this light, the Commission's concerns about the supposed difficulties of opinion monitoring in the "large appellate unit" ring hollow. Judges today need not read opinions as they come out in order to make use of them when they are relevant. As for monitoring, the evidence indicates that the judges of the Ninth Circuit can and do monitor the opinions rendered by their colleagues.

B. Maintaining Coherent and Consistent Law

Monitoring, of course, is not an end in itself, but a means to an end. The Commission's principal argument is that "large appellate units have difficulty developing and maintaining consistent and coherent law." (Final Report at 47.) The Commission thus aligns itself with those who believe that inconsistencies in panel decisions are more common in the Ninth Circuit than in other circuits.

What is the basis for this conclusion, so critical to the Commission's recommendation? The Commission refers to "perceptions" of inconsistency and to its own "judgment, based on experience." The "experience" is not specified or described. This is a remarkably weak foundation on which to build so substantial a structure.

The Commission acknowledges "the literature on [the] subject," including my own empirical studies of inconsistency in the Ninth Circuit. The Commission's only response is to say that consistency and predictability cannot be "reduce[d] . . . to statistical analysis" because the "concepts are too subtle, the decline in quality too incremental, and the effects of size too difficult to isolate, to allow evaluation in a freeze-framed moment." (Final Report at 39–40 & n.39.)

It is the Commission's prerogative to reject the methods or conclusions of empirical research, but it is regrettable that the Commission simply gives up and declares that the concepts are too subtle to warrant analysis. For example, what does the Commission mean by "evaluation in a freeze-framed moment"? The research I conducted, and which the Commission cites, embraced two distinct years of the Ninth Circuit's work, and the evaluation involved decisions rendered over a much longer period of time.

Although the Commission is not willing to credit systematic empirical research, it is willing to rely on "perceptions." The reference to "perceptions" apparently incorporates the brief account earlier in the report of the Commission's survey of district judges and lawyers in the Ninth Circuit and nationwide. The survey is a valuable—indeed unique—source of information, and happily the Commission has made available a complete account of the findings in its Working Papers. Those findings raise some doubts about the conclusions drawn by the Commission.

Consider one of the specific points cited by the Commission in its report:

Ninth Circuit lawyers, more often than others, reported as a "large" or "grave" problem the difficulty of discerning circuit law due to conflicting precedents, and the unpredictability of appellate results until the panel's identity is known. (Final Report at 40.)

When we look at the corresponding table in the Working Papers, we find that, indeed, Ninth Circuit lawyers were more likely than lawyers in other regional circuits to have experienced problems in "discerning circuit law due to conflicting precedents." (Working Papers at 86, Item 20g.) But two other points also stand out:

- The Ninth Circuit lawyers who viewed the problem as "large" or "grave" constituted only one-quarter of the respondents.
- The highest proportion of lawyers giving this response came not from the Ninth Circuit, but from the Federal Circuit—a court of 12 judges, all of whom have their chambers in the same building.

A similar pattern can be seen in the responses to the question "how big a problem is the unpredictability of results until the panel's identity is known?" (Working Papers at 87, Item 20j.) Ninth Circuit lawyers were more likely to have experienced problems than lawyers in other regional circuits, but so were lawyers practicing before the Federal Circuit. Interestingly, one out of seven lawyers experienced a "large" or "grave" problem of unpredictability in the First Circuit, which has only six judgeships and enjoys a reputation for collegiality. (The Commission, in explaining what it means by "collegiality," quotes at length from a book by the former chief judge of the First Circuit.)

These findings point to the need for caution in interpreting the survey results. The question is not whether particular phenomena are associated with the Ninth Circuit Court of Appeals, but whether those phenomena are causally linked to circuit size. On this score, a recent news story about the Court of Appeals for the Federal Circuit provides a useful perspective. (National Law Journal, Aug. 3, 1998, at A-1.) The story notes that some members of the intellectual property bar "accuse the specialized court of unpredictability, claiming that judges are deeply divided on basic patent doctrine, [and] that results are often panel-dependent." The story elaborates:

This factionalism leads to a crap-shoot mentality among lawyers who say the outcome of their cases depends too heavily on who sits on a particular panel. Because the U.S. Supreme Court rarely reviews patent cases, the panels' inconsistent rulings remain unresolved.—Some say the court should take more cases en banc.

To anyone who has followed the debate over dividing the Ninth Circuit, these comments will sound uncannily familiar. They are precisely the kinds of comments that give rise to the "perceptions" that the Commission relies on. Yet no one would argue that the Court of Appeals for the Federal Circuit is too large and should be divided into smaller adjudicative units.

I do not know whether the criticisms of the Federal Circuit are justified. Nor would I want the Ninth Circuit to view the survey findings with complacency. I do suggest that the "perception" evidence drawn from the survey offers little support for the Commission's conclusion that "large appellate units have difficulty developing and maintaining consistent and coherent law."

Finally, there is (to borrow a favorite allusion of Chief Justice Rehnquist) the evidence of the dog that did not bark in the night-time. If inconsistency is as much of a problem as the Commission believes it is, examples should be easy to find. The Commission compiled a voluminous record of testimony and statements dealing with the Ninth Circuit, yet not a single witness came forward with examples—systematic or even anecdotal—of conflicts between Ninth Circuit panel decisions. It is not even clear what kinds of conflicts the Commission has in mind—whether it believes that panels are ignoring relevant precedents, or that panels are drawing unpersuasive distinctions, or some combination of the two.

The absence of examples and the lack of specificity are emblematic of the flimsy evidentiary support that underlies the Commission's plan. At most, the Commission has shown that there is some dissatisfaction with the Ninth Circuit Court of Appeals' performance of its law-declaring function. The Commission has not demonstrated the existence of problems that would be cured by dividing the court into three largely autonomous decisional units.

III. CONCLUSION

The Commission's proposal for regionally based adjudicative divisions reflects a conscientious attempt to respond to criticisms of the Ninth Circuit Court of Appeals "while preserving [an] administrative structure that no one has seriously challenged." Unfortunately, the plan is flawed both in conception and in execution. It is unlikely to accomplish its goals, and it has the capacity to produce much mischief. I urge the Committee to reject the proposal and to allow the Ninth Circuit Court of Appeals to continue its course of productive experimentation "to improve the delivery of justice in the region it serves."

Mr. COBLE. Mr. Olson.

STATEMENT OF RONALD L. OLSON, ESQ., MUNGER, TOLLES & OLSON

Mr. OLSON. Thank you, Mr. Chairman. It is a high honor and high privilege to be before this committee. And I thank the commit-

tee for taking this issue seriously. I will volunteer my time in the event the prior testimony has given rise to any questions on the part of the committee, and would be happy to respond. If not, I will go forward with my summary of my remarks.

Mr. COBLE. Proceed if you will.

Mr. OLSON. In view of that, I will proceed. I am a user of this system. I have practiced law in California for about 33 years and have tried cases, argued cases, argued motions in Federal courts between here and California. I can honestly say that I know of few Federal institutions that work as efficiently and as effectively as the United States Court of Appeals for the Ninth Circuit.

It is ironic, I think, that the very document, the part of the document that Professor Hellman emphasizes, that that very document that is serving as a basis for the proposed legislation does not fundamentally disagree, as has been pointed out by several of the persons testifying already. That document concludes that there is no persuasive evidence that the ninth circuit is not working, and it further found that having a single court interpreting the law of the West is a strength.

Now, my opinion is that, alone—those findings alone should blunt any effort to change. That opinion is shared by two different committees of the American Bar Association that have studied this issue, the Federal Court Improvements Committee in the Litigation Section, and it is shared by my hometown bar association, the Los Angeles County Bar. It seems to me that heavy burden of proof rests with those who want to change an important Federal institution, not those who are in favor of the status quo.

I was disappointed at hearing the remarks related to reversal rate as some indication that the ninth circuit is not operating effectively. I know of no study, none, that correlates the size of the institution and getting it right. And I heard very clearly, I think, the testimony of Judge Rymer that that—that the reversal rates were irrelevant to the proposals being made by the White Commission. So that is point one.

Point two is the faulty notion that greater regionalism will somehow advance federalism. Each circuit court implements congressional policy and Supreme Court direction. I know of no jurisprudence, no judicial philosophy that suggests that the national legal function is somehow better attained through smaller and more sharply regional courts. To the contrary, it seems to me just the opposite is true. It seems from what I have heard that a good deal of the impetus for the proposal that has been made in the White Commission report is that greater consistency would somehow emerge from this tripartite division; but in reality, the proposed legislation would not only exacerbate but legitimize inconsistency. That has been explained by Professor Hellman and others, but the basic point is, each division would under the proposal have decisional autonomy.

Today each three-judge panel issues opinions that are binding circuit-wide. Secondly, each judge in the circuit today participates through internal debate and vote in the decisions to accept or reject en banc treatment. Under the legislation, that kind of participation in whether to accept or reject en banc treatment would only take place on a divisional basis with those judges in each separate divi-

sion; and as the Assistant Attorney General has pointed out, matters of exceptional, importance which now receive en banc treatment circuit-wide, would only be entitled to divisional en banc treatment, not circuit-wide review. That is point two.

Point three: Seemingly the premise of the White Commission report is that greater efficiency and effectiveness would be attained through the tripartite approach; but in practice, for us litigants and lawyers—as well as, I think, for the government—the proposed imposition of regional divisions is sure to add, not subtract, to complexities and costs. From the government perspective, staffing and offices of the separate divisions wouldn't be necessarily duplicative and expanded.

The splitting to achieve efficiency is not only counterintuitive, but at odds with the private sector mergers now being justified by size, efficiencies, and the elimination of overlapping employees and functions. From the user perspective, my perspective, the absurdity seems obvious. Conducting California site-wide business under the jurisdiction of two different Federal court divisions, each with decisional autonomy, but for square conflicts that are resolved, and the notion that a litigant in the West would have three levels of Federal decision-making to get themselves through the district court. The regional adjudicated division and the circuit division is sure to add inefficiency, time delay, and expense to both business and litigation.

I thank the committee for hearing me out.

Mr. COBLE. Thank you, Mr. Olson.

[The prepared statement of Mr. Olson follows:]

PREPARED STATEMENT OF RONALD L. OLSON, ESQ., MUNGER, TOLLES & OLSON

SUMMARY

The White Commission Report is right on the mark in its conclusion that the Ninth Circuit should not be split, and the Commission has correctly concluded that the Circuit is neither inefficient nor dysfunctional. My experience as a litigator confirms this. Accordingly, there is no reason to tinker with this well-functioning Circuit.

Nonetheless, the Commission has recommended a "divisional structure," in which the Circuit would, for all intents and purposes, be split three ways. The recommendation rests primarily on two bases, neither of which is a proper, let alone compelling, reason to interfere with the workings of one of this Country's most respected courts. The first basis is little more than a sense of nostalgia for a time when courts were smaller. The second, unspoken, basis appears to be a concession to those who would have our federal court system reflect "regional" interests, a notion that undermines authority of the federal court system by suggesting that federal judges are in fact guided by the varying winds of regional interests, rather than by the Constitution and federal law.

Moreover, the divisional system will exacerbate the very problems it seeks to remedy. For instance, in the face of a perception that the Ninth Circuit is bad at preventing and fixing intracircuit conflicts, the divisional system explicitly permits the divisions to *ignore* one another's holdings. In the face of the perception that the Ninth Circuit is slow to process appeals, the Commission recommends adding a new layer of review in the name of the "Circuit Division," which, as a supra-divisional division, would resolve conflicts between the three divisions. This additional procedural layer—involving only a subset of the total Circuit judges—will delay the ultimate resolution of appeals, increase the cost of litigating an appeal to finality, and preclude Circuit-wide participation in the process of harmonizing Circuit law.

Finally, the proposed legislation will preempt the Circuit—a clear standout with a long history of innovative and creative Court management—from fixing its own problems. Even now, for instance, the Circuit, through an effort led by Senior Judge David Thompson, is evaluating the Court's en banc procedures, monitoring of panel

decisions and disposition times, among other issues. The Court has, and will continue, to revitalize itself without interference.

INTRODUCTION

Thank you for the opportunity to add my views to the thoughtful debate regarding the workings of the Ninth Circuit, the findings and recommendations of the White Commission, and the Ninth Circuit Reorganization Act.

By way of introduction, I am a Los Angeles lawyer who has for thirty-three years practiced before federal courts throughout the United States. I regularly argue cases before the Ninth Circuit and work with the judges to improve it. I believe the Ninth Circuit to be among the most vital, effective, and innovative courts in which I have practiced, and fear that the changes now proposed will take the Circuit in exactly the wrong direction. I previously submitted prepared testimony to the White Commission, and comments to the White Commission's draft report, and am pleased that the Commission has recognized the wisdom in retaining the Ninth Circuit as single federal Circuit Court for the Western states. I appreciate the invitation to testify again, this time before this Senate subcommittee, and offer the following testimony in opposition to the Commission's recommendation that the Court be reorganized into three semi-autonomous divisions.

1. The White Commission Itself Acknowledged That The Ninth Circuit Is Functioning Well And Should Not Be Split; Therefore, There Is No Basis To Impose The New, Complex Divisional Structure On The Well-Functioning Court.

As a lawyer, I place the burden of persuasion on those who seek to change the current structure and operation of the Circuit. Like the states that comprise individual circuits, the boundaries of each circuit are best explained by historical facts that may have less relevance today. However, subsequent history and tradition and the opportunity to share the collective experience of different circuit sizes and management tools are powerful reasons against redrawing circuit boundaries or meddling in their internal organization, absent a compelling reason to do so.

I am not alone in placing the burden on those who ask Congress so fundamentally to alter the internal structure and operations of the Ninth Circuit. The Committee on Long Range Planning of the Judicial Conference of the United States, for instance, has concluded:

Circuit restructuring should occur only if compelling empirical evidence demonstrates adjudicative or administrative dysfunction in a court so that it cannot continue to deliver quality justice and coherent, consistent circuit law in the face of an increasing caseload.

Proposed Long Range Plan for the Federal Courts (1995).

Here, the White Commission Report itself makes the case for keeping things as they are:

Maintaining the court of appeals for the Ninth Circuit as currently aligned respects the character of the West as a distinct region. Having a single court interpret and apply federal law in the western United States, particularly the federal commercial and maritime laws that govern relations with the other nations on the Pacific Rim, is a strength of the circuit that should be maintained.

The Commission also concluded that splitting the Circuit is unnecessary: "We have reviewed all of the available objective data routinely used in court administration to measure the performance and efficacy of the federal appellate courts, but we cannot say that the statistical criteria tip decisively in one direction or the other." In other words, those seeking to change the current operation of the Circuit, according to the Commission itself, have failed to meet their burden to show that change is needed.

The Commission has correctly concluded that the Circuit is neither inefficient nor dysfunctional. My experience as a litigator confirms this. Accordingly, there is no reason to tinker with this well-functioning Circuit.

2. The Proposed Divisional Structure Improperly Concedes That Federal Court Should Be Structured To Secure Regional Representation And To Reflect Regional Interests.

Despite the fact that the Commission finds no compelling data justifying splitting the Circuit, it nevertheless proposes a "divisional structure," which, for all intents and purposes, does just that. The proposal rests in part on the rather quaint notion that the Circuit is "just too big," and that balkanizing the Circuit into divisions will

foster "collegiality" of the judges, thereby increasing the quality of decisionmaking.¹ Suffice it to say that this idea that Circuits have a natural size limit is unprincipled, sentimental, and fails to face the inevitable consequences of ever increasing case-loads and expanding federal jurisdiction. Like it or not, I predict that the Circuits of the future will look more and more like the Ninth Circuit of today, regardless of judges' and litigants' nostalgia for the smaller courts of years past.²

More troubling, however, is the concession implicit in the proposed "regional" divisions that litigants from certain regions or states are entitled to have their federal cases heard by local judges. It is no secret that the most recent efforts to restructure the Circuit have been launched by politicians who believe that Ninth Circuit judges have issued opinions detrimental to local interests. One Senator, for instance, has stated that the Ninth Circuit is "dominated by California judges and California judicial philosophy. . . . [T]he interests of the Northwest cannot be fully appreciated or addressed from a California perspective." Putting aside the threshold question of, for example, what constitutes a "California perspective," I am terribly concerned that these regionalist notions have insinuated themselves into the public debate about the working of the Circuit.

The authority we collectively confer on federal judges rests largely upon the premise the judges are to be guided by the Constitution and federal law, not by the varying winds of regional interests. Indeed, the Constitution in its wisdom provides that Article Three judges be appointed for life, in significant part to protect against the pressures of local, state, or regional interests. The federal circuit courts are superimposed upon the fifty states and numerous territories in the face of their vastly differing economies, histories, and cultures. Despite these local differences, however, we expect that the Constitution, as well as the Securities and Exchange Act, the Endangered Species Act, ERISA, RICO, and even the Federal Rules of Civil Procedure and Federal Sentencing Guidelines, all mean the same, and will be enforced with equal vigor, whether the judge interpreting these authorities sits in Guam, Texas, or Maine.

Any argument premised on the assumption that judges will *not* limit the bases of their decisionmaking to the law and record before them, but instead will decide cases with an eye to local interests, should not be countenanced. I fear, however, that the proposed divisional structure, *sub silentio*, acknowledges the validity of these arguments. The majority of judges assigned to a division must be "residents" of the territory encompassed by that division, and their decisions would bind only the districts within that division. Similarly, membership in the Circuit Division, which resolves conflicts among the divisions, is to be determined by lot, with *equal numbers* of judges from each of the Divisions.

In short, the proposal seems designed at every level to ensure *regional* representation in decisionmaking affecting litigants from that region. The result is not only cumbersome, it sets a sorry precedent, and by its very structure encourages judges of the Circuit to look out for their own when deciding issues of law. The judges of the federal circuits, however, are not, and are not intended to be, representative of their constituents in the same manner as are, for instance, members of the Senate. There is no reason to concede (to the contrary, we are bound to resist) any suggestion that litigants are entitled to be heard by a federal judge hailing from the same region. Because the proposed divisional structure institutionalizes a norm—regionalism—that is anathema to our system of federal courts, I oppose it.

²The Commission presumably relied on testimony such as that submitted by the Honorable Edward Becker of the Third Circuit, whom I admire greatly, and who testified:

[W]hen a circuit gets so large that an individual judge cannot truly know the law of his or her circuit . . . the circuit is too large and must be split. . . . I cannot imagine a judge in a circuit as large as the Ninth, with its staggering volume of opinions, being able to do what we in the Third Circuit do. . . . If this assumption is correct, the Ninth Circuit, according to my rough rule of thumb, needs to be split.

Letter from Hon. Edward R. Becker to the Honorables Byron R. White, Gilbert S. Merritt, Pamela Ann Rymmer, and William D. Browning, and N. Lee Cooper, Esq. of January 26, 1998.

³The Honorable J. Clifford Wallace, former Chief Judge of the Ninth Circuit, wisely acknowledged in testimony submitted to the Commission that the life of a judge on a small court may well be more enjoyable than it is on a large court. However, "my preference to live in a small town or to work in a smaller court is not relevant. Federal courts do not exist to serve the preference of federal judges. . . . The real question, then, is not what size of court judges prefer, but which size will work best for the future."

3. *The Proposed Divisional Structure Moves The Court In The Wrong Direction By Adding Unnecessary Layers of Review, Precluding Circuit-Wide Review Of Published Decisions, And Encouraging Intra-Circuit Conflicts.*

Even if I were to assume for the sake of argument that the Ninth Circuit had problems that needed fixing, I cannot think of a worse fix than the one proposed by the White Commission. The divisional system will exacerbate the very problems it seeks to remedy. In short, it moves the Circuit in exactly the *wrong* direction.

For instance, in the face of a perception that the Ninth Circuit is bad at preventing and resolving intracircuit conflicts, the divisional system explicitly permits the courts in one division to *ignore* the holdings of a sister division.

Once a regional division has spoken on a matter of law, the trial courts over which it has jurisdiction will be bound by that decision, regardless of decisions issued in other divisions.

The Commission makes this proposal in the face of its own conclusion that "the circuit's court of appeals should continue to provide the West a single body of decisional law"¹ The system, on its face, institutionalizes complacency for, if not outright encourages, intra-circuit conflict.

Nor does the Commission's proposed creation of the "Circuit Division," solve the problem. The Circuit Division would not be empowered, either of its own accord or at the request of a litigant, to review division decisions that are plain wrong, or that raise unusually important questions. "[I]ts only authority would be to resolve square interdivisional conflicts," whatever those are, and even then, its jurisdiction to resolve such conflicts is discretionary.

Nor can a judge in one division request an en banc hearing of an opinion issued by a panel of another division. This aspect of the structure would create a terrible loss. Currently, all judges of the Circuit, including Senior judges, participate in what I am told are vigorous, frank, and detailed debates as to whether a particular case should be reheard en banc.³ The divisional structure would severely limit participation in this crucial process of policing panel decisions to maintain uniformity, and in the equally crucial process of providing en banc consideration of matters of great importance.⁴

Moreover, the Circuit Division adds a new layer of review, which is bound to delay the ultimate resolution of appeals. Not only will this new layer inevitably increase the average time from docketing to termination (one of the grounds on which "efficiency" is judged), it also will add to the cost of prosecuting an appeal in the Ninth Circuit. The Circuit Division will not "resolve" conflicts in a vacuum. Rather, as is the case with most other legal processes, litigants must pay their lawyers to act, to do additional research, draft additional briefs, file additional copies of the record, and request that the Circuit Division resolve the conflict. This is expensive. Prosecuting an appeal already is a remarkably expensive proposition for a great number of litigants who find themselves before the Ninth Circuit—Social Security claimants, persons prosecuting immigration appeals, criminal defendants, and even the typical small business owner in federal court on a contract claim. The creation of any additional hurdles necessarily limits access to justice for these litigants, at least incrementally, as they face the stark reality of the increasing cost of obtaining review. Absent a compelling reason to add additional procedures, layers of review, and the concomitant costs, I cannot support any proposal that does so.

Finally, the divisional approach divides the state of California into separate adjudicative divisions. This is a singularly bad idea, as recognized by, among others Senator Diane Feinstein, former Governor Pete Wilson, and current Governor Gray Davis. As former Governor Pete Wilson has aptly observed, dividing the state will exacerbate problems of forum shopping in any number of cases, including the numerous challenges to state initiatives that often find their way into federal court in my home state. And Governor Gray Davis has stated that the proposed division of California is at odds with the state's fundamental policy favoring integration and consistency between Northern and Southern California. Not even the Commission can assert that splitting the state will yield any benefits, only that it was the best division it could come up with given the demographics of the West and population

⁴ Twenty-four of the associates at my law firm served as law clerks to Ninth Circuit judges.

⁵ I have witnessed in my own practice the value of en banc review in matters of great importance. I formerly represented the Republic of the Philippines in an action against the Marcos family. On appeal, after the three-judge panel issued its opinion, the case went en banc, not because of any "square conflict," but, I presume, simply because the case raised important issues of law. I believe that Circuit judges throughout the Circuit, and litigants, should retain this important right to seek en banc review in such circumstances.

of California. Again, this element of the proposed divisional structure simply takes the Court in the wrong direction.

4. The Ninth Circuit Has A Long History Of Revitalizing Itself And Improving The Quality Of Justice It Delivers; Congress Should Permit It To Continue To Regulate Itself Without Outside Interference.

As the Commission itself recognizes, efforts to split the Circuit date back as far as 1891. Despite this long history of criticism, even the Commission acknowledges that "[t]here is no persuasive evidence that the Ninth Circuit (or any other circuit, for that matter) is not working effectively." The question, especially in light of the century-old criticism that the Circuit is too big, is: how has the Circuit done so well? The answer, I think, is that the Ninth Circuit is at the forefront of innovation in terms of Court management. The Ninth Circuit is a test case for the future, a sort of pilot program, and I fear that mandating the restrictive divisional approach will truncate creative management and innovation of which the Court has long shown itself capable.

As I previously have testified, the Ninth Circuit can, and has, served as a testing ground for numerous techniques in court management. Applying the maxim that innovation follows need, we should allow the Ninth Circuit, including its large, and tremendously knowledgeable and professional clerk's office—to continue to operate without re-definition, and to encourage it to share its experiences and innovations with other circuit courts.

The Ninth Circuit clerk's office, with its staff of research attorneys, is among the smartest and most advanced in the county. In order to handle the Circuit's burgeoning caseload, the clerk's office has developed a number of procedures aimed at preventing the very parade of horrors the proponents of the divisional approach fear (mistakenly) are already upon us. This phenomenon is not particularly remarkable: when an institution increases in size, it often develops management tools that increase efficiency and effectiveness. A few examples of these administrative innovations should suffice.

The Ninth Circuit employs a staff of research attorneys who evaluate appeals as soon as they have been docketed. They read the briefs and assign the appeal a "weight" from one to ten, based on the apparent complexity of the issues and the record. This process assists the clerk's office in distributing roughly equal quantities of work to the various three judge panels sitting for hearings in any given month.

The research attorneys also code the issues presented by a particular appeal, and track the cases raising the issues through a computerized tracking system. This allows the court to group appeals raising the same or similar issues and sends those grouped appeals to the same three judge panel. In this way, a single panel gains expertise in the particular issue and sees it in a variety of factual contexts, which can lead to better reasoned discussion of the implications of deciding the issue one way or another. When the clerk's office is unable to group cases with similar issues together, the office notifies panels that a different panel is also deciding a case that raises the same issue. This allows panels to communicate with one another so as to avoid the possibility that separate panels might simultaneously, or nearly simultaneously, decide the same issue differently.

The Ninth Circuit is also a leader among courts in adopting and integrating advanced communication techniques.⁶ The judges' chambers, for example, have long been connected to one another through e-mail and other document sharing capabilities. The court even utilizes video conferencing. I, for one, have participated in a video conference with circuit executives. I was told video conferencing is used regularly among judges and among judges and the clerk's office. Finally, communication with the bar is also innovative and effective. Judges throughout the Circuit regularly make themselves available for attorney exchanges and education. As an example of innovative communication, the court produced a video for practitioners that is designed to guide them through the twists and turns of appellate procedure. This video, widely distributed at low cost, reaches an audience far beyond the typical educational program.

Indeed, even today, the Court is engaged in an aggressive self-evaluation, the purpose of which is to study and make recommendations relating to many of the same issues examined by the White Commission, including the en banc process, monitoring of panel opinions, regional considerations, and disposition times, among other issues. Senior Judge David Thompson of San Diego is heading up this ten-member Evaluation Committee, composed of district and circuit judges, and members of the

⁶ These communication techniques take some wind out of the sails of those who presume that geographic breadth of the circuit prevents meaningful and frequent exchange between judges.

bar and the academy. The Committee is expected to submit its final report within the next few months.

The purpose of my mentioning this Evaluation Committee is not to suggest that Congress should delay action until it hears from that committee. Rather, it is to emphasize that the Ninth Circuit has shown itself time and time again to be adept at self-evaluation and self-criticism, even while laboring under the shadow of Congressional intervention. And, moreover, its efforts have borne fruit, yielding a modern, efficient, innovative, and responsive court that is well prepared to face the future.

CONCLUSION

The Ninth Circuit works well and provides high quality justice to all the citizens of the West. The White Commission has acknowledged as much. To the extent that challenges remain, the Court has shown itself more than capable of meeting them head on, as it always has. The proposal to impose an unwieldy, untested, and unpopular divisional structure takes the Court in exactly the *wrong* direction, and exacerbates the very problems it purports to fix. I urge you to reject the proposals set forth in the White Commission as they relate to the Ninth Circuit, and to oppose The Federal Ninth Circuit Restructuring Act of 1999.

Mr. COBLE. Mr. LaForge.

STATEMENT OF WILLIAM N. LaFORGE, CHAIRMAN, COMMITTEE ON GOVERNMENT RELATIONS, FEDERAL BAR ASSOCIATION

Mr. LaFORGE. Thank you, Mr. Chairman, members of the subcommittee. The Federal Bar Association has a major stake in the issues articulated in the White Commission report and before the subcommittee today because we are the only nationwide bar association with a primary focus on the practice of Federal law.

The Federal Bar Association's 15,000 members nationwide have a direct stake in the well-being and independence and integrity of the Federal judiciary. At the same time, our 2,700 members practicing in the ninth circuit have direct experience with the structure, the case load, the adjudication, and the operation of the ninth circuit, as well as with that circuit's own continuing efforts to address its problems.

The Federal Bar Association's position on the ninth circuit per se and on the White Commission report generally was developed over a period of thorough consideration, including testimony before the Commission itself. Today, I am pleased to represent the Federal Bar's National President, Adrienne Berry of Kentucky, and our membership across the country in highlighting very briefly three basic areas of concern: first, the reorganization of the court; number two, the filling of judicial vacancies; and third, the federalization of State crimes.

The Federal Bar Association supports the recommendation of the White Commission against splitting the ninth circuit into two or more circuits. Instead of a split, the Federal Bar favors increased innovation and experimentation by the ninth circuit to arrive at solutions that advance the court's efficiency and effectiveness, as just discussed. As the Commission's report acknowledges, the ninth circuit long has been a crucible for experimentation in management and disposition of a growing Federal court case load. In fact, many of the innovations employed by the ninth circuit in the past have proven successful and, thus, are proven mechanisms for other circuits to implement as they encounter problems associated with growth of case load and court size.

However, the Federal Bar Association, Mr. Chairman, believes that the Commission's proposed division of the circuit into three semiautonomous adjudicative units and corresponding en banc revisions are not in the best interest of the circuit or its adjudicatory processes, litigants appearing before it, or the interest of justice generally. That remedy is not likely to increase the uniform application of Federal law certainly within California. It is not likely to make the law more predictable nor speed the court's decision-making. And it will not create cost savings for litigants.

It is not likely to lead to fewer conflicts in decisional law nor ease the way of the ninth circuit's case load, and it will not enhance or simplify litigation. Indeed, Mr. Chairman, the proposal, we think, in many respects would accomplish just the opposite effect by haplessly layering, dividing and isolating.

And a special comment on the politics of this issue. Splitting the ninth circuit is inappropriate in the view of the Federal Bar Association, both legislatively and adjudicatively, if the purpose is to remedy the problem of political or ideological differences with or disapproval of the opinions emanating from the ninth circuit. Altering basic judicial structure on political grounds is both shortsighted and misguided and would, in the opinion of the Federal Bar, violate the basic tenets of judicial independence and integrity. To those in Congress who may advance or even hide behind a political motivation on this issue, we would say, beware of that for which you ask, because the political winds are bound to change.

To the extent that Congress may feel compelled legislatively to ensure continuing focus on reform within the circuit, the Federal Bar recommends that Congress enact legislation that will authorize the ninth circuit to implement sensible initiatives, including reform of the en banc process as suggested by Senator Feinstein, all in an effort to determine in practice what does work and what does not. Rather than pass legislation that would essentially pour concrete around a new structure that may or may not prove desirable with experience, Congress should permit, even charge, the ninth circuit to blaze the trail, through experiment and flexibility, and create a model to be used by other circuits in the future.

Finally, the Federal Bar Association believes that the best interests of both the ninth circuit and the entire Federal court system would be served well by increased congressional attention to two major concerns. First, as we commented before the White Commission, the prompt filling of judicial vacancies is critical to a healthy Federal judiciary. Mr. Chairman, no structural innovation will work if excessive vacancies continue. While you as House members do not play an institutional role in advice and consent, your State and regional delegation influence and especially your political party input are sure ways that you can help the process.

And finally, regarding the problem with federalization of State crimes, the Federal Bar Association recommends that Congress require of itself the generation of a judicial impact statement before the passage of any further criminal legislation. Viewing your legislative actions through a prism such as this would enable you to forecast and guard against unnecessary additional case loads and costs that new legislation may create. Therefore, we ask that this subcommittee and the full Judiciary Committee implement a judi-

cial impact review and analysis procedure before reporting out your next piece of criminal legislation.

Thank you, Mr. Chairman, for affording the Federal Bar Association this opportunity to appear and testify.

Mr. COBLE. Thank you, Mr. LaForge.

[The prepared statement of Mr. LaForge follows:]

PREPARED STATEMENT OF WILLIAM N. LAFORGE, CHAIRMAN, COMMITTEE ON
GOVERNMENT RELATIONS, FEDERAL BAR ASSOCIATION

The Federal Bar Association is vitally interested in the proposed reorganization of the Court of Appeals for the Ninth Circuit because it is the only national bar association that has as its primary focus the practice of federal law. Of the 15,000 attorneys in private and government practice across the nation who belong to the FBA, over 2,700 practice in the Ninth Circuit. With such a regional and national constituency, the FBA has its feet in both camps—as the beneficiary of direct experience with the structure and operation of the Ninth Circuit, and as a stakeholder in the well-being of the entire federal court structure and the uniform administration of justice.

The FBA applauds the recommendation of the Commission on Structural Alternatives for the Federal Courts of Appeals (White Commission) against splitting the Ninth Circuit into two or more circuits. In our prior comments and testimony before the White Commission, the FBA strongly argued against such a split. Instead the FBA favors increased innovation and experimentation by the Ninth Circuit to arrive at solutions that advance the court's efficiency and effectiveness. As the White Commission Report acknowledges, the Ninth Circuit long has been a crucible for experimentation in management and disposition of a growing federal court caseload. Many of the innovations employed by the Ninth Circuit in the past have proven successful, and thus, are proven mechanisms for other circuits to implement as they encounter problems associated with growth of caseload and court size.

The FBA believes that the White Commission's proposed division of the Circuit into three semi-autonomous adjudicative units, and corresponding en banc revision, is not in the best interests of the Circuit, its adjudicatory processes, litigants appearing before it, and the interests of justice. It is not likely to increase the uniform application of federal law, and certainly not within the state of California. It is not likely to make the law more predictable. It is not likely to speed the court's decision-making or create cost-savings for litigants. It is not likely to lead to fewer conflicts in decisional law. It is not likely to enhance the integrity of or the respect for the federal courts. Furthermore, it is not likely to ease the weight of the Ninth Circuit's caseload, nor enhance or simplify litigation. Indeed, the proposal would in many respects accomplish the contrary. The structure and processes of a court are not its ends. They are the means to the end of serving the administration of justice. Rather than passing structure-oriented legislation that may or may not prove desirable with experience, the FBA recommends that Congress encourage and charge the Ninth Circuit to proceed with continued innovation and flexibility.

The FBA believes that the well-being of the Ninth Circuit and the federal court system are best served by increased Congressional attention to two other concerns: the assurance of timely filling of judicial vacancies; and the reversal of the trend to federalize crimes in areas traditionally reserved to the states. Both of these concerns relate directly to the capacity of courts to render justice fairly and swiftly. Indeed, we recommend that Congress, prior to the passage of any further federal criminal legislation, procedurally require of itself the generation of a "judicial impact statement" that projects the additional caseload and costs that such legislation may create.

Good afternoon, Mr. Chairman and Members of the Subcommittee. The Federal Bar Association (FBA) thanks the House Judiciary Committee, Subcommittee on Courts and Intellectual Property, for the opportunity to offer comments concerning the Final Report of the Commission on Structural Alternatives for the Federal Courts of Appeals (White Commission). We testified before the White Commission at its San Francisco hearings in May, 1998, and we offered written comments to the Commission concerning its draft report last fall.

The FBA remains vitally interested in this matter because we are the only nationwide bar association that has, as its primary focus, the practice of federal law. Of our 15,000 members across the United States, over 2,700 of them practice in the Ninth Circuit. With those demographics, the FBA has its feet in both camps. We are the beneficiary of direct experience with the structure, caseload, adjudication and operation of the Ninth Circuit and of that Circuit's own continuing efforts to

address its circumstances. At the same time, we occupy a perspective that necessarily embraces the well-being of the entire Federal Court system. In that capacity, we appreciate the opportunity to continue to help shape solutions to problems associated with growth of caseload management and adjudication as they affect the due administration of justice in the federal appellate judiciary.

At the outset, we will address the report's proposals concerning division of the Ninth Circuit and, in the future, other circuits as they continue to grow. We also propose that Congress take certain broad actions, apart from structural initiatives, that we believe will reduce the stress on the circuit courts, regardless of their structure.

I. DIVISION OF THE NINTH CIRCUIT

The FBA applauds the Commission's recommendation against splitting the Ninth Circuit into two or more circuits. Both in our written statement and in our testimony before the Commission at its San Francisco hearing in May 1998, the Federal Bar Association—like the state officials, the U.S. Department of Justice, the American Bar Association, and most of the state and local bar associations that have addressed the issue—strongly argued against such a split.

Although eschewing splitting the Ninth Circuit, the Commission report proposes adjudicative division of the circuit, with specific and detailed suggestions for implementing that division, including a "circuit division" for resolving inter-division conflicts and a revised *en banc* procedure. As well, the report recommends certain experimental efforts, such as two-judge panels and district court appellate panels, to relieve decisional pressure.

As the report acknowledges, the Ninth Circuit long has been a crucible for experimentation in management and disposition of the growing federal court caseload. Many of the innovations of the Ninth Circuit have proven successful, and thus, are proven mechanisms for other circuits to implement as they encounter problems associated with growth of caseload and court size.

Indeed, even as these hearings are held, the Ninth Circuit is reexamining many of its procedures in order to experiment with innovations that might lead to greater efficiency and effectiveness. In order to do so, the Circuit has constituted a 10-member Evaluation Committee that is chaired by Senior Circuit Judge David R. Thompson and includes representatives from that court, its district courts, the bar, and academia. The committee will examine the Circuit's limited *en banc* process, the monitoring of panel opinions, regional considerations, and disposition times, among other issues.

The White Commission's report proposes several creative structural approaches and additional mechanisms for grappling with many of these same issues. They seem to serve three overarching principles that the Commission has concluded are desirable in conceiving a circuit structure and operation.

- First, an appeal should be decided largely by circuit judges who reside in the region from which the appeal emanates.
- Second, the judges who reside in a particular region of the circuit, where there are relatively homogenous interests and culture, are best able to work together to develop the body of law particularly applicable to that region.
- Finally, a smaller body of judges, all from a particular region of the circuit, would be better able to monitor the panel decisions from within that region and to adopt procedures for doing so.

In our view, however, the proposals that are designed to implement these principles create issues that suggest caution and flexibility. For instance, it well might be that legal issues of unique regional concern within a circuit can be resolved more satisfactorily by judges from within that region, though that would not seem to be a given. The much larger portion of appellate issues and caseload, however, are not regionally unique. Experience with the specific division structure proposed in the report might well reflect some achievement of greater sensitivity in resolution of essentially regional issues. At the same time, experience also might demonstrate that the price of achieving this—occasioned by lack of inter-division *stare decisis* and of meaningful *en banc* review—is a significant compromise of jurisprudential integrity of the circuit as an institutional structure.

In an effort, at least in part, to accommodate regionalism, the White Commission's report, and now the implementing bill in the Senate, S.253, propose a system that is convoluted and unwieldy. A circuit structure of multiple, semi-autonomous adjudicative units with their separate *en banc* processes and an appellate division to resolve potential "square conflicts" actually seems to go in the wrong direction.

A sound proposal for reform should countenance swifter administration of justice, uniform decisions and application of federal law, fewer conflicts, less cost to the litigants, and increased predictability. Splitting the decisional function within the circuit—with little intra-circuit accountability for uniformity and precedent and with a concomitant layering of additional intra-circuit review in an effort, though likely futile, to correct these flaws—does none of this.

We will not burden these comments with exhaustive discussion of these and other concerns. Neither will we reiterate the numerous significant criticisms of the division approach that others—including the large majority of chief judges of the other circuits—have addressed. Suffice to say at this point that, at a minimum, they raise yellow flags that signal caution.

The White Commission report offers Congress a vision that looks beyond the present and well into the future. Such a vision, however, must recognize and reflect on the risk of significant adverse harm, not just the possibility of improvement in certain areas. Congress must take care to acknowledge that, as creative and positive as any particular scheme or structure might seem to be, only experience will prove the point.

Based on this realization, we urge that Congress build upon the Ninth Circuit's tradition as a crucible for change and experimentation and transform it into a laboratory that will illuminate for itself and other circuits the rocky roads, as well as the smooth and promising ones. Congressional focus on the Ninth Circuit over the last five years seems to have provided appropriate stimulus for that circuit to be ever bolder in its rulemaking to respond to the need for sound reform. These continuing efforts and the work of the Evaluation Committee should be given a fair opportunity to succeed before a potentially wrenching structural approach is embraced.

To the extent that Congress may feel compelled to legislatively ensure continuing focus on reform within the circuit, we suggest that Congress enact legislation that will authorize the Ninth Circuit to implement sensible initiatives, including reform of the *en banc* process, in an effort to determine, in practice, what does and does not work.

The structure and processes of a court are not the ends. They are the means to the end of serving the principles identified by the White Commission that are implicit in its recommendations. Rather than pass legislation that would pour concrete around a new structure that may or may not prove desirable with experience, the FBA recommends that Congress permit—even charge—the Ninth Circuit to blaze the trail through experiment and flexibility. In this manner, the judges and practitioners of the Ninth Circuit can discover the most efficient and effective appellate structure and procedure, for the sake not just of the Ninth Circuit but of those that follow. Make no mistake—it is the future of the entire federal judiciary and the citizens that it serves that is at stake.

II. OTHER RELIEF ON CIRCUIT STRESS

A. Judicial Vacancies

In our written and oral presentations to the White Commission, the Federal Bar Association urged the Commission to note for the attention of the Congress and the President the vital importance to the health of the federal judiciary and the well-being of all our citizens in promptly filling judicial vacancies. No structural innovation will work if judges are not appointed to already-existing, Congressionally approved judicial seats (to say nothing of reasonable expansion of those seats on certain courts).

Although the House of Representatives institutionally does not play a role in that process, we recognize that Members of this chamber provide important input into both the nomination and confirmation of individual judges. In that context, we respectfully urge that Members of the House exert all available influence to ensure timely filling of judicial vacancies. Empty seats on the bench ill serve our Nation just as surely as vacant seats in the Congress.

B. Federalization of State Crimes

Additionally, in our testimony before the White Commission, the Federal Bar Association discussed with the Commission the importance of focusing attention on the impact on the judiciary of the proliferation of new federal criminal statutes. Surely, there are appropriate occasions for federalization of a crime—occasions in which a federal statute would not merely duplicate a state statute, but where some additional aspect makes federal treatment appropriate. But crimes that adequately are addressed in state courts do not belong in federal courts.

In the course of considering the issues involved in the White Commission's report, we urge Congress to acknowledge the substantial impact that its actions in this regard have on federal court caseloads. Before Congress passes another single new criminal statute, we urge Congress to require of itself a "judicial impact statement" that projects the additional caseload and costs that such legislation will create.

CONCLUSION

The Federal Bar Association offers these comments and suggestions in the spirit of assisting Congress in grappling with these important questions. We remain available to be of service to the Subcommittee on this and other matters concerning the courts and the administration of justice. Thank you for the opportunity to appear before you today.

Mr. COBLE. Thanks to each of you.

One of my friends today said to me, do you really believe that second panel will comply with the 5-minute rule? I confidently responded in the affirmative, and I thank you all for making my confidence prophetic. You were very compliant.

Judge Rymer, you criticize circuit splitting as a device that tends to Balkanize Federal law. Would you not end up doing the same thing in the ninth if you configure into divisions?

Ms. RYMER. No, because it continues to be a single court of appeals, and the Circuit Division is there for the very purpose for maintaining uniformity where uniformity itself is the interest to be served. If you were, on the other hand, to split the circuit, there is no mechanism short of review by the United States Supreme Court to resolve conflicts between different circuits.

Mr. COBLE. Judge Wiggins, you and Professor Hellman—I believe I am correct in this assumption—embraced certain recommendations of the Hruska Commission which you no longer embrace today. I don't know that you outrightly rejected those, but I don't think you warmly embraced them.

Tell me, why the change of heart?

Judge, I will start with you.

Mr. WIGGINS. I am a little wiser. I have reflected for 25 years about the mistake I made agreeing to a division of California, and I changed my mind. It is a bad idea, and I apologize to you and to the country for recommending it 25 years ago.

Mr. COBLE. Everyone has a right to change his mind, Judge.

How about you, Professor?

Mr. HELLMAN. I am not actually quite so sure if it was a bad idea at the time, but at least a couple of things have changed in significant ways. One is that we now have some experience with the way a large court can work. The Hruska Commission made some assumptions that were very similar to the assumptions made by the White Commission, but we didn't have any large court at that time to test them against. So that was—that is one change.

The other is we thought we could preserve two courts of nine judges each, and you just can't do that now. So whether or not it was a good idea at the time, the assumptions, the premises, the facts that we based our recommendation on just are no longer operative.

Mr. COBLE. Thank you, sir.

The nonjudges, Mr. Olson and Mr. LaForge, we occasionally hear that some litigants believe they are not receiving adequate personal attention in the appellate courts. I believe that their ref-

erences are to unpublished opinions, maybe relies upon staff attorneys and the like.

To what extent is this criticism valid and what can we do to improve matters?

Mr. Olson, I will start with you.

Mr. OLSON. First of all, I don't think that criticism is valid with regard to the ninth circuit. Generally speaking, the ninth circuit has, in my opinion, been terribly responsive to the bar and the litigants. They have sought out the views of the bar and litigants for the very kinds of reform measures the chairman has mentioned and for others that have been talked about today.

With regard to the issue of the litigants' concern about getting the attention, our court operates with a degree of efficiency and effectiveness in part because of a very, very sophisticated clerk staff. In my opinion and my exposure around the country, the staff of the ninth circuit is among, if not the most sophisticated in the country; and they have done a great deal to bring matters not only to the attention of the judges, where relevant, but have done a lot to facilitate the interaction between litigants and the court itself.

Mr. COBLE. Do you concur, Mr. LaForge?

Mr. LAFORGE. I would concur and just simply say, Mr. Chairman, in the discussions within the Federal Bar Association, including our chapters in the ninth circuit, there does not seem to have been a problem. There has been no discussion of concern about treatment of lawyers in the practice, and there seems to be more concern about the structural change than there is treatment.

Mr. COBLE. Thank you, sir.

Mr. OLSON. May I add one further point? In the ninth circuit and almost without exception, we get oral argument and that can't be said of every circuit.

Mr. COBLE. Thank you, sir.

Final question for those who have not yet been questioned, and I will start with Judge Hug. Do any of you believe a desire—I am not suggesting this is the case, but I want to hear from you all. Do you believe that a desire to isolate California and its contributions to the ninth circuit case law is a driving force behind the movement to split the circuit?

Judge Hug.

Mr. HUG. Well, I don't really think so, no. I think probably the statements that have been made, feeling the circuit is too large, all that sort of thing really is the motivation. Earlier there it was some political motivation, but I don't think that is really the current motivation.

I just might add this, that our circuit with California and the smaller circuits is a great balance. The idea that we don't have one State that is dominant over the others, and the difference in the experience of various judges from various areas, I think, are extremely helpful in interpreting the Federal law.

Mr. COBLE. Judge O'Scannlain, even though the red light is on, I put the question to you before it came on. We will go ahead and do this.

Mr. O'SCANNLAIN. No, Mr. Chairman.

Mr. COBLE. Judge Browning?

Mr. BROWNING. No, Mr. Chairman.

Mr. COBLE. Judge Thompson?

Mr. THOMPSON. I think it was at one time. I think some people may still have that motivation. I think that those true statesmen amongst yourselves and in the Senate certainly do not.

Mr. COBLE. Thank you, sir. Ms. Acheson, do you have an opinion on this?

Ms. ACHESON. Just looking at the history—

Mr. COBLE. Pull that mike to you.

Ms. ACHESON. Okay. Let me see. Closest one. In looking at the extraordinary history that the White Commission report supplies and other works on the ninth circuit, I would say that the original and the still abiding push to deal with the ninth circuit and other large circuit issues does not appear to be politically motivated. I do think that the ninth circuit got sucked up to the judicial appointment wars of 1996, are 1997 which thankfully, knock on wood, we hope are over. But I think that was a matter of coincidence, not that there were great conspiracies on any side of the matter.

Mr. COBLE. And ladies and gentlemen, I reiterate, I was not implying that was the case but I had heard it. Thank you, ladies and gentlemen.

I am now pleased to recognize the gentleman from California, Mr. Berman.

Mr. BERMAN. Mr. Chairman, may I yield with a particular note of thanks to you, and Mr. Goodlatte and to our ranking member Mr. Conyers. I don't know if I would sit through nine witnesses on a panel and four legislators before that, as erudite and intelligent and persuasive as they were about a division of his circuit. And so I appreciate it very much. And I would yield to him for a few comments.

Mr. GOODLATTE. Would the gentleman yield?

Mr. CONYERS. Thanks, Howard, I won't take long but I did want to say hello to former Congressman Chuck Wiggins. I am glad that he is here. And Chief Judge Hug I am always happy to see again. I think this was a very balanced presentation here, Chairman Coble, because by including the bar association, and I understand that there are several bar associations that are resisting this split that has now been proposed, we are getting a pretty clear picture. And I want to commend those of you who are here who put this together. It just seems to me that until we have resolved the vacancy question first, this is premature.

I hope all of you can get a chance to mention what life is like with this shortage of judges that exists, and if anyone would like to comment on that, I would be happy to hear about it. Chief Judge.

Mr. HUG. I would comment on that. It has been very strenuous for the court. I have had to ask all of our active judges to take more cases than they normally would, and I have had wonderful cooperation from our senior judges, who have taken more than they ever would, but they can't keep it up. There is a burn-out factor. It has been very strenuous. If we were able to have our vacancies filled, we would have heard another 750 cases this last year or would have last year, and we would be completely up to date. There would be no question about there being any kind of delay on our court. It is just the fact that we don't have enough judges.

Mr. OLSON. I would just add an endorsement of your point of view, it is desperately needed. We need the judges on the ninth circuit, but if not for the good will of the senior judges who have kicked in, and I might also add the regular use of district court judges sitting on circuit court panels, we would be in a much more difficult position than we are today. Anything you can do to get those vacancies filled would be greatly appreciated by the users of the ninth circuit.

Mr. CONYERS. I think it is a critical question that would almost have to come before we really get moving in the direction that the White panel recommended. So I want to just go on record here today as saying that I am not sure that any kind of division within the ninth is going to be productive, certainly not until you not only get the seven judges or so you may be short, but they are also up and running for awhile. If there is still a need after that, we can come back and look at this. I probably would be more inclined to review it than I am now.

But I thank all of you for making it very clear on the record all of your views. I am particularly grateful to Ms. Acheson, who for the second day in a row has ended up in the House Judiciary Committee, an awful lot of preparation is always required for that. And I thank you all very much. Thanks, Howard, for letting me intervene early.

Mr. BERMAN. Well, I do have—I don't know that—I will let that be John's time and maybe somewhere along the line—

Mr. COBLE. We will shift to—I think the gentleman from Virginia wanted to ask. I will recognize you now, Bob, for 5 minutes. Then we will come back to Howard.

Mr. GOODLATTE. Thank you, Mr. Chairman. I was going to say to the gentlemen from California, speaking for the chairman and myself, Virginians and North Carolinians get along just fine with each other in the fourth circuit. We probably wouldn't sit through that hearing about splitting the fourth circuit either. But everybody loves a good fight, and so that is why we are here today.

I would like to ask you, Judge Rymer, to explain how you wind up with a Balkanization of the decision making when you have three divisions and you don't get it when you divide the circuits. I am in favor of having fewer conflicts at the Federal level and fewer disputes to be resolved at the Supreme Court amongst the various circuits, so increasing the number of circuits is not attractive to me. But I am concerned that we are effectively doing the same thing or maybe even compounding it by having three divisions that, as I understand it, are largely autonomous. Is there any hierarchy that would impose a decision or make consistent a decision by one division amongst the other two divisions?

Mr. RYMER. First of all, the Commission completely agreed with your premise, that further Balkanizing the circuits is not the way that the future should—the direction in which the circuit administration should move in the future.

Indeed, we think that the division approach provides maximum flexibility to deal with increased caseload and other demands in the future, because it is infinitely flexible. The reason it doesn't create Balkanization, even though each division is semi-autonomous and would be its own—it would develop and maintain the coherence of

its own body of law, is that there is a mechanism which we call the Circuit Division which, if there is conflict that matters to the Western part of the United States or along the Western seaboard, can resolve it. If you split circuits as the way to deal with caseload and judgeship needs, the only mechanism to resolve conflict is the United States Supreme Court.

So this keeps the conflict resolution mechanism within the same court as well as within the same circuit. It is not an extra layer of review because we have three levels of possible review now and we would have three possible layers of review under the divisional concept, panel rehearing now; there is limited en banc by only 11, or whether you have 13, it doesn't make any difference, it is a limited number of judges, and full court en banc—three possible levels of review now. Under the differential approach there would be three, panel rehearing, divisional en banc rehearing, and in those cases that need it, for uniformity of the law throughout the circuit, Circuit Division review. I should say this, also, in the last decade the ninth circuit.

Mr. GOODLATTE. Who would make that decision?

Mr. RYMER. The Circuit Division. Except the conflict would have to be created advisedly and I think we have to assume that the judges on the court would act reasonably and in good faith in how the Circuit Division plays out. Only 10 percent of the cases in the last decade on the Ninth Circuit Court of Appeals have gone en banc in order to resolve inconsistencies.

Mr. GOODLATTE. Judge Hug, would you like to comment on that? Do you agree with Judge Rymer's conclusion?

Mr. HUG. No, I don't, with all due respect to Judge Rymer, who I admire a great deal. I think that if you take the comparison, for example, to our full court en banc possibility, which has never been exercised, that would come after a limited en banc had interpreted the law of the whole circuit. What I take from our full court en banc, the fact that it has never been utilized is the fact representation of the court is fully willing to accept the limited en banc's interpretation of the law of the circuit. What I see as being created here are three autonomous divisions where the only thing that is going to ever be resolved is just direct square conflicts. I can see litigation over what is the direct square conflict.

Mr. GOODLATTE. It seems to me that you would have three groups of justices who would never have interaction. Right now they are all chosen at random for three-judge panels so they all interact with each other, is that correct?

Mr. HUG. They do.

Mr. GOODLATTE. And they all cover the entire Western part of the United States. You don't have the justices in the Northwest only sitting in the Northwest, they also go down to Arizona. If you create three divisions, it seems to me that a preference for precedential decisions in your own division is going to start taking hold and you are going to have the effect of having the equivalent of separate circuits. And it is going to be awfully hard to enforce that supposedly greater view when you never interact with those judges and you never even develop, I would think, a lesser respect for the decisions. As I would guess, ninth circuit justices, when they look at a decision of another circuit they say "that is interesting but

that is not the ninth circuit." Would either of you care to comment on that?

Mr. HUG. I think that is exactly right. That is what would occur were it viewed the same as another circuit's opinions would be viewed. Yes.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Mr. COBLE. Judge Browning, I understand you may be on a tight flight schedule. If you feel obliged to depart you may be excused or you can hang around. Your call.

Mr. BROWNING. I think I will try and make that flight if I may.

Mr. COBLE. All right.

Mr. BROWNING. Thank you, Mr. Chairman.

Mr. COBLE. All right. The gentleman from California for the second time, Mr. Berman. And by the way, thank you for the compliments you gave to the rest of us. This was not an ordeal at all. It wasn't all that arduous.

Mr. BERMAN. Thank you very much, Mr. Chairman. Had we had an opportunity or were it the custom to question the legislative panel, I was curious about why the tenth circuit doesn't want Arizona and why Professor Campbell feels a need to read every other faculty member's articles. But I had a chance to meet briefly with Judge O'Scannlain yesterday and listen to Judge Rymer today, and both of them, now that Judge Browning has left, all remaining people in favor of the White Commission discount totally the issue of reversals everyone has discounted. And I believe in the context of the business here that judicial philosophy and ideology has nothing to do about either the White Commission or the other people's opinions. The range of backgrounds in the room here is I think the best evidence of that.

Judge O'Scannlain in our conversation, we sort of repeated it here, you had said "there is a limit to how big you can get. I think we are about at it. But if we are not at it now, there is some point where we will be at it. Some of my colleagues on the bench do not think there is such a limit. But if there is a limit to the number of judges then there are other kinds of limits, conflicts. And I sat here in 1983 and 1984 and '85 and heard testimony about the compelling need for an intercircuit tribunal due to the proliferation of cases, the proliferation of conflicts which laid such a burden on the U.S. Supreme Court that they could never ever handle the problem. And all of a sudden it just disappeared. And in 14 years I have not heard another word about it.

So I mean, this is maybe more of a comment than a question, but this whole notion of these absolute limits, in a way there is something very appealing in what you say, how big can you get. I think Judge Rymer made some very interesting comments, which I want to look at more closely, in terms of the collegial dynamic in all of this. But it just reminded me of that.

Very quickly, Mr. Olson, because you commented on this, what is the rule—I understand why a district judge follows the precedent of a circuit panel decision, and why a circuit panel follows the Supreme Court decision, unless you are Tony Kline. But when a three-judge panel makes a decision and another case very similar comes up, what is that three-judge panel's obligation to rely on the first three-judge panel's decision in the same circuit? What is the

rule? I am sure they are informed by their thinking of the first panel but what is their obligation here?

Mr. OLSON. I am happy to comment on it although I know there is far greater expertise on this panel among the judges. The bottom line is my understanding is a three-judge panel decision is the law of the circuit. And any subsequent panel that faces those issues is also obligated to follow that decision.

Mr. BERMAN. For the first time and you get to rule.

Mr. OLSON. And in those instances where somebody believes that a result is not in line with a prior decision that has been made on the same subject matter, that is a basis for seeking en banc review from the ninth circuit as a whole.

And I am happy to defer to others who practice this every day.

Mr. THOMPSON. That is exactly right.

Mr. O'SCANNLAIN. Congressman, if I could just respond, that is quite accurate but I think you need to be sensitive to the normal temptations of the human psyche, to distinguish a case that has just been issued by another panel which perhaps may not necessarily meet your own expectations or desires. Unfortunately, that can happen and that probably, among other things, accounts for the fact that there are a lot of conflicts within our circuit today where these do not necessarily occur.

Mr. OLSON. If I may respond, it is the very point Judge O'Scannlain has made that gives me such great concern regarding the future Balkanization of our circuit in the event the proposal is adopted. As Representative Goodlatte has indicated, there will be a tendency on the part of decision makers and separate decisions or separate divisions to adopt their own point of view. And it won't be all that hard for them to avoid a, quote, square conflict, which as I understand the proposal, only square conflicts will receive the attention of the so-called circuit division to be resolved circuitwide. So the very tendency that Judge O'Scannlain speaks of is I think a real problem, and increasing problem, in the proposed tripartite division.

Mr. BERMAN. Mr. Chairman, my time has expired. Mr. LaForge earlier threw out the cautionary warning and while no one here on these panels I think is doing this or has their views based on philosophy or ideology, the fact is there have been some politicians who have had some positions based on ideology. It reminds me the last time that clearly happened was when Franklin Roosevelt had some ideological problems with the court. And I don't know here if a stitch in time can save 28. But in retrospect that may have been from my point of view the only mistake he ever made.

Mr. COBLE. I thank the gentleman. The gentlelady from California, Ms. Lofgren, is recognized for 5 minutes.

Ms. LOFGREN. Thank you, Mr. Chairman. Like my colleague, Mr. Berman, as a Californian, I have been riveted to the testimony of what I've heard today and what I've read. It is late in the day and so I have just a couple of questions and comments.

First, I would like to reiterate my appreciation to the entire panel for the very useful observations you have made. It is obvious that while some in the political arena may have once been motivated by politics thought on this issue, that you have approached

this in a very thoughtful, analytical way to come up with the best judgment you could possibly give us, and for that I am grateful.

A special thanks to Ms. Acheson for appearing again, the second day in a row. It is always useful to hear from you. Your testimony is very informative and very helpful. I was thinking about when my undergraduate colleagues went off to medical school; they were taught first to do no harm. I think that is what your testimony is as well, that we ought to proceed very cautiously. I think that is very good advice.

The comments made by Mr. Conyers about the judicial vacancy issue are quite pertinent. Once the vacancy issue is remedied, there may be other things that we will want to do. I was therefore quite interested in your comments about nonlegislative or structural changes that might be engaged in by the circuit that would improve whatever perceived deficiencies might need remedies, although I am also hearing to some extent this may be a solution in search of a problem in the view of some.

Pursuant to the sort of structural changes, I was struck by your testimony about some of the, for lack of a better word, demographic issues in California. We have the biggest State in the Union. It is growing enormously quickly and this is not going to change. No matter what we do with the court structure, that dynamic will continue to be true. Along with the sheer population changes within the State, I noticed on page 6 of your testimony that 50 percent of the nationwide caseload of circuit review of INS decisions is in the ninth circuit. I guess that makes sense when you think about the ninth circuit. But how much of an issue is that in terms of immigration caseload for the circuit. My perception has always been that although it is an issue, it is not a huge burden in terms of the actual hearing of these immigration cases.

Perhaps, Judge Hug, you have a concept of whether this is something we need to address in a different subcommittee or whether it is instead not an issue for the circuit?

Mr. HUG. We do have a large number of immigration cases but we are equipped to handle them if we had our full judgeship requirement filled. I think it is an area of the law that we deal a lot with. But I think we can do it very well if we just have the vacancies filled.

Ms. LOFGREN. That was always the perception I had. I am not going to unduly prolong this. I know that we will soon be called to a vote on the floor. I guess I am persuaded that probably the best thing for us to do is to get our vacancies filled, to encourage the circuit to take those steps that it is already beginning to take to deal with these issues and perhaps revisit this in 2 years or so and see how we are doing when we are up to strength completely.

And with that I yield back the time and thank you very much for having the non-ninth circuit members listen to all these wonderful experts on this subject.

Mr. COBLE. Thank you, Ms. Lofgren. The gentleman from Indiana I know has been in other matters this afternoon, but do you want to insert your oars into these judicial waters into the far West?

Mr. PEASE. Thank you, Mr. Chairman. If I learned anything in the practice of law, it is not to get between judges of different opin-

ions. And let me just say that I met with a number of the witnesses today; I am grateful for the time that they spent with me; and I look forward to working with you on the resolution.

Mr. COBLE. Thank you, sir. Ladies and gentlemen, the subcommittee appreciates very much you all coming in and the testimony that you have given and the contribution that you have made. This concludes the oversight hearing on the final report of the Commission on Structural Alternatives in the Federal Courts of Appeals, and the record will remain open for 1 week.

Thank you again, and the subcommittee stands adjourned.

[Whereupon, at 5:05 p.m., the subcommittee was adjourned.]

A P P E N D I X

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF DANIEL J. MEADOR, JAMES MONROE PROFESSOR OF LAW
EMERITUS, UNIVERSITY OF VIRGINIA

Mr. Chairman and members of the Subcommittee:

This subcommittee is to be highly commended for setting in motion a process that will lead, I fervently hope, to the enactment of the recommendations of the Congressionally created Commission on Structural Alternatives for the Federal Courts of Appeals (the Commission). It was my privilege to serve as Executive Director of the Commission. Accordingly, I hereby respectfully request that this statement be included in the record of this hearing.

Before my work with the Commission this past year, I had spent more than a quarter-century studying federal and state appellate courts and working with judges, the Department of Justice, other organizations, and Congressional committees to improve those courts. So I present this statement not solely from the standpoint of my service as the Commission's Executive Director—indeed I do not speak here for the Commission—but as one who has labored long in the appellate vineyards, always, to borrow from Lord Macaulay, to reform them in order to preserve them—to preserve them as vital organs of government under law in the face of continued docket growth and changing circumstances.

Pursuant to its Congressional mandate, the Commission spent ten months of intensive study of the courts of appeals, resulting in the most thorough and in-depth examination of the federal appellate system since the Hruska Commission report of 1973 (Commission on Revision of the Federal Court Appellate System). While no proposals for structuring the courts and adjusting their processes is perfect—there are always advantages and disadvantages to be weighed—it is doubtful that any other body can or will devote the time and resources to developing a better set of proposals. Having looked to this Commission for guidance—and the Commission having done what it was directed to do—Congress would do well, after hearings and due deliberation, to enact into law its recommendations. If this opportunity to “fix” the federal appellate courts for the next century is not taken, the thirty-five year old controversy over the Ninth Circuit will continue to fester, with its dysfunctional and debilitating consequences and with its damage to the status of the federal courts in the public mind. Moreover, an opportunity will have been lost to equip all the courts of appeals with the means of coping with future growth.

Inasmuch as the Commission's report gives particular attention, as the statute directed, to the Ninth Circuit, I devote the bulk of my statement to that subject.

THE NINTH CIRCUIT AND ITS COURT OF APPEALS

The Commission's report provides an important insight that has not heretofore been appreciated, namely, that there is a significant distinction between a judicial circuit and a court of appeals. A circuit is purely an administrative entity, organized on a territorial basis, and should be evaluated as such. A court of appeals, by contrast, is an adjudicative body, charged solely with deciding appeals. Informal discourse among lawyers and judges tends to equate the two. For example, when one hears that “Judge X is on the Ninth Circuit,” it is understood as meaning that Judge X is a member of the court of appeals for the Ninth Circuit. The statement that “the Ninth Circuit held that . . .” is understood to mean that the Ninth Circuit Court of Appeals made such a holding. While this may be useful as shorthand, it has the unfortunate consequence of leading persons to think that the circuit and its court of appeals are indistinguishable. This leads to the assumption that the only way to address problems of an overgrown court of appeals and to create more man-

ageable appellate units is to split the circuit. The Commission's report rejects that premise and makes it plain that circuit splitting is not the only way to deal with problems of growth in a court of appeals.

The Commission's enunciation of this distinction between circuit and court provides a valuable premise not only for dealing with the Ninth Circuit, but also for the consideration of the nationwide circuit structure for many years to come. It is hoped that Congress will accept and act upon this premise.

After close examination of the Ninth Circuit, the Commission concluded that the problems agitating much of the bench, bar, and public officialdom relate only to the court of appeals and not to the circuit. Believing that the remedy should be tailored to the problems, the Commission recommended that the circuit be left to function intact administratively, but that the difficulties of the huge, 28-judge court of appeals—a court certain to grow larger in the years ahead—which purports to function as a single decisional unit, be addressed by restructuring the court into regional adjudicative divisions, thereby creating smaller, more manageable appellate forums.

The benefits and advantages of the recommended divisional structure are these:

1. Heightened uniformity in circuit court law.

An argument that has been heard against the divisional structure is that it will increase intra-circuit conflicts, as the decisions rendered in one division need not be regarded as binding precedents in other divisions. But the opposite is true; uniformity will be increased by a divisional structure. Currently, the court of appeals functions through dozens and dozens of ever-shifting panels. In practice, the court uses more than 40 judges annually (district judges and visiting circuit judges, in addition to its own judges). Those panels decide thousands of cases annually. In theory, a decision by any one of those panels is considered to be a precedent binding on all judges and panels of the court. But according to many participants and observers, the vast body of case law generated by this multitude of panels is in many instances unharmonious, ranging from direct conflicts to near-conflicts to divergences in tone and reasoning. Those who assert that this is not the situation appear not to acknowledge the realities as seen by many others. In theory, the court's existing en banc process irons out all conflicts. But again, theory does not accord with reality. According to many participants and observers, the court's limited en banc procedure is inadequate and ineffective to monitor and conform those thousands of decisions.

By contrast, the divisional structure would provide an effective means for maintaining uniformity within each division because its seven to 11 judges could monitor all divisional decisions and could sit in a true en banc whenever necessary to resolve conflicting panel decisions. There would thus be only three decisional units (the three regional divisions) among which conflict could arise, instead of the many dozens or hundreds of panels, as at present. When an interdivisional conflict did arise, it could be resolved far more quickly and inexpensively through the Circuit Division than is possible with the current en banc process.

2. Reduced judicial burdens, increased coherence in settling circuit law.

A key here is the recommended Circuit Division. It would be a continuously functioning body, with a stable, though gradually rotating, membership, drawn from throughout the circuit, available at all times to resolve inter-divisional conflicts quickly. There would be no administrative hassle in having to assemble a fresh group of judges for each case, as is done in present practice. The Circuit Division's resolution of such conflicts would require no elaborate additional process, such as en banc rehearings presently involve. It would resolve the conflict on the papers filed in the regional division, without any additional briefing or oral argument. Its sole mission would be to decide whether position A or position B should be adopted. It would be, as some have said, a "tie-breaker." Because it would be a stable, on-going body, its judges would become accustomed to working together and could thus dispose of business more efficiently. The present Ninth Circuit limited en banc functions through judges who are unlikely to have worked together before in deciding cases and will never do so again—hardly the picture of an appellate court, as such is understood in the Anglo-American legal world.

The Circuit Division should not be confused with the en banc procedure long familiar in the federal courts of appeals. It would be a quite different entity. In addition to being a stable on-going body, a key difference is that it would not be involved in the difficult and controversial business of deciding important or unsettled legal issues, where there is no inter-divisional conflict. It would act only when such a conflict is presented. The Circuit Division would, of course, need to decide when a conflict existed so as to act, but this would not involve any additional litigation. The judges would examine the assertion of a conflict and decide for themselves, as a

matter of unreviewable discretion, whether there is indeed the kind of conflict that needs circuit-wide resolution.

The divisional plan would make each judge a more effective monitor of the court's output and would enable each to play a meaningful role in shaping uniform case law. Presently, no Ninth Circuit appellate judge can possibly read or even cursorily glance at all of the thousands of decisions the court as a whole produces annually. As a member of a division of from 7 to 11 judges, he or she could do so. Now each judge must consider and respond to en banc calls from each of the other judges—27 when the court is at full strength. That takes time away from the routine business of deciding appeals and writing opinions. Under the divisional plan, each judge would need to consider en banc calls from only six to ten other judges. Moreover, when an en banc is held, every judge of the decisional unit—the division—can fully participate, something that is impossible on the court of appeals as it is presently organized.

The Circuit Division is, of course, another tier in the judicial system, but it is a minimal tier, not, as just explained, one that involves the full panoply of briefing and argument. It could act expeditiously on existing papers with minimal expense to litigants. Moreover, some additional tiers in the system are probably inevitable, as the volume of appeals and number of judges grow. Indeed, Justice Bryer, in a letter to the Commission, suggested "tiering" in the judicial hierarchy as a promising approach to anticipated growth.

3. Restored relationship between the appellate forum and the people and territory it serves; appropriate accommodation of federal and regional interests.

The federal appellate structure nationwide is built on the concept of regionalism, balanced with concern for the federalizing function of the appellate courts—a concept endorsed by the Judicial Conference in its Long Range Plan. The larger the circuit's territory, the more attenuated the regional relationship becomes. The Ninth Circuit is the extreme, and it is the sense of many judges, lawyers, and observers that this relationship is there stretched too thin. Compare the Ninth Circuit, embracing nine large states, with most of the other circuits: 1st (four states), 2nd (three states), 3rd (three states), 4th (five states), 5th (three states), 6th (four states), 7th (three states), 11th (three states). To assert that the entire Ninth Circuit, stretching from Arizona to Alaska and from Montana to Hawaii, is a single region, in the sense relevant here, taxes credulity. One can reasonably ask why the lawyers, litigants, and citizens in the territory of the Ninth Circuit should be denied the benefits of regionalism enjoyed in those other circuits.

Regionally based divisions would bring the regional interest back into balance in the Ninth Circuit, and would do so without splitting the circuit. The federalizing function would continue to be served because each division would include the territory of more than one state, and judges from more than one state would sit on each division.

In my view, this consideration alone is sufficient to call for enactment of the divisional plan, even if one does not accept the other arguments that support it.

4. An appellate court preserved.

The Commission's report embodies a traditional conception of appellate courts derived from two centuries of experience. This traditional conception is that of a relatively small group of judges working regularly together in considering and deciding appeals, collaborating in arriving at commonly agreed reasoning and result in each case. Whether one agrees with the recommendations for a divisional plan for a court as large as the Ninth Circuit Court of Appeals depends to a considerable extent on whether one shares that view of an appellate court. Those who oppose the divisional plan appear not to do so; acceptance of their view would work a radical alteration in the nature of appellate courts. Thus, the federal appellate courts are at a crossroads, presenting Congress with the necessity of deciding the nature of those judicial bodies for generations to come. This decision involves a fundamental matter of value judgment, one not determined by empirical studies or statistics or conflicting factual assertions over whether there is this or that degree of inter-circuit conflict. Rather, it involves belief rooted in experience about the nature of an institution.

Appellate judges do not act alone, as trial judges do. They must function as a team, a team whose members are constantly interacting in the decisional process. This conception is often summed up in the word "collegiality." One of the best statements of this quality in an appellate court—what he called "judiciality"—comes from Judge Frank Coffin, former chief judge of the U. S. Court of Appeals for the First Circuit. He says that it involves "the deliberately cultivated attitude among judges of equal status working in intimate, continuing, open, and noncompetitive relationship with each other . . ."

It takes little imagination to understand that 28 judges, or any very large number, cannot work in an "intimate, continuing" relationship. In the Ninth Circuit, each judge is unlikely to serve on a panel with any other judge of the court more than once every three years. The judges may be acquainted with each other and cordial in their relationships, but they do not constantly function together in adjudicative work.

Under the traditional conception, an appellate court is a special kind of body, basically different from a legislative body or any other entity. Those who do not share this conception place little or no value on the kind of collegiality described by Judge Coffin, and they see no problem in an appellate court of near infinite size. At the Commission's public hearings, some of those who defended the present organization of the Ninth Circuit Court of Appeals were unwilling to say that a court of even forty or fifty judges, attempting to function as a single decisional entity, presented a problem. Apparently to those holding that view, a random threesome of strangers brought together every three years is sufficient to satisfy the appellate process in the American legal order. The Commission's report implicitly rejects that view, and I urge Congress to do so.

The divisional plan would preserve the traditional conception of an appellate court by establishing decisional units of from seven to 11 judges each. The plan would permit an indefinite number of judges to be added to the court to meet increased business without eroding the essential nature of an appellate forum, as additional divisions of this size could be created. Without such a plan, we will lose institutions that have served the law well and will have in their place ever-growing Towers of Babel, increasingly unknown courts composed of a vast number of semi-strangers.

THE COURTS OF APPEALS GENERALLY

As charged by statute, the Commission examined the structure and alignment of the federal appellate system as a whole, and it did so with an eye to the future. It reached these conclusions: (1) There will be continuing growth in the volume of appeals in the years ahead. (2) The rapidity and magnitude of growth will vary among the circuits and among types of cases. (3) It is impossible to predict with confidence any of these future developments beyond the assertions just made. Given the difficulty of predicting the rate, amount, and type of growth in each circuit, the Commission concluded that it is not prudent to prescribe by legislation at this time a single set of structures and procedures for all courts of appeals. Rather, the Commission recommended that each circuit and court of appeals be authorized in its discretion to employ any one of three defined and circumscribed options to meet its particular docket situation.

1. The Divisional concept as long-range solution to growth in the nationwide appellate system.

The beauty of the divisional concept is that it not only deals effectively with the present Ninth Circuit situation, but it also provides a means of enabling courts of appeals in other circuits to continue to function effectively as they grow larger, without splitting the circuit. If we adhere to the proposition that no circuit should consist of fewer than three states—endorsed by the Hruska Commission and re-endorsed by this Commission—there are now eight circuits that cannot be split. Yet their courts of appeals are almost certain to grow. It is not difficult to imagine several of those courts with 20 or more judges within the next 10 to 15 years, a growth that will be necessary in order to cope with their dockets. They will increasingly encounter the same problems that the Ninth Circuit now encounters. A divisional plan of organization will enable those courts to function effectively in a situation where circuit-splitting is not an option.

While the Commission was clear that the Ninth Circuit Court of Appeals is at a point where a divisional structure is required, it was hesitant to say exactly where that point is reached short of 28 judgeships. Thus, it concluded that the wise course of action is to authorize any court of appeals with more than 15 judgeships to organize itself into divisions, in its discretion. This gives each court the ability to assess its distinctive situation and design an appropriate internal structure.

2. Two-judge panels.

Because the courts of appeals now decide many appeals through a summary process, typically using staff attorneys, the Commission concluded that as to cases of that type, each court of appeals should be authorized, in its discretion, to assign them to panels of two judges instead of three judges. The report explains this option in detail.

3. District Court Appellate panels.

Shifting a portion of the appellate work to the trial level has long been advocated. The Commission concluded that the idea is sufficiently promising that each Circuit Judicial Council should have discretionary authority to establish district court appellate panels and assign designated categories of cases to those panels, each consisting of two district judges and one circuit judge.

In all of these options, the Federal Judicial Center would be charged with monitoring the procedure and reporting on the experience to the Judicial Conference of the United States, which, in turn, would communicate its views to the Congress.

As is always the case with proposals for change, opponents can raise an array of hypothetical questions and imagined difficulties in their operation. And so it is here. Having heard many, and maybe all, of them, I am satisfied that no one of them amounts to a reason for rejecting the Commission's recommendations. Some of the imagined situations will never occur, and others will be worked out in practice. It must be remembered that any new judicial structure, jurisdiction, or procedure will go through an initial "shakedown" period after its adoption, during which kinks are ironed out and uncertainties are clarified. It should also be borne in mind that much of the opposition voiced to the Commission's recommendations comes, as members of Congress no doubt understand, from the instinctive objection to change by some judges and lawyers.

The relatively modest, evolutionary changes to the century-old federal appellate system recommended by this Congressionally created Commission are needed to preserve the appellate courts as we have known them in the face of unprecedented growth. After three decades of debates, conferences, committee hearings, studies, and reports, I respectfully submit that it is time for Congress to act.

PREPARED STATEMENT OF BYRON WHITE

My name is Byron White, safely until September in my home state of Colorado. I hope the Congressional representatives will welcome my written views about the subject matter that will be heard.

Pamela Rymer, a very experienced Ninth Circuit Judge, is a member of the Commission, and will represent in person the Commission in a very competent way. Judge William Browning, also a Commission member and a district judge of the Ninth Circuit, will accompany Judge Rymer. Professor Daniel Meador, the Executive Director of the Commission, will present a written statement.

In late 1997, Congress created the Commission on Structural Alternatives for the Federal Courts of Appeals. The statute specified that the Chief Justice should appoint its five members, and he promptly did so.¹ The Commission began its work in early 1998, and it presented its recommendations in a final report to the Congress and the President, pursuant to its statutory mandate, on December 18, 1998.

Although the creation of the Commission was prompted by Congressional difficulty in deciding how to resolve the long-standing debate over what, if anything, should be done about the Ninth Circuit, the Commission was also directed to study and make recommendations concerning the entire federal appellate system. In carrying out its charge, the Commission held public hearings in six cities, heard from dozens of witnesses, received dozens of written statements from others, and spent ten months of intensive study of the nationwide structure of our appellate courts, "with particular reference," as the statute required, to the Ninth Circuit.

This study led the Commission to two insights concerning the structure and functioning of the federal appellate courts, and those insights form the premises for the Commission's key recommendations. First, there is a significant distinction between a circuit and its court of appeals. Second, the magnitude and nature of future growth and changes in appellate business cannot be reliably predicted and will vary among circuits; therefore, the appellate courts should have a flexible authority to deal with such unforeseeable changes.

The distinction between a circuit and a court of appeals is that a circuit is an administrative entity, whereas a court of appeals is an adjudicative body. Acting through its Judicial Council, each of the twelve regional circuits discharges a variety of administrative responsibilities concerning the federal courts and judges within its territory. A court of appeals, on the other hand, is concerned solely with deciding

¹ Commission members were Byron R. White, Chair; N. Lee Cooper, Vice Chair; Gilbert S. Merritt; Pamela Ann Rymer; William D. Browning. The Commission was authorized to appoint an Executive Director. The Commission chose Professor Daniel J. Meador, a very competent selection. The statute also authorized the Federal Judicial Center and the Administrative Office of the United States Courts to serve the Commission, help that was essential.

appeals from district courts within its circuit and from administrative agencies. In other words, problems of circuit administration, are separable from problems of court of appeals' adjudication.

Proceeding from that premise, the Commission, ² found no administrative malfunctions in the Ninth Circuit sufficient to call for a division or realignment of the circuit. Thus, it recommended that the circuit be left intact as an administrative unit.

But, the court of appeals in the Ninth Circuit presents a different picture. The court has 28 authorized judgeships and has requested more; it will undoubtedly need still more judges in the years ahead. From its study, the Commission concluded that an appellate court of that size, attempting to function as a single decisional entity, encounters special difficulties that will worsen with continued growth. These can be avoided by organizing the court into smaller decisional units (and without dividing the circuit). Thus the Commission recommended that a court be organized into three regionally based adjudicative divisions and that a court called the "circuit division" be established to resolve conflicting decisions among those divisions.

The Ninth Circuit has been the subject of debate' and intense controversy for many years. For that debate to continue year after year into the future is dysfunctional and damaging to the status of the federal judiciary in the public mind. If Congress does not accept the Commission's recommendations, it is left with two choices: do nothing or split the circuit. Under the circumstances, doing nothing would seem irresponsible. Splitting the circuit would have distinct disadvantages and is not necessary. The Commission's recommendations address the problems that many perceive in the court of appeals, while preserving the administrative advantages of leaving the circuit undivided.

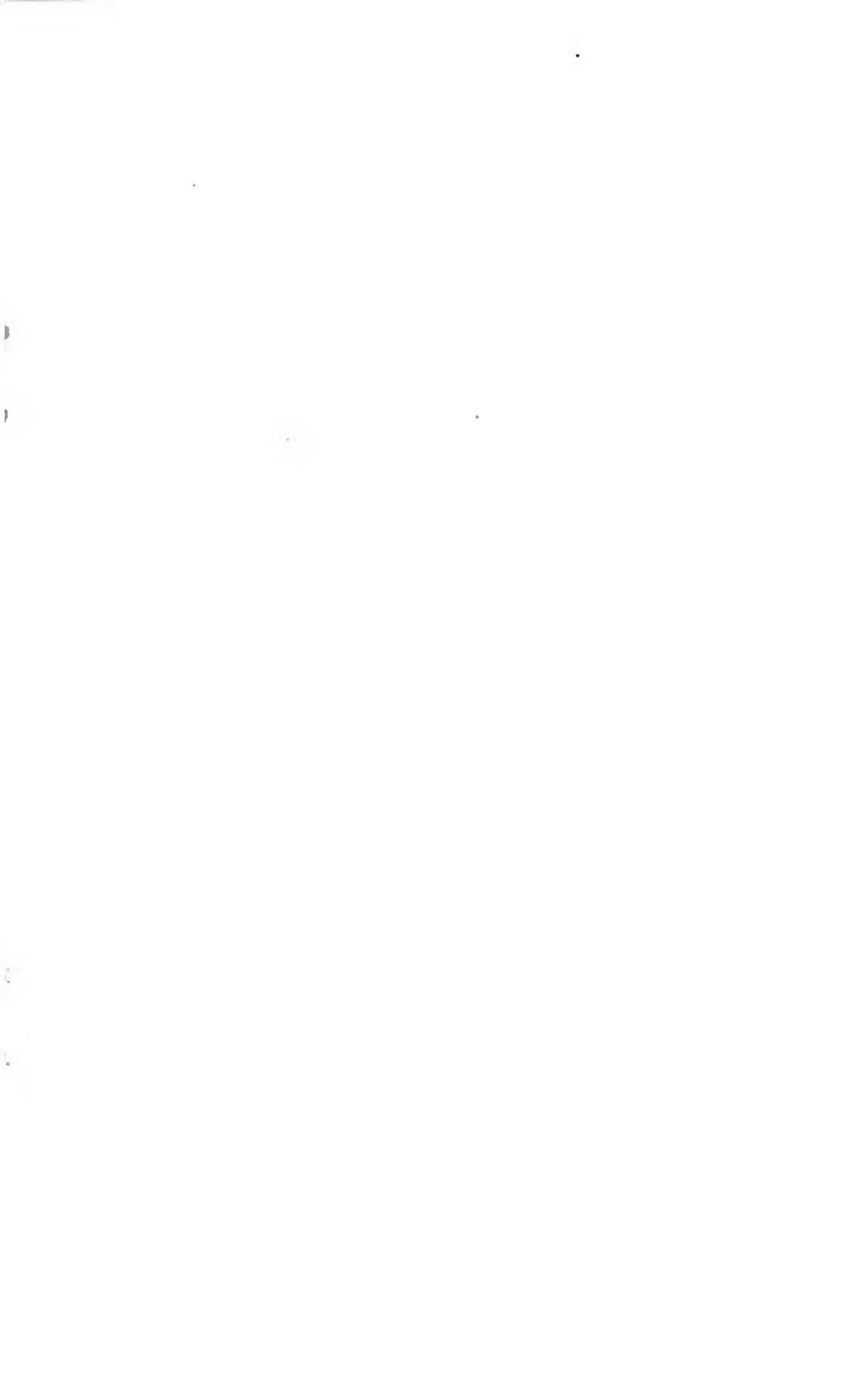
The Commission's other insight, leading to its second premise, is that the appellate system needs flexibility to deal effectively with future, unpredictable changes in the size and composition of the dockets. To this end, the Commission made three recommendations: (1) that Congress authorize each court of appeals with more than 15 judgeships to organize itself into adjudicative divisions, with a "circuit division" to resolve inter-divisional conflicts; (2) that Congress authorize each court of appeals to decide appeals through two-judge panels in selected categories of cases; (3) that Congress authorize the Judicial Council of each circuit to establish district court appellate panels, each panel to consist of two district judges and one circuit judge, to decide appeals in designated categories of cases, with discretionary review thereafter in the court of appeals.

If the courts exercise their discretionary authority to adopt any of these measures, the Federal Judicial Center would be required to evaluate the experience over a period of time and report to the Judicial Conference of the United States. Those arrangements that worked well could be models for other circuits; those that did not work could be discontinued. The ability of courts to experiment in this manner will be increasingly important in the future as dockets grow and circumstances change.

History teaches that any recommendations for change in the courts are likely to encounter opposition from some members of the bench and bar. Some of that can be discounted as nothing more than instinctive reluctance to embrace change. No proposals for dealing with the judiciary's problems will achieve perfection, and there are advantages and disadvantages to any proposal. In arriving at its conclusions, the Commission weighed benefits and costs carefully, after receiving a wide assortment of ideas from judges, lawyers, law professors, and public officials. The Commission has carried out the most thorough study of the federal appellate courts since the Hruska Commission a quarter century ago.² Therefore, it is to be hoped that Congress will give serious attention to the enactment of these recommendations and that they will have the support of a substantial segment of the bench and bar.



² Report of Commission on Revision of the Federal Court Appellate System (1973). That Commission's recommendation that the 5th Circuit be split was enacted by Congress. Its recommendation that the 9th Circuit likewise be split has never been acted on.

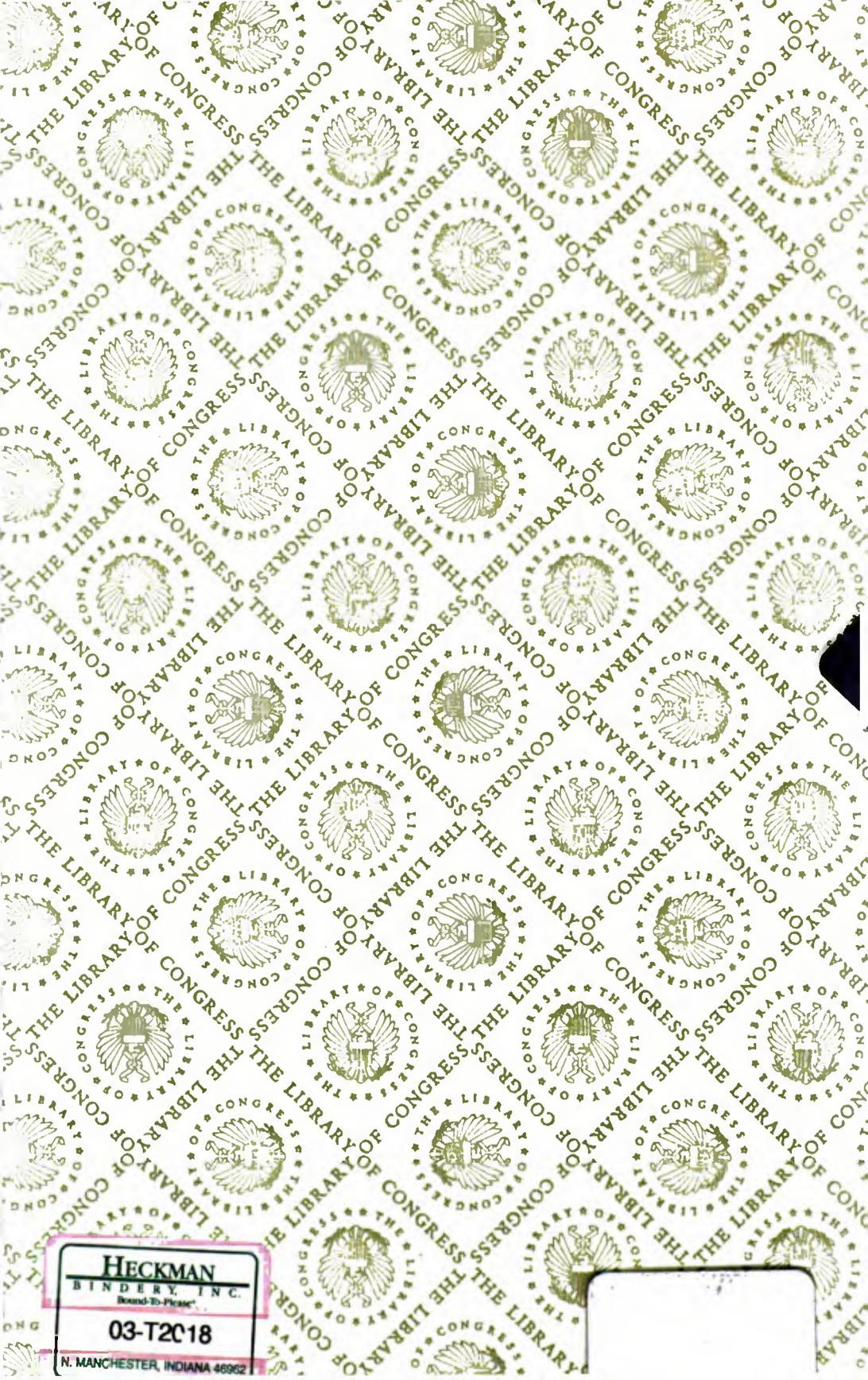


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