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Natural Resources and the White Commission Report

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Individuals and entities with concerns regarding environmental issues as well as those concerned about the federal judicial system have carefully followed the debate over the possible division of the United States Court of Appeals for the Ninth Circuit that has been raging since 1995. During the first session of the 105th Congress, the Senate approved an appropriations rider, which would have established a new Twelfth Circuit including Alaska, Arizona, Hawaii, Idaho, Montana, Oregon, Washington, Guam, and the Northern Mariana Islands, and would have left California and Nevada in the Ninth Circuit. That action was very important because neither house of Congress had ever voted to split the Ninth Circuit, and this session could well have done so. Circuit division might have significantly affected the environment, public lands, and natural resources, as well as the federal courts of the West and the nation. In November 1997, however, Congress rejected circuit bifurcation and approved a study of the appellate system that would emphasize the Ninth Circuit.

Congress authorized the Chief Justice of the United States to appoint the Commission on Structural Alternatives for the Federal Courts of Appeals (the Commission) in December 1997. The Commission closely analyzed the appellate courts and the Ninth Circuit for nearly a year and issued a report with constructive suggestions for improvement.[1] Because the commissioners were experts, had committed much effort to the assessment, and developed a comprehensive report, their recommendations promised to be influential. For example, the Commission pro-

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[1] *See* COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, FINAL REPORT (Dec. 1998) [hereinafter COMMISSION REPORT].

posed the idea of adjudicative divisions for the Ninth Circuit today and for the other appeals courts as they grow, while the commissioners clearly and forcefully rejected the possibility of splitting the Ninth Circuit. These suggestions have already proved controversial. For instance, soon after the Commission tentatively recommended the divisional arrangement, most active and senior appellate judges of the Ninth Circuit sharply criticized it, even as seven other members of the court urged the commissioners to endorse bifurcation. Some senators who reluctantly agreed to the study as a necessary, albeit unpalatable, condition precedent to dividing the circuit, recently introduced proposed legislation which would split the court, while several senators had earlier offered a measure that incorporates the Commission's suggestions.[2]

If Congress passes a statute that would bifurcate the Ninth Circuit or adopts the Commission's concept of adjudicative divisions and additional Commission recommendations, these actions could substantially affect the environment and the federal courts in the western United States and the country. The extraordinary quantity and quality of natural resources that the Ninth Circuit encompasses accentuate the importance of the commissioners' report and proposals. Illustrative are the large percentage of national parks, the many wilderness areas, and the significant number of national wildlife refuges that are situated in the Ninth Circuit.

These considerations mean that the recent report and suggestions of the Commission deserve evaluation. This Article undertakes that effort. Part I of the Article analyzes the developments that led to the creation of the Commission. Part II briefly discusses the commissioners' work. Part III analyzes the Commission's report and proposals by emphasizing the potential effects of the recommendations on natural resources. Part IV sets forth suggestions for the future.

I

CREATION OF THE COMMISSION

The origin of the Commission on Structural Alternatives for the Federal Courts of Appeals warrants comparatively limited exploration in this Article because much of the relevant history

[2] *See* S. 253, 106th Cong. (1999); S. 2184, 106th Cong. (2000).

has been examined elsewhere.[3] Nevertheless, some consideration of issues that implicate natural resources is justified, as that evaluation informs comprehension of the report and proposals that the commissioners recently published.

During May 1995, senators from Alaska, Idaho, Montana, Oregon, and Washington introduced measures that would have divided the Ninth Circuit.[4] Senator Slade Gorton (R-Wash.) and Senator Conrad Burns (R-Mont.) led the effort to split the court, and Senator Orrin Hatch (R-Utah), Chair of the Senate Judiciary Committee, held a hearing on Senate Bill 956 four months later.

Advocates articulated three major contentions in support of the proposed legislation, while critics developed numerous responses to these arguments and several reasons opposing bifurcation. First, proponents asserted that the court's substantial magnitude poses difficulties.[5] The complications encompass geographic size, travel and related expenses, the people whom the circuit serves, the complement of twenty-eight judges, the court's caseload and concomitant time to resolve appeals, and the cost of operating the circuit. Opponents of the bill tendered several responses. They claimed that the court has implemented measures for treating problems ascribed to size.[6] For example, the location of administrative units in Pasadena and Seattle, where appeals can be orally argued, addresses the distances that attorneys and litigants must travel. Critics also asserted that large size is an advantage.[7] For instance, it affords economies of scale and diversity in terms of cases' novelty and complexity and in terms of

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[3] *See, e.g.*, Thomas E. Baker, *On Redrawing Circuit Boundaries—Why the Proposal to Divide the United States Court of Appeals for the Ninth Circuit is Not Such a Good Idea*, 22 ARIZ. ST. L.J. 917 (1990) [hereinafter Baker, *On Redrawing Circuit Boundaries*]; Carl Tobias, *The Impoverished Idea of Circuit-Splitting*, 44 EMORY L.J. 1357 (1995) [hereinafter Tobias, *Impoverished Idea*]; Carl Tobias, *Natural Resources and the Ninth Circuit Split*, 28 ENVTL. L. 411 (1998). I rely substantially in this Article on these three articles and on THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS (1994).

[4] *See* S. 956, 104th Cong. (1995).

[5] *See* 141 CONG. REC. S7504 (daily ed. May 25, 1995) (statement of Sen. Slade Gorton (R-Wash.)) [hereinafter Gorton Statement]; 141 CONG. REC. S7505-06 (daily ed. May 25, 1995) (statement of Sen. Conrad Burns (R-Mont.)) [hereinafter Burns Statement]. *See generally* Tobias, *Impoverished Idea*, *supra* note 3, at 1366-69 (discussing the impacts of geographic size on the Ninth Circuit).

[6] *See The Ninth Circuit Split: Hearings on S. 956 Before the Senate Comm. on the Judiciary*, 104th Cong. 29-31 (1995) [hereinafter *S. 956 Hearings*] (statement of Chief Judge Clifford Wallace, United States Court of Appeals for the Ninth Circuit).

[7] *See id.*; 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 Reorganiza-*

judges' race, gender, political perspectives, and geographic origins.

Another important contention of Senate Bill 956's sponsors was that circuit case law was inconsistent.[8] They stated that the statistical opportunities for conflicts are significant in part because 3,276 combinations of three-judge panels might theoretically be constituted to treat a question.[9] The Ninth Circuit Executive Office and federal courts observers who have analyzed circuit decisionmaking have found little inconsistency.[10] The court has correspondingly instituted procedures to address possible conflicts.[11] For example, staff attorneys review each appeal and code the issues for consideration into a computer. The court then assigns to the same three-judge panel those cases that involve similar issues and are ready for resolution at the same time.

The proponents' argument most relevant to the issues explored in this Article is that California judges, appeals, and viewpoints dominate the Pacific Northwest.[12] The idea could reflect advocates' opposition to the court's decisions in fields such as environmental, public lands, and natural resources law. One initial co-sponsor of the measure stated that an important reason for its introduction was an increase in lawsuits against economic activities, including mining and timber, which threatens local financial stability.[13] The lawmaker later observed that the present Ninth

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tion Act of 1995, 4, *reprinted in* 141 CONG. REC. S10436-02 (daily ed. July 20, 1995) [hereinafter *S. 956 Position Paper*].

[8] *See* Burns Statement, *supra* note 5; Gorton Statement, *supra* note 5; Tobias, *Impoverished Idea*, *supra* note 3, at 1369-71.

[9] *See* Baker, *On Redrawing Circuit Boundaries*, *supra* note 3, at 938; *see also* Burns Statement, *supra* note 5; Gorton Statement, *supra* note 5.

[10] *See S. 956 Position Paper*, *supra* note 7, at S10437; *S. 956 Hearings*, *supra* note 6 (statement of Professor Arthur D. Hellman, University of Pittsburgh School of Law); *see also* Arthur D. Hellman, *Maintaining Consistency in the Law of the Large Circuit*, *in* RESTRUCTURING JUSTICE: THE INNOVATIONS OF THE NINTH CIRCUIT AND THE FUTURE OF THE FEDERAL COURTS 55-90 (Arthur D. Hellman ed., 1990); Baker, *On Redrawing Circuit Boundaries*, *supra* note 3, at 938-50; Arthur D. Hellman, *Breaking the Banc: The Common Law Process in the Large Appellate Court*, 23 ARIZ. ST. L.J. 915 (1991); Arthur D. Hellman, *Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court*, 56 U. CHI. L. REV. 541 (1989).

[11] *See* Baker, *On Redrawing Circuit Boundaries*, *supra* note 3, at 939; Arthur D. Hellman, *Central Staff in Appellate Courts: The Experience of the Ninth Circuit*, 68 CAL. L. REV. 937, 945 (1980); *S. 956 Position Paper*, *supra* note 7, at S10437-38.

[12] *See* Burns Statement, *supra* note 5; Gorton Statement, *supra* note 5; *see also* Tobias, *Impoverished Idea*, *supra* note 3, at 1371-73.

[13] *See* Conrad Burns, Gorton-Burns Bill Would Split the Ninth Circuit Court of

Circuit deprives states that depend substantially on resource management of the opportunity to have judges who might be more responsive to local needs resolve cases that raise environmental issues.[14] Additional proponents of the bill expressly disavowed these concepts. The Senate Committee Report, which accompanied Senate Bill 956, specifically stated that dissatisfaction with the court's opinions which involved resources was an inappropriate reason for bifurcation, even as the report acknowledged that certain advocates had voiced this concern.[15]

Some critics characterized Senate Bill 956 as environmental gerrymandering, asserted that its sponsors were attempting to create a new Twelfth Circuit which would be more receptive to resource development, and urged that the better way to realize substantive legal change is by persuading Congress to modify applicable statutes.[16] Opponents concomitantly attacked the proponents' essential premise that circuit judges in California are idiosyncratic and similar.[17] Evaluation of their philosophies and the computerized, random selection of panels erode efforts to stereotype those California circuit judges. Critics also contended that the court's record in treating natural resources cases was rather neutral.[18]

Advocates of division contended that judges on a smaller court, such as the proposed Twelfth Circuit which would have had thirteen judges, are more collegial, thereby increasing efficiency.[19] This notion may be accurate, but familiarity can also promote detrimental routinization and even foster disagreements. Opponents of circuit-splitting argued that the projected

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Appeals; Burns to Hold Up Judicial Nominations Until Bill is Approved (May 25, 1995) (press release, on file with author).

[14] *See* Neil A. Lewis, *Partisan Gridlock Blocks Senate Confirmations of Federal Judges*, N.Y. TIMES, Nov. 30, 1995, at A16; *see also* Ninth Circuit Court of Appeals Reorganization Act of 1995, S. REP. NO. 104-197, at 26 (1995).

[15] *See* S. REP. NO. 104-197, at 8-9.

[16] *See id.* at 26-27; *see also Ninth Circuit Court of Appeals Reorganization Act of 1989: Hearing on S. 948 Before the Subcomm. on Courts and Admin. Practice of the Senate Comm. on the Judiciary*, 101st Cong. 284 (1990) [hereinafter *S. 948 Hearing*] (statement of Sen. Pete Wilson (R-Cal.)) (providing earlier accusation of environmental gerrymandering).

[17] *See S. 948 Hearing*, *supra* note 16, at 284-85; Baker, *On Redrawing Circuit Boundaries*, *supra* note 3, at 941; Tobias, *Impoverished Idea*, *supra* note 3, at 1372.

[18] *See* S. REP. NO. 104-197, at 27; *see also infra* note 39 and accompanying text.

[19] *See* Tobias, *Impoverished Idea*, *supra* note 3, at 1385-86. *See generally* FRANK M. COFFIN, ON APPEAL: COURTS, LAWYERING AND JUDGING 213-29 (1994) (concluding that a collegial court is one in which each judge's strengths and qualities are valued and each judge knows they are valued).

Ninth Circuit would have had a substantially less beneficial ratio of three-judge panels to appeals than the proposed Twelfth Circuit, and a considerably less advantageous ratio than the present Ninth Circuit.[20] Critics asserted that the new Twelfth Circuit would have entailed much administrative expense, particularly by duplicating functions that the current Ninth Circuit was performing well.[21] Moreover, opponents claimed that bifurcating the court would have fractured the consistent interpretation of federal environmental, public lands, and natural resources legislation, which it has applied uniformly in the western United States and across ecosystems that traverse the political boundaries of the two projected circuits.[22]

In autumn 1995, the champions of Senate Bill 956 held discussions with certain Judiciary Committee members and senators from states that the court's division would have affected.[23] Arizona seemed to assume importance for Senate Bill 956's advocates who believed that the committee vote of Senator Jon Kyl (R-Ariz.) was significant and that the state's caseload, population and Ninth Circuit active judges were important to attaining acceptable bifurcation. The proponents examined the prospect of placing Arizona in the Tenth Circuit, but jettisoned the idea because it contravened the tradition of not transferring states between appellate courts.

During a December 1995 Senate Judiciary Committee markup session, Committee members approved an amendment that moved Arizona and Nevada to the projected Twelfth Circuit, authorized thirteen judges for this court, and placed its headquarters in Phoenix.[24] The Committee, except Senator Howell Heflin (D-Ala.), approved the revised proposal along strict political

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[20] *See S. 956 Hearings*, *supra* note 6, at 29-31 (statement of Chief Judge Clifford Wallace); *S. 956 Position Paper*, *supra* note 7, at S10437.

[21] *See* S. REP. NO. 104-197, at 24-25; *S. 956 Position Paper*, *supra* note 7, at S10437.

[22] *See S. 956 Hearings*, *supra* note 6; *S. 956 Position Paper*, *supra* note 7, at S10437; *see also S. 948 Hearing*, *supra* note 16, at 508 (statement of Michael Traynor, Chair, Sierra Club Legal Defense Fund) (affording earlier expression of idea); *S. 948 Hearing*, *supra* note 16, at 285 (statement of Pete Wilson (R-Cal.)) (same).

[23] I rely substantially in this paragraph on conversations with numerous individuals who are familiar with the developments that transpired. *See also* S. REP. NO. 104-197, at 5-6.

[24] *See* S. 956, 104th Cong. (1995); *Hearings on Markup of S. 956 Before the Senate Judiciary Comm.*, 104th Cong. (1995) [hereinafter *Markup Hearings*]; *see also* Adrianne Flynn, *Senate Panel OKs New Appeals Court; Circuit Would Be Based in Phoenix*, ARIZ. REPUBLIC, Dec. 8, 1995, at B1.

party lines.[25] Senator Dianne Feinstein (D-Cal.) strongly opposed the change on several grounds.[26] Most significant were the numerous benefits that the proposed Twelfth Circuit would have secured at the expense of the projected Ninth Circuit. For example, the new Ninth Circuit would have had a disadvantageous ratio of three-judge panels to appeals and would have effectively been a one-state appellate court. Senator Feinstein tendered an amendment that would have instituted a national commission to assess circuit structure, but the Committee rejected this prospect.

On the eve of the Committee markup, Governor Pete Wilson (R-Cal.) sent Senator Hatch a letter that strongly opposed any Ninth Circuit realignment, pending the completion of an objective analysis of the court, and stated that bifurcation would foster inconsistency along the West Coast in important fields, including natural resources law.[27] Chief Judge J. Clifford Wallace wrote the one hundred senators to explain why the Circuit Judicial Council and virtually every active judge of the court rejected division and to ask that Congress approve a national study.[28] Ninth Circuit Judge Charles Wiggins correspondingly contacted Senator Feinstein to voice his vociferous opposition to Senate Bill 956 and to request that Congress authorize an evaluation.[29]

In March 1996, Senate Bill 956's advocates attempted to have the Senate pass the measure when considering a federal courts appropriations bill.[30] Considerable substantive debate on circuit-splitting's merits occurred, but the proposal's proponents determined that they lacked enough votes and agreed to a compromise that would authorize a national study commission. This

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[25] *See Markup Hearings*, *supra* note 24; *see also* S. REP. NO. 104-197, at 6; Flynn, *supra* note 24.

[26] *See Markup Hearings*, *supra* note 24; *see also* S. REP. NO. 104-197, at 19-20, 29-31; Flynn, *supra* note 24.

[27] *See* Letter from Pete Wilson, Governor of California, to Sen. Orrin Hatch (R-Utah), Chair, U.S. Senate Judiciary Comm. (Dec. 6, 1995) (on file with author).

[28] *See*, *e.g.*, Letter from Chief Judge Clifford Wallace, United States Court of Appeals for the Ninth Circuit, to Sen. Spencer Abraham (R-Mich.) (Dec. 21, 1995) (on file with author); *see also* S. REP. NO. 104-197, at 6 (suggesting need for study of appellate system).

[29] *See* Letter from Judge Charles E. Wiggins, United States Court of Appeals for the Ninth Circuit, to Sen. Dianne Feinstein (D-Cal.) (Dec. 18, 1995) (on file with author); *see also S. 956 Hearings*, *supra* note 6, at 107 (statement of Sen. Howell Heflin (D-Ala.)) (suggesting need for "careful evaluation of the entire appellate court structure").

[30] *See* 142 CONG. REC. S2219-303 (daily ed. Mar. 18, 1996); *see also* Carl Tobias, *A Proposal to Study the Federal Appellate System*, 167 F.R.D. 275, 279 (1996).

passed easily with bipartisan support.[31] The proposal was transmitted to the House Subcommittee on Intellectual Property and Judicial Administration chaired by Representative Carlos Moorhead (R-Cal.).[32] The measure remained in the subcommittee until September, when a few senators threatened to attach it to a court appropriations bill. This prompted Representative Moorhead to act on the proposal. Nonetheless, Congress adjourned before passing the measure, although it did appropriate $500,000 for a study.

Senators who favored circuit division introduced a bill to do so during the 105th Congress.[33] The three major justifications—the court's great size, conflicts in circuit case precedent, and California's purported dominance of the court—which proponents had enunciated, remained as relevant as they had been in the 104th Congress.[34] Circuit-splitting advocates even claimed that some features of the court's operations had worsened since 1995. For example, champions suggested that the populace whom the court serves and the circuit's dockets continued to expand and would grow over the foreseeable future, while the court had not decreased the time needed to decide appeals.[35] Critics stated that the judges had improved certain aspects of caseload resolution, namely the speed with which they write opinions once appeals are argued.[36]

The other principal arguments—increasing conflicts and California dominance of the Pacific Northwest—advocated by proponents of circuit splitting were less convincing than the contentions respecting size.[37] The Senate Judiciary Committee had adopted Senate Bill 956, although some relatively recent information indicated that intracircuit inconsistency was not a major difficulty and that California dominance could not be determined by evaluating the court's environmental decisions.

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[31] *See* 142 CONG. REC. S2544-45 (daily ed. Mar. 20, 1996).

[32] I rely in this sentence and in the remainder of this paragraph on conversations with numerous individuals who are familiar with the developments that transpired.

[33] *See* S. 431, 105th Cong. (1997).

[34] *See supra* notes 4-19 and accompanying text. *See generally* Tobias, *Impoverished Idea*, *supra* note 3, at 1366-73 (analyzing the three major justifications).

[35] *See* 143 CONG. REC. S1104 (daily ed. Feb. 6, 1997) (statement of Sen. Conrad Burns (R-Mont.)); *see also* Gorton Statement, *supra* note 5; S. REP. NO. 104-197, at 6-11 (1995).

[36] *See* S. REP. NO. 104-197, at 28; *S. 956 Position Paper*, *supra* note 7, at S10438; *see also S. 956 Hearings*, *supra* note 6.

[37] *See supra* notes 12-18 and accompanying text.

For instance, Professor Arthur Hellman, who has analyzed the Ninth Circuit as much as any legal scholar, testified that studies of the court's case law revealed few conflicts.[38] Senator Feinstein observed that examination of 129 recent appeals involving natural resources found 64 that were "pro-environment" and 65 that were "con-environment."[39] The Senate Committee Report correspondingly rejected disagreement with the court's rulings in the natural resources area as a proper reason for division.[40]

Several considerations assessed above and others indicate that pressure to bifurcate the Ninth Circuit or at least implement divisions will continue to grow. As judges assume senior status or resign, more members will join the court who may not be concerned with keeping the circuit intact. Indeed, before the 104th Congress, no judge of the court had publicly favored realignment.[41] New members, who are not steeped in circuit traditions, may be less committed to maintaining the court's century-old structure.

Pressure to split the circuit or institute divisions will also persist until Congress discovers a better way to address docket growth than approving more judgeships and bifurcating circuits.[42] Congress continues to authorize judges and divide courts, although there are many structural and non-structural measures that may have greater efficacy. For example, Congress could limit civil or criminal jurisdiction, establish subject matter courts, or restrict the right of appeal.[43]

The ongoing debate over whether the Ninth Circuit warrants division also led members of Congress to introduce several proposals that would authorize studies of the federal appeals courts

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[38] *See supra* note 10; *see also supra* notes 8-11 and accompanying text. *But see* S. REP. NO. 104-197, at 10.

[39] *See* S. REP. NO. 104-197, at 27; *see also supra* notes 12-18 and accompanying text. *But see supra* notes 13-14 and accompanying text.

[40] *See supra* note 15 and accompanying text; *see also infra* notes 88-92 and accompanying text.

[41] *See* S. REP. NO. 104-197, at 20. Ninth Circuit Judge Diarmuid O'Scannlain suggested in testimony at the Senate hearing that he considered division appropriate and inevitable. *See S. 956 Hearings*, *supra* note 6, at 69; *see also* Comments to Commission on Draft Report of Eugene A. Wright et al. (1998).

[42] *See* Baker, *supra* note 3, at 99-105; Tobias, *Impoverished Idea*, *supra* note 3, at 1386-95; *see also* S. REP. NO. 104-197, at 18.

[43] For thorough analysis of these and numerous other options, see Baker, *supra* note 3, at 106-286; *see also infra* notes 105-10 and accompanying text (analyzing options); S. REP. NO. 104-197, at 6 (summarizing and epitomizing views that increasing numbers of members of Congress and judges may hold on the Ninth Circuit).

in the first session of the 105th Congress. During January 1997, Senators Feinstein and Harry Reid (D-Nev.) sponsored a bill that would have approved a national commission to evaluate the appeals courts.[44] Senator Burns and Representative Rick Hill (R-Mont.) then introduced a similar study commission measure that differed in important respects from that offered by Senators Feinstein and Reid.[45] In March, Representative Howard Coble (R-N.C.) and Representative Howard Berman (D-Cal.) tendered a proposal that was similar to the Feinstein-Reid bill, and the House subsequently modified it.[46] That month, senators from Pacific Northwest states sponsored a measure that would have divided the Ninth Circuit by moving Alaska, Arizona, Idaho, Montana, Nevada, Oregon, and Washington to the proposed Twelfth Circuit and leaving California, Hawaii, Guam, and the Northern Mariana Islands in the Ninth Circuit.[47] The Coble-Berman proposal is emphasized because it is most analogous to the measure that Congress adopted, and the remaining proposals have received evaluation elsewhere.[48]

House Bill 908 was similar in some important respects to the study commission ideas that the 104th Congress examined. The Coble-Berman measure mandated that the commission "study the structure and alignment of the Federal Court of Appeals system, with particular reference to the Ninth Circuit."[49] The second phrase modifies the notion used in the 104th Congress by including the term "system," thereby clarifying and emphasizing the systemic nature of the assessment envisioned.[50] House Bill 908 also commanded the entity to "report . . . its recommendations for such changes in circuit boundaries or structure as may be appropriate for the expeditious and effective disposition of the caseload of the Federal Courts of Appeals, consistent with

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[44] *See* S. 248, 105th Cong. (1997). The ideas in this paragraph and this subsection are premised on conversations with people who are knowledgeable about the developments that occurred.

[45] *See* S. 283, 105th Cong. (1997); H.R. 639, 105th Cong. (1997).

[46] *See* H.R. 908, 105th Cong. (1997).

[47] *See* S. 431, 105th Cong. (1997); *see also supra* note 33 and accompanying text.

[48] *See* Carl Tobias, *Suggestions for Studying the Federal Appellate System*, 49 FLA. L. REV. 189, 205-14 (1997).

[49] H.R. 908, 105th Cong. § 1(b)(1)-(2) (1997). *Compare id. and* S. 248, 105th Cong. § 1(b)(1)-(2) (1997), *with* S. 283, 105th Cong. § 1(b)(1)-(2) (1997), *and* H.R. 639, 105th Cong. § 1(b)(1)-(2) (1997).

[50] *Compare* S. 248, 105th Cong. § 1(b)(2) (1997), H.R. 908, 105th Cong. § 1(b)(2) (1997), *and* H.R. 639, 105th Cong. § 1(b)(2) (1997), *with* S. 956, 105th Cong. § 1(b)(2) (1995).

fundamental concepts of fairness and due process."[51] On June 3, the House adopted a variation on the Coble-Berman proposal which incorporated numerous compromises.[52] This version included the reporting provision considered immediately above and afforded the Commission eighteen months to conclude the analysis. The House transmitted the measure to the Senate, and the bill was held at the desk awaiting action in that chamber.

In mid-July, Senator Ted Stevens (R-Alaska), Senator Gorton, and Senator Burns, who were members of the Appropriations Committee, persuaded their colleagues to approve an appropriations rider that would have divided the Ninth Circuit, and on July 29, the Senate adopted it. The measure would have left California and Nevada in that court and would have created a new Twelfth Circuit which included Alaska, Arizona, Hawaii, Idaho, Montana, Oregon, Washington, Guam, and the Northern Mariana Islands.[53] The rider authorized fifteen judges for the Ninth Circuit and thirteen judges for the Twelfth Circuit and assigned the Twelfth Circuit two co-equal headquarters and two co-equal court clerks in Phoenix and in Seattle.

Republican senators, principally from the West, voiced many arguments that they had earlier expressed for affirmative Senate action during the floor debate. For instance, they repeated the notion that the Ninth Circuit's size, in terms of population, geography, caseloads, and judges, creates problems, such as travel expenses and conflicting precedent. Several senators asserted that the rate at which the Supreme Court reverses the Ninth Circuit showed that the court requires bifurcation. They claimed that projected population expansion in the West would exacerbate these difficulties.[54]

Critics of the court's division claimed that there was too little clarity about the precise nature of the complications facing the Ninth Circuit and other appeals courts and the best solutions for those problems were not to adopt dramatic remedies, such as splitting the Ninth Circuit. Many important issues involving the court and other circuits are ones as to which there is insufficient understanding. For example, division's proponents have con-

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[51] H.R. 908, 105th Cong. § 1(b)(3) (1997).

[52] *See* 143 CONG. REC. H3223-25 (daily ed. June 3, 1997).

[53] I rely in the remainder of this and the next three paragraphs on S. 1022, 105th Cong. § 305 (1997), and 143 CONG. REC. S8041 (daily ed. July 24, 1997).

[54] 143 CONG. REC. S8007 (daily ed. July 29, 1997).

tended that the Ninth Circuit's magnitude prevents expeditious case resolution. However, little empirical data correlate size with time to disposition.

The proposed bifurcation also posed significant practical difficulties. It would have inappropriately allocated the court's appeals. For instance, judges of the projected Twelfth Circuit would have had to resolve 239 cases annually, while judges of the proposed Ninth Circuit would have had to decide 363 appeals annually, which would have been fifty percent more. During floor debate, senators rejected 55-45 by political party an amendment that would have authorized an analysis similar to the one that the House had approved.

The appropriations rider provoked criticism from Representative Henry Hyde (R-Ill.), chair of the Judiciary Committee, Representative Coble, chair of the subcommittee responsible for the matter, and the California delegation.[55] These lawmakers enunciated several contentions against circuit division. For example, they claimed that the proposed split would improperly distribute the docket between the two projected courts and that action as radical as division required clearer comprehension of the exact complications that the circuit and the appellate system were experiencing, the impacts of those problems, and the most effective means of addressing them.

In mid-November, the House-Senate Conference Committee on Commerce-Justice-State Appropriations rejected the appropriations rider that would have bifurcated the Ninth Circuit.[56] The Committee substituted a national study that incorporated numerous aspects of the proposals that the Senate and the House had considered and that essentially included most features of House Bill 908. The compromise authorized five Commissioners, all of whom the Chief Justice of the United States was to appoint within thirty days. It gave the Commission ten months to study

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[55] *See, e.g.*, Letter from Henry J. Hyde, Chair, House Judiciary, Comm., to Robert Livingston, Chair, House Comm. on Appropriations (Sept. 5, 1997) (on file with author); Letter from Jerry Lewis et al., Members of Congress from California, to Harold Rogers, Chair, Appropriations Subcomm. on Commerce, Justice, and State (Oct. 17, 1997) (on file with author). I also rely in this paragraph on conversations with individuals who are knowledgeable about the developments that occurred.

[56] *See* Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-119 § 305, 111 Stat. 2440, 2491-92 (1997) (reprinted at 28 U.S.C. § 41 (1997) (historical and statutory notes)); Bill Kisliuk, *White, Rymer to Consider Circuit Split*, THE RECORDER, Dec. 22, 1997, at 1.

the courts and two months to write a report and suggestions while including verbatim House Bill 908's charge. On December 19, Chief Justice William Rehnquist named retired Supreme Court Justice Byron White, United States Court of Appeals Judges Gilbert Merritt of the Sixth Circuit, Pamela Rymer of the Ninth Circuit, United States District Judge William Browning of Arizona, and N. Lee Cooper, the immediate past president of the American Bar Association.

In sum, the November 1997 legislation which approved a national commission to assess the federal appellate courts left ambiguous some important aspects of the evaluation and afforded the commissioners relatively little time to finish their work. Accordingly, the second section of this Article considers the efforts that the entity instituted in completing the significant assignment that Congress gave the Commission.

II

THE COMMISSION'S WORK

One critical factor makes it difficult to describe the efforts that the Commission on Structural Alternatives for the Federal Courts of Appeals instituted during the brief period it had to analyze the federal appellate system, formulate the report, and make suggestions for Congress and the President.[57] This consideration was that most of the Commission's activities were not matters of public record. For example, many Commission meetings were private, and communications involving the commissioners and the staff were not made public. In fairness, the significant, controversial, and delicate character of the Commission's endeavors and the need to promote candid interchange might have required secrecy. Moreover, the commissioners did attempt to inform the public by establishing a website. Despite these problems, numerous significant initiatives can be delineated partly by consulting the material incorporated in the Commission report.

During the commissioners' initial formal meeting in January 1998, they named Professor Daniel Meador as Executive Director.[58] In early 1998, the Commission began assembling, evaluating, and synthesizing considerable relevant information on the

[57] I rely in this section on conversations with numerous people who are familiar with the Commission's work.

[58] *See* COMMISSION REPORT, *supra* note 1; *see also* Departments of Commerce,

federal appeals courts. One of the entity's first actions was to seek the aid of the Federal Judicial Center (FJC) and of the Administrative Office of the United States Courts (AO), the principal research and administrative arms of the federal courts.[59] Congress had instructed the commissioners to enlist the assistance of these institutions, and the Commission worked with the FJC and the AO throughout the project.[60]

In the early stage of the Commission's efforts, the entity asked that the FJC assemble a detailed account of the difficulties that the appellate courts were apparently confronting and possible remedies for the complications.[61] The FJC carefully reviewed the considerable, previous research on the circuits and collected comprehensive lists of the problems that the courts purportedly encounter and potential solutions.

From the initial phases, the commissioners also sought public input on many questions that implicated its charge.[62] The Commission conducted public hearings during March in Atlanta and Dallas, cities apparently chosen because they are situated in the appeals courts that Congress created from the former Fifth Circuit. The commissioners held hearings during April in Chicago and New York, two of the country's major metropolitan areas and the headquarters for the Seventh and Second Circuits. The Commission held public hearings during May in Seattle and San Francisco, partly to solicit the perspectives of those in the West. The commissioners asked that witnesses address perceived difficulties in the appellate system's structure, organization, alignment, procedures, and personnel that might interfere with determinations that "are reasonably timely, are consistent among the litigants appearing before it, are nationally uniform in their interpretations of federal law, and are reached through processes that afford appeals adequate, deliberative attention of judges."[63] The Commission also requested possible solutions to the problems, as well as the remedies' advantages and detriments,

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Justice, and State, the Judiciary and Related Agencies Appropriations Act § 305(a)(4)(A).

[59] *See* COMMISSION REPORT, *supra* note 1, at 2.

[60] *See* Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act § 305(a)(4)(D).

[61] *See* COMMISSION REPORT, *supra* note 1, at 2.

[62] *See id.* at 2-3.

[63] Commission on Structural Alternatives for the Federal Courts of Appeals, Appellate Commission Schedules Public Hearings (Feb. 26, 1998) (press release).

while wondering what features of the courts were operating well. Individuals and institutions that did, or could, not appear at the hearings were asked to submit written comments.

Numerous witnesses who spoke at the hearings were federal appeals court judges.[64] The witnesses tendered useful material regarding the difficulties that mounting dockets and restricted resources pose for the regional circuits as well as potential remedies for these problems.

The Commission heard a wide range of perspectives related to the complications and possible solutions; few new concepts were adduced. Most witnesses gave testimony that effectively reiterated ideas that they or others had previously voiced. Illustrative of this were statements of Eleventh Circuit Chief Judge Joseph Hatchett and Gerald Bard Tjoflat, the court's former Chief Judge, who continued their dialogue over whether the court requires more active judgeships to treat its substantial, growing docket. Chief Judge Hatchett called for the court's expansion "from twelve to fifteen judges," while Judge Tjoflat rejected additional judgeships.[65] However, each jurist had made analogous, prior public statements.[66] A small number of witnesses asserted that the appeals courts encounter difficulties that are sufficiently problematic to warrant treatment, particularly with measures as dramatic as dividing circuits.

The FJC assisted the commissioners in developing several surveys, which were circulated to circuit and district judges as well as to lawyers who have pursued appeals, to seek information related to their experiences. Moreover, the commissioners solicited the perspectives of the Supreme Court Justices.[67] Justice Anthony Kennedy, a former member of the Ninth Circuit, Justice Sandra Day O'Connor, the Justice responsible for the court, Jus-

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[64] The assertions in this paragraph are premised on review of the hearing transcripts.

[65] *See Testimony Before the Commission on Structural Alternatives for the Federal Courts of Appeals* (Mar. 23, 1998) (statements of Joseph W. Hatchett, Chief Judge, United States Court of Appeals for the Eleventh Circuit, and Gerald Bard Tjoflat, Circuit Judge, United States Court of Appeals for the Eleventh Circuit) (on file with author).

[66] *See Considering the Appropriate Allocation of Judgeships in the U.S. Courts of Appeals for the Fourth, Fifth and Eleventh Circuits: Hearings Before the Subcomm. On Admin. Oversight and the Courts of the Senate Comm. On the Judiciary*, 105th Cong. (1997) (testimony of Chief Judge Hatchett); Gerald Bard Tjoflat, *More Judges, Less Justice: The Case Against Expansion of the Federal Judiciary*, 79 A.B.A. J. 70, 70 (1993).

[67] *See* COMMISSION REPORT, *supra* note 1, at 3.

tice John Paul Stevens, Justice Antonin Scalia, and Justice Stephen Breyer tendered comments.[68] The first four Justices asserted that the Ninth Circuit Court of Appeals is too large and urged that three regional circuits be carved out of the current Ninth Circuit. One would encompass the five states of the Pacific Northwest, a second would include the Eastern and Northern Districts of California and Hawaii, and the third would incorporate the Central and Southern Districts of California, Arizona, Nevada, Guam and the Northern Mariana Islands. Justice Breyer recognized that caseload growth is the principal problem facing the appeals courts; however, he rejected circuit division and asked the commissioners to consider the various solutions found in the Long Range Plan assembled by the Judicial Conference.[69]

The commissioners gathered, assessed, and synthesized all of the material they had sought and received. The commissioners then compiled a tentative draft report and suggestions which they issued for public comment on October 7; interested parties were given thirty days to respond. The commissioners reviewed public input, changed some aspects of the draft report and proposals in light of public comment, and finalized them for Congress and the President during December.

III

ANALYSIS OF THE COMMISSION REPORT

A. Descriptive Analysis

The Commission determined that Ninth Circuit administration

[68] *See* Letter from Anthony M. Kennedy, Justice, United States Supreme Court, to Byron R. White, Chair, Commission on Structural Alternatives for the Federal Courts of Appeals (Aug. 17, 1998) (on file with author); Letter from Sandra Day O'Connor, Justice, United States Supreme Court, to Byron R. White, Chair, Commission on Structural Alternatives for the Federal Courts of Appeals (June 23, 1998) (on file with author); Letter from Antonin Scalia, Justice, United States Supreme Court to Byron R. White, Chair, Commission on Structural Alternatives for the Federal Courts of Appeals (Aug. 21, 1998) (on file with author); Letter from John Paul Stevens, Justice, United States Supreme Court, to Byron R. White, Chair, Commission on Structural Alternatives for the Federal Courts of Appeals (Aug. 24, 1998) (on file with author); Letter from Stephen G. Breyer, Justice, United States Supreme Court, to Byron R. White, Chair, Commission on Structural Alternatives for the Federal Courts of Appeals (Sept. 11, 1998) (on file with author) [hereinafter Breyer Letter].

[69] *See* Breyer Letter, *supra* note 68; *see also* COMMITTEE ON LONG RANGE PLANNING OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS (1995) [hereinafter LONG RANGE PLAN].

was at least equivalent to "that of other circuits, and innovative in many respects" and that there was "no good reason to split the circuit solely out of concern for its size or administration [or] to solve problems [of] consistency, predictability, and coherence of circuit law."[70] The commissioners correspondingly observed that bifurcating the Ninth Circuit would forfeit the administrative advantages provided by the present circuit alignment and deprive the west coast and the western United States of a way to preserve uniform federal law in the region.[71]

The Commission rejected circuit division unless no other means of addressing perceived problems in the court of appeals could be found, and the commissioners recommended three regionally-premised adjudicative divisions as an effective approach for the Ninth Circuit and an option which the remaining courts should have as they grow.[72] The commissioners suggested that "each division with a majority of its judges resident in its region" have jurisdiction to resolve cases emanating from districts in the areas.[73] The commissioners proposed that a Circuit Division treat inconsistencies that arise from regional divisions.[74] The Commission claimed that its approach would enhance the "consistency and coherence of the law, maximize the likelihood of genuine collegiality, establish an effective procedure for maintaining uniform decisional law within the circuit, and relate the appellate forum more closely to the region it serves."[75]

The commissioners recognized that Congress could reject the divisional idea while reconfiguring the Ninth Circuit and observed that the "challenges to finding a workable solution are daunting."[76] The Commission assessed some dozen prospects and "found no merit in any of them."[77] However, the commissioners described only the three possibilities they found even arguable but characterized each as flawed and endorsed none.[78]

The commissioners also considered structural alternatives for the courts of appeals.[79] The Commission commented that it had

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[70] *See* COMMISSION REPORT, *supra* note 1, at ix.
[71] *See id.* at ix-x.
[72] *See id.* at x.
[73] *Id.*
[74] *See id.* at 45-46.
[75] *Id.* at x; *see also id.* at 40-46.
[76] *Id.* at 53.
[77] *Id.*
[78] *See id.* at 53-57.
[79] *See id.* at 59-66.

formulated divisions for the Ninth Circuit today and as a viable alternative to reconfiguration for the other circuits as they expand.[80] The commissioners proposed legislation that would give specific courts the flexibility to develop a divisional plan, stressing that the Ninth Circuit recommendation was only one model.[81]

Realizing that the twelve courts vary in terms of their magnitude, caseloads, resources and growth, the Commission suggested that Congress "equip those courts to cope with future, unforeseen conditions by according them a flexibility they do not now have."[82] The commissioners specifically proposed that Congress empower all of the circuits to assign panels of two, rather than three, appellate judges to those cases that do not implicate issues of public importance, present special difficulty, or have precedential value as well as to establish district court appellate panels comprised of two district judges and one circuit judge to review specific classes of cases with discretionary review in the court of appeals.[83] The commissioners asserted that these concepts collectively "should equip the courts of appeals with an ability, structurally and procedurally, to accommodate continued caseload growth into the indefinite future, while maintaining the quality of the appellate process and delivering consistent decisions—assuming, of course, that the system has the necessary number of judges and other resources."[84]

B. Critical Analysis

Several important considerations frustrate efforts to assess critically the Commission recommendations, especially by attempting to evaluate the possible impact on natural resources. Perhaps most significant, because the federal judiciary has never applied the commissioners' core proposal, which calls for implementation of divisions in the Ninth Circuit today and in other appeals courts as they grow, predictions regarding the divisional approach are speculative. Moreover, some Commission ideas, namely those which implicate potential expansion of the Federal Circuit's jurisdiction to include tax and social security appeals, are irrelevant.

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[80] *See id.* at 59-60.

[81] *See id.* at 60-62.

[82] *Id.* at xi.

[83] *See id.* at 64.

[84] *Id.* at xi; *see also id.* at 67-74.

Other recommendations, including suggestions for two-judge, as well as district court and bankruptcy appellate panels, are only tangentially related to natural resources. Even had federal courts employed divisions and if the less central Commission proposals were more relevant, additional phenomena would complicate assessment—the perceived political character of judicial selection and of numerous natural resources appeals and the difficulty of analyzing appellate accuracy in this field. However, it is possible to evaluate the commissioners' work by emphasizing their recommendation for Ninth Circuit divisions and by making future projections based on current circumstances.

The divisional organization that the Commission proposed could significantly affect natural resources in several ways. One is that divisions might preclude realization of the important objective which the commissioners themselves clearly and strongly articulated: "Having a single court interpret and apply federal law in the western United States . . . is a strength of the circuit that should be maintained."[85] Achievement of this goal is crucial to natural resources because Congress intended that many statutes which govern the field receive analogous construction and enforcement, especially across the West, which shares certain attributes. These attributes include substantial public landholdings, arid climates, critical needs for water, as well as common boundaries (namely rivers), ecosystems that traverse state lines, and similar flora and fauna, some of which are endangered or threatened.

Despite the Commission's recognition of this laudable purpose, the proposed structure may well complicate its attainment. For example, divisions would fail to preserve uniform circuit law because the determinations of panels and divisional *en banc* courts would lack binding effect throughout the Ninth Circuit. An *en banc* decision of a division that does not conflict with an opinion of another division would be reviewable only through certiorari to the Supreme Court and would frustrate the Ninth Circuit's interpretation and application of federal law. This situation could be peculiarly problematic for individuals and institutions that depend on federal law's construction and enforcement in California. For example, the Middle Division might invalidate a state ballot initiative implicating natural resources, even as the measure would remain applicable in the Southern Division. The

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

Circuit Division, a seven-judge court with limited representation from the full circuit, not the Middle and Southern Divisions, which include California, would correspondingly resolve inconsistent interpretations of those divisions.

The divisional organization's placement of specific phenomena, such as ecosystems, wildlife corridors, river drainages, and endangered species habitat, in different divisions could have significant impacts on the resources. One clear example of this concern was proffered in 1990 testimony on proposed legislation to split the Ninth Circuit. Then-Senator Pete Wilson (R-Cal.) raised the spectra of diverse application of the law at the Klamath River's Oregon headwaters and at its California mouth, as well as unseemly races to the courthouse and forum-shopping.[86] This illustration implicates the proposed Northern and Middle Divisions, although similar situations will exist in the Middle and Southern Divisions, particularly because each division includes two federal districts situated in California.

A third way that the divisional approach might affect natural resources is by imposing unnecessary expense and delay in appellate resolution. This would especially disadvantage resource-poor litigants, many of whom pursue natural resources cases.[87] For instance, the use of divisional *en bancs* could entail additional costs for the parties involved and greater delay in securing an ultimate decision. The suggested Circuit Division would correspondingly create another tier before finality, thus increasing expense and delay. Moreover, much litigation might ensue over what constitutes a conflict with attendant costs and delays.

The contemplated divisional arrangement could also affect natural resources by constituting three-judge panels, as well as the divisional *en banc* courts and the Circuit Division differently than those panels and the limited *en banc* courts are presently comprised. This may happen, despite the commissioners' emphatic declaration that circuits and appeals courts should not be realigned or left alone, because of specific judicial decisions or particular judges. The divisional structure might lead to different resolution of natural resources appeals in divisional three-judge panels and *en banc* courts and the Circuit Division, but several

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[86] *See S. 948 Hearing*, *supra* note 16, at 284-85.

[87] *See* Carl Tobias, *Environmental Litigation and Rule 11*, 33 WM. & MARY L. REV. 429 (1992); *see also* Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485, 497-98 (1988-1989).

phenomena complicate precise assessment. For instance, the divisions will include only a majority of resident judges, thereby leaving unclear the composition of divisional panels and *en banc* courts. The Ninth Circuit will decide the Circuit Division's constitution, so predicting substantive results is fraught with difficulty.

However, an effort can be undertaken using the example of the Northern Division. This analysis assumes that the division's active resident judges would comprise a majority on most divisional three-judge panels and divisional *en banc* courts and applies the judges' prior voting records in natural resources cases as crude proxies for how they might resolve future appeals. The analysis suggests that the division's three-judge panels and its *en banc* court would be less likely than three-judge panels and the *en banc* court of the Ninth Circuit (as presently constituted) to issue decisions that protect the environment.

In short, the Commission has proposed a divisional structure for the Ninth Circuit that could have important impacts on natural resources in the region. Pressure to implement divisions for the Ninth Circuit will probably grow over the near term, while the 106th Congress seriously considered the divisional approach, held Senate and House hearings on the concept[88] and might authorize or require divisions in the future. Given this possibility, the fourth section provides recommendations for the future.

IV

Suggestions For The Future

A. Introduction

Individuals and groups that are concerned about the environment, public lands, and natural resources, as well as about the federal courts in the West and the nation, must scrutinize the report and proposals recently issued by the Commission on Structural Alternatives for the Federal Courts of Appeals. These people and entities should develop views on issues examined in

[88] *See Review of the Report by the Commission on Structural Alternatives for the Federal Courts of Appeals Regarding the Ninth Circuit and S. 253, the Ninth Circuit Reorganization Act: Hearing Before the Senate Judiciary Subcomm. On Admin. Oversight and the Courts*, 106th Cong. (July 16, 1999); *Oversight Hearing on the Final Report of the Commission on Structural Alternatives for the Federal Courts of Appeals Before the House Judiciary Subcomm. On Courts and Intellectual Property*, 106th Cong. (July 22, 1999).

the report and on the commissioners' suggestions and convey their sentiments to members of the legislative, judicial, and executive branches.

The goal of securing appellate determinations that are more solicitous of those who would develop natural resources is not a proper reason for reconfiguring circuits or for instituting the proposed divisional arrangement. The Senate Committee Report (Report), which attended Senate Bill 956 and was apparently compiled as an advocacy document for realigning the Ninth Circuit, clearly detailed why the Judiciary Committee found this purpose inappropriate. The Report stated that some champions of bifurcation premised their view on "outcomes in certain cases or on a perceived liberal bias on the part of California judges [and] [f]requently cited . . . environmental cases affecting the northwest States,"[89] but declared that "[t]he committee does not support a split of the ninth circuit on those bases."[90] The Report correspondingly remarked that numerous parties had registered opposition to some environmental and other Ninth Circuit decisions, although the committee found this dissatisfaction an improper rationale for dividing courts and rejected the alteration of "circuit boundaries in order to achieve a given ideological outcome on the merits in any case or to benefit any regional interest."[91] The Report concomitantly criticized as "questionable" the appropriateness of "considering the judicial philosophies and resulting opinions of particular judges or regions when examining circuit boundaries."[92] The Commission similarly characterized as undebatable the impropriety of premising determinations to restructure circuits or courts on the specific substantive decisions of judges.[93]

In 1990, during hearings on a measure to divide the Ninth Circuit, Senator Mark Hatfield (R-Or.) argued that creating a proposed Twelfth Circuit consisting of the five Pacific Northwest states would implement Congress's original intent when delineating appellate boundaries: the establishment of circuits which re-

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[89] S. REP. NO. 104-197, at 8 (1995); *see also supra* notes 15-16 and accompanying text.

[90] S. REP. NO. 104-197, at 8; *see also id.* at 25-27.

[91] *Id.* at 8 (expressing hope that the court will reach correct legal decisions and stating that parties are entitled to full, fair, and prompt decision on the merits but not to a given result).

[92] *Id.* at 9.

[93] *See* COMMISSION REPORT, *supra* note 1, at 6.

flected a regional identity by including a "small set of contiguous states that shared a common background."[94] This contention could also support the divisional approach that the commissioners recently recommended.

Several concepts appear more persuasive than these propositions, which effectively derive from the idea of regionalism, although this notion may retain some continuing vitality, as the Commission recognized.[95] Basing divisions on the aspiration to honor Congress's century-old purpose in drawing circuit boundaries seems rather obsolete, given, for instance, the increasing globalization and computerization of modern American society and the appellate system.[96] A better solution may be to invoke principles of diversity, which might be defined in terms of geographical, political, environmental, or demographic differences, when configuring appeals courts in a culture that depends on "law as the adhesive force binding a diverse population together."[97]

Insofar as regional considerations may be applicable in specific cases, district judges can arguably take account of these factors.[98] As to circuits, the areas where judges are stationed should be of little relevance. The appellate courts also have a federalizing responsibility to reconcile the Constitution and congressional legislation with more localized policies.[99] In short, local favoritism contravenes the concept of a circuit and the fragmentation of national law offends the notion of federalization,[100] while political considerations are rarely appropriate reasons for federal court policymaking, which is as important as realigning circuits.[101]

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[94] *S. 948 Hearing*, *supra* note 16, at 252 (statement of Sen. Mark Hatfield (R-Or.)).

[95] *See* COMMISSION REPORT, *supra* note 1, at 44-45.

[96] *See* Tobias, *Impoverished Idea*, *supra* note 3, at 1372.

[97] Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L.J. 929, 940 (1996); *see also* Martha J. Dragich, *Once a Century: Time for a Structural Overhaul of the Federal Courts*, 1996 WIS. L. REV. 11, 35-39 (1996). *See generally* MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW (1990).

[98] *See S. 948 Hearing*, *supra* note 16, at 694-95 (statement of Eric Redman); *see also* Baker, *On Redrawing Circuit Boundaries*, *supra* note 3, at 942.

[99] *See* CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 10-13 (5th ed. 1994); John Minor Wisdom, *Requiem for a Great Court*, 26 LOY. L. REV. 787, 788 (1980).

[100] *See S. 948 Hearing*, *supra* note 16, at 286; Baker, *On Redrawing Circuit Boundaries*, *supra* note 3, at 942-43; ABA Appellate Practice Comm., Subcomm. to Study Circuit Size, Report 3 (1992); *see also* Tjoflat, *supra* note 65 (analyzing fragmentation).

[101] *See* Cass R. Sunstein, *Participation, Public Law, and Venue Reform*, 49 U. CHI.

B. Specific Recommendations

Before Congress authorizes the divisional approach, it must have systematically collected empirical data which clearly show that mounting caseloads and additional phenomena that affect the Ninth Circuit are sufficiently problematic to deserve remediation and that divisions would be efficacious. However, some divisional arrangement may be implemented because the lack of practical experience with divisions precludes definitive conclusions regarding their value or because other factors, especially political concerns, could influence the ultimate decision. For example, some senators from the Pacific Northwest will continue to favor the Ninth Circuit's bifurcation, for which the divisional concept may be a precursor.[102] Political factors should not dictate congressional policymaking related to the federal courts, but there is a narrow sphere, that even Article III of the Constitution acknowledges, in which proper political considerations can apply.[103]

Persons and organizations with concerns about natural resources as well as the federal judicial system in the western United States and the country, therefore, must think pragmatically and imaginatively about the Commission's report and recommendations. For instance, scientists might apply their technical expertise to predict precisely what the divisional approach would mean for natural resources located within the Ninth Circuit. They could identify discrete resources, such as rivers, endangered species, national parks, and wildlife refuges, which will be situated in the proposed three divisions and the legal regimes that may govern the phenomena. Attorneys might attempt to ascertain what the exact composition of three-judge panels and *en banc* courts in the three divisions as well as the Circuit Division would portend for natural resources, especially vis-à-vis current panels and the present *en banc* court. More spe-

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L. REV. 976, 997-1000 (1982); *see also* Tobias, *Impoverished Idea*, *supra* note 3, at 1374-75; *supra* notes 88-92 and accompanying text (reproducing excerpts from Senate Committee Report suggesting refusal to countenance circuit-splitting premised on political factors).

[102] *See* Timothy Egan, *"War" Refrain is Given the Boot*, N.Y. TIMES, Sept. 15, 1996, at A36; *supra* notes 13-14 and accompanying text. *See generally* WILLIAM PERRY PENDLEY, WAR ON THE WEST: GOVERNMENT TYRANNY ON AMERICA'S GREAT FRONTIER (1995).

[103] *See supra* note 100 and accompanying text; *see also* S. REP. NO. 104-197, at 8, 30 (1995) (recognizing independent responsibilities of Judiciary Committee and Congress to monitor courts and treat problems identified).

cifically, lawyers could assess earlier environmental decisionmaking of the active resident judges who would comprise numerous panels and *en banc* courts in each division to determine how they might resolve future appeals involving resources.

These people and entities should formulate a wide spectrum of practicable approaches that would make sense in terms of environment, public lands, and natural resources in the West while honoring significant values that implicate the federal courts, such as prompt, economical, and fair appellate disposition. Concerned individuals and institutions must anticipate calls for Congress to authorize divisions by developing workable alternatives.

A valuable illustration of a feasible option would be affording the Ninth Circuit sufficient flexibility to continue experimentation with measures that could realize the Commission's objectives in less intrusive ways. The commissioners clearly intended that the divisional arrangement enhance territorial connections between the judges deciding cases in the area from which appeals arise, enable smaller groups of judges to function as a court when articulating the law that applies to a specific region, and facilitate more careful monitoring of the opinions of three-judge panels inside the divisions.

However, the Ninth Circuit may be able to achieve these goals with fewer disruptions by maintaining the current structure and experimenting with promising approaches.[104] Indeed, an Evaluation Committee, which has been analyzing the court and suggesting means to improve operations in response to perceived concerns aired by the Commission, has proffered recommendations involving regionalism.[105] For example, the Committee proposed, and the circuit is experimenting with, regional assignments, whereby one judge who is located in the administrative unit from which an appeal arises serves on the panel that hears the case.[106] Judges of particular divisions could have special responsibility for reviewing more closely decisions in their

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[104] When commenting on the Commission's Tentative Draft Report, Chief Judge Hug suggested, for example, that the circuit might temporarily institute three divisions with oral argument panels in each division comprising two resident judges. *See* Procter Hug, Jr., Comments on the White Commission Draft Report (Oct. 29, 1998) (on file with author).

[105] *See* Ninth Circuit Evaluation Committee, Interim Report 12-13 (Mar. 2000). *See generally* Procter Hug, Jr. & Carl Tobias, *A Preferable Approach for the Ninth Circuit*, 88 CAL. L. REV. 1657 (2000).

[106] *See* S. 1403, 106th Cong. (1999). The bill, which Sen. Diane Feinstein (D-Cal.) introduced, includes reformation of the *en banc* process.

regions by, for instance, relying on the circulation of opinions before formal publication.[107] The Ninth Circuit might also expand the limited *en banc* court to thirteen or fifteen judges with equal representation from the divisions, an idea that the circuit recently endorsed.[108]

Should Congress find unsatisfactory the continued Ninth Circuit experimentation with the measures above or other concepts, those concerned about natural resources may want to explore additional alternatives. One helpful option would be the establishment of a court with national subject matter jurisdiction, which would hear all cases related to the environment, public lands, and natural resources.[109] The District of Columbia Circuit essentially operates this way in treating appeals that legislation governing these areas commands or allows parties to pursue in the tribunal.[110] The Federal Circuit is a useful, general analogue.[111] Scholars have also evaluated the concepts of scientific and environmental courts, which would afford some advantages, namely particularized expertise in the substantive fields under review.[112] However, these courts could have certain disadvantages, principally the possibility of developing tunnel vision and being influenced by various interests, such as regulated industries or specialized practitioners.[113] Moreover, the federal judicial system has not formally implemented scientific or environmental

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[107] Some courts now rely on prepublication circulation. *See* 3D CIR. I.O.P. 5.6; 4TH CIR. I.O.P. 36.2.

[108] *See* S. 253, 106th Cong. (1999); S. 1403, 106th Cong. (1999). For the endorsement, see Evaluation Committee Report, *supra* note 105, at 4-5. For discussion of additional ideas, see Evaluation Committee Report, *supra*.

[109] For general analyses of subject matter courts, see Baker, *supra* note 3, at 261-69; Ellen R. Jordan, *Specialized Courts: A Choice?*, 76 NW. U. L. REV. 745 (1981); Daniel J. Meador, *An Appellate Court Dilemma and a Solution Through Subject Matter Organization*, 16 U. MICH. J.L. REFORM 471 (1983).

[110] *See, e.g.*, 42 U.S.C. § 7607(b) (1994); 42 U.S.C. § 9613(a) (1994). *See generally* Sunstein, *supra* note 101, at 998 (discussing the D.C. Circuit).

[111] *See* Act of Apr. 2, 1982, Pub. L. No. 97-164, 96 Stat. 25 (current version at 28 U.S.C. § 41 (1994)). *See generally* Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1 (1989); *United States Court of Appeals for the Federal Circuit: Tenth Anniversary Commemorative Issue*, 41 AM. U. L. REV. 559-1074 (1992).

[112] *See, e.g.*, James L. Oakes, *Developments in Environmental Law*, 3 ENVTL. L. REP. 50001, 50011-12 (1973); Scott C. Whitney, *The Case For Creating a Special Environmental Court System*, 14 WM. & MARY L. REV. 473 (1973); Gordon J. Zimmerman, *Synergy and the Science Court: Scientific Method and the Adversarial System in Technology Assessment*, 38 U. TORONTO FAC. L. REV. 170 (1980).

[113] *See, e.g.*, Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329, 335-36 (1991); Meador, *supra* note 109, at 482-84; William M.

tribunals, apparently because Congress and the federal judiciary seem to prefer general courts.[114]

If senators and representatives choose to bifurcate the Ninth Circuit or require divisions, persons and organizations concerned about natural resources and the federal courts may wish to examine how the districts that are now constituents of the Ninth Circuit could be grouped. They might think in terms of phenomena, such as ecosystems, like the one involving Yosemite National Park and its environs; habitat for endangered species, namely old growth forests implicating the spotted owl; and wildlife corridors, including those for grizzly bears in Idaho.

Individuals and groups with concerns could correspondingly consider particular resources, or the perceived perspectives of specific judges, in the proposed divisions, but they should remember that emphasizing these considerations over other substantive factors, such as economic development, or important procedural values, including federal court access, may be undesirable.[115] Concerned individuals and entities might evaluate the prospect of different combinations in the districts in the current Ninth Circuit for the proposed divisions. For example, the prevalent natural phenomena and the prevailing political viewpoints in certain Ninth Circuit districts, such as Idaho and Montana, both located in the projected Northern Division, probably resemble one another more than they do those of other districts, such as the Northern District of California situated in the Middle Division or the Southern District of California, located in the Southern Division. The approach recently proposed could create divisions that have similar resources or relatively compatible perspectives; however, it might forfeit diversity of resources and viewpoints.[116]

Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for The Learned Hand Tradition*, 81 CORNELL L. REV. 273, 319-320 (1996).

[114] *See* LONG RANGE PLAN, *supra* note 69, at 43; Richman & Reynolds, *supra* note 113, at 319-20; *see also supra* note 112 and accompanying text (discussing legislation that requires or permits appeals of natural resources cases to the D.C. Circuit). Of course, subject matter panels could be created within existing circuits. *See* Report of the Federal Courts Study Committee 120-22 (1990); Baker, *supra* note 3, at 261-69; *see also* Meador, *supra* note 109, at 476-77 (reporting that oil and gas appeals are assigned to special panel of several judges in the Fifth Circuit who have developed expertise in the area).

[115] *See supra* notes 98-100 and accompanying text; *see also supra* note 96 and accompanying text (discussing diversity).

[116] For discussion of diversity, see *supra* note 96 and accompanying text; *see also supra* notes 24-26 and accompanying text (suggesting circuit-splitting advocates ex-

CONCLUSION

Those concerned about the environment, public lands, and natural resources as well as federal courts in the western United States and the country should scrutinize the suggestions of the Commission on Structural Alternatives for the Federal Courts of Appeals. They must think practically and creatively about the Ninth Circuit and divisions while formulating practicable alternatives to the divisional arrangement recommended. Systematic, imaginative anticipation could help protect the substantial natural resources of the West and honor values that are important to the federal judicial system.

perienced resistance when they broached the possibility of moving Arizona to the Tenth Circuit during the 104th Congress).