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THE IMPOVERISHED IDEA OF CIRCUIT-SPLITTING

Carl Tobias*

A half-decade ago, the United States Congress considered and rejected controversial measures that would have split the United States Court of Appeals for the Ninth Circuit into two courts. The proposed Ninth Circuit would have included Arizona, California and Nevada, while the new Twelfth Circuit would have encompassed Alaska, Hawaii, Idaho, Montana, Oregon, Washington, Guam, and the Northern Mariana Islands. Congress fully aired, particularly in hearings before the Senate Judiciary Committee, all of the issues that were salient to the Ninth Circuit’s division. Nevertheless, Congress ultimately refused to split the Ninth Circuit Court of Appeals.

Senators representing every state in the latest iteration of the projected Twelfth Circuit recently revived the idea by introducing Senate Bill 956, a proposal that closely resembles the measure debated by Congress in 1990. The new bill’s sponsors contend that certain factors, principally the Ninth Circuit’s substantial size and burgeoning docket, have now made division of the court imperative.

Comparison of the new and the earlier proposals and the underlying rationales of the measures reveals that they are virtually identical. Sena-

* Professor of Law, University of Montana. I wish to thank David Aronofsky, Thomas E. Baker, Arthur Hellman, Kathy Monzie, Jeff Renz, Peggy Sanner, and Ronald Waterman for valuable suggestions, Cecelia Palmer and Charlotte Wilmerton for processing this piece, as well as Ann and Tom Boone and the Harris Trust for generous, continuing support. I am a member of the Civil Justice Reform Act Advisory Group for the United States District Court for the District of Montana and of the District Local Rules Review Committee of the Ninth Circuit Judicial Council. However, the views expressed here and errors that remain are my own.


tors and representatives closely examined the appellate court’s bifurcation and found it inadvisable five years ago. Nothing consequential enough to require division has transpired since. These ideas suggest that Congress should leave the present Ninth Circuit intact.

Senate Bill 956 and the issue of circuit-splitting, however, warrant careful analysis for several important reasons. There have been a few changes since the earlier bills were proposed. Some arguments for dividing the Ninth Circuit, such as its ever-expanding caseload and the time which it requires to decide appeals, may seem more persuasive today. The composition of the Congress is also quite different. These factors mean that senators and representatives could seriously consider bifurcation and may well split the Ninth Circuit.

Even if the 104th Congress eschews division of the Ninth Circuit, bifurcation will remain significant. Senators from the Pacific Northwest perennially sponsor legislation to split the appellate court, while members of Congress representing other areas may introduce measures to divide other regional circuits. As appeals inexorably mount, pressure to address them will continue to intensify. In fact, bifurcation will remain important until Congress discovers remedies for the dilemma of multiplying dockets that do not involve appellate court division. These propositions show that Senate Bill 956 and circuit-splitting deserve evaluation, and this Article undertakes that effort.

The Article initially describes the origins and development of the proposed legislation. It then assesses the measure and arguments for and against dividing the Ninth Circuit. I find that there is no greater need for bifurcation now than before and that the disadvantages of division quantitatively and qualitatively outweigh its benefits. Indeed, knowledgeable federal court observers differ over one of circuit-splitting’s most frequently proffered justifications: that growing caseloads create complications which are sufficiently problematic to warrant solutions as controversial as dividing appeals courts. Some experts even consider anachronistic the century-long congressional practice of creating additional judgeships and bifurcating circuits.

I recommend that Congress not split the Ninth Circuit, but rather explore fundamental reforms, several of which concern the entire appellate court system. If Congress believes that these alternatives and Senate Bill
956 are unpalatable, it should scrutinize comparatively modest approaches, principally more circuit experimentation and additional study of the appeals courts and their expanding dockets. Were Congress to find unpersuasive the strong evidence of the inadvisability of dividing circuits and to consider seriously the legislative proposal, this Article provides suggestions for improving the measure.3

I. ORIGINS AND DEVELOPMENT OF SENATE BILL 956

The origins and development of the recently introduced proposal to split the Ninth Circuit merit rather comprehensive analysis. Senate Bill 956's historical background deserves a relatively thorough examination because it informs understanding of this measure, even though the origins, development, and congressional consideration of the legislation that would have created the Twelfth Circuit in 1990 have been evaluated elsewhere;4 and virtually no new reasons have been advanced to support the Ninth Circuit's division.

A. General Background

Congress instituted the modern appellate court system by passing the Circuit Court of Appeals Act of 1891, popularly known as the Evarts Act.5 In 1866, it established a newly numbered Ninth Circuit Court of Appeals consisting of California, Nevada, and Oregon.6 Congress included Montana and Washington within the appellate court's jurisdiction on

3 At the outset I feel compelled to admit that comprehensive review of the wealth of literature which has been written on the appellate courts over the last century has left me somewhat uncertain about the exact nature of the problems that crowded dockets create, whether they are sufficiently troubling to deserve treatment and, if so, which solutions are preferable.

4 I rely substantially in this section and throughout this article on Baker, supra note 1, and on Thomas E. Baker, Rationing Justice on Appeal (1994). I also rely heavily on Restructuring Justice: The Innovations of the Ninth Circuit and the Future of the Federal Courts (Arthur D. Hellman ed., 1990), and on the work of its editor and contributing authors, including Professor Paul Carrington and Professor Daniel Meador. See also Hearing on S. 948 Before the Subcomm. on Courts and Admin. Practice of the Senate Comm. on the Judiciary, 101st Cong., 2d Sess. 18 (1990) [hereinafter S. 948 Hearing] (affording congressional testimony and much additional information on S. 948).


During the twentieth century, Congress has created two new courts of appeals and has redrawn circuit boundaries of a few courts. In 1948, Congress formally recognized the District of Columbia Circuit, which primarily hears appeals that challenge administrative agency decision-making. In 1982, Congress established the Federal Circuit and invested it with national, specialized subject matter jurisdiction principally involving customs, patents, trademarks, copyrights, and claims against the United States.

In 1929, Congress formed the Tenth Circuit Court of Appeals by removing Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming from the Eighth Circuit and leaving Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota within it. Congress
created the new appellate court as a response to caseload congestion in the Eighth Circuit.\textsuperscript{17}

In 1980, Congress established the Eleventh Circuit by detaching Alabama, Florida, and Georgia from the Fifth Circuit and maintaining Louisiana, Mississippi, and Texas in that court.\textsuperscript{18} Numerous observers had voiced concerns about crowded dockets for several decades before Congress decided to split the Fifth Circuit.\textsuperscript{19} For instance, the number of cases that litigants appealed to the Fifth Circuit had increased ninefold over the third quarter of the twentieth century.\textsuperscript{20}

Congress based its decision to divide the Fifth Circuit in part on the recommendation of the Commission on Revision of the Federal Court Appellate System, popularly called the Hruska Commission for its chair, Senator Roman Hruska (R-Neb.).\textsuperscript{21} Congress created the Commission in response to the importunings of United States Supreme Court Chief Justice Warren Burger and other federal court judges.\textsuperscript{22}

After thorough study, the Commission proposed that Congress split the two largest circuits, the Fifth and the Ninth, rather than championing a more comprehensive solution, such as national reconfiguration of all of the


appeals courts’ boundaries. The Hruska Commission was reluctant to disturb institutions that had gained their constituents’ respect and loyalty after judges and attorneys eloquently testified to the sense of community that they enjoyed within the existing appellate boundaries.

The Commission based its recommendation that Congress divide the Fifth and Ninth Circuits on general criteria governing realignment which it had developed: (1) at least three states were needed to constitute a circuit; (2) appeals courts should not be established that would immediately require more than nine judges; (3) circuits ought to include states with diverse populations, legal business, and socio-economic profiles; (4) realignment should not unduly interfere with existing appellate court boundaries; and (5) appeals courts should consist of contiguous states.

Congress split the Fifth Circuit because it was large in terms of geography, population, caseload, and number of judges and because the court’s active members unanimously favored division. Creating two circuits, however, failed to relieve docket pressures. In less than a half-decade, the new Fifth Circuit had encountered the same crisis level of appeals that it had experienced before division. By 1989, the Eleventh Circuit’s caseload justified adding more members, but the Circuit Judicial Council, out of concern that the court might grow too large, adopted a formal, unanimous resolution requesting that Congress not authorize additional judgeships.

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23 See Hruska Commission, supra note 21, at 228.
24 See Hruska Commission, supra note 21, at 228.
26 See Baker, supra note 1, at 927.
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B. Earlier Proposals To Divide the Ninth Circuit and Ameliorative Efforts

There have been numerous proposals to divide the Ninth Circuit since before World War II.29 Therefore, the Hruska Commission's suggestion that Congress split the circuit was anticipated, although its recommendation that California be divided and that one state's district courts be reassigned to different circuits was surprising.30 The Commission's proposal to split California proved highly controversial, and delayed serious congressional consideration of the appeals court's division during 1973. Congress was no more responsive to circuit-splitting legislation that was introduced a decade later.31

In 1978, Congress empowered those circuits with more than fifteen active judges to reorganize their courts with administrative units and to adopt streamlined procedures for en banc hearings.32 The Ninth Circuit responded to this congressional authorization in a number of creative ways. For example, the court restructured itself into three units to achieve more efficient and decentralized administration33 and adopted a circuit rule prescribing a limited en banc mechanism, under which the chief judge and ten active judges selected by lot would sit en banc to hear appeals on a majority vote of all active judges.34

30 See Hruska Commission, supra note 21, at 235. See generally Hellman, supra note 22.
32 Any court of appeals having more than 15 active judges may constitute itself into administrative units complete with such facilities and staff as may be prescribed by the Administrative Office of the United States Courts, and may perform its en banc function by such number of members of its en banc courts as may be prescribed by rule of the court of appeals.
34 See 9th Cir. R. 35-3 (formerly Rule 25). See generally Paul D. Carrington et al., Justice on Appeal 161-63, 200-03 (1976); Steven Bennett & Christine Pembroke, "Mini" In Banc
Ninth Circuit judges have increased their output, and the circuit has implemented numerous internal measures. Illustrative reforms include prebriefing conferences which help to narrow issues for appeal, limit the size of briefs, and explore the possibilities for settlement. Circuit support staff have increased their efficiency, while the court has been an acknowledged leader in employing technological advances. During the late 1980s, the Ninth Circuit reported to Congress that the court’s experiments had enabled it to manage a substantial caseload effectively, that there was no reason to split the circuit, and that the procedures adopted even provided for continued growth in the circuit.

C. Analysis of Senate Bill 948

Senate Bill 948, which Congress seriously examined in 1990, warrants relatively thorough analysis here because the proposed legislation and the principal reasons enunciated on its behalf closely resemble Senate Bill 956 and the arguments articulated for it. Indeed, these striking similarities and the lack of changes in the subsequent five years are critical to the new proposal’s consideration.


The Judicial Council and United States Court of Appeals for the Ninth Circuit, Fourth Biennial Report to Congress on the Implementation of Section 6 of the Omnibus Judgeships Act of 1978 and Other Measures to Improve the Administration of Justice in the Ninth Circuit 1 (July 1989) [hereinafter Fourth Biennial Report to Congress]. See generally S. 948 Position Paper, supra note 33, at 6-7. Indeed, the circuit’s experimentation has been so successful that numerous other appeals courts have conducted similar experimentation. See S. 956 Position Paper, supra note 28, at 4. See generally infra notes 201, 262-71 and accompanying text.
Professor Thomas Baker characterized S. 948 as the “most credible effort” to split the Ninth Circuit ever undertaken because eight Senators, representing the states affected by the proposed split, had co-sponsored the legislation. Moreover, the United States Department of Justice endorsed the bill in a surprising reversal of the official “no position” approach that it had previously assumed.

In March of 1990, the Senate Judiciary Subcommittee on Courts and Administrative Practice conducted a hearing in which numerous proponents and critics of S. 948 afforded voluminous, well-considered testimony. Four senators from affected states officially opposed splitting the Ninth Circuit. Senator Dennis DeConcini (D-Ariz.) was in this group, and he was the only member of the Judiciary Committee to testify against division during the hearing.

At the 1989 meeting of the Ninth Circuit Judicial Conference, it went on record to recommend that Congress reject all proposals to split the court, and the vast majority of the circuit’s active judges opposed division. Moreover, Senate Bill 948’s advocates apparently failed to persuade Congress to redraw the court’s boundaries, while the legislation’s critics seemed to refute convincingly the arguments of the bill’s champions.

The Senate Judiciary Committee eventually decided against sending the circuit-splitting bill to the floor in 1990. The most important reasons for

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38 See Baker, supra note 1, at 933; see also 135 Cong. Rec. S5027 (daily ed. May 9, 1989) (providing statements of introduction by original sponsors).
40 See S. 948 Hearing, supra note 4.
41 See S. 948 Hearing, supra note 4, at 280-83, 288-89, 290, 286-87 (statements of Senators Alan Cranston, Dennis DeConcini, Daniel K. Inouye, and Pete Wilson).
43 See S. 1686 Position Paper, supra note 29, at 2; see also infra note 75. See generally S. 956 Position Paper, supra note 28, at 3.
44 See, e.g., S. 948 Hearing, supra note 4; S. 948 Position Paper, supra note 33. See generally Baker, supra note 1, at 934.
and against the measure deserve analysis. Those rationales will frame the revived debate over the appeals court's division. Most of the relevant issues received full consideration five years ago, but the recent proposal appears more likely to pass primarily because of Congress's changed composition.

1. Major Arguments For and Against Senate Bill 948 and Responses

a. Size

Numerous advocates of S. 948 suggested that the sheer size of the Ninth Circuit created difficulties. These concerns implicated geographic magnitude, the travel and concomitant expense required, the population base served, the number of judgeships, the circuit's caseload and corresponding time for processing appeals, and the costs of operating the appellate court.

The Ninth Circuit encompasses nine states and two territories containing some fourteen million square miles. The court's travel expenses were the largest in the federal system, and the distances that attorneys and litigants had to travel and the concomitant costs which they incurred were quite significant. It is important to understand that the circuit which includes Alaska will be enormous. Moreover, each of the appellate courts proposed in Senate Bill 948 would have been large. For example, Alaska, Idaho, and Montana counsel in the new Twelfth Circuit would have had to travel for oral argument to Portland or Seattle, the same cities to which the lawyers previously travelled. Furthermore, a single circuit which serves a "large geographic region promotes uniformity and consistency in the law and facilitates trade and commerce by contributing to stability and orderly progress."}

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46 I rely substantially in this subsection on the testimony and other statements of S. 948's advocates and opponents.
47 For helpful overviews of the issues that size implicates, see Baker, supra note 1, at 934-38; S. 956 POSITION PAPER, supra note 28, at 3-5.
48 See Baker, supra note 1, at 935.
49 See S. 948 Hearing, supra note 4, at 558 (statement of Mark C. Rutzick). See generally Baker, supra note 1, at 935.
50 See S. 956 POSITION PAPER, supra note 28, at 3; S. 1686 POSITION PAPER, supra note 29, at 2; S. 948 POSITION PAPER, supra note 33, at 6. The quotation in the text appears in the 1995.
When the Senate considered S. 948 in 1990, the Ninth Circuit Court of Appeals served a population of nearly forty-four million individuals—fifteen million more persons than lived in the Sixth Circuit, the second largest—and approximately twenty million more people than in any of the remaining appellate courts. The Ninth Circuit, accordingly, served approximately sixteen percent of the country’s population, which was similar to the population of the Eighth Circuit when Congress divided it in 1929. Any appeals court which encompasses California, however, will have a substantial population base.

In 1990, Congress had allocated to the Ninth Circuit twenty-eight active judges, which surpasses by twelve the second largest appellate court, the Fifth Circuit. This figure is sixteen more than the average judicial complement in the other appeals courts. Senator Slade Gorton (R-Wash.), who has led the recent efforts to split the Ninth Circuit, estimated that the standard caseload formula would have justified ten additional judges five years ago.

The significant number of judges authorized to sit on the appellate bench has numerous benefits. For instance, the “court of appeals is strengthened and enriched, and the inevitable tendency to regional parochialism is weakened, by the variety and diversity of backgrounds of its judges drawn from the nine states comprising the circuit.” The Ninth Circuit’s substantial membership has given the circuit and district courts considerable flexibility in assigning judges who are able to respond to special concerns, such as sharp filing increases by specific case types or in particular districts.

position paper. However, virtually identical language appears in the 1991 and 1989 position papers. When this situation obtains, I shall rely on the most recent version and cite to the less recent ones.

See Navarro Letter, supra note 39, at 4. See generally Baker, supra note 1, at 935.

See Navarro Letter, supra note 39, at 4. See generally Baker, supra note 1, at 935.

See S. 948 Hearing, supra note 4, at 557 (statement of Mark C. Rutzick).

See Baker, supra note 1, at 935.


See S. 956 POSITION PAPER, supra note 28, at 3. Accord S. 1686 POSITION PAPER, supra note 29, at 3; S. 948 POSITION PAPER, supra note 33, at 4-5; Albert, supra note 45, at 13 (quoting former Chief Judge James Browning’s assertion that court’s diversity is an asset).

See S. 956 POSITION PAPER, supra note 28, at 3; S. 948 POSITION PAPER, supra note 33, at 5.
In the late 1980s, the Ninth Circuit's docket of over 6000 appeals was fifty percent greater than the appellate court with the second largest number of filings. The Ninth Circuit accounted for fifteen percent of all appeals filed in the twelve regional circuits. If the Ninth Circuit's caseload continued to grow at the 1990 rate, the number of appeals that litigants docketed in 1980 would double before the year 2000.

During 1990, even with three unfilled seats, the Ninth Circuit kept its calendar current. This meant that the court scheduled all fully briefed appeals for oral argument on the subsequent argument calendar. The maintenance of a current calendar should not be determinative, however. For instance, some observers have asserted that the increasing number and complexity of cases intuitively suggest that circuit division would facilitate the efforts of judges and lawyers to master the court's substantive law.

Senator Conrad Burns (R-Mt.) observed that the Ninth Circuit required a median time of fourteen and one-half months to process an appeal, the longest in the country. Only a small percentage of that time, however, was spent in judges' chambers, from submission to disposition: 2.5 months for orally argued cases and 0.9 months for submitted cases, numbers which are lower than the national average. Court reporters and counsel consumed the rest of the fourteen and one-half months preparing the record and briefing. Nonetheless, Professor Baker found the 14.5 months statistic problematic because half of the appeals required more than two years. Even so, he warned that practicing lawyers were expressing little concern about delay, and that splitting the Ninth Circuit would have absolutely no impact on the aggregate workload.

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89 See Baker, supra note 1, at 936.
90 See S. 948 Position Paper, supra note 33, at 3.
91 See, e.g., Baker, supra note 1, at 936; Gorton Position Paper, supra note 55, at 3.
92 135 CONG. REC. S5027 (daily ed. May 9, 1989) (statement of Sen. Burns); see also Gorton Position Paper, supra note 55, at 3 (15.3 months as of June 3, 1989).
93 See S. 948 Position Paper, supra note 33, at 9-10; see also infra text accompanying note 127 (suggesting improvement since 1990).
94 Baker, supra note 1, at 937.
95 Baker, supra note 1, at 937. Accord S. 948 Hearing, supra note 4, at 288 (DeConcini Statement) (asserting that practitioners do not complain); S. 948 Hearing, supra note 4, at 481-83 (statement of James W. O'Brien) (asserting that division would not affect aggregate workload); see also Thomas E. Baker & Denis J. Hauptly, Taking Another Measure of the "Crisis of Volume" in the
Expense is another parameter that implicates size. During 1988, the Ninth Circuit’s expenditures were twenty-five million dollars, which constituted approximately twenty percent of the total cost of the whole appellate system. In 1990, the initial estimated expense of creating the new Twelfth Circuit was “$5.3 million in start-up costs and $2.5 million annually in current dollars.” Logic and prior experience with federal government programs prompted several respected observers to question whether the new Ninth and Twelfth Circuits would actually yield greater cost efficiency and net savings.

During 1990, Professor Baker remarked that debate over the Ninth Circuit’s size was not always placed in context, while he afforded several illustrations which do so. For example, the appeals court had more judges than the complete federal appellate bench and almost twice the national docket in 1939. He concluded that the Ninth Circuit’s problem was workload, not size, and that any measure, which like Senate Bill 948, kept Arizona and California in the same circuit could only promise a “few speculative and marginal gains.”

b. Consistency

Avid proponents of S. 948, such as Senator Mark Hatfield (R-Or.), expressed much concern about the growing inconsistency in the Ninth Circuit, offering the “increased likelihood of intracircuit conflicts” as an important justification for splitting the court. The statistical opportunities for inconsistency on a twenty-eight judge court are substantial; for instance, 3,276 combinations of panels could resolve an issue. During 1990, S. 948’s advocates and Ninth Circuit judges, practitioners, and state

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66 See Gorton Position Paper, supra note 55, at 4; see also infra note 144.

67 S. 948 Position Paper, supra note 33, at 12.

68 See S. 948 Hearing, supra note 4, at 442 (statement of Chief Judge Barbara J. Rothstein) (asserting that cost “is certain to be exorbitant”); Baker, supra note 1, at 937.

69 Baker, supra note 1, at 938.

70 Baker, supra note 1, at 938.

71 Baker, supra note 1, at 938.


73 See Baker, supra note 1, at 938.
bar associations in jurisdictions in the proposed Twelfth Circuit apparently disagreed about the issue of conflicts and about premising division on inconsistency. 74 The vast majority of active Ninth Circuit judges and state bar associations found these conflicts insufficiently problematic to justify supporting the legislation, 75 while the Circuit Executive Office and other students of the court persuasively repudiated the notion that the threat of inconsistency posed serious difficulties. 76

In 1990, the Ninth Circuit probably had instituted more measures than any other circuit to address these conflicts. 77 For example, Ninth Circuit staff attorneys fully reviewed every case and coded into a computer the issues for consideration. 78 The court then assigned to the identical three-judge panels the appeals that raised similar issues and were ready for calendaring at the same time. Using a limited en banc mechanism to resolve intracircuit inconsistencies concomitantly proved very efficacious. 79 The author of a 1989 study concluded, partly on the basis of these improvements, that the conflicts were less problematic than many attorneys thought and certainly less than S. 948's sponsors contended. 80

The proponents of division project that it will enable judges, lawyers, and parties to master the more limited and predictable universe of rele-


75 During the 1989 Judicial Conference of the Ninth Circuit Courts, all judges and lawyer representatives who were in attendance voted by secret ballot on S. 948, and 90% opposed the measure, while 69 of 79 lawyers opposed it. The Bar Associations of Arizona, California, Hawaii, Idaho, Montana, Nevada, and the Northern Mariana Islands opposed S. 948. See Baker, supra note 1, at 939 n.114.

76 See S. 948 Position Paper, supra note 33, at 8-9; see also Baker, supra note 1, at 938-50; Arthur D. Hellman, Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court, 56 U. Chi. L. Rev. 541 (1989).

77 See S. 948 Position Paper, supra note 33, at 6-7; see also S. 956 Position Paper, supra note 28, at 3-4; S. 1686 Position Paper, supra note 29, at 3-4.

78 I rely substantially in this sentence and the next on Hellman, supra note 36, at 945. See generally Baker, supra note 1, at 939 n.116 (citing United States Court of Appeals for the Ninth Circuit General Orders 4.1 (1987)).

79 See, e.g., S. 948 Position Paper, supra note 33, at 6; S. 956 Position Paper, supra note 28, at 3; Baker, supra note 1, at 939-40.

vant case law. Insofar as debate over inconsistency involves the amount of Ninth Circuit precedent, a phenomenon which enhances panels' ability to apply precedent selectively, this is a national development that is only marginally more applicable in larger appellate courts with greater case law. Splitting the Ninth Circuit, therefore, would not eliminate the problem.

Finally, although splitting the Ninth Circuit might reduce conflicts within the two new appeals courts, it would also foster intercircuit inconsistency, thereby increasing the burden on the Supreme Court to resolve conflicts. More specifically, attorneys have "expressed particular concern that dividing the extended coastline in the West between two circuits would create inconsistent and conflicting application of maritime, commercial, and utility law in the two circuits, making commerce more difficult and costly, and requiring them to research the law of two circuits for every potential cross-circuit transaction."  

c. California and the Northwest

Some strong champions of S. 948 constructed several arguments from a northwestern regional perspective, which manifested varying degrees of hostility toward California. For example, Senator Gorton contended that litigants in the Pacific Northwest are "simply dominated by California judges and California attitudes," while Senator Burns argued that residents of states like Montana should not have their appeals delayed because California "continues to experience an economic and population boom." Senator Hatfield pointed out that creation of the Twelfth Circuit
would honor Congress's original intent in drawing appellate court bound­
aries: the establishment of circuits which reflected a regional identity by
combining a "small set of contiguous states that shared a common
background." 88

Alaska, Idaho, Montana, Oregon, and Washington do resemble one an­
other more than California, but the five states differ in certain respects.
For instance, Alaska's climate and size and the peculiar manner in which
its huge mass of real property is owned may make that state very unusual,
if not sui generis. Idaho and Montana, as landlocked jurisdictions in the
intermountain West, are comparatively untouched by numerous concerns
that are important to the three coastal states.

It is inconceivable that Congress added Hawaii, Guam, and the North­
ern Mariana Islands to the Ninth Circuit to give the court a regional
identity as part of a "small set of contiguous states that shared a common
background." 89 After all, Hawaii and the two territories have diverse his­
tories, populations, and local legal and nonlegal cultures, and are located
thousands of miles from the mainland. Moreover, premising the creation
of an appeals court today on the aspiration to honor original congressional
intent in drawing the appellate system's boundaries may be
anachronistic. 90

Professor Baker challenged the "sponsors' underlying premise that Cal­
ifornia judges are idiosyncratic and monolithic." 91 He suggested that com­
puterized, random selection of Ninth Circuit panels and a study of the
judges' philosophies rendered these stereotypes untenable. 92 To the extent
that regional factors might apply in specific lawsuits, district judges can
arguably consider them. 93 At the appellate level, the geographical locales

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88 See S. 948 Hearing, supra note 4, at 253 (statement of Sen. Hatfield).
89 See supra text accompanying note 88.
90 See supra text accompanying note 88.
91 Baker, supra note 1, at 941.
92 See S. 948 Position Paper, supra note 33, at 9 (analyzing panel selection); Baker, supra
note 1, at 941 (analyzing stereotyping); see also Daniel Trigoboff, Northwest Favors Splitting "Cal­
ifornia" Circuit, LEGAL TIMES, June 12, 1989, at 2 (suggesting that former Chief Judge Browning
challenged bifurcation's advocates to produce study documenting geographic correlation of Ninth Cir­
cuit rulings). When S. 948's sponsors introduced the measure in 1989, a bare majority of active judges
on the court listed their duty stations as California. Indeed, only four of ten judges whom President
Ronald Reagan appointed were so listed.
93 See Baker, supra note 1, at 942 (citing S. 948 Hearing, supra note 4, at 692 (statement of
Eric Redman)).
in which judges sit should be irrelevant. Circuits have an important responsibility to federalize the law; that is, to harmonize local and state policy concerns with national policy and the Constitution.\textsuperscript{94}

Indeed, when commenting on Senate Bill 948, former Chief Justice Warren Burger described as "very offensive [the notion] that a U.S. judge, having taken an oath of office is going to be biased because of the economic conditions of his own jurisdiction."\textsuperscript{95} In short, local prejudice offends the very idea of an appellate court, while federal law's balkanization conflicts with principles of federalism.\textsuperscript{96}

2. Miscellaneous Arguments

a. State Law Mastery

Senator Robert Packwood (R-Or.) claimed that S. 948's division of the Ninth Circuit would enable judges and their law clerks to achieve even greater mastery of applicable state law than the substantial expertise which they displayed in 1990.\textsuperscript{97} Relevant statistical information blunts the force of this contention. In 1990, the appellate court entertained more than 5800 appeals that involved federal question jurisdiction and decided some 250 diversity cases, three-quarters of which sustained district court determinations.\textsuperscript{98}

b. Reduction of the Reversal Rate

Senator Packwood also argued that splitting the Ninth Circuit might reduce the frequency with which the Supreme Court overturned its decisions.\textsuperscript{99} As a preliminary matter, it seems that little significance should

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\textsuperscript{94} See John Minor Wisdom, Requiem for a Great Court, 26 LOY. L. REV. 787, 788 (1980).
\textsuperscript{95} See S. 948 Hearing, supra note 4, at 469 (statement of former Chief Justice Warren Burger); see also Trigoboff, supra note 92, at 2 (quoting Judges Browning and Alex Kozinski to similar effect). See generally S. 1686 POSITION PAPER, supra note 29, at 6.
\textsuperscript{97} 135 CONG. REC. S5027 (daily ed. May 9, 1989) (statement of Sen. Packwood). Professor Baker observed that the existing "high level of expertise" did not seem inadequate. Baker, supra note 1, at 943.
\textsuperscript{98} See S. 948 POSITION PAPER, supra note 33, at 10.
\textsuperscript{99} 135 CONG. REC. S5027 (daily ed. May 9, 1989) (statement of Sen. Packwood); see also S. 948 Hearing, supra note 4, at 449 (statement of Chief Judge Owen M. Panner).
attach to a particular circuit's reversal rate. Even if the frequency of reversal were considered more important as a theoretical proposition, the rate is influenced by so many variables, such as cases which litigants choose to appeal and on which the Supreme Court chooses to grant certiorari, and fluctuates so substantially from year to year, that the concept lacks much practical value. Moreover, splitting the former Fifth Circuit minimally influenced the number of cases which the Supreme Court reviewed from the two new appellate courts.

3. A Word About Politics

Certain ideas articulated in support of and against the Ninth Circuit's division and some express statements of S. 948's sponsors indicate that the underlying political objective of changing the court's substantive law partly motivated the bill's proponents. Illustrative is the argument regarding California and the northwest states explored above. Senator Pete Wilson (R-Cal.) dubbed the endeavor "environmental gerrymandering." Former Ninth Circuit Chief Judge Alfred Goodwin similarly observed that the measure's advocates, who represented "states heavily involved in federal timber distribution . . . [were] unhappy with the way the [environmental] laws were implemented" by the court, and this made the 1989 congressional effort "more blatantly political."

The Ninth Circuit judges who opposed splitting the court may also have been animated by politics, albeit of a different type. For example, Chief Judge Goodwin apparently felt compelled to say that he no longer believed it "appropriate to discuss the motivation" of the legislation's

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100 In the October 1986 Term, the "Ninth Circuit ranked tenth among the twelve circuits in reversal rate." S. 948 Position Paper, supra note 33, at 10. In the October 1993 Term, however, the Supreme Court reversed ten cases from the Ninth Circuit, five from the Fifth Circuit, and only one or two from each of the remaining circuits. See Preview of U.S. Supreme Court Cases, July 7, 1995, at 71. See generally Richard G. Wilkins et al., Supreme Court Voting Behavior: 1993 Term, 22 Hastings Const. L. Q. 269 (1995).

101 See Baker, supra note 1, at 944-45.

102 For a helpful overview of the politics in 1989 and 1990, see Baker, supra note 1, at 944-45.

103 See supra notes 86-96 and accompanying text.


105 Trigoboff, supra note 92, at 2 (quoting former Chief Judge Alfred Goodwin).

106 See Baker, supra note 1, at 944-45.
champions. Senator Gorton proclaimed that "as expected, this bill has been taken personally by the Ninth Circuit hierarchy—God bless their souls—who has set out to defeat this bill and protect their power base."108

4. S. 948's Resolution and a Glance at More Recent Developments

Several factors alone and synergistically may have prompted Congress to reject S. 948 and to leave the Ninth Circuit undisturbed in 1990. The resistance of the appeals court's members, the opposition of a few senators from affected states, and of environmental organizations, such as the Sierra Club, and the suggestion of the Federal Courts Study Committee that Congress authorize a five-year study of the circuits apparently explain the measure's tepid congressional reception.109

Numerous developments that are relevant to the Ninth Circuit's division have transpired since 1990. Senators and representatives who favored bifurcating the court sponsored measures similar to S. 948 in 1991 and 1993.110 Congress did not seriously consider the proposed legislation as witnessed by its failure to schedule hearings. Congress also failed to authorize an official study specifically focusing on appellate court caseloads and structural remedies for addressing them, as recommended by the Study Committee.111

The Federal Judicial Center (FJC) did complete a 1993 study of structural alternatives at the instigation of the Committee and Congress.112 The FJC found little evidence to suggest that intracircuit inconsistency is an important difficulty or that conflicts strongly correlate with circuit

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111 See supra text accompanying note 109.
112 Judith A. McKenna, Structural and Other Alternatives for the Federal Courts of Appeals (Federal Judicial Center 1993).
size. Moreover, the Center determined that the appellate system was encountering stress that structural changes would not "significantly relieve." The Long Range Planning Committee of the Judicial Conference undertook a comparatively broad evaluation of the federal courts and published a final report in March 1995. The Committee expressed its opposition to circuit restructuring and explored the possibilities of assigning district judges additional appellate duties and reducing the size of appeals court panels.

In short, Senate Bill 956 has a rich and interesting background which apparently underlies the measure's introduction by most of the senators who represent the Pacific Northwest. Much of that proposed legislation's origins and development and a number of the issues that remain salient today can be traced to Congress's consideration of Senate Bill 948 five years ago. The recent measure is examined in the following section of this Article.

II. ANALYSIS OF SENATE BILL 956

Many particulars of Senate Bill 956 and the reasons given for its introduction are analogous to the provisions of S. 948 and the rationales that supported it. Indeed, the new bill makes only two substantive modifications in the proposal that Congress explored five years earlier. It is important, nonetheless, to evaluate the requirements that sponsors have included in Senate Bill 956, the arguments which advocates have enunciated to substantiate that measure, and additional ideas in favor of and against the proposal, especially by emphasizing those concepts which are new or have changed during the 1990s.

113 Id. at 94.
114 Id. at 155.
115 COMMITTEE ON LONG RANGE PLANNING OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS (1995) [hereinafter LONG RANGE PLAN].
A. Descriptive Analysis of Senate Bill 956

Senate Bill 956 leaves intact nearly everything that the sponsors included in S. 948. Provisions governing where the circuit courts sit, the assignment of active appeals court judges and senior judges' election of assignment, judicial seniority, as well as the legislation's application to cases and its effective date, definitions, and administration are either identical or quite similar.117

The principal substantive alterations govern the jurisdictions that would be included in, and the number of circuit judges who would be authorized for, the Ninth and Twelfth Circuits. Senate Bill 956 differs from Senate Bill 948 in leaving Hawaii, Guam, and the Northern Mariana Islands in the new Ninth Circuit, and in originally prescribing seven, rather than nine, judges for the new Twelfth Circuit.118

B. Proponents' Arguments for Senate Bill 956

In introducing the legislation, the supporters of Senate Bill 956 repeated the three major ideas—size, consistency, and the relationship between California and the Northwest—which proponents had espoused in support of Senate Bill 948.119 For instance, Senator Gorton stated that the "Ninth Circuit is by far the largest of the thirteen judicial circuits, measured both by number of judges and by caseload . . . [and] the deplorable consequence of the massive size of this circuit is a marked decrease in the consistency of justice provided by Ninth Circuit courts."120 He also said that California is responsible for fifty-five percent of the appellate court's filings, which means that "California judges and California judicial philosophy" dominate parties in the Pacific Northwest states appealing issues that are "fundamentally unique" to the region.121

Senator Burns, an original co-sponsor of the new legislation, echoed these sentiments. He reiterated that the "Ninth Circuit is by far the large-

119 See supra notes 46-96 and accompanying text.
121 1995 Gorton statement, supra note 120, at S7504.
est of all the circuit courts, both in terms of the number of judges and caseload,” and that appeals remain “pending in the Ninth Circuit for an average of 14½ months.” Senator Burns suggested that it was neither fair nor in the justice system’s best interest for Montana citizens and businesses to suffer because of California’s continuing population and economic explosion. He alleged that he now detected bias against inland states in the federal judiciary as well as in the legislative and executive branches.

Senate Bill 956’s advocates articulated several propositions which are new or represent variations on the above themes. Senator Gorton observed that the Ninth Circuit had an “astounding 8092 new filings, almost 2000 more than the next busiest circuit” in 1994. He also asserted that the appellate court is currently the “slowest of twelve regional circuits in hearing and deciding appeals, on average taking a full sixteen months,” and that the “number of pending cases swelled by almost twenty percent in the last year.” Senator Burns commented that the appellate court had 6342 appeals pending in 1988 and 7597 in 1993, an increase of nearly twenty percent, but this information apparently adds little to the material which Senator Gorton supplied.

The large number of new filings is commensurate with increases in several other circuits, while the figure of nearly “2000 more than the next busiest circuit” actually constitutes a modest improvement. For instance, when Senator Gorton introduced Senate Bill 948 in 1989, he remarked that “the Ninth Circuit handle[d] 2003 more cases than any other circuit,” considering 6334 appeals the preceding year. The court does have the country’s largest docket in absolute terms, but the caseload level is not excessive when compared to other circuits.

122 Burns statement, supra note 122, at S7506.
123 See supra text accompanying notes 124-25.
124 Burns statement, supra note 122, at S7505.
125 Burns statement, supra note 122, at S7506.
126 Burns statement, supra note 122, at S7504.
127 Burns statement, supra note 122, at S7505.
128 Burns statement, supra note 122, at S7504.
129 Burns statement, supra note 122, at S7506.
130 Burns statement, supra note 122, at S7504.
131 Burns statement, supra note 122, at S7506.
The statistics regarding the average time required to process appeals and the number of pending appeals are more troubling. It is worth observing, however, that the additional one and a half months of processing time is relatively small, both figures can fluctuate, and the court lacked a full complement of active judges during the relevant period. Moreover, the "average time from oral argument submission to disposition—that is, the actual time the judges have the cases in their hands—is 1.9 months, or .5 months less than the national average."\(^{130}\)

Senator Burns was troubled to "see convicted murderers bringing lawsuits against the State claiming cruel and unusual punishment because they've been sitting on death row for a number of years."\(^{131}\) The Senator cited the example of a Montana prisoner who evaded execution for two decades by pursuing three Ninth Circuit appeals, while he ascribed the delay in securing justice for the victim's family partly to the court's overloaded docket and its attendant inefficiencies.\(^{132}\) The Ninth Circuit has instituted measures that are intended to reduce the number of similar suits and to expedite review of cases filed.\(^{133}\) Congress is currently considering legislation to limit the number of analogous filings and to resolve expeditiously the cases that are pursued.\(^{134}\)

Senator Burns also claimed that the appellate court's division would "bring much needed caseload relief to the Ninth Circuit while providing overall relief to states like my own Montana."\(^{135}\) These contentions are superficially plausible, but scrutiny reveals that these assertions leave considerable relevant information unsaid. The statements deserve close analysis and emphasis because they apparently typify important justifications for Senate Bill 956 and for the practice of circuit-splitting.

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446, a number which is exactly the national median. See S. 956 Position Paper, supra note 28, at 5-6.

130 S. 956 Position Paper, supra note 28, at 7; see also supra notes 62-65 and accompanying text.

131 Senators Burns, supra note 122, at S7505.

132 See supra note 122, at S7505-06.


135 Senators Burns, supra note 122, at S7506. The ideas that follow apply both to the proposed Ninth Circuit and to the proposed Twelfth Circuit.
An example is the notion that the new Ninth Circuit and the proposed Twelfth Circuit will individually receive fewer filings in absolute terms than the present Ninth Circuit. This proposition is essentially a truism. It is indisputable that each new circuit would confront a smaller number of cases than the existing Ninth Circuit, but it will also have a reduced contingent of active judges to decide them. Moreover, the two circuits combined will have the identical complement of active judges, who are charged with resolving the same total number of appeals as the present Ninth Circuit. These factors mean that the new Ninth Circuit, and the regions served by the existing Ninth Circuit and the two proposed courts, will realize no net benefit.

Senator Burns's specific allegation that the Ninth Circuit's bifurcation would "bring much needed caseload relief to the Ninth Circuit" is correct on one level, although this observation omits numerous applicable ideas. It is accurate that the new Ninth Circuit would receive fewer appeals as an absolute matter than the current Ninth Circuit; however, this decrease would afford no true advantages and would actually be detrimental.

Senate Bill 956, by assigning nineteen active judges to the proposed court, authorizes a ratio of three-judge panels to filings which is significantly less favorable than the current Ninth Circuit ratio, and which would be substantially less beneficial than the ratio proposed for the new Twelfth Circuit. Indeed, the Ninth Circuit Executive Office recently determined that the realignment proposed by S. 956 would "materially increase the caseload of judges" in the new Ninth Circuit from 868 to 1014 appeals per three-judge panel annually.

More striking is the sharp contrast between the 1000 filings per panel annually for which the new Ninth Circuit would be responsible and the 645 appeals per year that judges on the proposed Twelfth Circuit would address. The statistics assume even greater significance because the new Ninth Circuit would confront a more complex and time-consuming docket than the present Ninth does or the proposed Twelfth Circuit would. These figures show that the new Ninth Circuit will secure no real

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138 See supra note 135 and accompanying text.
Senator Burns also did not mention that the composition of the Ninth Circuit proposed by Senate Bill 956 would complicate the court's future efforts to discharge all of its duties effectively, especially resolving appeals promptly, inexpensively, and fairly. Even Senator Burns acknowledged that the "caseload for the Ninth Circuit will remain high no matter what, due to the population dynamics in a State like California."\textsuperscript{139}

It warrants emphasizing that California alone will not constitute the new Ninth Circuit. In addition to California, the jurisdiction would include Arizona, whose already sizable population is steadily rising, and Nevada, which is the nation's fastest-growing state.\textsuperscript{140} California is responsible for a majority of the existing Ninth Circuit's filings, a substantial percentage of which are complex. Arizona and Nevada generate a significant number of appeals, many of which are complicated. The proposed Ninth Circuit's composition, accordingly, guarantees that over time it will have increasingly onerous obligations which are imposed by a large, rapidly expanding docket consisting of relatively complex filings.\textsuperscript{141}

In short, Senate Bill 956 would not alleviate, but would in fact exacerbate, the new Ninth Circuit's caseload situation. The proposed legislation would require the court to decide many more appeals per panel, a higher percentage of which are complicated and time-consuming, than either the current Ninth Circuit or the proposed Twelfth Circuit. This situation would probably worsen in the future.

Senator Burns's particular claim that splitting the Ninth Circuit would afford "overall relief to states like my own Montana"\textsuperscript{142} is correct. His contention, nevertheless, ignores much pertinent material, especially regarding the way that the advantage would materialize. Some of this information has already been analyzed and thus receives less detailed treatment here.

\textsuperscript{139} See Burns statement, \textit{supra} note 122, at S7506.


\textsuperscript{141} S. 956 would also place Hawaii, Guam, and the Northern Mariana Islands in the new Ninth Circuit. Their inclusion will minimally affect the court's caseload, although the circuit and lawyers and parties who appeal cases from those districts will incur significant travel costs.

\textsuperscript{142} See Burns statement, \textit{supra} note 122, at S7506.
It is true that the jurisdictions in the new Twelfth Circuit would benefit. Most significant, the data analyzed already show that S. 956's allocation of nine active judges to the proposed Twelfth Circuit would provide a far better ratio of three-judge panels to filings than that of the new Ninth Circuit and a ratio more advantageous than the present Ninth Circuit. The three-judge panels of the proposed Twelfth Circuit would annually confront 645 cases, in marked contrast to those of the new Ninth Circuit, which would face 1014 appeals; the existing Ninth Circuit now decides 868 cases. The proposed Twelfth Circuit would also have a docket which is less complex and which requires less time to resolve than both the proposed and the current Ninth Circuit.

In short, the Ninth Circuit's division will offer the states included in the proposed Twelfth Circuit and the court itself important immediate benefits, which should improve in the future. The circuit will address considerably fewer appeals per panel, a smaller percentage of which are comparatively complicated and time-consuming than either the new or the present Ninth Circuit. It is critical to understand, however, that most of the gains accruing to the proposed Twelfth Circuit will be at the expense of the new Ninth Circuit. The region served by the existing Ninth Circuit and the two proposed circuits will derive no net advantage.

The above examination indicates that the Ninth Circuit's bifurcation will give the new Twelfth Circuit considerable relief. Nevertheless, the benefits realized could be costly and will probably be delayed in the near term. There would be numerous start-up and permanent expenses, involving time, money, and energy, which would accompany any effort that is as ambitious as creating a new appellate court.

Illustrative are requirements that the proposed Twelfth Circuit devote time and money to establishing and maintaining Clerk of Court and Circuit Executive Offices, training employees to staff them, and training ad-

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143 See supra text accompanying notes 137-38.
144 S. 948 Position Paper, supra note 33, at 12-13; S. 956 Position Paper, supra note 28, at 2-3. The Ninth Circuit Executive Office estimated the initial start-up costs of creating the new Twelfth Circuit to be approximately $37.44 million and the additional annual operating expenses of maintaining two circuits to be $5.19 million. See Office of the Circuit Executive of the U.S. Courts for the Ninth Circuit, Position Paper in Opposition to S. 956—Ninth Circuit Court of Appeals Reorganization Act of 1995, Supplement 1 (Sept. 6, 1995). The discussion presented in the next four paragraphs relies heavily on the first two sources.
ministrative personnel to manage them. The Twelfth Circuit might be able to capitalize on the experience of creating the Eleventh Circuit. However, the Eleventh Circuit was established fifteen years ago; institutional memories may have faded and that court differs significantly from the proposed Twelfth Circuit.\(^{148}\)

Complications apart from these fixed start-up costs would attend any project of this magnitude. Once the proposed Twelfth Circuit exists and has overcome the basic problems involving its institution, it will encounter both anticipated and unpredictable obstacles. For instance, the circuit must master the size and composition of the new court's docket and secure appreciation of various appellate procedures' efficacy.

The judges of the proposed Twelfth Circuit may experience corresponding difficulties in adjusting to the new system. These features could range from the comparatively mundane, such as working with unfamiliar or newly trained appeals court staff, to the relatively serious, such as sitting more frequently on panels with the same colleagues or expeditiously resolving a different case mix.\(^{146}\)

The Ninth Circuit Executive Office predicted that the proposed Twelfth Circuit would replicate functions which the existing Ninth Circuit now performs satisfactorily.\(^{147}\) The Office's elaboration of this prognostication summarized or expanded some ideas above and added several new concepts:

\[\text{Administratively, the creation of a new circuit would require duplicative offices of clerk of court, circuit executive, staff attorneys, settlement attorneys, and library, as well as courtrooms, mail and computer facilities. In addition, approximately 40,000 square feet of new headquarters space would be required, all of which would duplicate offices and space in San Francisco. Further, a small circuit, with its concomitant small caseload, would underutilize judicial resources and reduce the opportunities for efficiencies available to a larger circuit.}^{148}\]

\(^{145}\) See supra notes 18-28 and accompanying text. Alabama, Florida, and Georgia are not only distant geographically, but also have quite different legal and nonlegal cultures than the five states of the Pacific Northwest.

\(^{146}\) For instance, some judges may find the Twelfth Circuit's more homogenous appellate docket less challenging; see infra text accompanying notes 151-53 (affording more discussion of collegiality).

\(^{147}\) See S. 956 POSITION PAPER, supra note 28, at 2.
In sum, the Ninth Circuit's division would provide the proposed Ninth Circuit no true relief in the near term and is likely to worsen its situation in the longer term. Division will have an immediate and long term positive impact on the states that comprise the new Twelfth Circuit and that court. Nevertheless, the advantages could be rather costly to procure and their realization may be delayed, while the gains would come at the expense of the proposed Ninth Circuit.

S. 956's sponsors, in recommending that Hawaii, Guam, and the Northern Mariana Islands be part of the new Ninth Circuit, not the proposed Twelfth Circuit, as S. 948 specified, are suggesting that the Congress create a new Twelfth Circuit comprising a small group of adjacent jurisdictions which share a common background and a reasonably close regional identity. The five states that would constitute the proposed Twelfth Circuit resemble each other more than any of them resembles California. The jurisdictions have somewhat similar land bases, populations, and economies. For example, each state has millions of acres of national forests, is rather sparsely populated, and is financially dependent on tourism, extractive industries, such as mining, and renewable resources, particularly timber.

It is easy to overstate the degree of regional homogeneity, however. For instance, phenomena such as maritime trade and Pacific fisheries, which have considerable significance to Alaska, Oregon, and Washington, are of limited consequence to Idaho and Montana. The local legal and nonlegal cultures in Seattle more closely resemble those of San Francisco than of Anchorage, Boise, or even Portland, much less any Montana city. It is also important to remember that jurisdictions such as Idaho and Montana historically derived much of their law from California, and that courts there continue to consult the jurisprudence of California in interpreting

148 S. 956 POSITION PAPER, supra note 28, at 2-3. This information and the insufficient capacity of the existing facilities to accommodate the new judicial officers, court personnel, and records seem to contradict Senator Burns's admonition that S. 956 will necessitate no new buildings as the new Twelfth Circuit will occupy extant Ninth Circuit structures. See Burns statement, supra note 122, at S7506; see also supra note 33 and accompanying text (suggesting that existence of administrative offices in Seattle may ameliorate certain start-up costs).

149 See supra text accompanying notes 88-90. The five states will also generate relatively homogeneous issues for appellate review.
and applying their own law. Finally, the notion of an appeals court comprising several contiguous states that share a common background may be an outmoded precept.\textsuperscript{180}

\textbf{C. Additional Arguments for Senate Bill 956}

Additional ideas that the advocates of S. 956 have not expressed or have enunciated only implicitly support the legislation. Perhaps most important is a cluster of concepts that come under the rubric of collegiality. Regardless of whether the proposed Twelfth Circuit has seven or nine active judges,\textsuperscript{181} it will have considerably fewer judges than the fifteen the Judicial Conference has suggested as the maximum.\textsuperscript{182}

This rather small complement of judges will multiply opportunities for the court's members to interact. Each Twelfth Circuit judge will serve on panels to hear cases, work on Circuit Judicial Council efforts, and participate at Circuit Judicial Conference meetings much more often with every other member of the court. The increased exposure and familiarity among the circuit's members should facilitate cooperation and enhance productivity in numerous relevant contexts. More specifically, judges who together must decide a larger number of appeals might well reach agreement and write opinions faster. They may also develop better means of communicating and resolving their differences and be more willing to assume special assignments and to assist their colleagues.\textsuperscript{183}

An appellate court with fewer judges could offer additional advantages. One potential benefit is that it might eliminate the need to employ some extraordinary procedures that can be relatively ineffective. The Ninth Circuit's limited en banc mechanism arguably offers an example. Critics "complain that the device is expensive and time-consuming without being

\begin{footnotesize}

\textsuperscript{180} See \textit{supra} notes 85, 88-90 and accompanying text; see also \textit{infra} notes 162, 164 and accompanying text (suggesting that smaller circuits reduce federalizing role and balkanize law).

\textsuperscript{181} See \textit{supra} note 118 and accompanying text.

\textsuperscript{182} \textit{JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES} 48 (1974). This two-decade-old recommendation is dated, given ensuing developments such as caseload expansion, congressional authorization of twenty-eight judges for the Ninth Circuit, and the former Fifth Circuit's division.

\textsuperscript{183} I would be remiss if I failed to include the obligatory allusion to the trite saying that familiarity can also breed contempt, a phenomenon which the experiences of certain judges on another circuit may illustrate. See Carl Tobias, \textit{The D.C. Circuit as a National Court}, 48 U. MIAMI L. REV. 159, 169-70 (1993). See generally \textit{Frank M. Coffin, On Appeal} 213-29 (1994).
\end{footnotesize}
effective to maintain a unity in the law of the circuit."\textsuperscript{164} Moreover, evidence suggests that the court's judges are reluctant to invoke the measure.\textsuperscript{165} On average, the Ninth Circuit has reheard en banc only nine cases per year.\textsuperscript{166} Chief Judge J. Clifford Wallace, however, has been favorably impressed with the technique,\textsuperscript{167} while the Federal Courts Study Committee recommended that other circuits adopt the special en banc mechanism.\textsuperscript{168}

D. Additional Arguments Against Senate Bill 956: The Limited Strategy of Circuit-splitting

There are several arguments against S. 956 that I have alluded to or treated implicitly above, and they warrant little additional examination here. For instance, the new Twelfth Circuit's creation would impose significant start-up and permanent costs, forfeit the sense of community which many Ninth Circuit judges and attorneys now share, and sacrifice certain advantages accruing from the Ninth Circuit's experimentation with innovative appellate procedures.\textsuperscript{169} Two ideas, the inadvisability of creating circuit judgeships and of bifurcating appellate courts nationally and on the West Coast, however, are sufficiently important to merit additional consideration.

Apart from the Ninth Circuit's specific circumstances, the division of appeals courts constitutes a limited reform that is simply ineffective. The larger appellate courts, such as the Second and the District of Columbia Circuits, that encounter greater difficulties than the remaining appeals courts, are resistant to feasible splitting as a practical matter.\textsuperscript{160} The few benefits and the numerous disadvantages, including the considerable costs,

\textsuperscript{164} Baker, \textit{supra} note 1, at 930.
\textsuperscript{165} See Gorton Position Paper, \textit{supra} note 55, at 7; Navarro Letter, \textit{supra} note 39, at 575.
\textsuperscript{166} See Gorton Position Paper, \textit{supra} note 55, at 7; Baker, \textit{supra} note 1, at 930.
\textsuperscript{168} \textit{Federal Courts Study Committee Report}, \textit{supra} note 109, at 114-15.
\textsuperscript{169} See \textit{supra} notes 32-37 and accompanying text; \textit{see also infra} note 201 (asserting that the Ninth Circuit is valuable for experimentation).
which accompanied the former Fifth Circuit’s bifurcation attest to this approach’s inefficacy. Moreover, dividing appellate courts irretrievably reduces circuits’ federalizing role, decreasing their role as national courts and increasing their impact as regional courts.

As a theoretical proposition, circuit-splitting might appear more workable if Congress redrew the boundaries of the entire appeals court system at once. However, the initial equalization realized by, for example, establishing twenty circuits of nine judges each would be too disruptive. The symmetry and limited improvements attained would undercut the appellate courts’ federalizing role and additionally balkanize the fragmented law of the circuits. Numerous judges and writers have criticized the concept of mincing appeals courts as an idea which is even worse than splitting them.

Dividing the Ninth Circuit or invoking it as a reason to establish many smaller circuits is flawed because each notion ignores the actual difficulties. Splitting appellate courts fails to solve one circuit’s complications and simply defers the resolution of the problems of two circuits. The remedy proffered for the Ninth Circuit, therefore, reflects a considerably broader conundrum.

Allocating the Ninth Circuit’s present docket between the proposed Ninth and Twelfth Circuits will only shift, not reduce, the workload and would actually impose more burdensome responsibilities on the new Ninth Circuit than either the proposed Twelfth Circuit will have or than the existing Ninth Circuit has. The total number of cases to be decided would remain identical, regardless of the number of appellate courts that heard the appeals. The difficulties of the largest circuits principally derive from Congress’s historic willingness to authorize more judges and expand

161 See supra notes 18-28 and accompanying text.
162 See CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS § 3, at 10-13 (5th ed. 1994); Wisdom, supra note 94, at 788.
163 See Hruska Commission, supra note 21, at 228. “More circuits multiply intercircuit conflicts and the resulting hegemony of national law is one of the principal banes of the federal appellate court system.” Baker, supra note 1, at 946 (citing Thomas E. Baker & Douglas D. McFarland, The Need for a New National Court, 100 HARV. L. REV. 1400, 1404-09 (1987)).
164 See Baker, supra note 1, at 946.
165 See, e.g., Baker, supra note 1, at 945-46; Gee, supra note 20, at 806.
federal court jurisdiction while leaving untreated multiplying caseloads. Former Chief Judge Goodwin aptly summarized most of these propositions:

Splitting the Ninth Circuit, or other circuits, would not address the real problem facing the Federal Courts of Appeals. The problem is not structure, but workload. Creating more regional circuits would not diminish the work, but merely divide it. The number of cases that must be heard by three-judge panels nationwide would remain the same and continue to grow no matter how many new circuits are formed.\(^{167}\)

The policy of creating additional judgeships and dividing appeals courts has eroded significant attributes of the circuit court system. The legislative approach of adding judges as a response to docket growth has not kept pace and might have actually exacerbated the problems experienced by the big appellate courts. The several thousand combinations of three-judge panels that now exist in the large appeals courts can have numerous adverse consequences. The combinations may complicate efforts to monitor the law, enhance the opportunities for intracircuit inconsistencies, make rehearing en banc unmanageable, and strain relations among individual judges on different panels and between panels and the en banc court.\(^{168}\)

Congressional increases in the number of judges have apparently yielded few permanent improvements, and this solution has principally served as a braking mechanism.\(^{169}\) For instance, a writer who comprehensively assessed the omnibus judgeships legislation\(^ {170}\) concluded that adding "judges only delayed what appear[ed] to be a nearly inexorable climb in appeals taken"\(^ {171}\) to the appellate courts and that there had been a mere

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\(^{169}\) See Baker, supra note 1, at 948; see also Patrick Higginbotham, *Bureaucracy—the Carcinoma of the Federal Judiciary*, 31 Ala. L. Rev. 261, 270 (1980).


\(^{172}\) Id.
one-year effect on the appeals-per-panel ratio.\textsuperscript{172} Simply authorizing more judgeships threatens to worsen the unintended impacts on the circuits.

Expanding the appeals court bench could further tax the judicial confirmation process and might even lead to the appointment of less qualified judges.\textsuperscript{173} A larger appellate judiciary would reduce collegiality among judges and would foster greater inconsistency, promoting concomitant uncertainty and increases in litigation.\textsuperscript{174} Congress may also be decreasingly willing to incur the expense of creating additional judgeships, much less of establishing new appeals courts, as Congress exhibits growing concern about the escalating national budget and deficit.\textsuperscript{175}

The concepts articulated above have led their exponents and other knowledgeable federal court observers to suggest that authorizing more circuit judges in the context of the present appellate system is a strategy with limited promise that may even be counterproductive. For example, as early as 1954, Supreme Court Justice Felix Frankfurter warned that the courts' growing business could not "be met by a steady increase in the number of federal judges" because he believed that this solution would not alleviate mounting dockets and was "bound to depreciate the quality of the federal judiciary and thereby adversely to affect the whole system."\textsuperscript{176} During 1980, Judge Patrick Higginbotham stated that legislative creation of additional judgeships "seemed to be the only positive response to the courts' increasing number of cases . . . [but it] ought to be the last resort, not the first."\textsuperscript{177} Soon after Congress divided the former Fifth Circuit that same year, Senator Howell Heflin (D-Ala.) remarked that "Congress recognized that a point is reached where the addition of judges decreases the


\textsuperscript{173} See Baker, supra note 1, at 949; see also supra note 168 and accompanying text.

\textsuperscript{174} See Baker, supra note 1, at 946; see also supra notes 144-48 and accompanying text. This paragraph and the one immediately above implicate the controversial, ongoing debate over the optimal size of the federal judiciary. For a sense of this debate, see Commentary \textit{On Determining the Size of the Federal Judiciary}, 27 CONN. L. REV. 851-913 (1995). See generally GORDON BERMANT \textit{ET AL., IMPOSING A MORATORIUM ON THE NUMBER OF FEDERAL JUDGES} (Federal Judicial Center 1993).


\textsuperscript{176} Higginbotham, supra note 169, at 270. Judge Higginbotham is the chair of the Advisory Committee on the Civil Rules.
effectiveness of the court, complicates the administration of uniform law, and potentially diminishes the quality of justice within a circuit.”

In 1990, the Federal Courts Study Committee found that the number of appeals court judges had nearly tripled in the preceding three decades, that each circuit had an average complement of thirteen judges, and that conservative caseload projections suggested the need for 315 appellate judges and an average court size of twenty-four judges by 1999. The Study Committee then warned that “tribunals of seventeen, much less twenty-four, sitting in panels of three, may resemble a judgeship pool more than a single body providing unified circuit leadership and precedent,” even as it acknowledged that “large courts such as these may be workable.” The Committee then questioned “[w]hether tribunals of thirty or forty judges will be workable,” characterizing them as “more problematic,” because the issue is “not simply one of administration but of the effect, both within the circuit and nationally, of so many uncoordinated opinions from so many judges.”

It bears repeating that there is a lack of consensus among federal courts experts about precisely what difficulties growing dockets cause and whether they create complications that are sufficiently troubling to warrant treatment, particularly with structural measures that are as controversial as splitting appeals courts. Professor Arthur Hellman’s valuable continuing research on the operation of circuit precedent provides a helpful, additional illustration. As of June 1995, he had found no evidence that the appellate court system needs more authoritative precedents, a determination that seriously questions an essential premise underlying most structural reform proposals, especially circuit-division.

Numerous respected individuals and entities have also challenged the wisdom of applying structural solutions. In a March 1995 report, the

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278 Howell Heflin, Fifth Circuit Court of Appeals Reorganization Act of 1980—Overdue Relief for an Overworked Court, 11 CUMB. L. REV. 597, 616 (1980). Senator Heflin did find that circuit realignment was “necessary in the case of the Fifth Circuit to create a firm base for durable reform.” Id. at 616 n.101. Senator Heflin was chair of the subcommittee that held the hearing on S. 948, and he served as a member of the Federal Courts Study Committee.

279 FEDERAL COURTS STUDY COMMITTEE REPORT, supra note 109, at 114.

280 FEDERAL COURTS STUDY COMMITTEE REPORT, supra note 109, at 114.

281 FEDERAL COURTS STUDY COMMITTEE REPORT, supra note 109, at 114.

282 See, e.g., Hellman, supra note 4; Hellman, supra note 22; Hellman, supra note 76.

Committee on Long Range Planning of the Judicial Conference strongly recommended that circuits be restructured "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." In a 1993 study of structural alternatives, the Federal Judicial Center (FJC) ascertained that the federal civil justice system was under pressure, but that it did "not appear to be a stress that would be significantly relieved by structural change to the appellate system at this time." In 1990, former Chief Judge Goodwin claimed that dividing appeals courts failed to address the actual problem of workload which circuits confront because establishing additional regional appellate courts would not reduce the number of cases but simply split them.

It is important to appreciate that there is considerably more agreement among students of the federal courts that increasing appeals create difficulties than there is about these complications' exact nature, whether they require treatment, and which mechanisms would most effectively address the difficulties. For example, Professor Baker's review of the voluminous literature, including ten major assessments of the circuit court system, led him to remark that the "commonly-repeated perception is that the caseload has come to threaten the federal appellate ideal and some reform is needed." Notwithstanding Professor Baker's equally thorough examination of the many antidotes which have been prescribed for the rising number of appeals, he could identify no superior approach and recommended additional study. Judge Edith Jones of the Fifth Circuit and Judge Stephen Reinhardt of the Ninth Circuit concurred that growing appellate dockets cause problems for which circuit-splitting is not the

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184 Long Range Plan, supra note 115, at 42. Fifteen years earlier, Senator Heflin had similarly observed: "Changes in the structure of the federal court appellate system are not to be executed without careful study and much deliberation. Dramatic changes in the demands placed upon a court which seriously threaten its effectiveness justify legislative and judicial reexamination of the appellate system." Heflin, supra note 178, at 616.

185 See McKenna, supra note 112, at 155.
186 Goodwin, supra note 167, at 11.
187 Baker, supra note 4, at 33.
188 Baker, supra note 4, at 295-300.
preferable solution,\textsuperscript{189} even though they disagreed sharply on the best remedies.\textsuperscript{190}

During 1990, the Federal Courts Study Committee began its discussion of the difficulties facing the appeals courts by stating: "However people may view other aspects of the federal judiciary, few deny that its appellate courts are in a 'crisis of volume' that has transformed them from the institutions they were even a generation ago."\textsuperscript{191} The Committee then predicted that "more fundamental change" seemed inevitable, barring reduced circuit workloads, a prospect which appeared unlikely.\textsuperscript{192} By comparison, in 1993, the FJC determined that structural modifications would not significantly relieve the stress under which the appellate system was laboring.\textsuperscript{193} and this March, the Judicial Conference Long Range Planning Committee strongly opposed circuit restructuring.\textsuperscript{194}

In short, numerous observers who are intimately familiar with federal court operations agree that mounting appeals do cause at least some complications which are grave enough to warrant serious consideration of possible remedies. Nonetheless, they also believe that structural solutions are controversial and that circuit-splitting may be one of the least effective responses.

A number of knowledgeable individuals and entities have suggested that the problems of the Ninth Circuit do not warrant structural solutions and have criticized the court's division. For instance, Michael Traynor, chair of the Sierra Club Legal Defense Fund, warned that splitting the appeals court "could fracture the unified interpretation of the Federal environmental laws that the Ninth Circuit consistently applies throughout the

\textsuperscript{189} Judge Jones prefers "limiting the scope of federal subject matter jurisdiction." Jones, supra note 189, at 1486. Judge Reinhardt prefers adding more judges. See Reinhardt, supra note 189, at 1507. I chose these two judges because they have quite diverse political perspectives.

\textsuperscript{190} Federal Courts Study Committee Report, supra note 109, at 109.

\textsuperscript{191} Federal Courts Study Committee Report, supra note 109, at 109. When S. 948's advocates requested that the Study Committee specifically stamp its imprimatur on the legislation, this entity assumed "no position" preferring to defer to Congress. Federal Courts Study Committee Report, supra note 109, at 123. The Committee did not endorse but explored "various structural alternatives . . . to stimulate further inquiry and discussion" among Congress, the courts, bar associations and scholars. Federal Courts Study Committee Report, supra note 109, at 116-17.

\textsuperscript{192} See supra notes 114, 185 and accompanying text.

\textsuperscript{193} See supra notes 116, 184 and accompanying text.
Western States." Senator Wilson correspondingly posed the rhetorical question whether the proposed Ninth and Twelfth Circuits would apply different substantive law "at the mouth than at the headwaters" of the Klamath River, which begins in Oregon and terminates on the California coast. Former Chief Judge Goodwin and Chief Judge Wallace claimed that splitting the appeals court would not address the real difficulty facing the circuit, its workload, but would merely increase conflicts between appellate courts for the Supreme Court to resolve. Judge Goodwin asserted that the "size of the Ninth Circuit is more an asset than a liability."

The Ninth Circuit Executive Office offered many cogent arguments against splitting the court in 1990, 1991, and in June of 1995. The Office repeated numerous ideas which have already been examined here and articulated a few new concepts. It criticized division by repeating the contentions that bifurcation would promote intercircuit inconsistency and would not treat the basic complication of rising caseloads. The Office suggested that division would enable litigants to forum shop and that attorneys have encountered little difficulty keeping abreast of the court's decisions because the "number of published opinions issued by the circuit has remained relatively constant" over the last seven years.

Three experienced students of the Ninth Circuit have summarized many of the above propositions. Former Chief Judge James Browning, who led the court for fifteen years and who implemented numerous reforms, stated:

The Ninth Circuit is the only remaining laboratory in which to test whether the values of a large circuit can be preserved. If we fail, there is no alternative to fragmentation of the circuits, centralization.

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195 S. 948 Hearing, supra note 4, at 508 (statement of Michael Traynor).
197 Goodwin, supra note 167, at 11; Albert, supra note 45, at 12.
198 See Goodwin, supra note 167, at 11; Albert, supra note 45, at 12-13 (quoting Judge Wallace).
199 Goodwin, supra note 167, at 11.
200 See S. 956 POSITION PAPER, supra note 28.
201 See S. 956 POSITION PAPER, supra note 28, at 4-5, 7-8.
202 See S. 956 POSITION PAPER, supra note 28, at 2, 5. The Federal Courts Study Committee also seemed to suggest that the Ninth Circuit might serve as an alternative to the approach of creating judgeships and splitting appeals courts that has prevailed since the 1891 founding of the modern appellate system. See FEDERAL COURTS STUDY COMMITTEE REPORT, supra note 109, at 122-23.
of administrative authority in Washington, increased conflict in circuit decisions, a growing burden on the Supreme Court, and creation of a fourth tier of appellate review in the federal system. If we succeed, no further division of circuits will be necessary. Indeed, combining the circuits into four or five might well be feasible—creating stronger and more effective appellate courts, lightening the burden on the Supreme Court, and resulting in a decentralized and more efficient administrative system for the federal judicial system.\textsuperscript{203}

Professor Baker, who recently completed one of the most thorough studies of the appellate system ever undertaken and who incisively analyzed the proposal to split the court five years ago, asserted:

\begin{quote}
[T]he strategy of adding judges and dividing circuits simply has been played out and is no longer defensible as a long-range plan. Senate Bill 948 is an idea whose time has come and gone. The justifications offered so far for dividing the Ninth Circuit simply do not withstand a close scrutiny. . . . Dividing the Ninth Circuit is the least available application of the strategy of division [because it] will prove nothing that has not been demonstrated repeatedly, most recently at the division of the Fifth Circuit.\textsuperscript{204}
\end{quote}

Professor Hellman, who has studied the appeals courts extensively and the Ninth Circuit in particular, contended in a prepared statement during the hearings on S. 948: "In my judgment, dividing the Ninth Circuit is neither necessary nor desirable at this time. Rather, the circuit should be allowed to continue an experiment in judicial administration that will ultimately redound to the benefit of the entire federal judicial system."\textsuperscript{205}

In sum, the above examination of the historical developments that preceded the recent introduction of Senate Bill 956 and the survey of the arguments in favor of and against the legislation suggest that the Ninth Circuit's division is inadvisable. The next section of this article, therefore,


\textsuperscript{204} Baker, supra note 1, at 960; see also Baker, supra note 4 (providing thorough study).

\textsuperscript{205} Professor Hellman has also served as Deputy Executive Director of the Hruska Commission and Director of the Ninth Circuit's central legal staff. S. 948 Hearing, supra note 4, at 654 (prepared statement of Arthur D. Hellman).
offers recommendations for the future by emphasizing fundamental reforms, such as those which the Federal Courts Study Committee explored. 208

III. SUGGESTIONS FOR THE FUTURE

The assessment in the first two segments of this Article indicates that the course of action embodied in Senate Bill 956 lacks promise. The evaluation also shows that the Ninth Circuit and other appellate courts are experiencing certain phenomena, primarily involving docket growth, which might warrant attention. The Ninth Circuit's mounting caseload, the correspondingly long time that it requires to resolve appeals, and the large number of additional judgeships that the circuit and the Judicial Conference have requested could deserve consideration. 207 It may be worthwhile to update the information, ideas, and approaches that existed when Congress rejected S. 948 in 1990; to collect, analyze, and synthesize the more recent data, and to ventilate the issues relevant to splitting appeals courts.

Congress will probably learn little that is new and may well decide that the reasons for dividing the Ninth Circuit now are no more persuasive than they were in 1990. Congress should capitalize on the opportunity which S. 956's introduction affords, however, to study what expanding dockets mean for the appellate system. Indeed, Sections I and II suggest that numerous students of the federal courts differ over the exact complications that growing caseloads cause and whether they are serious enough to justify treatment, and, if so, over which measures will best address the difficulties. Nonetheless, observers believe that the rising rate of appeals can be problematic and that circuit splitting is at best a palliative.

208 Federal Courts Study Committee Report, supra note 109, at 116-23. On September 13, 1995, the Senate Judiciary Committee held a hearing on S. 956. Witnesses provided virtually no new information on bifurcating the Ninth Circuit. A partial exception was Ninth Circuit Judge Diarmuid F. O'Scannlain. He may have been the first active judge of the court to endorse publicly the idea of splitting the Ninth Circuit. Judge O'Scannlain also proposed that California be divided. The Ninth Circuit Split: Hearings on S. 956 Before the Senate Committee on the Judiciary, 104th Cong., 1st Sess. 2 (1995) (statement of Diarmuid F. O'Scannlain, U.S. Circuit Judge for the Ninth Circuit). Even that idea was not new, as the Hruska Commission had proposed the concept two decades ago. See infra text accompanying notes 302-05.

207 See supra notes 54-55, 58-59, 62, 64, 120, 122, 124-25, infra note 288 and accompanying text.
This section emphasizes basic reform proposals. Almost all of these options are controversial and Congress may not adopt any of them; therefore, this section then proposes more modest approaches, such as future appellate court experimentation and additional study of the circuits and their growing dockets. Finally, it suggests improvements to S. 956 should senators and representatives seriously consider the legislation. 208

A. Comparatively Fundamental Reforms Principally Relating to Appellate Structure

1. Federal Courts Study Committee Proposals

a. Descriptive Analysis of the Proposals

The efforts of the Federal Courts Study Committee are a helpful departure point for assessing comparatively fundamental reforms that principally implicate the appeals courts' structure. 209 During 1990, the Committee evaluated several essential structural possibilities to address mounting appellate caseloads. Its report discussed five of those prospects to promote future inquiry and debate among Congress and the legal community. 210

The Committee's initial proposal was that circuit boundaries be periodically redrawn to attain regional appeals courts of nine judges and that the

208 The earlier apologia suggests my uncertainty about the precise character of the difficulties that rising numbers of appeals cause, whether they are sufficiently problematic to warrant treatment, and, if so, which remedies are best. See supra note 3. Even if I were more confident about identification of the problems, no solution seems clearly superior, much less a panacea. Therefore, I attempt selectively to designate and evaluate those approaches which seem more promising. Congress should also keep in mind the possibility of less global solutions, such as circuit-specific remedies.

209 I rely substantially in this subsection on the Federal Courts Study Committee Report, supra note 109, at 118-23, and the valuable elaboration of the Committee's proposals in Baker, supra note 4, at 238-79, as well as on the work of several contributors to Hellman, supra note 4. The exhaustive evaluation of the benefits and disadvantages of the approaches in these sources and the examination of certain aspects of two of the above five options obviate the need to offer more than descriptive analyses in this section. Because court consolidation is apparently a preferable approach, I accord it more detailed treatment. For alternatives other than the five structural options which the Federal Courts Study Committee explored, I attempt to evaluate the benefits and disadvantages of the approaches. Insofar as I have preferences, I try to indicate and justify them. It is important to remember that no remedy appears to be a panacea, that circuit-specific solutions may be preferable, and that Congress must make the ultimate policy determination.

210 Federal Courts Study Committee Report, supra note 109, at 116-17.
existing geographic circuits be dissolved. This alternative would require the new circuits to follow prior precedent declared by panels in each region unless overruled by the Supreme Court. This option contemplated a centralized division of representative judges, functioning as a type of national en banc court, which would review panel determinations to resolve inconsistencies. This would limit the number of conflicts that having more circuits would inevitably produce.

A second suggestion was to create a new appellate level. Approximately twenty-five regional appellate divisions with nine judges each would hear appeals of right, and five higher-tier appellate courts encompassing larger geographic areas would entertain discretionary appeals from these divisions. The Supreme Court would exercise discretionary jurisdiction to consider appeals from the upper-tier tribunals.

A third proposal was to establish courts with national subject matter jurisdiction in areas such as admiralty, civil rights, and labor, which would coexist with the current circuits. A variation on this theme was the creation of subject matter panels in the present appellate courts. The Study Committee's fourth proposal was to merge the existing circuits into one centrally organized tribunal with the power to establish and abrogate subject matter panels as necessary. The new entity could correspondingly formulate internal procedures to resolve inconsistencies. The Committee's final suggestion was the consolidation of the current appeals courts into some five "jumbo" circuits, each of which would resemble the

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211 Federal Courts Study Committee Report, supra note 109, at 118-19; see also supra notes 163-65 and accompanying text (affording additional critical analysis).

212 See Baker, supra note 4, at 239-42 (providing additional valuable analysis).


214 See Baker, supra note 4, at 230-61.


217 See Federal Courts Study Committee Report, supra note 109, at 121.

218 See generally Baker, supra note 4, at 269-76 (affording additional valuable analysis).

219 Federal Courts Study Committee Report, supra note 109, at 122-23.
present Ninth Circuit. The Committee's principal purpose in presenting these five options was to stimulate discussion. The Committee may have been suggesting that consolidation and the existing Ninth Circuit might create alternatives to the traditional strategy of adding judges and dividing appeals courts that Congress has followed since it passed the Evarts Act in 1891.

b. A Closer Look at Consolidation

Creating judgeships and splitting appellate courts may well be ideas whose time has passed. If Congress believes, nonetheless, that additional judges are an appropriate response to steadily rising caseloads, it should seriously consider consolidating the intermediate appeals court system. Consolidation treats the Ninth Circuit as a model rather than a problem to be rectified. Congress can extract instructive insights from the Ninth Circuit's creative approaches to appellate procedure, modernization, reorganization of administrative structures, and employment of technology, all of which have contributed to an efficient, consistent circuit despite its size.

Consolidation would reduce conflicts among appeals courts, a major weakness of the existing appellate structure. Intercircuit inconsistency arises when appellate court judges refuse to consider dispositive other regional appeals courts' opinions and invoke the law of their circuit and rehearings en banc to address expanding dockets and increasing judgeships. The consolidation of existing courts, by abolishing the circuits' geographical boundaries and merging them into a single unified administrative and jurisdictional tier, would eliminate these conflicts among appellate courts, although the enhanced intracircuit inconsistency must be treated.

219 See generally Baker, supra note 4, at 277-79.
221 Federal Courts Study Committee Report, supra note 109, at 122-23.
222 Baker, supra note 1, at 953.
223 See Baker, supra note 1, at 953-54; supra notes 32-37 and accompanying text.
225 See Baker, supra note 1, at 954.
Unification would create one United States Court of Appeals and eliminate the Federal Circuit and the regional appeals courts.227 Three-judge panels that would be consolidated from some forty regular "general divisions," typically consisting of four judges from different, neighboring states, would continue to resolve cases.228 Every general division would exercise jurisdiction over appeals from a similar number of designated district judges.

Increases in oral presentations and dispositions and reductions in written opinions are this plan's hallmarks. Cases that raise important issues of federal law would require supplementation of panels with four additional judges drawn from "special divisions" identified by subject area.229 Members of these augmented courts would participate in judicial conferences and collegial deliberations, circulate and extensively amend draft decisions, and issue published opinions. Supplemental determinations would have effect across the country, thus nationalizing the current idea of the law of the circuit.

Proponents of consolidation claim that it will lead to the expeditious, inexpensive, and equitable resolution of appeals.230 The system would also promote more coherent national law and end conflicts among appellate courts. This course of action would alleviate judges' concern about maintaining the law of the circuit and would utilize judicial officers more efficiently.231

Unification is controversial, however. Critics have suggested that this model might fragment and specialize the bench, while the approach could facilitate congressional creation of more judgeships because it can absorb


228 See Baker, supra note 1, at 955.

229 See Baker, supra note 1, at 956.

230 See Baker, supra note 1, at 957-58. See generally Meador, supra note 215.

231 See Baker, supra note 1, at 955-59.
an indeterminate number of new judges. The complicated structure could pose difficult organizational challenges. Moreover, every general division, which would no longer be required to publish opinions in most cases, could ignore nationally applicable law. In short, consolidation appears promising enough for Congress to consider this possibility carefully.

2. Alternative Structural Reforms

Apart from the five responses to increasing appellate dockets that the Federal Courts Study Committee explored, there are several alternatives that deserve mention. One option that the Long Range Planning Committee of the Judicial Conference has explored is restricting the number of circuit court judges who must decide cases. The Committee suggested that appeals court panels might consist of two judges, and it proposed experimenting with single-judge review in cases that present one issue and are subject to deferential review standards. The most obvious benefit of limiting the size of circuit panels would be the savings in time and effort that could be redirected to other judicial responsibilities.

The application of both approaches might compromise the quality of appellate justice which litigants have traditionally received. Two-judge panels could have difficulty resolving their disagreements over the merits of appeals, and single-judge review may significantly restrict appellate oversight of certain categories of cases. These potential complications, together with a lack of clarity about the likely benefits, mean that Congress might prefer to consider the possibility of authorizing limited experimentation.

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232 I devoted less analysis to the five options that the Federal Courts Study Committee explored than to the alternatives considered here because these options have received less secondary treatment. This is obviously not an exhaustive, but rather a selective, representative analysis of reforms. For additional discussion of these and other reforms, see BAKER, supra note 4; McKENNA, supra note 112; LONG RANGE PLAN, supra note 115; Hellman, supra note 4.


234 See LONG RANGE PLAN, supra note 115, at 124.

235 For explication of the idea of the appellate ideal, see BAKER, supra note 4, at 14-17, 21-30.

236 The obvious problem is one-to-one votes, but special provisions can be made for this situation. See ABA Report, supra note 34, at 550.

237 This may be especially true of cases that judges deem less worthy of consideration. See infra note 251 and accompanying text. For helpful analysis of adjunct judicial officers, such as appellate commissioners, see LONG RANGE PLAN, supra note 115, at 123; McKENNA, supra note 112, at 129-33; Oakley, supra note 35, at 915-21.
Two additional alternatives, differentiated appeal management and enhanced reliance on district judges, can be conceptualized either as variations on discretionary appellate review or as hybrids of that option and structural reform.\(^{238}\) The Committee on Court Administration and Case Management of the Judicial Conference, among others, has examined differentiated appeal management or "two-track" appellate review.\(^{239}\)

In this plan, three-judge screening panels would review cases for assignment. The appeals that judges identify for Track Two would receive plenary review, while the cases designated for Track One would receive summary disposition, perhaps with judgment orders that affirm the district court.\(^{240}\) Permitting one of the screening panels' judges to place appeals on Track Two should counter the possibilities that circuits might hastily resolve cases or might not fully review specific classes of appeals. If the assignment of cases to Track Two yields greater temporal savings than resource expenditures, judges could devote additional attention to other duties, such as hearing more complex appeals.\(^{241}\)

Assigning some circuit court functions to district judges through "appellate terms" or "appellate divisions" is another approach that a number of observers have proposed over the last half-century.\(^{242}\) The panels would principally insure error correction and screen issues of law for potential appeals court review, while additional consideration would only be afforded in the circuit court's discretion on petition, unless the first appellate panel certified the appeal.\(^{243}\)

The system would prohibit trial judges from hearing cases from their own districts.\(^{244}\) The Judicial Conference Long Range Planning Committee suggested that circuit courts experiment with greater use of district judges, that such a program be restricted initially to particular categories

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\(^{238}\) See infra text accompanying notes 247-54 (discussing discretionary appellate review).

\(^{239}\) See Judicial Conference Committee on Court Administration and Case Management, Report to the Judicial Conference Committee on Long Range Planning (1993); see also McKenna, supra note 112, at 127-29 n.226 (affording analysis of procedure). See generally Oakley, supra note 35, at 862-68.

\(^{240}\) See McKenna, supra note 112, at 127-29.

\(^{241}\) I subject all three approaches examined in the text to similar cost-benefit analysis.


\(^{244}\) See Long Range Plan, supra note 115, at 123-24.
of appeals, and that Congress enlarge the pilot project's jurisdiction if it proves successful.\footnote{See Long Range Plan, supra note 115, at 124.}

Proponents of enhanced dependence on district court judges believe that such a system would offer a number of benefits, primarily by reducing current workloads of appellate court judges, thus giving them more time to consider a smaller number of appeals. The proposal would, however, necessitate a significant increase in the corps of district judges required to discharge these augmented responsibilities. Moreover, this model places substantial reliance on district judges, who were not appointed for this purpose and who may lack the experience, training, and temperament needed for these enlarged appellate court duties.\footnote{Of course, many district judges currently assume these duties when they sit by designation on appeals courts. See 28 U.S.C. § 292 (1988 & Supp. V. 1993). See generally Richard B. Saphire & Michael E. Solimine, Diluting Justice on Appeal?: An Examination of the Use of District Court Judges Sitting by Designation on the United States Courts of Appeals, 28 U. Mich. J.L. Ref. 35 (1995).} The dubious ratio of benefits to disadvantages which the approach would apparently afford means that it deserves less serious consideration.

\section{3. Discretionary Appellate Review}

The replacement of the statutory right of appeal with discretionary review, perhaps patterned on the Supreme Court's certiorari jurisdiction, is an important potential means of addressing docket growth in addition to structural measures.\footnote{See 28 U.S.C. § 1291 (1988 & Supp. V. 1993); Baker, supra note 4, at 234-38; McKenna, supra note 112, at 123-27. See generally Harlan Dalton, Taking the Right to Appeal (More or Less) Seriously, 95 Yale L.J. 62 (1985).} Discretionary appellate review would oblige the circuits, individually or together, to develop procedures and criteria for deciding which appeals to hear.

Advocates contend that such a proposal would afford numerous advantages. For instance, the discretionary approach would save time, money, and effort.\footnote{See Donald P. Lay, A Proposal for Discretionary Review in Federal Courts of Appeal, 34 Sw. L.J. 1151, 1157 (1981). See generally Baker, supra note 4, at 235.} Those cases that courts do designate for review would receive better treatment, including traditional collegial and deliberative ap-
pellate procedure, because judges would be processing fewer other appeals.\textsuperscript{249}

One difficulty with discretionary review is whether it would pass constitutional muster.\textsuperscript{250} A second concern is whether this alternative is desirable as a policy matter. It would substantially modify the appeal of right, a procedure which has enjoyed a long and rich history in the federal courts. More specifically, the discretionary procedure would additionally compromise the ability of circuits to correct errors and could ration their scarce resources into specific classes of cases which are deemed more worthy of consideration than others.\textsuperscript{251}

The Subcommittee on Structure of the Federal Courts Study Committee asserted that this model would not be an improvement because discretionary review "must be somewhat painstaking unless it is to do violence to the tradition of appellate error correction."\textsuperscript{252} The full Committee characterized "certiorari for the courts of appeals as a last resort" even while encouraging "further study of the concept."\textsuperscript{253} Professor Baker and Professor Judith Resnik suggested that the option would take the circuit courts "much farther away from our appellate tradition," granting district judges too much authority and depriving parties of too much.\textsuperscript{254} Because discretionary review would significantly change a time-honored, valuable federal court institution, Congress should probably consider it only after exhausting other less controversial options.

4. Miscellaneous Reforms

Several other substantial reforms deserve examination. The most important suggestion is restricting the original civil or criminal jurisdiction of federal district courts.\textsuperscript{255} The candidates for limitation are diversity of

\textsuperscript{249} See Lay, supra note 248, at 1157-58.
\textsuperscript{251} See, e.g., J. Woodford Howard, Jr., Courts of Appeals in the Federal Judicial System 287-88 (1981); see also Baker, supra note 4, at 237.
\textsuperscript{252} Baker, supra note 4, at 237 n.37 (citing Report of the Subcommittee on Structure to the Federal Courts Study Committee 34 (1990)).
\textsuperscript{253} Federal Courts Study Committee, supra note 109, at 116.
\textsuperscript{255} This was a central premise of the Long Range Planning Committee's Plan. See Long
citizenship jurisdiction and federal question jurisdiction. Unfortunately, modifying diversity jurisdiction would provide little relief because trial court determinations in diversity cases constitute a minuscule percentage of the appellate docket.\textsuperscript{256} Moreover, it is politically unrealistic to expect that Congress will meaningfully restrict federal question jurisdiction.\textsuperscript{257} These potential limitations on civil jurisdiction, therefore, warrant minimal additional treatment here.

Congress could also restrict appellate caseloads by reducing district courts' criminal jurisdiction. However, the perceived political gains to be derived from expanding federal criminal law, which the 1994 crime legislation's passage trenchantly reaffirmed, make the prospect of limiting criminal jurisdiction even less likely.\textsuperscript{258} Furthermore, narrowing civil or criminal jurisdiction is purely derivative and would rely on the decreased number of appeals which litigants would take from fewer district court filings.\textsuperscript{259} In sum, restricting civil and criminal jurisdiction lacks promise because neither solution appears to be politically feasible.\textsuperscript{260}

\textit{Range Plan, supra} note 115, at 23-37.

\textsuperscript{256} See \textit{supra} note 98 and accompanying text. Even the legal reforms in the ninth tenet of the Contract With America do not directly attack diversity; see \textit{also Carrington et al., supra} note 34, at 193-94. \textit{See generally} Carl Tobias, \textit{Common Sense and Other Legal Reforms}, 48 \textit{Vand. L. Rev.} 699 (1995).


\textsuperscript{259} There are numerous measures that seek to expedite the resolution, and termination, of criminal and civil cases that are pursued in district courts. \textit{See, e.g.,} Speedy Trial Act of 1974, Pub. L. No. 93-619, 88 Stat. 2076 (1975); Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990). More specifically, alternative dispute resolution (ADR) is a favored technique for diverting cases at the trial court level. Numerous circuit courts correspondingly use a number of appellate ADR techniques whose use could be quantitatively and qualitatively expanded. \textit{See supra} note 35, \textit{infra} note 265 and accompanying text.

\textsuperscript{260} For additional discussion of these and other reforms, see \textit{Baker, supra} note 4; \textit{Long Range Plan, supra} note 115; \textit{McKenna, supra} note 112; \textit{Hellman, supra} note 4.
B. Comparatively Modest Approaches

If Congress declines to make the basic reforms surveyed above and rejects S. 956, relatively modest approaches would warrant consideration, as the size of appeals courts' membership and dockets continues to grow and increasingly resembles the Ninth Circuit. The following recommendations for additional study and experimentation are principally directed to the Congress, although the appellate courts could institute most of the recommendations absent legislative authorization.

1. Experimentation

Should Congress reject the rather fundamental reforms enumerated already and S. 956, it ought to encourage new experimentation which treats the rising number of appeals and support ongoing initiatives instituted by many circuits. Congress could sponsor efforts to test the numerous options that federal court observers have proposed over the last century.

Examples of such experimentation are assigning greater appellate responsibilities to district judges and reducing the size of appeals court panels, both of which the Judicial Conference Committee on Long Range Planning recently explored. More specifically, Congress could empower several circuits to experiment with the alternatives for a period that is sufficient to gauge their worth and mandate a careful study by the Federal Judicial Center of their efficacy, in terms of saving time and expense and of judicial and litigant satisfaction, for instance.

Illustrative of continuing endeavors which Congress should support is the Ninth Circuit's creative work implicating administrative reorganization, appellate settlement, use of technology, and the limited en banc technique. Most of the other appeals courts have tested numerous mecha-

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261 See Federal Courts Study Committee Report, supra note 109, at 122-23. I afford suggestions relating to these approaches before recommendations respecting S. 956 principally for ease of analysis, although the organizational structure selected admittedly reflects the policy choices that I consider most promising. Were Congress to consider seriously or even pass S. 956, it should seriously explore incorporating certain aspects of the suggestions relating to experimentation and additional study.

262 See supra notes 233-37, 242-46 and accompanying text:

263 Many additional possibilities could be offered. For enumeration of these possibilities, see Baker, supra note 4; Long Range Plan, supra note 115; Hellman, supra note 4.

264 See supra notes 32-37, 154-58 and accompanying text.
nisms that are both similar and different. For example, the Sixth and Seventh Circuits have instituted ambitious prehearing conference programs that resemble the Ninth Circuit efforts. In comparison, the Ninth Circuit premised its Capital Punishment Project on earlier Fifth and Eleventh Circuit initiatives. Application of various other alternatives by the Fifth and Eleventh Circuits should be instructive because both circuits have large complements of judges and substantial, growing caseloads. Moreover, nearly all appellate courts decide a significant percentage of cases without oral argument, while practically every circuit resolves many appeals without issuing published or even written opinions.

Congress must insure that any such experimentation receives rigorous analysis as a predicate for future policymaking. An independent evaluator should scrutinize the application of the measures' application for enough time and in sufficiently diverse contexts to ascertain as definitively as possible whether the mechanisms are effective, for example, in expediting cases or improving the quality of appellate justice dispensed. Several Federal Judicial Center studies and the RAND Corporation's comprehensive assessment of the expense and delay reduction procedures that district courts implemented under the Civil Justice Reform Act of 1990 can

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265 See supra note 35; see generally ANTHONY PARTRIDGE & ALLAN LIND, A REEVALUATION OF THE CIVIL APPEALS MANAGEMENT PLAN (Federal Judicial Center 1983) (affording analysis of Second Circuit program).


serve as valuable models.\textsuperscript{271} Congress could also explore whether it should encourage a broader exchange of ideas regarding promising approaches, although the circuits, particularly through the judicial councils, and bodies such as the FJC and the Administrative Office of the United States Courts, already promote much interchange.

2. Additional Study

Congress could authorize additional study of the appeals courts and their dockets. The numerous analyses of the ostensible difficulties that mounting appellate caseloads create and the many remedies prescribed—a number of which have been reviewed in this Article—may suggest that the complications and their solutions have received adequate examination and that Congress should now act.\textsuperscript{272}

The advisability of undertaking another evaluation, nonetheless, finds support in the disagreement about whether the phenomena ascribed to increasing dockets actually produce difficulties that are sufficiently troubling to warrant treatment, and, if so, which responses would be most efficacious. Indeed, the Federal Courts Study Committee urged that a careful, comprehensive assessment be performed to overcome imperfect knowledge of the relevant complications, their impacts, and potential remedies.\textsuperscript{273} Professor Baker made a similar recommendation after conducting an exhaustive survey of the circuits.\textsuperscript{274}


\textsuperscript{272} See Reinhardt, supra note 189, at 1512. After all, as Judge Reinhardt states, evaluators have conducted ten major studies. See also Baker, supra note 4, at 33-43 (summarizing ten studies).


The specifics of such an evaluation require relatively brief treatment here, as analogous study proposals have been examined elsewhere. The success of the Federal Courts Study Committee indicates that it could serve as a helpful model, even though senators and representatives should attempt to learn from the problems that the Committee encountered to avoid repeating them. Illustrative are legislative assignment to an entity which consisted of individuals with demanding professional occupations of the responsibility for scrutinizing most of the federal courts' structure, jurisdiction, procedures, and practices in an eighteen month period. This idea suggests that Congress might seriously consider funding a full-time professional staff, crafting a narrow, particularized charge, and giving the group at least two years to complete its work.

Congress should create an entity like the Federal Courts Study Committee, which would include representatives from Congress, the federal judiciary, the Executive Branch, state governments, bar associations, and law schools. Senators and representatives, preferably Judiciary Committee members, must have considerable representation and must actively participate, although federal judges ought to serve and provide much input. The chair should probably be a member of Congress, but could also be a jurist, perhaps a Supreme Court Justice.

Congress must appropriate adequate resources to cover the costs of hearings and travel and to support a staff comprised of full-time professionals. Some of these personnel should have the expertise to undertake extensive, empirical research in the social sciences, assess demographic trends, balance conflicting data, and assemble additional information on the future demands that the federal courts will confront.

The committee's membership and staff must be inclusive, and it ought to maximize the involvement of interested individuals and organizations. The group should enlist the assistance of public and private institutions such as the Judicial Conference, the FJC, the Justice Department,

275 See Baker, supra note 4, at 292-300; see also Thomas E. Baker, A Proposal That Congress Create a Commission on Federal Court Structure, 14 Miss. C. L. Rev. 271 (1994); Tobias, supra note 271, at 1627.

276 See Federal Courts Study Committee Report, supra note 109.

277 I rely substantially in this paragraph on Baker, supra note 4, at 296-99; Weis statement, supra note 274.

278 I rely substantially in this paragraph on Baker, supra note 4, at 297.

279 I rely substantially in this paragraph on Baker, supra note 4, at 297-99.
the Judiciary Committees, the American Bar Association, the American Law Institute, and the National Center for State Courts, which possess a wealth of information and expertise relating to the federal circuits. The committee must institute special efforts to draw on the experiences of the states in reforming their appellate courts.

Congress should request that the entity pinpoint as specifically as possible the phenomena attributable to expanding appeals court dockets and ascertain whether the difficulties are problematic enough to deserve treatment, and, if so, identify appropriate solutions. The commission must analyze these remedies in light of their potential benefits and disadvantages and the appellate ideal. The group could then develop proposed legislative reforms and criteria by which Congress can evaluate them.

Once this entity makes its recommendations to Congress, Congress should evaluate the possibilities and draft measures incorporating the most promising alternatives. After the Senate and the House conduct public hearings on these options, Congress can probably reach consensus on the best means of addressing appellate caseload growth in the twenty-first century.

C. Suggested Improvements in Senate Bill 956

Much of the preceding discussion, in particular the evidence which shows that splitting the Ninth Circuit is unnecessary and the relatively few propositions favoring the court's division, demonstrates that Congress should leave the Ninth Circuit intact. More specifically, bifurcation's numerical and qualitative detriments eclipse its benefits. Indeed, the weight

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280 This list is obviously not intended to be exhaustive. See also Baker, supra note 4, at 295-96 (affording additional suggestions).
281 See Baker, supra note 4, at 298. The National Center for State Courts will obviously be helpful in this regard. See generally Coffin, supra note 153, at 43-65 (advocating the use of states' experiences in fashioning remedies); Daniel J. Meador, Appellate Courts (1974) (same).
282 See Baker, supra note 4, at 296-97.
283 I rely substantially in this paragraph on Baker, supra note 4, at 296-97. See generally Frankfurter & Landis, supra note 5, at 107 (the designers of any new judicial machinery will be a success if they meet the needs of their generation).
284 The committee may experience difficulty specifically identifying those difficulties caused by increasing caseloads or find that growing dockets are insufficiently problematic to deserve treatment, and, even if they are more troubling, that less ambitious solutions than national approaches, such as circuit-specific remedies, are more appropriate.
of available evidence against circuit-splitting nearly dissuades me from even advancing recommendations for improving Senate Bill 956, lest the suggestions somehow be misconstrued as endorsing an approach that I believe is flawed.

If the evidence already adduced fails to persuade the members of Congress, and they seriously consider S. 956, Congress should carefully explore ways to improve it. Perhaps most important, Congress should allocate the requisite resources, particularly the numbers of judges authorized, that will enable the new Ninth and Twelfth Circuits to discharge their responsibilities, especially to resolve appeals expeditiously, inexpensively, and fairly.

The proposed legislation, as originally introduced, would have assigned nineteen active judges to the new Ninth Circuit and seven active judges to the proposed Twelfth Circuit. As modified, the bill allocates nineteen judges to the proposed Ninth Circuit and nine judges to the proposed Twelfth. Certain factors complicate efforts to identify the exact number of judges who would be appropriate for the two new circuits. For example, it is very difficult to predict with precision the number and complexity of filings that each court will receive, the speed with which the circuits will resolve appeals, and the effects which division will have on the courts' disposition rates.

Nevertheless, comparatively accurate estimates can be derived from some relevant information. Most significant, increasing workloads led the Ninth Circuit to request ten more judges in 1992, and the Judicial Conference of the United States recommended that Congress authorize the judgeships the next year. Indeed, Senator Gorton acknowledged five years ago that the court's caseload would have justified the addition of ten judges.

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287 Another important factor will be the new courts to which senior judges elect to be assigned because the Ninth Circuit's senior judges have assumed a significant portion of the court's workload. See S. 956 § 7. See generally Patrick Walker, The Work of Senior Judges in the U.S. District Courts During 1985, 1990 and 1992 (Administrative Office of the U.S. Courts, Statistics Division, 1994).
288 See Albert, supra note 45.
289 See supra note 55 and accompanying text.
It is also possible to formulate reasonably reliable approximations by compiling recent statistics involving the quantity, difficulty, and disposition rate of appeals arising from the proposed circuits' districts, adjusting for applicable variables, and projecting these estimates into the future. For example, the Ninth Circuit Executive Office calculated the number of filings per three-judge panel for the existing Ninth Circuit and the two proposed circuits.\textsuperscript{290}

Those estimates show that Senate Bill 956's recommended allocation of the Ninth Circuit's judges between the proposed courts will provide no caseload relief to the new Ninth Circuit. Indeed, it would require that the circuit hear a larger, more complex and more time-consuming docket than the current Ninth and the proposed Twelfth Circuits.\textsuperscript{291} Congress may also want to allow for the predictable and unforeseeable difficulties which will attend the creation of the two new circuits.

The above ideas, particularly the Executive Office figures, suggest that Congress should authorize more than ten additional judges for the new courts, a majority of whom would serve on the proposed Ninth Circuit and ought to assign this new court approximately three times as many judges as the proposed Twelfth Circuit.\textsuperscript{293} If Congress disagrees with these recommendations, it should create a sufficient number of additional judgeships and distribute them between the two courts, so that the circuits can perform their duties effectively.\textsuperscript{294}

\textsuperscript{290} See supra text accompanying notes 137-38.
\textsuperscript{291} See supra text accompanying notes 138-43.
\textsuperscript{292} Both the total number of judges and their allocation are approximations that I derived primarily from the Executive Office statistics and Ninth Circuit and Judicial Conference requests. These requests may be out of date in light of caseload increases. See supra notes 124, 137-43, 288-89 and accompanying text. Indeed, it is arguable that Congress should assign all of the additional judges recommended to the proposed Ninth Circuit, especially in light of the small, relatively uncomplicated docket which the proposed Twelfth Circuit will have and the potential for underutilization of its resources. See supra text accompanying note 148.
\textsuperscript{293} The multiplier is an approximation that I premises primarily on the Executive Office figures. See supra notes 137-43 and accompanying text. If Congress does not authorize additional judges for the new courts, it should seriously consider allocating judges between the two circuits in accordance with the multiplier. I realize that nine judges comprise a workable complement for constituting panels, but six would as well and would give the Twelfth Circuit the identical composition of the First Circuit, the nation's smallest. See generally Breyer, supra note 257.
\textsuperscript{294} The polestar that Congress should use and that I have employed is the effective discharge of judicial duties. Similar considerations apply to the allocation of other resources. The Ninth Circuit Executive's Office illustrates this. Congress should provide sufficient resources to replicate that entity,
If Congress remains unconvinced by the evidence above and decides to examine S. 956 seriously, it must prescribe a workable composition for both new appeals courts. The difficulty with assigning states to the proposed appellate courts is that the current Ninth Circuit defies logical division. The following attempt to identify a practicable realignment of the court demonstrates that the existing circuit resists effective division, and, indeed, that the better solution is to leave the court as presently configured.

The Ninth Circuit as envisioned by Senate Bill 956 is one starting point. As discussed above, any appeals court encompassing California would serve more than thirty million people and confront an enormous and complex caseload. These considerations are magnified because S. 956 places in the Ninth Circuit Arizona with its large, increasing populace, and Nevada, which is the country's most rapidly growing jurisdiction, and both generate substantial appellate filings, many of which are complex.

The proposed Ninth Circuit will have a large, complex docket and a less favorable ratio of three-judge panels to appeals than the current Ninth and the new Twelfth Circuits. The Ninth Circuit as contemplated by Senate Bill 956 would, therefore, realize no actual caseload relief and will have relatively few judges to treat a gigantic number of filings, many of them complicated, in the near term, and this situation will only worsen over time. In short, the composition of the proposed Ninth Circuit would be less satisfactory than the constitution of the current court.

The obvious alternatives to the Ninth Circuit which S. 956 prescribes may be preferable. These possibilities include assigning Arizona, Nevada, although any newly created Circuit Executive's Office will experience great difficulty attaining the reputation for excellence of the Ninth Circuit Office. Resource allocations for buildings and other technical details are beyond the scope of this Article, although Congress must consider them. See supra notes 67-68, 146-48 and accompanying text. I feel compelled to reiterate that my recommendations should not be misinterpreted as an endorsement of bifurcation, an approach that I believe is flawed.

295 See supra note 160 and accompanying text.

296 See supra notes 46-71, 137-40 and accompanying text. Because the disadvantages are more important to the analysis here, I emphasize them.

297 Of course, Congress could respond to the new Ninth Circuit's circumstances by authorizing additional judgeships. See supra notes 288-89 and accompanying text. Much of the above analysis suggests that this would not be an optimal solution, particularly for the appellate system. See supra notes 160-207 and accompanying text.
Hawaii, Guam, or the Northern Mariana Islands to the new Twelfth Circuit. Inclusion of either or both mainland districts will afford the proposed Ninth Circuit a measure of caseload relief.\(^{298}\) However, this realignment would not create an appeals court consisting of adjacent jurisdictions that share a common background,\(^{299}\) thus violating the Hruska Commission’s contiguity principle.\(^{300}\) No states now designated to comprise the new Twelfth Circuit adjoin Arizona, and the major population centers in Alaska, Idaho, Montana, Oregon, and Washington are located far from those of Arizona and Nevada. Neither Arizona nor Nevada correspondingly has very much in common with the five northwestern states.

Instituting certain procedures, such as locating administrative units in Boise or Reno and relying more heavily on technology, could ameliorate the difficulties created by distance. Because the benefits of placing Arizona or Nevada in the proposed Twelfth Circuit appear to outweigh the disadvantages, this may be a feasible, albeit unsatisfactory, approach.

California presents a conundrum.\(^{301}\) Observers have found that assigning California’s federal districts to separate appellate courts would be problematic because each circuit could construe California law differently.\(^{302}\) The Hruska Commission contended that the potential for inconsistency would not produce unmanageable complications, as the possibility of inconsistency already existed in every regional appeals court.\(^{303}\) Professor Hellman argued that “none of the conflicts likely to arise in the divided-state situation are unique” and predicted that the judicial system could preserve “harmony between two federal appellate courts sitting within one state.”\(^{304}\) Nevertheless, the Hruska Commission’s recommendation that Congress split California was controversial in 1973 and delayed legislative consideration of the Ninth Circuit’s bifurcation for a decade,\(^{305}\) and the idea of dividing California has received relatively little support since.

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\(^{298}\) Inclusion of Hawaii, Guam, and the Northern Mariana Islands would afford little caseload relief, but would impose costs. See supra note 141.

\(^{299}\) See supra notes 88-90 and accompanying text. Consider the contrast between Arizona and Alaska. Although Nevada adjoins Oregon, it differs substantially from the five states of the Pacific Northwest.

\(^{300}\) See supra text accompanying note 25.

\(^{301}\) See supra notes 46-71, 137-38, 296 and accompanying text.

\(^{302}\) See Hruska Commission, supra note 21, at 238-39.

\(^{303}\) See Hruska Commission, supra note 21, at 238-39.

\(^{304}\) See Hellman, supra note 22, at 1281.

\(^{305}\) See supra notes 30-31 and accompanying text.
The notion of creating an appeals court consisting solely of California has never been seriously entertained because of the significant disadvantages that it would seemingly impose. For example, the Hruska Commission observed that a “one-state circuit would lack the diversity of background and attitude brought to a court by judges who have lived and practiced in different states” and described this characteristic as a “highly desirable, and perhaps essential, condition” for constituting circuits.\textsuperscript{308} The Commission was also concerned that one senator with long tenure who actively participated in the appointments process could shape the court for a whole generation.\textsuperscript{307} In sum, the options proposed for directly treating the problems that have been attributed to California are simply impractical.

The Twelfth Circuit that S. 956 envisions offers more benefits than detriments, but only if the substantial disadvantages which bifurcation would impose on the new Ninth Circuit are ignored.\textsuperscript{308} The benefits and the detriments of the proposed Twelfth Circuit have already been examined thoroughly in this Article.\textsuperscript{309}

Perhaps most importantly, the very favorable ratio of three-judge panels to appeals which Senate Bill 956 allocates to the Twelfth Circuit and its relatively homogeneous, uncomplicated docket would afford considerable immediate and future caseload relief.\textsuperscript{310} The relatively few judges serving on the new Twelfth Circuit should also foster more collegial relationships and enhanced productivity among them.\textsuperscript{311}

A number of the projected gains, however, could fail to materialize, and certain ostensible benefits might not even warrant that characterization. Most importantly, it may be inaccurate to describe as advantages numer-
ous significant gains which will accompany the Twelfth Circuit's highly beneficial ratio of judges to filings and its less complex docket because those advantages would accrue at the expense of the proposed Ninth Circuit. Some benefits will also be delayed or will be rather costly to achieve. Furthermore, the smaller complement of judges might not necessarily be more collegial, and the Twelfth Circuit's size could sacrifice diversity and the flexibility to make special assignments.

In sum, Senate Bill 956's plan to split the existing Ninth Circuit appears unworkable. Its detrimental aspects outweigh the advantages. The proposed Twelfth Circuit would have a positive cost-benefit ratio, especially if its start-up and permanent expenditures are discounted, but this would come at the expense of the new Ninth Circuit. Unfortunately, the alternatives, particularly those which would expressly address California, are only marginally more palatable. In the final analysis, Congress should leave the Ninth Circuit as currently constituted and appropriate the resources that the court needs to fulfill its mandate.312

**CONCLUSION**

In 1990, Senator Hatfield asserted that "for too long, the problems facing the Ninth Circuit, and the entire federal court system for that matter, have not received the thoughtful attention of Congress and the public discussion they deserve."313 This observation is equally true today as it was in 1990.314

312 I have included the suggestions relating to experimentation in this footnote, lest textual placement give them undeserved validity and be misinterpreted as my endorsement of bifurcation, an approach which I consider faulty. Congress could mandate a broad range of experiments in the proposed Ninth and Twelfth Circuits. The proposed Ninth Circuit, by virtue of its composition and caseload, could continue to apply many of the experimental approaches involving, for instance, technology, on which the current Ninth Circuit relies. The proposed Twelfth Circuit might wish to use these and numerous additional options, such as prebriefing conferences, that other appeals courts have utilized. The Fifth and Eleventh Circuits, both because of the large number of judges and cases filed and the recent split of the former Fifth Circuit, should be fruitful sources of ideas for more testing and for anticipating and treating the predictable and unforeseeable difficulties which will attend division. See supra notes 18-28 and accompanying text.

313 See Baker, supra note 4, at 99 (citing S. 948 Hearing, supra note 4, at 250-51) (statement of Sen. Mark O. Hatfield)).

Division, however, will solve the difficulties neither of the Ninth Circuit nor of the other appeals courts. Bifurcation will not remedy most complications that the Ninth Circuit in particular, and the appellate system in general, will confront in the twenty-first century. The quantitative and qualitative disadvantages of splitting appeals courts clearly outweigh their advantages. Bifurcation would accomplish nothing new and would eliminate the best appellate court for experimenting with solutions to the problems faced by large circuits. Indeed, there is a lack of consensus about whether burgeoning appeals court dockets cause problems that are sufficiently serious to warrant treatment, especially with mechanisms that are as controversial as circuit-splitting.

The import of the information which has been presented here suggests that Congress should reject as anachronistic both the Ninth Circuit's division and the broader notion of creating additional judgeships and bifurcating appellate courts. A better approach appears to be structural modification, perhaps in the form of consolidation. If Congress finds this proposal too controversial, it should explore additional circuit court experimentation and more study of appeals courts and their increasing caseloads. Congress must attempt to identify as conclusively as possible whether docket growth creates complications that are sufficiently problematic to be addressed, and, if so, with what measures. If Congress is not convinced by the persuasive evidence against circuit-splitting, and, thus, seriously considers Senate Bill 956, it ought to adopt the recommendations for improving the proposed legislation presented in this Article.

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315 See supra notes 32-37, 204-06 and accompanying text.