

2002

Dear Chief Judge Schroeder

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Recommended Citation

Carl Tobias, *Dear Judge Schroeder*, 13 Stan. L. & Pol'y Rev. 161 (2002)

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Dear Chief Judge Schroeder

Carl Tobias*

Congratulations on becoming the Chief Judge of the United States Court of Appeals for the Ninth Circuit.¹ Judge Procter Hug, Jr., transferred that office to you on December 1, 2000, during a quiet period in the tribunal's life, affording several months of relative calm in which to assume the daunting responsibility for Ninth Circuit operations.² Your twenty-one-year service as an active court member will promote the felicitous discharge of your new duties as chief judge and will ease resolution of the difficulties that the tribunal will invariably encounter.³

You have entered the pantheon of leaders whose century of collective experience on the Ninth Circuit enables them to address deftly numerous complex, delicate challenges involving the federal government's coordinate branches, the three tiers of the judiciary, and relations between the national government and the states. Examples include the court's efforts to secure resources from a budget-conscious Congress; to insure efficient and fair disposition of the largest appeals court docket; and to address perennial attempts to split the Ninth Circuit. Moreover, as you know, there are bitter, longstanding disputes among the Ninth Circuit judges and between those jurists and the Supreme Court over the death penalty, as well as environmental, Indian and water law. The following discussion is a selective catalog of

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¹ See, e.g., Mary Schenk, *Urbana Judge Named Chief of 9th Circuit, Schroeder is First Woman on Bench in Largest Federal Circuit*, CHAMPAIGN NEWS-GAZETTE, Jan. 14, 2001, at A3, at 2001 WL 9726414; see also 28 U.S.C.A. § 45 (West 1993) (prescribing the requirements for becoming the chief judge and the responsibilities of the chief judge).

² This circumstance sharply contrasted with Judge Hug's experience upon becoming chief judge in 1996 when the Ninth Circuit was embroiled in controversy. See Carl Tobias, *Keeping It Together*, RECORDER, Dec. 6, 2000, at 5 (comparing the transitional experiences of Chief Judges Hug and Schroeder); *infra* notes 21-38 and accompanying text.

³ See John P. Frank & Janet Napolitano, *Judge Mary M. Schroeder: Twenty Years*, 31 ARIZ. ST. L.J. 705 (1999); see also John P. Frank, *The Tenth Anniversary of Mary M. Schroeder as a Judge of the Ninth Circuit Court of Appeals*, 22 ARIZ. ST. L.J. 1 (1990); sources cited *supra* note 1; *infra* note 6 and accompanying text.

problems that will probably arise during your tenure as chief judge and some suggestions on how best to resolve them.

I. A BRIEF HISTORY OF THE APPELLATE SYSTEM AND THE NINTH CIRCUIT

A. THE APPELLATE SYSTEM

In 1891, Congress created the modern federal appellate system and it functioned well for the succeeding eight decades.⁴ Parties filed a comparatively small number of appeals, while the courts operated with relatively few members and staff. During this period of time, panels comprised of three active judges wrote thorough opinions only after full briefing, oral argument, and consultation.⁵

Burgeoning appeals, however, have transformed the courts from the institutions they were a generation ago.⁶ Congress partially addressed case growth by creating new judgeships but failed to authorize sufficient positions and other resources.⁷ The tribunals also invoked some new approaches that may have eroded appellate justice. For example, courts granted a dwindling percentage of oral arguments and published fewer and less expansive decisions.⁸ Circuits also relied more on nonjudicial personnel, judges who were not tribunal members, and numerous other measures, including appeals management and alternative dispute resolution (ADR).⁹ Although these changes may appear to diminish justice, most of the actions actually enhanced justice by efficiently resolving numerous disputes in which parties needed little argument or written explanation.

⁴ I rely here on THOMAS E. BAKER, *RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS* (1994); JUDITH MCKENNA, *STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS* (1993) (outlining the difficulties that the appeals courts face and recommending possible solutions through structural alteration); COMM'N ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, *FINAL REPORT* 13-32 (1998) [hereinafter *COMMISSION REPORT*] (recounting the history of the federal judicial structure under increasing use of the appeal process); Carl Tobias, *A Federal Appellate System for the Twenty-First Century*, 74 WASH. L. REV. 275 (1999) (discussing concerns about the appellate system and suggesting remedies).

⁵ See, e.g., BAKER, *supra* note 4, at 14-30 (describing the traditional conception of how the appellate system should operate); JUDICIAL CONF. OF THE U.S., *LONG RANGE PLAN FOR THE FEDERAL COURTS* 10-11, 42 (1995) [hereinafter *LONG RANGE PLAN*] (tracing the change in the courts over time); REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 109 (1990) (discussing how the appellate system has changed over the past generation).

⁶ See, e.g., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 5, at 109 (discussing how the appellate system has changed over the past generation); *LONG RANGE PLAN*, *supra* note 5, at 42 (describing a growth in circuit size and caseload); Procter Hug, Jr., *Introduction to the Symposium*, 34 U.C. DAVIS L. REV. 319, 320 (2000) (revealing the effects of increasing caseloads); Tobias, *supra* note 4, at 278 (recounting changes in the system due to greater caseloads).

⁷ See, e.g., Thomas E. Baker, *On Redrawing Circuit Boundaries—Why the Proposal to Divide the United States Court of Appeals for the Ninth Circuit is Not Such a Good Idea*, 22 ARIZ. ST. L.J. 917, 948 (1990); Carl Tobias, *The Impoverished Idea of Circuit-Splitting*, 44 EMORY L.J. 1357, 1388 (1995) (discussing the inadequacies of Congress's addition of judgeships).

⁸ See, e.g., *LONG RANGE PLAN*, *supra* note 5, at 42; MCKENNA, *supra* note 4, at 42-49 (analyzing the decline in oral arguments and published decisions).

⁹ See, e.g., MCKENNA, *supra* note 4, at 38-42, 49-53 (discussing courts of appeals' techniques for treating a growing number of appeals); *COMMISSION REPORT*, *supra* note 4, at 21-25 (reporting on use of alternative processes for decisionmaking and support staff); see also JUDITH MCKENNA ET AL., *CASE MANAGEMENT PROCEDURES IN THE FEDERAL COURTS OF APPEALS* (2000); ROBERT J. NIEMIC, *MEDIATION & CONFERENCE PROGRAMS IN THE FEDERAL COURTS OF APPEALS* (1997); ANTHONY PARTRIDGE & ALLAN LIND, *A REEVALUATION OF THE CIVIL APPEALS MANAGEMENT PLAN* (1983) (describing the Civil Appeals Management Plan used by the Second Circuit).

B. THE NINTH CIRCUIT

The Ninth Circuit is the largest appeals court by several important parameters. The tribunal covers a gigantic geographical expanse, ranging from the Arctic Circle to the Mexican border and from eastern Montana to the middle of the Pacific Ocean. The court comprises eight western states, Hawaii, Guam, and the Northern Mariana Islands; has twenty-eight active appellate judges and 106 active district judges; has ninety-six bankruptcy judges and sixty-eight magistrate judges; reviews 9,000 cases annually; and serves 50 million people.¹⁰ The Ninth Circuit treats many controversial legal and policy questions and is essentially the court of last resort for the western United States because the Supreme Court hears so few appeals.

The tribunal, like other appellate courts, addressed dramatic docket expansion with some success, despite inadequate resources.¹¹ The circuit afforded smaller percentages of arguments and published opinions, while it depended substantially on court staff, judges of other tribunals, and certain approaches such as case management, ADR, a special *en banc* process, and administrative units.¹² Many of those, and numerous related measures also helped the circuit function efficiently.

For instance, the Ninth Circuit employs personnel imaginatively. The staff “inventory” fully briefed appeals; notify judges of issues raised to help maintain consistent circuit law; assist judicial “screening panels” to terminate 150 cases monthly using truncated procedures; and discharge appeals management and ADR duties.¹³ The court also created the office of appellate commissioner that processes Criminal Justice Act vouchers for lawyer compensation; rules on motions, usually those seeking counsel’s appointment and withdrawal; and acts as a special master on certain matters, including attorney discipline

¹⁰ See NINTH CIRCUIT REORGANIZATION ACT OF 1995, S. REP. NO. 104-197, at 9 (1995) (outlining the Ninth Circuit’s composition and the court’s judgeships) [hereinafter SENATE REPORT]; 28 U.S.C.A. §§ 41 (West 1993), 44 (West Supp. 2001) (same); see also 28 U.S.C.A. §§ 133 (West Supp. 2001), 152, 633 (West 1993) (affording the district, magistrate and bankruptcy judgeships); COMMISSION REPORT, *supra* note 4, at 27, 30, 32 (affording the appellate and district judgeships, the number of appeals and the population base served).

¹¹ See COMM’N ON STRUCTURAL ALTERNATIVES FOR THE FED. COURTS OF APPEALS, WORKING PAPERS, 93 tbl.1 (1998) [hereinafter WORKING PAPERS] (providing statistics for appellate caseloads in 1997); see also COMMISSION REPORT, *supra* note 4, at 13-17, 30-32 (discussing increase in workload and methods used to manage it); *supra* note 6 and accompanying text.

¹² COMMISSION REPORT, *supra* note 4, at 30-32 (describing the use of staff attorneys, mediators, screening panels, administrative units, and limited *en banc* hearings); WORKING PAPERS, *supra* note 11, at 93 tbls.2-3 (reporting statistics on oral arguments and published opinions), 108 tbl.6a (providing percentage of appeals involving at least one visiting judge); Arthur D. Hellman, *Getting it Right: Panel Error and the En Banc Process in the Ninth Circuit Court of Appeals*, 34 U.C. DAVIS L. REV. 425 (2000); see also JOE CECIL, ADMINISTRATION OF JUSTICE IN A LARGE APPELLATE COURT: THE NINTH CIRCUIT INNOVATIONS PROJECT (1985); MCKENNA, *supra* note 9, at 159-74 (discussing the duties of the staff of the Ninth Circuit and the procedural route of cases); RESTRUCTURING JUSTICE: THE INNOVATIONS OF THE NINTH CIRCUIT AND THE FUTURE OF THE FEDERAL COURTS (Arthur D. Hellman ed., 1990) [hereinafter RESTRUCTURING JUSTICE]; James R. Browning, *Innovations of the Ninth Circuit*, 34 U.C. DAVIS L. REV. 357 (2000).

¹³ COMMISSION REPORT, *supra* note 4, at 31 (outlining the duties of nonjudicial personnel); see also NIEMIC, *supra* note 9, at 72-80 (treating prepublication reports and stating that off-panel judges’ ability to question panel opinions also fosters uniformity); Arthur Hellman, *The Unkindest Cut: The White Commission Proposal to Restructure the Ninth Circuit*, 73 S. CAL. L. REV. 377, 395-96 (2000) (discussing the monitoring of panel opinions); Procter Hug, Jr., *The Commission on Structural Alternatives for the Federal Courts of Appeals’ Final Report: An Analysis of the Commission’s Recommendations for the Ninth Circuit*, 32 U.C. DAVIS L. REV. 887, 907 (1999) (describing the use of prepublication reports and memoranda exchange to ensure consistency in decisions).

and fee award requests in civil cases.¹⁴ Moreover, the circuit has earned a reputation for according most appeals written explanations.¹⁵

The court also experiments with many innovative concepts that facilitate case disposition, making it a national laboratory and a model for large tribunals.¹⁶ Illustrative is its implementation of Bankruptcy Appellate Panels (BAP),¹⁷ which proved so valuable that Congress asked every appeals court to consider creating them.¹⁸ These actions have fostered prompt, economical and fair resolution, partly by conserving judicial resources.

Neither the Ninth Circuit itself nor the federal judiciary agrees about the courts' greatest problems or the best way to treat them. There is consensus, however, that the tribunals face increasing caseloads with relatively static resources. Although few believe restructuring the geography of the Ninth Circuit will be effective, the latest attempt to split the Ninth Circuit exposed different opinions among its judges, representing the first time any member publicly supported division. Nevertheless, a majority still opposes the notion and favors continued testing of, and reliance on, approaches that promise to improve operations without restructuring the circuit.¹⁹

¹⁴ See COMMISSION REPORT, *supra* note 4, at 31 (outlining the duties of the appellate commissioner); see also Browning, *supra* note 12, at 361 (describing the creation of the appellate commissioner position); Procter Hug, Jr., *The Ninth Circuit Should Not Be Split*, 57 MONT. L. REV. 291, 305 (1996) (discussing advantages of having an appellate commissioner); John B. Oakley & Robert S. Thompson, *Screening, Delegation and the Values of Appeal*, in RESTRUCTURING JUSTICE, *supra* note 12, at 97, 135-37 (suggesting measures to deal with ever increasing caseload).

¹⁵ Interview with Procter Hug, Jr., Chief Judge, Ninth Circuit (May 7, 1999); Interview with Pamela Ann Rymer, Judge, Ninth Circuit (Mar. 20, 1998); see also Hug, *supra* note 14, at 298 (lauding the percentage of written decisions issued by the Ninth Circuit in 1995).

¹⁶ See COMMISSION REPORT, *supra* note 4, at 30-32 (discussing procedures used by the Ninth Circuit); *infra* note 48 and accompanying text. For analysis of many of these measures, see *supra* note 12, especially CECIL and RESTRUCTURING JUSTICE.

¹⁷ See, e.g., Michael A. Berch, *The Bankruptcy Appellate Panel and Its Implications for Adoption of Specialist Panels in the Courts of Appeals*, in RESTRUCTURING JUSTICE, *supra* note 12, at 165-91; Gordon Bermant & Judy Sloan, *Bankruptcy Appellate Panels: The Ninth Circuit Experience*, 21 ARIZ. ST. L.J. 181 (1989); Browning, *supra* note 12, at 362 (analyzing the establishment of the Bankruptcy Appellate Panel). See generally NAT'L BANKRUPTCY REV. COMM'N, *BANKRUPTCY: THE NEXT TWENTY YEARS, FINAL REPORT 764-66* (1997) [hereinafter NBRC].

¹⁸ Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 104(c), 108 Stat. 4106, 4109-10; see also LONG RANGE PLAN, *supra* note 5, at 47 (discussing BAPs). Large size has benefits, such as economies of scale; flexibility to assign districts resources to treat case growth; and diversity in terms of case mixes and judges' backgrounds. See Arthur D. Hellman, *Dividing the Ninth Circuit: An Idea Whose Time Has Not Yet Come*, 57 MONT. L. REV. 261, 273 (1996) (arguing the advantages of large circuit size); Hug, *supra* note 14, at 300-02 (discussing the benefits of size); Margaret Z. Johns, *The Advantages of Larger Federal Courts of Appeals*, 34 U.C. DAVIS L. REV. 471 (2000) (same). Some dispute these ideas or find any benefits eclipsed by detriments. See, e.g., Edward R. Becker, *Contemplating the Future of the Federal Courts of Appeals*, 34 U.C. DAVIS L. REV. 343 (2000); *infra* notes 37-38, 44 and accompanying text.

¹⁹ See Letter from Procter Hug, Jr., Chief Judge, to Justice White and Members of the Commission on Structural Alternatives for the Federal Courts of Appeals (Oct. 29, 1998) (on file with Stanford Law & Policy Review) (affording alternate recommendations for how to improve operations in the Ninth Circuit); Letter from Eugene A. Wright et al., Senior United States Circuit Judge, to Byron R. White, Chairman, Commission on Structural Alternatives for the Federal Courts of Appeals (Nov. 6, 1998) (on file with Stanford Law & Policy Review) at <http://app.comm.uscourts.gov/report/comments/OScannlain.htm> (calling for a split of the Ninth Circuit); see also Diarmuid O'Scannlain, United States Circuit Judge, to Byron R. White, Chairman, Commission on Structural Alternatives for the Federal Courts of Appeals (Nov. 6, 1998) (on file with Stanford Law & Policy Review), at <http://app.comm.uscourts.gov/report/comments/DOScannlain.htm> (calling for a split, but suggesting that the Circuit itself decide how best to divide); *infra* note 40. See generally Hug, *supra* note 15; Diarmuid O'Scannlain, *A Ninth Circuit Split Study Commission: Now What ?* 57 MONT. L. REV. 313 (1996).

II. CIRCUIT RECONFIGURATION

One of your major concerns will be the ongoing dispute over possible Ninth Circuit reconfiguration, a controversy that originated in the 1940s or perhaps even earlier.²⁰ Judge Hug expended enormous energy on this issue and successfully opposed realignment. The jurist also required the court to undertake self-study and encouraged the tribunal to test and apply a variety of mechanisms intended to enhance circuit functioning.

A. THE MOST RECENT CIRCUIT-SPLITTING EFFORT

When Chief Judge Hug first assumed office in 1996, the court was embroiled in a debate over its future begun by senators from the Pacific Northwest.²¹ Judge Hug, as well as members of his circuit and Congress, including Senator Dianne Feinstein (D-Cal.), persuasively resisted bifurcation and urged further study of the appellate system.²² During late 1997, Congress authorized the Commission on Structural Alternatives for the Federal Courts of Appeals (the Commission) and provided it one year to assess the tribunals, particularly the Ninth Circuit, and issue recommendations.²³ In December 1998, the Commission proposed a divisional arrangement for the Ninth Circuit and the other courts as they grow.²⁴ One month later, senators introduced a bill embodying this idea.²⁵ Judge Hug scrutinized the divisional plan and measure, found them unworkable, and widely circulated his criticisms.²⁶ Not content to be merely a constructive critic, Judge Hug simultaneously created a Ninth Circuit Evaluation Committee (the Committee),²⁷ asking

²⁰ See Baker, *supra* note 7, at 928; Hellman, *supra* note 13, at 378-79 (recounting the history of the White Commission); Tobias, *supra* note 7, at 1363-76 (recounting the history of early proposals for splitting the Ninth Circuit).

²¹ S. 956, 104th Cong. (1995); 141 CONG. REC. S7504 (daily ed. May 25, 1995) (statement of Sen. Gorton) (speaking on behalf of western state senators introducing the Ninth Circuit Court of Appeals Reorganization Act of 1995); BAKER, *supra* note 4, at 74-105 (describing past congressional decision not to divide Ninth Circuit); SENATE REPORT, *supra* note 10 (analyzing the Ninth Circuit Reorganization Act); Tobias, *supra* note 7, at 1376-95 (discussing support for and opposition to Senate Bill 956).

²² See, e.g., SENATE REPORT, *supra* note 10, at 19-20; Carl Tobias, *Suggestions for Studying the Federal Appellate System*, 49 FLA. L. REV. 189, 202-11 (1997) (discussing congressional studies regarding the courts of appeals). For previous studies, see Thomas E. Baker, *A Generation Spent Studying the United States Courts of Appeals: A Chronology*, 34 U.C. DAVIS L. REV. 395 (2000).

²³ Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act, Pub. L. No. 105-119, § 305, 111 Stat. 2440, 2491-93 (1997) (establishing the Commission). See generally Tobias, *supra* note 22, at 214-19 (discussing the task set before the Commission).

²⁴ See COMMISSION REPORT, *supra* note 4, at 40-50 (recommending a divisional arrangement of the Ninth Circuit consisting of three, relatively independent, regional divisions). See generally Hellman, *supra* note 13, at 381-93 (reporting on the recommendations of the Commission); Hug, *supra* note 13, at 897-99, 901-06, 909-17; John B. Oakley, *Comparative Analysis of Alternative Plans for the Divisional Organization of the Ninth Circuit*, 34 U.C. DAVIS L. REV. 483 (2000); *Special Issue on the Commission on Structural Alternatives for the Federal Courts of Appeals*, 15 J.L. & POL. 379-580 (1999).

²⁵ See S. 253, 106th Cong. (1999) (proposing implementation of the Commission's suggestions); see also 145 CONG. REC. S742 (daily ed. Jan. 20, 1999) (introducing S. 253). See generally COMMISSION REPORT, *supra* note 4, at 89-91 (affording the suggested statute on which senators premised S. 253).

²⁶ See Hug, *supra* note 13 (analyzing the recommendations of the Commission). See generally Tobias, *supra* note 4 (commenting on the Commission's report); sources cited *supra* note 24.

²⁷ See NINTH CIRCUIT EVALUATION COMM., INTERIM REPORT (Mar. 2000), at <http://www.ca9.uscourts.gov/ca9/Documents.nsf> (on file with Stanford Law & Policy Review) [hereinafter INTERIM REPORT]. The Committee's membership principally comprised active Ninth Circuit judges whom a number of presidents had appointed.

that the body assess the tribunal and develop recommendations in light of the concerns of the Commission and additional federal court observers.²⁸

In July 1999, the Senate and House held public hearings on the commissioners' report and the legislative proposal.²⁹ Judge Hug and Ninth Circuit Judge Charles Wiggins testified against the Commission's approach and the bill,³⁰ although Ninth Circuit Judge Pamela Ann Rymer spoke in favor of them.³¹ Senator Feinstein simultaneously sponsored a measure that would have reformed the *en banc* process and required at least one Ninth Circuit member who was stationed in the region where an appeal originated to serve on the three-judge panel deciding that case.³²

In March 2000, the Evaluation Committee issued an Interim Report with twenty-five proposals, a number of which the court later adopted.³³ The Report responded to Commission and general concerns about the *en banc* process, regionalism, collegiality, communications, disposition time, and consistency. For example, the Committee successfully recommended changes in the limited *en banc* court that now convenes quarterly and reconsiders more appeals than it did before the reforms were proposed.³⁴ The tribunal is also testing regional assignments, whereby one circuit judge in the northern administrative unit

²⁸ *Id.* at 2 (establishing the objectives of the Committee); *see also* Procter Hug, Jr., Responding to Ninth Circuit Concerns: The Innovative Work of the Evaluation Committee (2000) (unpublished manuscript, on file with Stanford Law & Policy Review); David R. Thompson, *The Ninth Circuit Court of Appeals Evaluation Committee*, 34 U.C. DAVIS L. REV. 365 (2000).

²⁹ *See Review of the Report by the Commission on Structural Alternatives for the Federal Courts of Appeals Regarding the Ninth Circuit and the Ninth Circuit Reorganization Act: Hearing on S. 253 Before the Senate Subcomm. on Administrative Oversight and the Courts of the Senate Comm. on the Judiciary*, 106th Cong. (1999) [hereinafter *Senate Hearing*]; *Oversight Hearings on the Final Report of the Commission on Structural Alternatives for the Federal Courts of Appeals Before the House Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 106th Cong. (1999).

³⁰ *See Senate Hearing*, *supra* note 29, at 41, 113 (recording the testimony of Judge Hug and Judge Wiggins). *See generally* Hellman, *supra* note 13, at 380-81 (reporting on congressional action regarding the courts of appeals); Hug, *supra* note 28 (relaying the work of the Evaluation Committee); Procter Hug, Jr. & Carl Tobias, *A Split By Any Other Name...*, 15 J.L. & POL. 397 (1999) (suggesting a lack of empirical justification for the White Commission's recommendations).

³¹ *Senate Hearing*, *supra* note 29, at 59; *see also id.* (stating that Judge Rymer served as a commissioner). *See generally* Hellman, *supra* note 13, at 387 (discussing Judge Rymer's support of the Commission findings); Pamela Ann Rymer, *How Big is Too Big?*, 15 J.L. & POL. 383 (1999) (outlining the White Commission proposal); Pamela Ann Rymer, *Implications of the White Commission*, 34 U.C. DAVIS L. REV. 351 (2000).

³² *See* S. 1403, 106th Cong. (1999) (proposing changes in the *en banc* procedure for the Ninth Circuit); *see also* 145 CONG. REC. S8884 (daily ed. July 20, 1999) (statement of Sen. Feinstein); *Senate Hearing*, *supra* note 29, at 6 (statement of Sen. Feinstein); *infra* notes 34-35 and accompanying text. *See generally* Thompson, *supra* note 28, at 374-75 (discussing the regional concerns behind Senator Feinstein's bill); Carl Tobias, *The Next Step for the Ninth Circuit*, 73 S. CAL. L. REV. 1407, 1416 (2000) (outlining the proposals in the bill); Penny Arevalo, *Ninth Circuit Remains Intact—for Now*, CORP. LEGAL TIMES, June 2000, at 80.

³³ *See* INTERIM REPORT, *supra* note 27 (listing recommendations for the improvement of processes and greater efficiency). *See generally* Procter Hug, Jr. & Carl Tobias, *A Preferable Approach for the Ninth Circuit*, 88 CAL. L. REV. 1657 (2000) (analyzing the Commission's report); Thompson, *supra* note 28 (discussing the approach of the Evaluation Committee to problems in the Ninth Circuit).

³⁴ *See* INTERIM REPORT, *supra* note 27 (providing suggestions for improvement in the *en banc* procedure and for increased consistency in "The *En Banc* Process" section of the report). *See generally* Hug & Tobias, *supra* note 33, at 1669-70 (discussing the *en banc* process and collegiality within the circuit). "[O]nly the Ninth Circuit uses a statutorily authorized 'limited *en banc*' court." COMMISSION REPORT, *supra* note 4, at 32. *See generally* Omnibus Judgeships Act of 1978, Pub. L. No. 95-486, 92 Stat. 1629 (authorizing additional judgeships); 9TH CIR. R. 35-3 (prescribing the requirements for a limited *en banc* court); Hellman, *supra* note 13, at 386-91 (discussing uniformity in the circuit and the *en banc* procedure).

hears cases arising from that geographical area.³⁵ The court has instituted Committee recommendations to expedite resolution, namely increased “batching” of appeals with similar issues; to preserve and promote uniformity such as creation of an “electronic mailbox” and closer staff analysis of rehearing *en banc* petitions, which help identify potential conflicts; and to facilitate operations, including expanded outreach.³⁶

Despite the efforts of the Commission and the Committee, senators offered a proposal that would split the tribunal during March 2000.³⁷ They criticized the divisional notion and reiterated ideas that the size of the Ninth Circuit allows too many reversals, delays disposition, and does not foster sufficient collegiality, communication, and consistency.³⁸ In the end, the 106th Congress passed none of the three reform bills, which would have authorized a divisional plan, modified the *en banc* process and mandated regional assignments, or bifurcated the court.

B. CURRENT CIRCUMSTANCES AND FUTURE CONCERNS

The amount of attention you should devote to possible realignment is unclear. Western lawmakers have orchestrated unsuccessful circuit-splitting campaigns for years,³⁹ but the latest initiative marked the first time that any of the court’s judges supported division.⁴⁰ Changed circumstances, however, might mean you need to accord reconfiguration little energy. Senators who have avidly pursued realignment seem to find the issue less urgent, possibly reflecting several phenomena. The first is reduced concern about reversals because the High Court has reviewed somewhat fewer Ninth Circuit opinions in the last four terms.⁴¹ A second and closely related factor could be the Ninth Circuit’s recently appointed judges, who may possess rather moderate political perspectives and whose decisions have received comparatively limited criticism. A third factor is the implementation of some of the recommendations, which manifest greater concern for users of circuit services, adopted partly at the Evaluation Committee’s behest. For example, the tribunal has increased *en banc* rehearings and experimented with regional assignments.⁴²

³⁵ See INTERIM REPORT, *supra* note 27 (discussing concerns in “Regional Sensitivity and Outreach” section); see also *supra* notes 12, 32 and accompanying text. See generally Hug & Tobias, *supra* note 33, at 1670; Thompson, *supra* note 28, at 374-75 (analyzing regional problems); Arevalo, *supra* note 32.

³⁶ See INTERIM REPORT, *supra* note 27 (highlighting main objectives of new methods for the Ninth Circuit in “Improving Processes and Efficiencies” and “Consistency of Decisions” sections); see also *infra* notes 46-47 and accompanying text. See generally Hug & Tobias, *supra* note 33, at 1667-69, 1671 (discussing the Evaluation Committee’s proposals of measures to improve efficiency); Thompson, *supra* note 28, at 369-74 (reporting Committee recommendations for new methods).

³⁷ See S. 2184, 106th Cong. (2000) (proposing a split of the Ninth Circuit); see also 146 CONG. REC. S1233 (daily ed. Mar. 7, 2000) (statement of Sen. Murkowski); *id.* at S1234 (statement of Sen. Hatch) [hereinafter Senators’ Statements]; *supra* note 25, *infra* note 44 and text accompanying those notes; Scott Bales, *The Ninth Circuit: Should It Stay or Should It Go?* 34 U.C. DAVIS L. REV. 379, 386-88 (2000).

³⁸ See Senators’ Statements, *supra* note 37; see also *supra* notes 20-21; *infra* note 44.

³⁹ See *supra* notes 21, 37-38 and accompanying text; *infra* note 44 and accompanying text.

⁴⁰ See *supra* note 19 and accompanying text; see also *Senate Hearing*, *supra* note 29, at 79 (testimony of Judge Kleinfeld); *id.* at 87 (testimony of Judge O’Scannlain); *id.* at 188 (statement of Judge Sneed).

⁴¹ See NINTH CIRCUIT COURT OF APPEALS LAW LIBRARY TABLE ON U.S. SUPREME COURT REVERSAL RATES (2000); see also Hellman, *supra* note 12, at 431-52 (discussing the reversal rates for the Ninth Circuit); Hug & Tobias, *supra* note 33, at 1669-70 (questioning the relationship of the *en banc* process to reversal rates).

⁴² See *supra* notes 34-36 and accompanying text; see also *infra* note 47 and accompanying text.

Fourth, the 2000 elections created an even Senate split between Republicans and Democrats and a slight Republican House majority, while Senator Slade Gorton (R-Wash.), bifurcation's foremost advocate, lost his seat.⁴³

Notwithstanding these notions, Senator Frank Murkowski (R-Alaska) introduced a circuit-division proposal in February 2001, espousing previously articulated justifications for division, namely the reversal rate, slow resolution, and inconsistency.⁴⁴ It is not clear why the lawmaker introduced the measure at this time. Perhaps he thought this action would rekindle waning public interest or that a Republican president might be more likely to sign a bill than his Democratic predecessor. A complex mix of considerations, such as Congress's composition, the nascent status of the Bush Administration, and legislative concern about imposing a statutory solution opposed by most Ninth Circuit judges, complicates accurate prediction.⁴⁵

C. SOME SUGGESTIONS FOR THE FUTURE

In short, the safest course of action throughout your tenure would be to assume that bifurcation's staunch proponents and other critics of the court will press for change and to monitor closely matters that implicate a potential split. The longstanding character of questions raised by the Ninth Circuit's substantial magnitude and the persistence of those who champion reconfiguration will make vigilance important.

A useful way to track developments may be by retaining the Evaluation Committee. It analyzed the tribunal in light of concerns expressed by the Commission and advocates of division and proffered many ideas that have improved operations.⁴⁶ Illustrative are responses to issues involving regionalism and communications. The court should expand ongoing attempts that maximize outreach and linkages between the circuit and its consumers. For instance, the Committee urged, and the tribunal has tested, regional assignments, while the tribunal has conducted additional sessions of the court and bench-bar meetings across the circuit.⁴⁷ The Committee could further scrutinize the tribunal and formulate more

⁴³ Forty-nine Republican members of the Senate recently signed a letter requesting that President George W. Bush appoint Senator Gorton to the Ninth Circuit. See Jason Hoppin, *GOP Senators Want Gorton on the 9th Circuit*, RECORDER, Feb. 16, 2001, at 1 (reporting the possibility of Gorton's nomination for a Ninth Circuit judgeship despite his earlier advocacy for splitting the circuit); Mark Preston, *Gorton May Get Key Judgeship*, ROLL CALL, Feb. 15, 2001; Constance Sommer, *Gorton's Loss Is a Win for an Intact 9th Circuit*, CORP. LEGAL TIMES, Feb. 2001, at 70. Of course, Vermont Senator James Jeffords's decision to become an independent in May 2001 accorded the Democrats a slight Senate majority. See, e.g., Jeanne Cummings, *How One Man's Urge to Bolt GOP Rattles Much of Washington*, WALL ST. J., May 24, 2001, at A1; Alison Mitchell, *Balance of Power: The Senator; G.O.P. Senator Plans Shift, Giving Democrats Control in Setback for White House*, N.Y. TIMES, May 24, 2001, at A1.

⁴⁴ S. 346, 107th Cong. (2001) (proposing a split of the Ninth Circuit); see also 147 CONG. REC. S1476 (daily ed. Feb. 15, 2001) (statement of Sen. Murkowski); *supra* note 37 and accompanying text. House Bill 1203, 107th Cong. (2001), an identical measure, was introduced five weeks later. 147 CONG. REC. H1114 (daily ed. Mar. 22, 2001). Both bills are quite similar to Senate Bill 2184, the 2000 measure.

⁴⁵ So long as measures like Senate Bill 346 and House Bill 1203 disadvantage California by, for instance, authorizing too few judges to resolve cases promptly, you can rely on the opposition of its delegation in Congress to defeat the bills. See O'Scanlain, *supra* note 19, at 317 (discussing the impracticability of recommended splits); Tobias, *supra* note 7, at 1382 (describing the imbalance that would be created by a circuit split); see also Bales, *supra* note 37, at 385 (outlining the difficulty in treating California's size in any proposed split).

⁴⁶ *Supra* notes 27-28, 33-36 and accompanying text.

⁴⁷ See INTERIM REPORT, *supra* note 27 (suggesting improvements in the "Regional Sensitivity and Outreach" section of the report); see also Hug & Tobias, *supra* note 33, at 1670 (discussing the Committee's recommendations for preserving and

suggestions. The court must continue innovative experimentation with salutary measures.⁴⁸ Over the past three decades, the Ninth Circuit has been a national leader in testing inventive mechanisms to promote expeditious, inexpensive, and equitable disposition, and it has essentially functioned as an experimental laboratory and a prototype for large tribunals.

Testing innovations and retaining the Evaluation Committee hold greater promise than either the divisional plan or bifurcation to solve the dilemma of rising appeals and limited resources. Finally, in addition to emphasizing the limitations of realignment, you should consider consulting members of each tribunal and Congress to develop the best approach for addressing case growth with static resources.

III. DAILY ADMINISTRATION

Another seemingly mundane, but significant, responsibility of the chief judge is day-to-day Ninth Circuit administration. This entails efforts that will help guarantee that the court of appeals and the fifteen federal districts in the West which constitute the Ninth Circuit operate as effectively as possible. One important means of fulfilling that obligation is to preside over the Circuit Judicial Council (the Council), which is the body responsible for policymaking.⁴⁹

Do not forget that the former chief judges possess a wealth of expertise about daily matters and rely heavily on the talented employees in the Circuit Executive and Clerk of Court Offices for valuable help.⁵⁰ These personnel enable the biggest tribunal to function smoothly by anticipating concerns before they become actual problems and by carefully treating difficulties that materialize. The staff specifically monitors judicial resources, namely vacancies; caseload size and complexity; and the time for resolution and related phenomena. When the officials detect complications, they alert the Council so that it may institute curative actions. For example, the entity might seek support from senior and visiting judges to combat mounting appellate dockets⁵¹ or temporarily assign other courts' members to address district civil backlogs.⁵²

increasing collegiality); Thompson, *supra* note 28, at 375 (analyzing concerns about regionalism and collegiality). *See generally* Hug, *supra* note 14, at 304-05 (praising the responsiveness of the Ninth Circuit). Chief Judge Hug undertook extraordinary efforts to be an ambassador for the entire region, especially geographic areas in which Ninth Circuit panels do not regularly sit.

⁴⁸ I rely here and in the remainder of this paragraph on *supra* notes 16-18 and accompanying text.

⁴⁹ Its duties include temporarily assigning judges to courts needing aid; reviewing districts' rules and plans for choosing juries, Criminal Justice Act appointments, and court reporters; resolving disputes involving district judges' residences and workloads; reviewing and approving construction and renovation plans; appointing BAPs; resolving judicial disability and unfitness complaints; and planning circuit-wide events, such as the judicial conference. COMMISSION REPORT, *supra* note 4, at 30; *see also* 28 U.S.C.A. § 332 (West 1993 & Supp. 2001) (requiring the Chief Judge to call a judicial council); John Oliver, *Reflections on the History of Circuit Judicial Councils and Circuit Judicial Conferences*, 64 F.R.D. 201 (1975); William W Schwarzer, *The Federal Judicial Center and the Administration of Justice in the Federal Courts*, 28 U.C. DAVIS L. REV. 1129, 1149 (1995) (discussing the purpose of the council).

⁵⁰ 28 U.S.C.A. §§ 332(e), 711-15 (West 1993) (establishing the office of Circuit Executive and staff support positions); *see also* Cathy A. Catterson, *The Changing Ninth Circuit*, 21 ARIZ. ST. L.J. 173 (1989) (discussing changes in the methods used to resolve appeals in the Ninth Circuit); Cathy A. Catterson, *The Role of the Staff in the Operation of the Ninth Circuit*, 34 U.C. DAVIS L. REV. 389 (2000). *See generally* RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 150-57 (1996) (indicating heavy reliance of judges on their clerks for writing opinions); CHRISTOPHER E. SMITH, *JUDICIAL SELF-INTEREST: FEDERAL JUDGES AND COURT ADMINISTRATION* 94-125 (1995).

⁵¹ *See* 28 U.S.C.A. §§ 291, 294 (West 1993) (authorizing temporary assignment of district or retired judges to sit on appeals panels); *see also infra* notes 55-56 and accompanying text. *See generally* COMMISSION REPORT, *supra* note 4, at 31 (mentioning the use of judges from the circuit); BAKER, *supra* note 4, at 198-201 (suggesting use of current non-appellate judges to resolve increasing caseloads); Tobias, *supra* note 22, at 230 (discussing the methods used to address dockets in several circuits).

A. RESOURCES

You can facilitate operations by maximizing the judicial resources available for discharge of the many circuit duties. An obvious method is to ensure the appeals court works at full strength using all twenty-eight judges.⁵³ Since 1996, slow Senate confirmation of nominees has in essence left the circuit with seventy-five percent of its judicial complement.⁵⁴ Judge Hug repeatedly urged the president and senators to fill the empty seats. Due to his concerted efforts, there were only three vacancies when you assumed office. Functioning at total capacity will require cooperation with the chief executive and senators through reminders of the need to approve nominees for every opening. The tribunal could also depend more on its senior and visiting judges;⁵⁵ however, these ideas have limits. The pressures in working absent one-fourth of your members might have exhausted senior judges. Although visitors can increase intercircuit uniformity and diversity, reliance on visiting judges might erode intracircuit consistency and collegiality, insofar as the jurists appreciate less the court's case law, members, and traditions.⁵⁶

Another approach would be to encourage the legislature to pass the first thorough judgeships bill since 1990.⁵⁷ The Judicial Conference suggestions for Congress, which are premised on conservative calculations of judges' workloads and appeals, propose five new Ninth Circuit positions.⁵⁸ Their

⁵² See 28 U.S.C.A. § 292(b) (West 1993) (authorizing assignment of a district judge to another district); see also Hug, *supra* note 14, at 300 (indicating the advantages in having a large circuit pool of judges for temporary assignment elsewhere in the circuit); COMMISSION REPORT, *supra* note 4, at 30-31 (discussing the use of visiting judges).

⁵³ The need to fill appellate openings is more urgent, but similar ideas apply to the 106 district judges.

⁵⁴ COMMISSION REPORT, *supra* note 4, at 30; Viveca Novak, *Empty-Bench Syndrome*, TIME, May 26, 1997, at 37 (analyzing politics as contributing to slow confirmation of federal judges); see also Carl Tobias, *Filling The Federal Appellate Openings on the Ninth Circuit*, 19 REV. LITIG. 233 (2000) (considering the reasons behind the national and Ninth Circuit judicial vacancies problem, analyzing the recommendations suggested by the Commission on Structural Alternatives for the Federal Courts of Appeals, and recommending alternative solutions); Carl Tobias, *The Judicial Vacancy Conundrum in the Ninth Circuit*, 63 BROOK. L. REV. 1283 (1997) (evaluating recent developments contributing to the vacancies on the Ninth Circuit and recommending solutions).

⁵⁵ See *supra* note 51 and accompanying text; see also WORKING PAPERS, *supra* note 11, at 108, tbl.6a (showing that 43 percent of three-judge panels in 1997 included at least one judge who was not a Ninth Circuit judge).

⁵⁶ See, e.g., BAKER, *supra* note 4, at 198-201 (discussing benefits and drawbacks of various options for increasing the supply of appellate "judgepower"); Carl Tobias, *The Federal Appeals Courts at Century's End*, 34 U.C. DAVIS L. REV. 549, 558 (2000). See generally sources cited *supra* notes 18, 51 (considering the appropriateness of excluding senior appellate judges from the category of visiting judge).

⁵⁷ Judicial Improvements Act of 1990, Pub. L. No. 101-650, §§ 202-206, 104 Stat. 5089, 5098-104 (authorizing additional federal judgeships); MICHAEL J. GERHARDT, THE FEDERAL APPOINTMENTS PROCESS 302, 385 n.38 (2000) (discussing Congress's failure to create significant numbers of new federal judgeships since 1990). See generally SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 241-47 (1997) (discussing comprehensive judgeship legislation such as the Omnibus Judgeships Act of 1978); WILLIAM H. REHNQUIST, 2000 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2001), at <http://www.supremecourtus.gov/publicinfo/year-end/2000year-endreport.html> (thanking Congress for creating new district court judgeships this year and mentioning the request for more court of appeals judgeships among others); Tobias, *supra* note 22, at 235 (suggesting that Congress has traditionally employed the solution of "creating additional appellate judgeships").

⁵⁸ See JUDICIAL CONF. OF THE U.S., REPORT OF THE PROCEEDINGS 21-23 (1999) (suggesting the addition of five new Ninth Circuit judgeships); see also S. 3071, 106th Cong. (2000) (proposing the authorization of additional federal judgeships); O'Scannlain, *supra* note 19, at 315 (arguing for splitting the Ninth Circuit rather than adding many additional judges). *But see* SENATE SUBCOMM. ON ADMIN. OVERSIGHT AND THE COURTS OF THE SENATE COMM. ON THE JUDICIARY, 106TH CONG., CHAIRMAN'S REPORT ON THE APPROPRIATE ALLOCATION OF JUDGESHIPS IN THE UNITED STATES COURTS OF APPEALS (1999) [hereinafter CHAIRMAN'S REPORT] (recommending filling vacancies but denying the existence of a need to create additional

authorization could enhance daily operations, yet prove controversial because numerous lawmakers who favor circuit-splitting already consider the court too large, and judges disagree about the bench's optimal size.⁵⁹

Despite these problems, now could be a propitious time to fill the vacancies and enact a comprehensive judgeships measure. Current GOP control of the House and presidency and only a slight Democratic majority in the Senate mean that Republican lawmakers and the chief executive might be able to expedite the approval of judges and of additional judicial positions. You should cooperate with legislators, particularly those who represent states in the Ninth Circuit, to confirm nominees and to pass a judgeships bill.

You must also assess actions apart from seating the judges and securing more positions to facilitate the functioning of the circuit. The chief option would be to increase the number of, or duties of, nonjudicial personnel who perform tasks that conserve the bench's energy. For instance, increasing the number of staff attorneys from forty-eight or expanding their obligations to draft opinions in "routine" cases and conduct alternative dispute resolution (ADR) might save judicial resources. However, these actions could further bureaucratize a tribunal that some observers already find overly bureaucratic.⁶⁰

B. PROCESS SOLUTIONS

The Ninth Circuit must continue to explore all feasible measures, especially procedural ones, which facilitate prompt, economical, and fair resolution of increasing dockets with few resources. For example, mechanisms such as BAPs and "screening panels" preserve judges' time and facilitate disposition yet deliver justice; while other techniques, such as inventorying and quarterly sessions of the limited *en banc* court, maintain and promote uniformity.⁶¹ Some tribunals already may have maximized most of the benefit they can glean from process reforms, particularly ones that involve case management and ADR. Nonetheless, the Ninth Circuit should proceed with testing such potential reforms and continue developing the above approaches and related ideas. Experimentation has been successful for thirty years, and the recent improvements promoted by the Evaluation Committee suggest that this avenue can lead to even more gains.⁶² The court might also contact the remaining regional circuits, the Federal Judicial

judgeships). See generally Carl Tobias, *Choosing Federal Judges in the Second Clinton Administration*, 24 HASTINGS CONST. L.Q. 741, 753 (1997) (considering the possible tradeoffs involved in increasing federal judgeships).

⁵⁹ As to Congress, see Senators' Statements, *supra* note 37 (arguing for a split of the Ninth Circuit). As to judges, compare Jon O. Newman, *1000 Judges—The Limit for an Effective Federal Judiciary*, 76 JUDICATURE 187 (1993) (arguing against increasing the size of the federal judiciary) and Gerald B. Tjoflat, *More Judges, Less Justice*, A.B.A. J., July 1993, at 70 (arguing against increasing the size of the federal judiciary), with Hug, *supra* note 6, at 321 (arguing that the number of Ninth Circuit judges must be increased before the court accepts a larger caseload) and Stephen Reinhardt, *Too Few Judges, Too Many Cases: A Plea to Save the Federal Courts*, A.B.A. J., Jan. 1993, at 52 (arguing for an increase in the size of the federal judiciary); see also GORDON BERMANT ET AL., *IMPOSING A MORATORIUM ON THE NUMBER OF FEDERAL JUDGES: ANALYSIS OF ARGUMENTS AND IMPLICATIONS* (1993).

⁶⁰ See COMMISSION REPORT, *supra* note 4, at 23-25 (discussing the increase in judges' reliance on staff attorneys and law clerks and its effects on judicial bureaucratization); POSNER, *supra* note 50, at 150-57 (discussing the negative effects caused by the growth of the federal judiciary); SMITH, *supra* note 50, at 94-125 (considering the increase in judges' administrative tasks). See generally Jerry Goldman, *Appellate Justice Economized: Screening and Its Effect on Outcomes and Legitimacy*, in RESTRUCTURING JUSTICE, *supra* note 12, at 138, 162-64 (discussing the effects of judicial screening of cases); Jennifer E. Spreng, *Proposed Ninth Circuit Split: The Icebox Cometh: A Former Clerk's View of the Proposed Ninth Circuit Split*, 73 WASH. L. REV. 875, 904, 924-27 (1998) (arguing that the Ninth Circuit is too large and bureaucratic to function effectively).

⁶¹ See *supra* notes 12-18, 34-36, 42 and accompanying text.

⁶² See *supra* notes 12-18, 33-36, 42, 46-48 and accompanying text.

Center (FJC), and the Administrative Office of the U.S. Courts (AO) to ascertain whether these tribunals have tested or applied productive concepts that the Ninth Circuit could usefully institute.⁶³

C. LOCAL RULE REVIEW

Many significant Council tasks are rather obscure. Typical is the obligation to review local admiralty, bankruptcy, civil, and criminal procedures of the fifteen district courts under circuit jurisdiction for consistency with the federal rules and statutes and to abrogate or modify those that are conflicting or redundant.⁶⁴ Chief Judges Procter Hug and J. Clifford Wallace successfully implemented these commands.⁶⁵ They delegated responsibility for this effort to the Conference of Chief District Judges, the entity that could best accomplish the important, delicate task of analyzing and proposing changes in local measures. The body named a Local Rules Review Committee (LRRC), which evaluated all the districts' strictures and prepared a thorough report suggesting alterations, many of which the courts adopted.⁶⁶ You may wish to revitalize that endeavor or commission another because the local provisions have received no circuit-wide scrutiny since 1997 when the LRRC completed its work. Since then, the 1990 Civil Justice Reform Act, under which some districts applied inconsistent local requirements, has expired, so that those procedures must be eliminated or modified.⁶⁷ Moreover, the 2000 federal civil rules revisions should promote consistency by omitting most provisos that expressly authorized districts to prescribe conflicting local measures.⁶⁸

⁶³ 28 U.S.C. § 620 et seq. (West 1993 & Supp. 2001) (creating FJC as the courts' research arm and stating its duties); 28 U.S.C.A. § 601 et seq. (West 1993 & Supp. 2001) (creating AO as the courts' administrative arm); Schwarzer, *supra* note 49, at 1144-47 (comparing their duties).

⁶⁴ See, e.g., 28 U.S.C.A. §§ 332(d)(4), 2071(a) (West 1993) (prescribing rule review function of judicial councils); FED. R. CIV. P. 83 (same as to civil rules); FED. R. CRIM. P. 57 (same as to criminal rules). See generally Carl Tobias, *Improving the 1988 and 1990 Judicial Improvements Acts*, 46 STAN. L. REV. 1589, 1600-01 (1994) (discussing congressional attempts to restrict the increasing creation of conflicting procedural rules).

⁶⁵ See DISTRICT LOCAL RULES REVIEW COMMITTEE, REPORT TO THE NINTH CIRCUIT JUDICIAL COUNCIL (1997) [hereinafter LRRC]. See generally Carl Tobias, *Local Federal Civil Procedure for the Twenty-First Century*, 77 NOTRE DAME L. REV. 533 (2002).

⁶⁶ See LRRC REPORT, *supra* note 65. For general analyses of the endeavor undertaken by the LRRC and how the process operated in two districts, see Walter W. Heiser, *A Critical Review of the Local Rules of the United States District Court for the Southern District of California*, 33 SAN DIEGO L. REV. 555 (1996); Carl Tobias, *Contemplating the End of Federal Civil Justice Reform in Montana*, 58 MONT. L. REV. 281 (1997).

⁶⁷ Federal Courts Improvement Act of 2000, Pub. L. No. 106-518, § 206, 114 Stat. 2410, 2414 (2000) (providing for sunset). See D. MT. R. 105-2 (requiring somewhat different procedures for consenting to magistrate judge jurisdiction than 28 U.S.C.A. § 636 requires); D. NV. R. IB 2-2 (same); D. OR. R. 72.1 (same); see also Hajek v. Burlington N. R.R. Co., 186 F.3d 1105 (9th Cir. 1999) (invalidating a local rule inconsistent with a federal rule); Patrick Longan, *Congress, the Courts, and the Long Range Plan*, 46 AM. U. L. REV. 625, 665 (1997) (arguing that the Civil Justice Reform Act should require rather than permit courts to stop experimenting with changes in local rules when the sunset provision of the act is triggered); Carl Tobias, *Did the Civil Justice Reform Act of 1990 Actually Expire?*, 31 U. MICH. J. L. REFORM 887 (1998) (arguing that since the date in the sunset clause of the Civil Justice Reform Act has been reached, Congress or the Judicial Conference should stop allowing district courts to use procedural rules that are inconsistent with federal rules).

⁶⁸ *Court Rules: Amendments to Federal Rules*, 192 F.R.D. 340, 384-85 (2000) (indicating purpose of amendments to Federal Rules of Procedure was to restore national uniformity to discovery practice). See generally Carl Tobias, *Congress and the 2000 Federal Civil Rules Amendments*, 22 CARDOZO L. REV. 75, 79-81 (2000) (same and discussing the effects of the opt-out clause in the 1993 revision to Federal Rule 26 requiring automatic disclosures).

You might ensure that the court discharges similar duties regarding its local appellate rules.⁶⁹ The tribunal should ascertain whether the rules depart from or repeat the federal analogues and, if so, abolish or change them. For instance, the court in 1999 abrogated a local rule that imposed limits on briefs' length that were different from the federal rule.⁷⁰ However, the circuit permits judges to seek rehearing *en banc*, although the federal mandate says only parties may do so.⁷¹ The tribunal has also levied sanctions for noncompliance with local commands even though the federal rules discourage this practice.⁷² Should the court not monitor its own rules, the Judicial Conference could eliminate or alter violative provisions.⁷³ This power is "little known and seldom invoked," but the one time that it was used involved a request that the Conference invalidate a Ninth Circuit rule.⁷⁴ The court may prefer its own review to one imposed by an external entity.

D. A MISCELLANY OF DUTIES

The Chief Judge and the Circuit Judicial Council must undertake myriad other responsibilities ranging across a broad spectrum. Certain of these obligations are somewhat pedestrian and a number of the duties are fundamentally ceremonial, but assignments that may appear mundane in fact involve important matters of substance and procedure.

Council responsibilities for choosing magistrate and bankruptcy judges who serve in the fifteen federal districts epitomize its significant obligations.⁷⁵ The rather arcane appointment processes seemingly limit

⁶⁹ 28 U.S.C.A. § 2071 (a) (West 1993) (requiring consistent local appellate rules); FED. R. APP. P. 47 (same). *See generally* Gregory C. Sisk, *The Balkanization of Appellate Justice: The Proliferation of Local Rules in the Federal Circuits*, 68 U. COLO. L. REV. 1 (1997) (discussing the effects of district courts having inconsistent procedural rules and recommending the adoption of uniform national rules).

⁷⁰ Compare 9TH CIR. R. 32 (declaring that briefs must match the requirements in Fed. R. App. P. 32) with FED. R. APP. P. 32 (detailing the requirements for brief length and format); *see also* former 9TH CIR. R. 32. *See generally* Sisk, *supra* note 69, at 16 (discussing different circuit court rules on brief length and format).

⁷¹ Compare 9TH CIR. R. 35-2 (preventing court from ordering rehearing *en banc* without first giving parties opportunity to comment) with FED. R. APP. P. 35(b) (indicating that parties may apply for a rehearing *en banc*). *See generally* United States v. Samuels, 808 F.2d 1298, 1299 (8th Cir. 1987) (Lay, C.J., concurring) (arguing that there is no authority for a judge to request a rehearing *en banc*); Michael Solimine, *Ideology and En Banc Review*, 67 N.C. L. REV. 29 (1988) (examining the history of the *en banc* process and suggesting the use of objective criteria to determine when an *en banc* hearing should be granted).

⁷² *See, e.g.*, Great S. Co. v. Davis, 57 F.3d 1077 (9th Cir. 1995) (sanctioning counsel for failing to conform to procedural rules); Suarez v. Confederated Tribes & Bands of the Yakima Indian Nation, 996 F.2d 1227 (9th Cir. 1993) (sanctioning counsel for failing to conform to circuit rules); Kalombo v. Hughes Mkt., 886 F.2d 258 (9th Cir. 1989). *But cf.* FED. R. APP. P. 47(b) (discouraging sanctions for violation of local rules, absent actual notice).

⁷³ *See* 28 U.S.C.A. §§ 331 (West 1993 & Supp. 2001), 2071 (c) (2) (West 1993) (establishing the Judicial Conference of the United States, which will review local procedural rules to ensure consistency with federal law); FED. R. APP. P. 47 (authorizing each court of appeals to make and amend its procedural rules that must be consistent with federal law); *see also* LONG RANGE PLAN, *supra* note 5, at 59 (suggesting that the Conference invoke its oversight powers and reduce the number of local rules).

⁷⁴ Sisk, *supra* note 69, at 51-52. Five states' attorneys general asked that the Conference invalidate the local Ninth Circuit Rule 22 that covers death penalty appeals, but the Conference essentially remanded the question to the Ninth Circuit by inviting its reconsideration. *See id.*; *see also* 9TH CIR. R. 22; JUDICIAL CONFERENCE OF THE U.S., COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, MINUTES OF THE MEETING OF JANUARY 11-13 (1995), at <http://www.uscourts.gov/rules/Minutes/95-01.htm>; Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U. L. REV. 1655, 1690 n.182 (1995) (discussing the modification request).

⁷⁵ *See* 28 U.S.C.A. §§ 152 (West 1993), 631 (West 1993 & Supp. 2001).

Council discretion. For example, district judges recommend lawyers to be magistrate judges,⁷⁶ while a merit selection panel evaluates applicants for bankruptcy judgeships, interviews a few finalists and provides the Council suggestions.⁷⁷ The procedures for appointing magistrate judges include incentives, namely alleviating trial judges' caseload burdens, which encourage meritocratic proposals, although potential remains to forward less qualified prospects and merit is a relative term. Reform, thus, could be indicated; however, district judges should receive some deference. The district judges can best appreciate the needs of the local bench, litigants and bar; will have personally observed candidates' abilities; and will work with appointees on a daily basis.⁷⁸ In short, change might be warranted, but the Council may prefer to retain the status quo or to examine the names tendered more closely.

Troubleshooting is one of your principal responsibilities. For instance, if judges fail to resolve cases efficiently or to fulfill other obligations you should offer advice or resources and even cajole them. The chief judge also promptly reviews complaints alleging that a circuit, district, bankruptcy, or magistrate judge has prejudiced effective and expeditious administration of the court's business or is unable to perform official duties because of a mental or physical disability.⁷⁹ If you do not issue a written order with reasons for dismissal of the complaint or conclusion of the proceeding,⁸⁰ a committee must investigate the complaint and promptly prepare a report and recommendation for the Council, which concomitantly investigates further or institutes measures for insuring the proper discharge of judicial business.⁸¹ The need to foster public confidence in the courts, Article III judges' life tenure and

⁷⁶ 28 U.S.C.A. § 631 (West 1993 & Supp. 2001). *See generally* CARROLL SERON, THE ROLES OF MAGISTRATES IN FEDERAL DISTRICT COURTS (1983) (describing survey results regarding the duties of magistrate judges); CHRISTOPHER E. SMITH, UNITED STATES MAGISTRATES IN THE FEDERAL COURTS: SUBORDINATE JUDGES (1990) (analyzing the roles and effects of magistrate judges in the federal court system); R. Lawrence Dessem, *The Role of the Federal Magistrate Judge in Civil Justice Reform*, 67 ST. JOHN'S L. REV. 799 (1993) (reviewing federal court reliance on magistrate judges as a tool for civil justice reform).

⁷⁷ 28 U.S.C.A. § 152 (West 1993); *see also* NBRC, *supra* note 17, at ch.3. *See generally* William W Schwarzer & Neil McGaraghan, *The Administrative Relationship Between the District and Bankruptcy Courts*, 17 BANKR. DEV. J. 9 (2000) (discussing the changes in the role of bankruptcy courts after the Bankruptcy Reform Act of 1978).

⁷⁸ *See* Tobias, *supra* note 64, at 1623-27; *see also* Carl Tobias, *Magistrate Judges in the Montana Federal District*, 174 F.R.D. 514 (1997). Similar ideas apply to the selection of bankruptcy judges. The council does retain ultimate authority, but members may be reluctant to disturb proposals of an expert panel that screens candidates.

⁷⁹ 28 U.S.C.A. § 372(c)(1)-(2) (West 1993) (establishing procedures for responding to allegations of prejudicial activity by judges); *see, e.g., In re Charge of Judicial Misconduct*, 62 F.3d 320 (9th Cir. 1995) (resolving a complaint filed against a bankruptcy judge); *see* RULES OF THE JUDICIAL COUNCIL OF THE NINTH CIRCUIT GOVERNING COMPLAINTS OF JUDICIAL MISCONDUCT OR DISABILITY [hereinafter NINTH CIRCUIT RULES]. *See generally* Charles Gardner Geyh, *Informal Methods of Judicial Discipline*, 142 U. PA. L. REV. 243, 278-86 (1993) (discussing informal disciplinary actions against chief circuit judges).

⁸⁰ 28 U.S.C.A. § 372(c)(3) (West 1993 & Supp. 2001) (requiring chief judges to issue written orders when resolving complaints against other judges); NINTH CIRCUIT RULES, *supra* note 79. *See, e.g., Duckworth v. Dept. of Navy*, 974 F.2d 1140 (9th Cir. 1992); *In re Charge of Judicial Misconduct*, 691 F.2d 923 (9th Cir. 1982). *See generally* Jeffrey N. Barr & Thomas E. Willging, *Decentralized Self-Regulation, Accountability and Judicial Independence Under the Federal Judicial Conduct and Disability Act of 1980*, 142 U. PA. L. REV. 25, 51-92 (1993) (reviewing empirical data on the actions taken by chief judges concerning complaints against other judges).

⁸¹ *See* 28 U.S.C.A. § 372(c)(4)-(6) (West 1993) (establishing procedures for committee investigation of complaints against judges); *see also* NINTH CIRCUIT RULES, *supra* note 79. *See generally* Richard L. Marcus, *Who Should Discipline Federal Judges, and How?* 149 F.R.D. 375 (1993) (evaluating the application of the informal methods of judicial discipline established by the Judicial Councils Reform and Judicial Conduct and Disability Act).

independence, and your relationships with these colleagues mean the tasks will be critical, complex, and delicate.⁸²

IV. JUDICIAL CONFERENCE

An important responsibility that Congress assigns the chief judges in all twelve regional circuits and the United States Court of Appeals for the Federal Circuit is service on the United States Judicial Conference (the Conference), which is the federal courts' policymaking arm.⁸³ That task could facilitate your promotion of certain initiatives because of the Conference's authority to announce and implement substantive and procedural positions on behalf of the federal judiciary.

One major Conference obligation is to develop suggestions for creating new judgeships.⁸⁴ Its reliance on the AO's finely-calibrated, conservative estimates of judicial workloads and filings seems to limit Conference discretion.⁸⁵ The calculations, however, are only future projections. The body consults the tribunals and judges, demographic trends, political feasibility, and related factors in making final recommendations. For example, the entity honored your court's request to add five members.⁸⁶ The Conference similarly respected other tribunals' preferences for the status quo,⁸⁷ even though they furnish the lowest percentages of arguments and published opinions and the situation could have been rectified by adding new judgeships.⁸⁸ In short, the body exercises considerable discretion when finalizing proposals. Because new judicial positions would enhance Ninth Circuit operations, you should support Conference efforts that urge Congress to pass a judgeships bill.⁸⁹

The Conference also assumes some responsibility for law clerk hiring. The entity lacks technical control over this process, but can offer helpful guidance and influence judges' practices.⁹⁰ For example,

⁸² See Emily Van Tassel, *Resignations and Removals: A History of Federal Judicial Service—and Disservice—1789-1992*, 142 U. PA. L. REV. 333 (1993) (reviewing the motivations prompting judicial resignations and considering the relationship between judicial misbehavior, accountability, and independence). For a wide-ranging discussion of judicial discipline, see Symposium, *Disciplining the Federal Judiciary*, 142 U. PA. L. REV. 1-430 (1993). For a miscellany of additional council duties, see *supra* note 49.

⁸³ 28 U.S.C.A. § 331 (West Supp. 2001) (describing the Judicial Conference of the United States); Schwarzer, *supra* note 49, at 1137-40 (discussing the policymaking role of the Conference). Because the Conference conducts much business at biannual private sessions, affording advice is difficult, but I can offer some guidance with examples.

⁸⁴ See 28 U.S.C.A. § 331 (West Supp. 2001). See generally sources cited *supra* notes 57-59 and accompanying text.

⁸⁵ See *supra* note 58 and accompanying text; see also *supra* note 63 and accompanying text.

⁸⁶ See *supra* note 58.

⁸⁷ *Id.*

⁸⁸ See WORKING PAPERS, *supra* note 11, at 93, tbls.2-3; see also *id.* at 26-27 (affording judges' responses to questions regarding the need for more judgeships); Tobias, *supra* note 56, at 563-66 (assessing the federal courts).

⁸⁹ This will be controversial, especially for the Ninth Circuit. See *supra* notes 57-59 and accompanying text.

⁹⁰ See, e.g., Edward R. Becker et. al., *The Federal Judicial Law Clerk Hiring Problem and the Modest March 1 Solution*, 104 YALE L.J. 207, 208-12 (1994) (considering the history of law clerk hiring and suggesting solutions for a smoother and more effective hiring process); Carl Tobias, *Stuck Inside the Heartland With Those Coastline Clerking Blues Again*, 1995 WIS. L. REV. 919, 923-25 (analyzing the potential effects of some recommendations for coordinated law clerk hiring and suggesting alternatives).

its 1993 resolution prescribed a benchmark for interviews beginning March 1 of applicants' second year of law school.⁹¹ The regime had proved a reasonable, albeit imperfect, system in the subsequent half decade.⁹² Despite that success, the Conference rescinded the guideline in 1998.⁹³ Continued inaction has made recent employment seasons notoriously chaotic with many students applying, and certain judges hiring, ahead of the third semester. You are well positioned to help address this conundrum. A few Ninth Circuit members may have exacerbated matters since 1998 by screening prior to students' second year, although numerous judges of your court and other tribunals' members find this practice intolerable. The best resolution might be delaying offers until applicants' fifth semester.⁹⁴ Even reinstatement of the March 1 proviso, which a number of judges as well as most law students and schools respected, appears better than the status quo.

Finally, the Conference provides an environment conducive to crafting measures that effectively treat caseload increases with scarce resources. The judiciary could experience difficulty persuading senators and representatives to implement salutary relief until it reaches consensus on the optimum approach.⁹⁵ At this juncture, additional judicial positions or court staff seem preferable for many circuits, especially the Ninth.⁹⁶ However, either option could impose disadvantages, such as reduced collegiality or greater bureaucratization.⁹⁷

⁹¹ See JUDICIAL CONF. OF THE U.S., REPORT OF THE PROCEEDINGS 49 (1993). See generally Becker et al., *supra* note 90, at 207-208 (discussing the history of law clerk hiring and endorsing the establishment of a March 1 benchmark for beginning law clerk interviews); Trenton H. Norris, *The Judicial Clerkship Selection Process: An Applicant's Perspective on Bad Apples, Sour Grapes, and Fruitful Reform*, 81 CAL. L. REV. 765, 786-88 (1993) (criticizing the unstructured process for hiring law clerks and reviewing reform efforts).

⁹² Many judges and most law students and schools followed the guidance, thus ameliorating the prior confusion that had permitted law clerk hiring to begin earlier. See, e.g., Edward S. Adams, *A Market-Based Solution to the Judicial Clerkship Selection Process*, 59 MD. L. REV. 129, 135, 160-62 (2000) (discussing disadvantages to interviewing in first year or first half of second year and benefits of March 1 system); Annette E. Clark, *On Comparing Apples and Oranges: The Judicial Clerk Selection Process and the Medical Matching Model*, 83 GEO. L.J. 1749, 1751-53 (1995) (discussing how open market of judicial clerkships pressures judges and students alike to start the interviewing process sooner than later—at the time in question from late in “third year to midway in his second year.”). But see Alex Kozinski, *Confessions of a Bad Apple*, 100 YALE L.J. 1707 (1991) (writing in support of unregulated open market for law clerks).

⁹³ “It has become apparent that the Judicial Conference recommendation on law clerk interviews has not been universally followed [and] is not an accurate reflection of the practice in the courts [and] there appears to be no consensus within the judiciary as to whether any alternate standardized policy could be more successful.” JUDICIAL CONF. OF THE U.S., REPORT OF THE PROCEEDINGS 38 (1998); see also Norris, *supra* note 91, at 786-88 (reviewing the history of reform efforts).

⁹⁴ This would give judges two years of law school and summer job performance on which to base decisions and students greater time to secure experience, sharpen and display skills, and make more informed career choices. For two new proposals, see Christopher Avery et al., *The Market for Federal Judicial Law Clerks*, 68 U. CHI. L. REV. 793 (2001); Jonathan Groner, *Disarming the Clerks Race Judge Offers Proposal to Slow Recruitment Process*, LEGAL TIMES, Dec. 10, 2001, at 1.

⁹⁵ Orchestrating this initiative and the clerkships employment endeavor could help to dispel possible views of numerous judges and additional federal courts observers that the Ninth Circuit considers itself the best, as well as the biggest, appellate court. See *supra* notes 33-36, 42, 46-47 and accompanying text.

⁹⁶ See *supra* notes 57-60, 89 and accompanying text; see also *supra* notes 13-14 and accompanying text.

⁹⁷ See *supra* notes 50, 59-60 and accompanying text. You could also suggest that the Conference adopt positions on a Ninth Circuit split or reconfiguration generally. However, broaching these issues would enable its members who favor division an opportunity to endorse officially both possibilities, although both lack efficacy.

V. CONCLUSION

Congratulations on recently assuming the chief judgeship of the United States Court of Appeals for the Ninth Circuit. Your two-decade experience on the tribunal will facilitate administration of the largest appellate court. If the Ninth Circuit considers the ideas above, the tribunal may avoid certain pitfalls, might resolve numerous complicated problems that it will confront, and could function even more effectively.