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Dear Justice White

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DEAR JUSTICE WHITE

Carl Tobias*

I. INTRODUCTION

Congratulations on your selection as Chair of the Commission on Structural Alternatives for the Federal Courts of Appeals that the United States Congress recently authorized.¹ The Commission has a valuable opportunity to evaluate the intermediate appellate courts and make constructive recommendations for improvement at an important time for the circuits. These courts' burgeoning dockets and insufficient resources now threaten appellate justice.

When the House-Senate Appropriations Conference Committee crafted the compromise which created the Commission, its members made two astute decisions. First, Congress recognized that the circuits are experiencing a "crisis of volume" which warrants serious scrutiny by an expert, independent entity. Second, senators and representatives rejected an ill-advised proposal to split the United States Court of Appeals for the Ninth Circuit.² This suggestion would have afforded neither the existing Ninth Circuit nor the appellate system any overall advantage because the identical complement of judges would have been treating the same total number of cases. Indeed, the recommendation's unbalanced distribution of judgeships and appeals would have exacerbated the current Ninth Circuit's situation. Most salient, the measure would have required that members of the new Twelfth Circuit resolve fifty-percent fewer cases annually than judges of the projected Ninth Circuit, thus complicating the proposed Ninth Circuit's efforts to conclude appeals promptly, efficaciously and equitably. Finally,

* Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas. I wish to thank Tom Baker, Rick Bales and Peggy Sanner for valuable suggestions, Cecilia Palmer and Charlotte Wilmerton for processing this piece, and the Harris Trust for generous, continuing support. Errors that remain are mine.

1. See *Members Named to Commission*, THE THIRD BRANCH, Feb. 1998, at 1; see also Department 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.A. § 41 (1997) (historical and statutory notes)). I submitted these ideas to the Commission in May, 1998.

2. See S. 1022, 105th Cong. § 305 (1997).

the suggestion would simply have ignored the circumstances of the remaining appellate courts.

Unfortunately, the legislation which established the Commission was also flawed in two major respects. First, Congress assigned the Commission an ambiguous mandate. The charge to “study the present division of the United States into the several judicial circuits [and] . . . the structure and alignment of the Federal Court of Appeals system, with particular reference to the Ninth Circuit,”³ left unclear exactly how much emphasis this court should receive. Every circuit has encountered expanding dockets; however, the courts differ significantly in terms of caseload size, complexity and growth rates as well as resources for addressing appeals. All of the appellate courts have applied creative, diverse measures that are intended to expedite cases but maintain effective and fair resolution, while they have realized varying degrees of success. The Ninth Circuit has ambitiously experimented with the broadest spectrum of devices, numerous of which have offered substantial benefits. These factors mean that the court might well be deciding appeals as promptly, efficaciously and equitably as a number of other circuits and deserves Commission consideration more as a solution than a problem.

Another difficulty with the statutory mandate was its explicit focus on boundary and structural modifications. The command instructed the Commission to report “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 Appeal, consistent with fundamental concepts of fairness and due process.”⁴ Boundary adjustments essentially reallocate the workload and may disrupt precedent and judicial administration. Therefore, the Commission should carefully assess a wide range of structural techniques, such as Ninth Circuit reliance on bankruptcy appellate panels, many of which have been salutary, although the entity must also analyze the mechanisms’ potential drawbacks. Moreover, the most efficacious measures, including technological innovations and increased dependence on court staff, do not alter circuit boundaries or structure. Thus, the Commission should flexibly interpret its charge to encompass these remedies and should comprehensively survey them.

A second flaw in the compromise which approved the Commission was the limited time accorded the entity to complete its apparently daunting task. Congress provided the Commission ten months for studying the appeals

3. § 305, 111 Stat. at 2491.

4. *Id.*

courts and two months for developing proposals.⁵ I, therefore, evaluate the difficulties that the circuits confront and canvass possible solutions to suggest how the Commission might finish the work most efficiently in the brief compass allotted. I propose that the entity restrictively conceptualize its assignment and effectively employ the short period by narrowly, but fairly, reading the legislative mandate and by applying this command to data, which are presently available or which could easily be secured, on how the appellate courts are resolving cases.

II. ORIGINS AND DEVELOPMENT OF THE CRISIS OF VOLUME

There is considerable agreement that substantial growth in the appeals which attorneys and parties pursued over the last quarter century and varying resources, especially judges, that the circuits had for addressing cases led them to invoke a number of responses which conflict or have disparate effects.⁶ "From July 1, 1972 to June 30, 1992, filings in the courts of appeals rose from 13,694 to 43,481, an increase of 218%."⁷ Lawyers and litigants concomitantly sought appellate review of trial judges' decisions at a much higher rate perhaps because few disincentives inhibited them. For instance, parties appealed one of forty district court determinations in 1945, but one of eight in 1989.⁸ Congress also expanded the civil and criminal jurisdiction of federal courts, but authorized too few additional judgeships to keep pace with mounting circuit dockets. The above phenomena led the Federal Courts Study Committee to declare during 1990 that the "appellate courts are in a 'crisis of volume' that has transformed them from the institutions they were even a generation ago."⁹

These circumstances prompted the regional circuits to apply numerous, inconsistent measures. Today courts differ significantly in the following ways: the alternatives to dispute resolution (ADR) which the circuits employ; the percentage of three-judge panels that include active members of specific

5. See *id.* at 2492; see also H.R. 908, 105th Cong. (1997) (showing that the House of Representatives unanimously accorded the Commission eighteen months to work).

6. I rely in this paragraph on William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 277-78, 297-339 (1996); Carl Tobias, *The New Certiorari and a National Study of the Appeals Courts*, 81 CORNELL L. REV. 1264, 1266-75 (1996). See generally THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL THE PROBLEMS OF THE U.S. COURTS OF APPEALS (1994) (affording comprehensive analysis of the appeals courts).

7. JUDITH MCKENNA, FEDERAL JUDICIAL CENTER, STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS 18 (1993).

8. See REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 110 (1990).

9. *Id.* at 109.

courts; the opportunities which the circuits afford for oral arguments; the en banc procedures that courts use; how decisionmakers resolve appeals by reviewing briefs, consulting and finalizing determinations; collegiality among judges; the time needed to conclude cases; the consistency of judicial decisionmaking; the forms which the circuits' determinations assume; the restrictions on citation to unpublished dispositions that the courts impose; the availability of circuit decisions; and the responsibilities which the courts assign to circuit staff.¹⁰

Burgeoning appellate dockets, disparities in the resources that appeals courts possess, and circuits' diverse responses to caseload growth apparently comprise inextricably intertwined, and even intractable, problems which defy felicitous resolution. However, application of the statutory mandate to existing information, and to material that could rather easily be collected, analyzed and synthesized, related to appellate courts' treatment of appeals should enable the Commission to complete its task in a timely fashion.

III. ANALYZING PROBLEMS THAT THE APPEALS COURTS MAY BE EXPERIENCING

A. Parsing the Statutory Mandate

The Commission's authorizing statute instructed it to "study the present division of the United States into the several judicial circuits [and] . . . the structure and alignment of the Federal Court of Appeals system, with particular reference to the Ninth Circuit" and to report "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 Appeal, consistent with fundamental concepts of fairness and due process."¹¹ This charge can properly be interpreted as requiring the Commission to suggest modifications in boundaries or structure only after it

10. See, e.g., 4TH CIR. R. 34-36; 9TH CIR. R. 34-36, 10TH CIR. R. 34-36; see also *infra* notes 18-30 and accompanying text. 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 divergent practices of the circuit courts and suggesting methods to improve uniformity). The responses and their effects differ, but judges write fully-reasoned opinions, after hearing oral arguments and closely conferring with their colleagues, in a dwindling percentage of cases. See Richman & Reynolds, *supra* note 6, at 274-78; see also BAKER, *supra* note 6, at 14-30.

11. Department of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-119, § 305, 111 Stat. 2440, 2491 (1997) (reprinted at 28 U.S.C.A. § 41 (1997) (historical and statutory notes)).

conclusively determines that alterations are necessary for, and will promote, the prompt, efficacious and fair resolution of cases. In other words, the Commission must first definitively find that specific regional circuits do not decide appeals expeditiously, effectively *and* equitably before considering whether boundary or structural adjustments would rectify these three phenomena. Even then, the Commission should propose only those changes which would clearly foster prompt, efficacious and fair treatment *both* of particular courts' dockets and of the appellate system's caseload without imposing substantial disadvantages.

The statutory mandate apparently contemplated that the Commission would attempt to define and measure expeditious, effective and equitable resolution in terms of similarly calibrated applicable parameters while identifying and allowing for relevant variables. For example, when the Commission evaluates speed, it should consult the idea of time to disposition calculated from the same starting point, namely filing of the notice of appeal or of briefs. When the Commission assesses efficacy and fairness, it might consider such factors as how frequently the circuits provide oral arguments and published opinions and, when they do so, how carefully judges respond to the contentions proffered or explain the results.¹²

The Commission must correspondingly delineate and provide for pertinent variables, including dockets' relative complexity, which complicated appeals from administrative agency decisionmaking to the United States Court of Appeals for the District of Columbia Circuit aptly epitomize, and the judicial resources that are available for addressing cases, which vacancies in one fifth of the Ninth Circuit's authorized judgeships illustrate. These factors could skew evaluation, for instance, by masking the consumption of additional time or the inefficiencies that judicial openings can create; they are variables that the Commission might not otherwise take into account.

Time to disposition as well as the percentages of appeals that receive oral arguments and published opinions are closely related, and they are informative measures of prompt, effective and equitable resolution. The Commission may want to examine additional parameters, but some will resist calibration, and their meaning will be even more difficult to assess. One helpful example is the accuracy of substantive decisionmaking, that is,

12. Oral argument may improve judges' understanding, while opportunities to argue before, and receive published opinions from, circuits that can be the courts of last resort may increase visibility, accountability and public confidence. See, e.g., Daniel J. Meador, *Toward Orality and Visibility in the Appellate Process*, 42 MD. L. REV. 732 (1983); ABA ACTION COMMITTEE TO REDUCE COSTS AND DELAY, *ATTACKING LITIGATION COSTS AND DELAY* 26-27 (1984); see also BAKER, *supra* note 6, at 165-66; PAUL D. CARRINGTON ET AL., *JUSTICE ON APPEAL* 1-12 (1976).

whether the courts reach appropriate results. The Commission might attempt to analyze the records, briefs, oral arguments and determinations in particular cases when ascertaining whether judges properly resolve appeals. Nevertheless, several phenomena will frustrate this effort. For instance, it is virtually impossible to evaluate oral arguments, especially how they influence decisionmaking, or to find conclusively that a judgment is correct even once the Supreme Court has ruled.

The Commission could concomitantly consult the rate at which the High Court reverses opinions of specific appellate courts. Indeed, senators who favor splitting the Ninth Circuit argue that the number and percentage of its determinations that the Supreme Court overturns is a compelling reason for bifurcation.¹³ However, the many variables, some of which are difficult to identify, isolate and allow for—such as why attorneys and parties decide to appeal, specific Justices' interests and the plethora of Ninth Circuit cases that the Court has recently chosen to review—which attend the reversal rate complicate attempts to derive reliable conclusions from that statistic.¹⁴

The statutory mandate's phraseology, which speaks in terms of prompt, effective and fair appellate disposition, also encourages comparisons among the circuits. Congress apparently envisioned that the Commission would first definitively decide that particular courts are not expeditiously, efficaciously and equitably addressing appeals—a determination which the entity can most confidently make after comparing and finding deficient the individual circuit's performance vis-à-vis the remaining courts. Only once the Commission conclusively ascertains that specific circuits are failing to treat cases promptly, effectively and fairly and that boundary or structural alterations would clearly promote expeditious, efficacious and equitable resolution and impose no substantial disadvantages, should the entity prescribe recommendations for such modifications.

13. See, e.g., 143 CONG. REC. S8041, S8044 (daily ed. July 24, 1997) (statement of Sen. Conrad Burns); *id.* at S8047 (statement of Sen. Slade Gorton). But see ABA Board of Governors Working Group on Structural Alternatives for the Federal Courts 6 (Apr. 24, 1998) [hereinafter ABA Resolution].

14. See Procter Hug, Jr., *The Ninth Circuit Functions Well And Should Not Be Divided*, FED. LAW., Aug. 1998, at 40; Carl Tobias, *Suggestions For Studying The Federal Appellate System*, 49 FLA. L. REV. 189, 225 (1997); see also *infra* sentence between text accompanying notes 21 and 22 (suggesting difficulty of assessing meaning even of parameters that can be calibrated).

B. Applying the Statutory Mandate: Expeditious, Effective and Fair Appellate Resolution

Several parameters might usefully serve as accurate measures of whether particular appellate courts promptly, effectively and fairly decide their appeals. One obvious yardstick for speed is time to disposition, although the Commission must insure that temporal factors are identically calculated while providing for applicable variables, such as case complexity. Recent statistics indicate that the Ninth and Eleventh Circuits need greater time to address appeals in certain absolute senses.¹⁵ The Commission might attempt to ascertain whether the courts actually afford less expeditious treatment and, if so, why. For example, the Ninth Circuit concludes cases faster, in terms of several measurements, than numerous courts, permits oral arguments more frequently than some circuits, and furnishes written, reasoned dispositions at a higher rate than most appellate courts.¹⁶

Instructive parameters for determining whether regional circuits efficaciously and fairly decide appeals are the percentage of counseled cases terminated on the merits in which courts hear oral arguments and the percentage of counseled appeals resolved on the merits in which circuits issue published opinions. The Commission might consult applicable empirical data by, for instance, considering those courts that compiled percentages which were below the national average in the 1997 fiscal year. The Third, Fourth, Fifth, Ninth and Eleventh Circuits failed to attain that average for either oral arguments or published opinions; however, the Ninth and Fifth Circuits more closely approached it for oral arguments and published opinions respectively.¹⁷ The Commission should also attempt to adjust for relevant variables and to discern whether the five courts in fact provide less effective and equitable resolution by, for example, evaluating

15. See Administrative Office of the U.S. Courts, Median Time Intervals in Cases Terminated After Hearing or Submission, by Circuit during the Twelve Month Period Ended Dec. 31, 1997, Table B4 (1998) (on file with author) [hereinafter Terminated Cases]. For example, the Eleventh Circuit is slowest from filing notice of appeal to filing last brief, while that court is third, and the Ninth Circuit is second, slowest from filing notice of appeal to final disposition. See *id.*

16. The court is quickest from submission to final disposition and third quickest from hearing to final disposition. See *id.*; see also NINTH CIRCUIT COURT OF APPEALS REORGANIZATION ACT OF 1995, S. REP. NO. 197, at 22 (1995) (affording data on oral arguments and written dispositions) [hereinafter SENATE REPORT]; William W Schwarzer, *Statement to the Commission on Structural Alternatives for the Federal Courts of Appeals* 1-2 (Apr. 24, 1998) (visited Nov. 12, 1998) <<http://app.comm.uscourts.gov/hearings/newyork/0424SCHW.htm>> [hereinafter Schwarzer Statement] (analyzing variables).

17. See Federal Judicial Center, Snapshot of Appeals Terminated in FY 1997 (1998) (on file with author) [hereinafter Snapshot]. The Ninth Circuit held oral arguments in two, and the Fifth Circuit issued published opinions in three, percent fewer cases than the national average. See *id.*

the time which they actually devote to conducting oral arguments and to producing published opinions. This material and the data on disposition times suggest that the Third, Fourth, Fifth, Ninth and Eleventh Circuits may not decide appeals promptly, efficaciously and fairly today.

C. Narrowing the Commission Inquiry

Even if the above information fails to demonstrate with the requisite certainty that some appellate courts expeditiously, effectively and equitably resolve cases, the statistics afford a sufficiently reliable basis for narrowing the scope of the Commission's inquiry. For instance, the material on disposition times as well as percentages of oral arguments and published opinions could support Commission findings that the First, Second, Sixth, Seventh, Eighth, Tenth and D.C. Circuits were, and that the five remaining appellate courts might have been, addressing their appeals promptly, efficaciously and fairly at least during fiscal year 1997. However, the Commission may want to consider similar data regarding earlier periods, to project into the future or to consult additional measures.

Insofar as the information on time to disposition as well as the percentages of oral arguments and published opinions accurately shows that regional circuits accord cases expeditious, effective and equitable treatment, the material could permit the Commission to limit its work substantially. The Commission might first briefly re-evaluate whether any of the five appeals courts designated does decide cases promptly, efficaciously and fairly, and thus, can be eliminated from consideration, or whether certain circuits perform so much better that they could receive relatively little attention. For example, the statistics on time to disposition indicate that the Third, Fourth and Fifth Circuits are addressing appeals expeditiously, even as the data on oral arguments and published opinions may demonstrate that the courts do not provide effective and equitable resolution. The information on oral arguments and on published opinions suggests that the Ninth and Fifth Circuits respectively decide cases with comparative efficacy and fairness, but the material on time to disposition apparently shows that the courts afford rather slow disposition. Therefore, the Commission might, and probably should, conclude that the circumstances of the Third, Fourth, Fifth, Ninth and Eleventh Circuits remain sufficiently unclear that they warrant greater analysis, partly because the available information is neither broad nor refined enough to support conclusive judgments.¹⁸ Even if the Commission

18. The Senate Judiciary Committee majority afforded data showing that the Fifth and Eleventh Circuits were more efficient than the Ninth, even as the minority offered equally valid data

decides to assess further those five courts, the determination that seven regional circuits promptly, effectively and equitably address appeals and, accordingly, require minimal additional examination would significantly circumscribe the Commission's efforts.¹⁹

D. Scrutinizing the Five Courts

When the Commission attempts to ascertain more definitively whether these five appellate courts expeditiously, efficaciously and fairly resolve cases, it should closely evaluate their actual practices while considering parameters other than time to disposition, percentages of oral arguments, and published opinions. For instance, the Commission could analyze the consequences of the Third Circuit's reliance on judgment orders and the choice of the Third, Fifth and Eleventh Circuits not to make their unpublished opinions available on line. The Commission might concomitantly explore how the Eleventh Circuit annually terminates 275 appeals on the merits per authorized judgeship when the national average is 155 and assess this disposition rate's impacts on specific cases.²⁰ Another important statistic shows that more than one-sixth of all three-judge panels constituted by the court and by the Ninth Circuit include a decisionmaker who is not an active member of the particular appellate court.²¹ The Commission could ask whether reliance on visiting judges promotes inter-circuit consistency and helpful interchange or whether it increases the potential for intracircuit conflicts while imposing expense. Some evidence correspondingly suggests that a majority of the Fourth Circuit's judges may employ the en banc procedure to reverse panel determinations with which they disagree politically.²² The Commission might want to evaluate these

showing the opposite. Compare SENATE REPORT, *supra* note 16, at 9-10, with Snapshot, *supra* note 17.

19. This is not the only way to narrow the inquiry, while more time to study or more data may prove my ideas incorrect. The approach is defensible, given available data and the short time for the Commission to complete a potentially enormous task. Indeed, some observers essentially argue that no circuits properly resolve appeals and argue for systemic solutions. See, e.g., Judith Resnik, *Statement Submitted to Commission on Structural Alternatives for the Federal Courts of Appeals* (Apr. 24, 1998) (visited Nov. 12, 1998) <<http://app.comm.uscourts.gov/hearings/newyork/0427RES.htm>>; Richman & Reynolds, *supra* note 6.

20. See Snapshot, *supra* note 17. This annual rate could be considered a parameter.

21. See Participation by Visiting Judges in Certain Work of the Federal Courts of Appeals, 1993 Through 1997, Table I (preliminary data); see also *id.* (showing 15% national average); Resnik, *supra* note 19, at 4 (analyzing visitors' benefits). These data could be considered parameters.

22. See, e.g., *Riley v. Dorton*, 115 F.3d 1159 (4th Cir. 1997); *Miller v. Smith*, 115 F.3d 1136 (4th Cir. 1997); see also *Hopwood v. Texas*, 84 F.3d 720, 721 (5th Cir. 1996) (Politz, C.J.,

practices by collecting, analyzing and synthesizing relevant empirical evidence, perhaps with surveys and interviews of affected judges, lawyers and parties.

There are actual appellate court practices which the Commission could consider in addition to the forms that resolution assumes; the accessibility of dispositions; how decisionmakers review briefs, choose whether to hear oral arguments, confer and reach determinations; reliance on visiting judges; and circuits' employment of the en banc mechanism. These include the alternatives to dispute resolution (ADR) that courts use, the collegiality of judges, the duties which circuits assign court staff, and the strictures imposed on citation of certain dispositions. For example, examination of the local circuit rules that apply to ADR, staff deployment, and decisions which lawyers may cite, reveals considerable disparity among the appeals courts and indicates that some circuits might treat cases less expeditiously, efficaciously and fairly than others. However, the Commission must definitively ascertain whether this impression, derived from assessing the requirements as written, is accurate by scrutinizing the courts' practices.

Parameters which the Commission could consult, apart from time to disposition as well as percentages of oral arguments and published opinions, encompass the consistency of intracircuit judicial decisionmaking and the reversal rate. For instance, the only systematic study of precedent's operation in a large appellate court, the Ninth Circuit, found that the court has "generally succeeded in avoiding conflicts between panel decisions."²³ Chief Judge Procter Hug, Jr., of the Ninth Circuit recently contended that "reversal rate of the cases selected for review by the Supreme Court is not a legitimate basis for evaluating the performance of [this appeals court] and is certainly no basis for dividing a circuit."²⁴ Chief Judge Hug argued that the court must "resolve more complicated, novel and important issues than other circuits," that several appeals courts had higher reversal rates than the Ninth Circuit, and that the Supreme Court overturned fewer than one percent of the Ninth Circuit's merits terminations during 1996.²⁵

dissenting from failure to grant rehearing en banc). See generally Douglas H. Ginsburg & Donald Falk, *The Court En Banc: 1981-90*, 59 GEO. WASH. L. REV. 1008 (1991); Michael E. Solimine, *Ideology and En Banc Review*, 67 N.C. L. REV. 29 (1998).

23. MCKENNA, *supra* note 7, at 94; see also Arthur D. Hellman, *Maintaining Consistency in the Law of the Large Circuit*, in RESTRUCTURING JUSTICE 55-90 (Arthur D. Hellman ed., 1990); 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).

24. Hug, *supra* note 14, at 40.

25. See *id.*; see also *supra* notes 13-14 and accompanying text.

When the Commission evaluates the five appellate courts which might not be promptly, effectively and equitably addressing appeals, it should remember that there may be multiple acceptable ways to decide cases. For example, the Third, Fourth and Eleventh Circuits issue published opinions less frequently than the remaining courts and permit oral arguments in a significantly smaller percentage of appeals than all except one.²⁶ Nevertheless, Commission analysis of actual practices might reveal that those three circuits are providing cases the treatment which they deserve and, therefore, are expeditiously, efficaciously and fairly resolving appeals. More specifically, pro se litigants pursue most of the cases in which the three courts do not afford published opinions and oral arguments,²⁷ thus perhaps indicating that appeals receive the attention which they warrant.²⁸ The Second Circuit offers another informative illustration. The court's production of published opinions in thirty-nine percent of counseled cases could suggest that it fails to conclude appeals promptly, effectively and equitably.²⁹ However, this figure is higher than the percentages which seven appellate courts compiled, and even were it lower, the Second Circuit's provision of oral arguments in eighty-five percent of counseled cases apparently compensates by according parties opportunities to persuade, and receive responses from, decisionmakers.³⁰

IV. ANALYZING POSSIBLE SOLUTIONS TO PROBLEMS THAT THE APPEALS COURTS MAY BE EXPERIENCING

A. An Introductory Comment About Solutions

If the Commission conclusively determines that any appeals courts are not expeditiously, efficaciously and fairly addressing cases, the entity must then ascertain whether changes in circuit boundaries or structure would foster prompt, effective and equitable treatment of appeals by the courts and the appellate system. It should remember that these modifications might fail to

26. See Snapshot, *supra* note 17 and accompanying text. The Third, Fourth, Tenth and Eleventh Circuits hold oral arguments in thirty percent of cases. See *id.*

27. See Snapshot, *supra* note 17.

28. See Tobias, *supra* note 6, at 1269-75. But see Resnik, *supra* note 19; Richman & Reynolds, *supra* note 6, at 280-81, 286, 290, 295.

29. See Snapshot, *supra* note 17.

30. See *id.*; Jon O. Newman, *Statement to the Commission on Structural Alternatives for the Federal Courts of Appeals* 2 (Apr. 24, 1998) (visited Nov. 12, 1998) <<http://app.comm.uscourts.gov/hearings/newyork/0424NEWM.htm>> [hereinafter Newman statement].

promote such resolution and that they could impose certain disadvantages, including detrimental side effects, which may be difficult to predict. For instance, the recommended alterations of the Ninth Circuit that Congress recently considered³¹ certainly would have delayed, and might well have permitted less efficacious and fair disposition of the proposed Ninth Circuit's caseload, even though the adjustments suggested could have led to expeditious, effective and equitable treatment in the projected Twelfth Circuit, while disrupting precedent and judicial administration. These developments might have materialized principally because the changes would have unevenly distributed the docket and judges without authorizing additional judicial positions, thus leaving members of the new Ninth Circuit to decide fifty-percent more appeals each year than their counterparts on the proposed Twelfth Circuit, and would have required duplicative courthouses and circuit administrative structures.³² The Commission, therefore, must insure that boundary and structural modifications will clearly facilitate prompt, efficacious and fair disposition of the caseload both for specific courts and for the appellate system.

The Judicial Conference concomitantly registered strong concerns about adjustments which involve boundaries and structure in the recommendation on appeals court size and workload of its 1995 Long Range Plan.³³ The Conference suggested that "[c]ircuit restructuring should occur only if compelling empirical evidence demonstrates adjudicative or administrative dysfunction in a court so that it cannot continue to deliver quality justice and coherent, consistent circuit law in the face of increasing workload."³⁴ The Conference urged that "division of a particular circuit or realignment of circuit boundaries should continue to be, as it has been historically, an infrequent event," admonishing that any reconfiguration proposed "must be considered in the light of the disruption of precedent and judicial administration that such changes generally entail."³⁵ The Federal Judicial

31. See Ninth Circuit Court of Appeals Reorganization of 1997, S. 431, 105th Cong. §§ 2-11 (1997); S. 956, 104th Cong. (1995).

32. See S. 431, 105th Cong. (1997); S. 956, 104th Cong. (1995); Letter from Procter Hug, Jr., Chief Judge, U.S. Courts for the Ninth Circuit, to Sen. Harry M. Reid (D.-Nev.) (July 18, 1997), reprinted in 143 CONG. REC. S8060 (daily ed. July 24, 1997); see also *infra* notes 69-73, 80 and accompanying text.

33. JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS 44-45 (1995) [hereinafter LONG RANGE PLAN]. The Conference is the federal courts' policy-making arm.

34. *Id.* at 44; see also ABA Resolution, *supra* note 13, at 4 (endorsing as ABA policy).

35. LONG RANGE PLAN, *supra* note 33, at 45; see also Letter from Edward R. Becker to Commission on Structural Alternatives for the Federal Courts of Appeals (Jan. 26, 1998) (on file with author) [hereinafter Becker Letter].

Center, which published a thorough study of the appeals courts in 1993, correspondingly found that the circuits and judges were under stress, although it was apparently not one which would have been “significantly relieved by structural changes to the appellate system at [that] time.”³⁶

In short, boundary and structural alterations are comparatively dramatic approaches to which Congress has rarely resorted, which might not facilitate expeditious, efficacious and equitable resolution and which could entail unforeseeable disadvantages, while the analysis above indicates that at least seven regional circuits promptly, effectively and fairly address cases.³⁷ The Commission, thus, must first ascertain whether remedies apart from boundary modifications would enable particular courts and the appellate system to treat appeals as quickly, efficaciously and equitably, with fewer detrimental impacts, and should initially consult solutions which would directly and narrowly respond to those phenomena that apparently prevent expeditious, effective and fair appellate disposition today.

In other words, the Commission must exhaust limited, circuit-specific approaches, which promise to foster prompt, efficacious and equitable treatment, but that have minimal adverse effects. For example, the authorization of several additional judges or the adoption of many remedies for docket growth—solutions which are more modest than creating judgeships and less extreme than changing boundaries—may facilitate expeditious, effective and fair resolution with little disadvantage. The Commission, therefore, should carefully assess numerous circumscribed measures which apply to individual appeals courts and definitively determine that they will fail to encourage prompt, efficacious and equitable disposition or would have deleterious impacts before the entity considers boundary alterations.

Finally, even if the Commission examines adjustments in boundaries or structure, it might well conclude that those modifications by themselves will simply not facilitate expeditious, effective and fair treatment or would impose substantial disadvantages and, accordingly, recommend no boundary changes.³⁸ Illustrative are proposals for splitting the Ninth Circuit which Congress recently evaluated.³⁹ Bifurcating the court alone would have afforded no overall or systemic benefit because division would have only reallocated the workload with the same contingent of active judges deciding the identical quantity of cases and could have disrupted precedent and

36. MCKENNA, *supra* note 7, at 155. The Center is the courts' major research arm.

37. *See supra* pp. 8-9.

38. If the Commission so concludes, its mandate suggests that Congress would have intended it to propose no such alteration. *See supra* note 3 and accompanying text.

39. *See supra* note 31 and accompanying text.

judicial administration.⁴⁰ Members of the new Twelfth Circuit would have annually confronted 239 appeals and the court would have needed redundant buildings and personnel, while judges on the proposed Ninth Circuit would have faced 363 cases yearly and, thus, this court would have processed appeals more slowly, and perhaps less efficaciously and equitably, than either the projected Twelfth Circuit or the present Ninth Circuit.⁴¹ Indeed, Congress's traditional response to caseload growth of realigning appeals courts and authorizing additional judgeships has marginally facilitated appellate disposition and seemingly has had some adverse impacts, such as the erosion of circuits' federalizing function, that is, the courts' responsibility to reconcile the Constitution and national policies with state and local interests.⁴²

B. "Structural" Solutions Other Than Changes in Circuit Boundaries

The Commission must first scrutinize, and seriously consider suggesting, a broad spectrum of limited solutions, other than circuit boundary alterations, which can fairly be characterized as structural.⁴³ The remedies may better promote prompt, efficacious and equitable resolution, in part because the approaches would apparently be rather simple and easier to implement and, therefore, ultimately less disruptive, while these measures could specifically and narrowly treat the phenomena which seem to prohibit expeditious, effective and fair disposition.

One such potential solution is subject matter panels of particular appellate courts that decide cases in designated substantive fields, including oil and gas, an approach which the Fifth Circuit has successfully employed.⁴⁴ Another helpful example is the Bankruptcy Appellate Panels ("BAP") used

40. See *supra* notes 32, 35; *infra* notes 69-73 and accompanying text.

41. See *supra* note 32 and accompanying text. The Fifth Circuit's division may have minimally improved resolution. See *supra* notes 15-19 and accompanying text; *infra* note 67.

42. See CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS § 3, at 10-13 (5th ed. 1994); John Minor Wisdom, *Requiem for a Great Court*, 26 LOY. L. REV. 787, 788 (1980); see also BAKER, *supra* note 6, at 202 (adding judges "does not achieve any lasting improvement"); *supra* note 35 (recounting more disadvantages); *infra* note 60 and accompanying text (same). The measures assessed are illustrative and are not exhaustively evaluated. At each subsection's conclusion, I suggest sources that analyze these measures and others more extensively.

43. The introductory comment treated structural with boundary changes and characterized both as rather extreme. The Commission's authorizing statute expressly prescribes both, although many "structural" approaches considered here would be more modest and less disruptive.

44. See REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 8, at 120-21. See generally Stuart Nagel, *Systematic Assignment of Judges: A Proposal*, 70 JUDICATURE 73 (Aug.-Sept. 1986) (analyzing panels and a system that factors judges' interests and abilities in case assignments).

in the Ninth Circuit.⁴⁵ Congress apparently found the panels' deployment sufficiently efficacious to require that all appeals courts institute BAPs or justify not implementing them.⁴⁶

A related measure is courts which have national appellate subject matter jurisdiction. The United States Court of Appeals for the Federal Circuit has generally afforded specialization's benefits, such as expertise, efficiency and enhanced consistency in the identified area of federal law, namely copyright, trademark and patents, since its 1982 creation.⁴⁷ However, the circumscribed focus of courts with nationwide subject matter jurisdiction contravenes the long-standing tradition of generalist judges, and the tribunals may be susceptible to capture by interests which regularly appear before them.⁴⁸

Other possibilities are appeals court panels that include fewer than three decisionmakers⁴⁹ or that consist of district judges who are responsible for error correction,⁵⁰ both of which would conserve the judicial resources of appellate courts. Nevertheless, two-judge panels will experience difficulty when the members disagree,⁵¹ while panels constituting three district judges might be reluctant to overturn rulings of colleagues who occupy identical positions in the judicial hierarchy and could include jurists whom Presidents appointed primarily for their trial court expertise.⁵² A rather provocative

45. See 28 U.S.C. §§ 158(a), (b) (1994); see also 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 23, at 165-91.

46. See Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 104(c), 108 Stat. 4106, 4109-10; see also LONG RANGE PLAN, *supra* note 33, at 47-49.

47. See Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 127, 96 Stat. 25, 37-38 (codified as amended at 28 U.S.C. § 1295 (1994)). See generally Rochelle C. Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1 (1989) (assessing the Court of Appeals for the Federal Circuit); *United States Court of Appeals for the Federal Circuit Tenth Anniversary Commemorative Issue*, 41 AM. U. L. REV. 559 (1992) (same).

48. See, e.g., BAKER, *supra* note 6, at 222; REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 8, at 120-21; Lawrence Baum, *Specializing the Federal Courts: Neutral Reforms or Efforts to Shape Judicial Policy?*, 74 JUDICATURE 217, 224 (1991).

49. See, e.g., BAKER, *supra* note 6, at 172; LONG RANGE PLAN, *supra* note 33, at 131-32; Diarmuid F. O'Scannlain, *Statement to the Commission on Structural Alternatives for the Federal Courts of Appeals* 3-4 (Apr. 24, 1998) (visited Nov. 11, 1998) <<http://app.comm.uscourts.gov/hearings/newyork/oscannl.htm>> [hereinafter O'Scannlain Statement].

50. See, e.g., LONG RANGE PLAN, *supra* note 33, at 131-32; MCKENNA, *supra* note 7, at 133-39.

51. See, e.g., MCKENNA, *supra* note 7, at 127-33; Newman Statement, *supra* note 30, at 3; Carl Tobias, *The Impoverished Idea of Circuit-Splitting*, 44 EMORY L.J. 1357, 1400 (1995).

52. See, e.g., Carl Tobias, *Some Cautions About Structural Overhaul of the Federal Courts*, 51 U. MIAMI L. REV. 389, 404 (1997); see also 28 U.S.C. § 292(a) (1994) (authorizing district judges to sit on appeals courts by designation); Richard B. Saphire & Michael E. Solimine, *Diluting*

approach for the Ninth Circuit would keep the circuit intact but have multiple divisions of the appeals court comprising the same complement of active appellate judges who would be responsible for cases that arise from the identical federal districts.⁵³ This concept would avoid disruption and capitalize on certain administrative benefits of retaining the circuit, namely expertise and fiscal economies, and ostensibly enable appeals court judges to have greater familiarity with the trial judges whose decisions they review.⁵⁴

Once the Commission has thoroughly assessed structural remedies apart from boundary changes, the entity must determine whether any of those solutions alone or together will enable the regional circuits, which are not expeditiously, effectively and fairly treating cases now, and the appellate system, to do so with little deleterious effect. If the Commission concludes that the remedies would permit such disposition, it should recommend the best combination of approaches and exclude the courts from further consideration.

C. Non-Structural Solutions

The same reasons which suggest that the Commission must first examine “structural” measures other than modifications in circuit boundaries also indicate that the entity should initially canvass, and carefully contemplate proffering, many non-structural solutions.⁵⁵ One potential problem with analyzing and proposing these remedies is that the legislation which authorizes the Commission expressly empowers it to recommend “changes in circuit boundaries or structure.”⁵⁶ However, the Commission may find that non-structural approaches would facilitate resolution which is as prompt, efficacious and equitable as, and less disadvantageous than, boundary alterations—thus essentially determining that no “changes in circuit boundaries or structure. . . may be appropriate for the expeditious [, fair]

Justice on Appeal?: An Examination of the Use of District Court Judges Sitting by Designation on the United States Courts of Appeals, 28 U. MICH. J.L. REFORM 351, 376 (1995).

53. I am indebted to Judge Pamela Ann Rymer and Professors Paul Carrington and John Oakley for this idea. See also Joseph E. Weis, Jr., *Statement to the Commission on Structural Alternatives for the Federal Courts of Appeals* 4-5 (Apr. 24, 1998) (visited Nov. 11, 1998) <<http://app.comm.uscourts.gov/hearings/newyork/0424WEIS.htm>>.

54. For more analysis of the “structural” measures examined above and evaluation of many others, see BAKER, *supra* note 6, at 215-24, 238-79; MCKENNA, *supra* note 7, at 105-21; REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 8, at 118-23.

55. See *supra* notes 43-54 and accompanying text.

56. Department of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-119, § 305, 111 Stat. 2440, 2491 (1997) (reprinted at 28 U.S.C.A. § 41 (1997) (historical and statutory notes)).

and effective disposition of the [appellate] caseload.”⁵⁷ Congress arguably intended that the Commission broadly read “structure” or suggest non-structural alternatives.

Two important measures which do not directly implicate structure are the authorization of appellate commissioners and of additional judgeships. Appellate commissioners, a concept with which the Ninth Circuit has recently experimented,⁵⁸ might augment existing judicial resources and improve disposition by assuming a broad range of responsibilities. For example, the officers could expedite rulings on non-dispositive motions and on attorney fee requests, might serve as the appeals court analogue of magistrate judges or may discharge several tasks, such as case screening, issue tracking and opinion drafting, which circuit staff now perform, thereby enhancing visibility and accountability.⁵⁹

The creation of more judgeships has been one critical component of the conventional congressional response to docket growth. Enhanced judicial resources could facilitate prompt, efficacious and equitable resolution, although some observers assert that expanding the membership of larger courts can have adverse consequences, such as decreases in collegiality and the consistency of intracircuit decisionmaking.⁶⁰

Reliance on visiting appellate and district judges to staff three-judge panels is a practice which is closely related to the authorization of additional judgeships and which every court except the District of Columbia Circuit has employed. Fifteen percent of judges who presently serve on panels are not active members of the specific appeals courts on which they sit.⁶¹ Continued and growing dependence on visiting judges may offer some benefits, including supplementation of existing judicial resources, potential reductions in intercourt inconsistency, greater diversity and enhanced interaction of appellate and district judges within and among appeals courts.⁶² However,

57. *Id.*

58. See Hug, *supra* note 14, at 40; see also BAKER, *supra* note 6, at 175-76; MCKENNA, *supra* note 7, at 129-33.

59. See MCKENNA, *supra* note 7, at 129-33; Hug, *supra* note 14, at 3.

60. See SENATE REPORT, *supra* note 16, at 10-11; Jon O. Newman, *1,000 Judges—The Limit For An Effective Federal Judiciary*, 76 JUDICATURE 187, 188 (1993); Gerald B. Tjoflat, *More Judges, Less Justice*, A.B.A. J., July 1993, at 70-73; see also Tobias, *supra* note 51, at 1388 (suggesting Ninth Circuit's 3276 combinations of three-judge panels may have these effects); *supra* note 42 and accompanying text (same).

61. See *supra* note 21.

62. See Resnik, *supra* note 19.

disadvantages, such as possible increases in intracircuit inconsistency and expense might be imposed.⁶³

Another important, albeit controversial, approach would be the formalization of discretionary appellate review. The appeals courts have essentially instituted this remedy by restricting the number of oral arguments and published opinions afforded and by substantially relying on staff. Formal recognition of discretionary review would more candidly acknowledge certain realities of modern appellate disposition and could conserve judicial resources; however, the concept may be unconstitutional and would alter appeal of right that has a long, revered history.⁶⁴

The non-structural solutions also include numerous, principally procedural, measures which the regional circuits have specifically invoked to address expanding dockets. These encompass various alternatives to dispute resolution, different en banc practices, diverse case screening and issue designation mechanisms, a broad spectrum of technological innovations, the placement of enhanced dependence on court staff and additional options as discussed above. The Ninth Circuit contends that application of the techniques enumerated and many others, such as special provision for long-range planning and a unique case "weighting" system, has permitted it to treat the largest appellate court docket promptly, efficaciously, equitably and consistently.⁶⁵

After the Commission has intensively reviewed a wide range of non-structural approaches, the entity must ascertain whether any of the remedies individually, together, or combined with "structural" solutions, will allow the remaining appeals courts, which do not afford expeditious, effective and fair disposition, and the appellate system to so decide cases but have minimal deleterious impact. Only if the Commission definitively finds that none of the measures would facilitate this type of resolution, should it then consider boundary alterations.

63. Visitors are less familiar with circuit law, traditions and active judges and impose travel and administrative costs. See BAKER, *supra* note 6, at 198-201; MCKENNA, *supra* note 7, at 38-39; see also Tobias, *supra* note 14, at 227 (suggesting other ways to augment resources but recognizing more judges and staff may pose above problems or increase bureaucratization).

64. See 28 U.S.C. § 1291 (1994); see also BAKER, *supra* note 6, at 234-38; Robert M. Parker & Ron Chapman, Jr., *Accepting Reality: The Time for Adopting Discretionary Review in the Courts of Appeals Has Arrived*, 50 SMU L. REV. 573, 578-82 (1997); Richman & Reynolds, *supra* note 6, at 277-78.

65. See JOE S. CECIL, ADMINISTRATION OF JUSTICE IN A LARGE APPELLATE COURT: THE NINTH CIRCUIT INNOVATIONS PROJECT (Federal Judicial Center 1985); Hug, *supra* note 14, at 40; Tobias, *supra* note 14, at 240-41. But see *supra* notes 10, 19. For more analysis of the "non-structural" measures examined above and evaluation of many others, see BAKER, *supra* note 6, at 108-47, 151-81, 187-214; MCKENNA, *supra* note 7, at 123-39; LONG RANGE PLAN, *supra* note 33, at 131-33.

D. Changes in Circuit Boundaries

Extensive Commission assessment of limited, circuit-specific remedies will reveal many that would permit any appeals courts which the entity conclusively determines are not promptly, efficaciously and equitably addressing cases to do so. If this survey clearly shows that no solutions alone or together would enable regional circuits and the appellate system to treat appeals as expeditiously, effectively and fairly as, and with fewer disadvantages than, modifications in boundaries, the Commission should explore boundary changes.

The Commission could variously approach alterations of boundaries. The entity must remember that boundary adjustments by themselves will not necessarily foster prompt, efficacious and equitable disposition, and could have adverse consequences. For instance, such modifications, without more, may essentially reallocate the workload by requiring the identical total number of judges to address the same caseload, and the changes could disrupt precedent and judicial administration.⁶⁶ Recent proposals for bifurcating the Ninth Circuit demonstrate, and the operation of the Fifth and Eleventh Circuits, since their 1980 creation from the former Fifth Circuit, may illustrate those dynamics.⁶⁷ The Commission might also keep in mind certain boundary-alteration criteria—that appeals courts should include three or more jurisdictions, states which are adjacent and jurisdictions that have diverse populations, legal business and socioeconomic interests—which the Commission on Revision of the Federal Court Appellate System (the Hruska Commission) articulated in 1973 and remains salient today.⁶⁸

These propositions mean that the Commission must emphasize boundary adjustments which will be most salutary, while the entity may want to consider those modifications in conjunction with other measures that would promote expeditious, effective and fair resolution but involve little detriment. More specifically, the Commission might scrutinize “minimalist” boundary changes which implicate, for example, the fewest federal districts or states or

66. See *supra* notes 35, 40-42 and accompanying text.

67. Smaller courts may better resolve cases, a view which finds some support in experience since the Fifth Circuit's 1980 division. See, e.g., Tjoflat, *supra* note 60, at 70-73; Eric J. Gribbin, Note, *California Split: A Plan To Divide the Ninth Circuit*, 47 DUKE L.J. 351, 381-82 (1997); Becker Letter, *supra* note 35, at 3. But see *supra* notes 15-19 and accompanying text. Recent proposals to realign the Ninth Circuit would not have improved resolution in the new Ninth Circuit but might have done so in the new Twelfth Circuit while disrupting precedent and judicial administration. See *supra* notes 39-41 and accompanying text; *infra* notes 69-73 and accompanying text.

68. See Commission on Revision of the Federal Court Appellate System, *The Geographical Boundaries of the Several Judicial Circuits: Recommendations for Change*, 62 F.R.D. 223, 231-32 (1973) [hereinafter *Hruska Commission*].

combine that approach and the structural and non-structural solutions examined earlier which have the greatest promise.

1. The Ninth Circuit

The analyses in the third part of this missive and in the remainder of section four suggest that the Ninth Circuit promptly, efficaciously and equitably treats cases today, or that the application of many mechanisms apart from boundary alterations would enable it to do so. However, I concentrate on this court because the statute which authorized the Commission expressly mentions the circuit and the recent dispute over the court's division prompted establishment of the entity. Moreover, attempts to identify those adjustments in Ninth Circuit boundaries that would most improve resolution and impose minimal disadvantage could inform similar efforts to evaluate other appeals courts.

Numerous concepts show that modifications of the Ninth Circuit's boundaries which Congress has considered or federal courts observers have recommended would be insufficiently effective to warrant adoption. The aforementioned general propositions involving the disruption of precedent and judicial administration apply to the Ninth Circuit.⁶⁹ For instance, bifurcation may foster inconsistent enforcement of the law that governs maritime matters, commerce and utilities in the two new courts along the West Coast, complicating economic activities and forcing attorneys to research the case precedent of both tribunals for possible cross-circuit transactions.⁷⁰ A split of the court could concomitantly lead to conflicting interpretations of federal statutes which cover the environment and in additional areas that the Ninth Circuit has uniformly applied throughout the West.⁷¹ Division might also promote forum shopping by litigants and counsel, while it may undermine the appellate courts' federalizing function and could limit intercircuit consistency.⁷² Moreover, bifurcation would

69. See *supra* note 35 and accompanying text.

70. See Hug, *supra* note 14, at 39; J. Clifford Wallace, *Statement to the Commission on Structural Alternatives for the Federal Courts of Appeals* 5 (Apr. 3, 1998) (visited Nov. 8, 1998) <<http://app.comm.uscourts.gov/hearings/chicago/wallace.htm>> [hereinafter Wallace Statement]. Of course, this situation now pertains to the East and Gulf Coasts.

71. See *Hearing on S. 948 Before the Subcomm. on Courts and Admin. Practice of the Senate Comm. on the Judiciary*, 101st Cong. 286-87 (1990) (statement of Sen. Pete Wilson); *id.* at 508 (statement of Michael Traynor); Schwarzer Statement, *supra* note 16, at 3.

72. See Gribbin, *supra* note 67, at 392; Wallace Statement, *supra* note 70, at 5; *supra* note 42 and accompanying text.

necessitate duplicative administration and might reduce the diversity of each court.⁷³

Even were restructuring less disruptive and more efficacious, the Ninth Circuit resists felicitous reconfiguration. The principal explanation for this circumstance is that California has a gigantic population base, which generates a majority of the court's appeals and comprises four federal districts. Congress and many observers of the Ninth Circuit and the federal courts have found it inadvisable to institute the unprecedented actions of creating a one-state circuit or of placing California's districts in two appellate courts, the options for addressing the jurisdiction which have received the greatest consideration.

California might become a circuit by itself, perhaps with several judges in addition to those presently stationed there, so that the court could better resolve the large number of cases that the state produces. However, a single-jurisdiction circuit may lack the diversity of backgrounds which judges who have practiced and lived in different states offer.⁷⁴ Moreover, one senator having long tenure might influence too substantially the court's appointments and, thus, could mold the circuit for a generation.⁷⁵ Splitting California and assigning the jurisdiction's four federal districts to different appeals courts may correspondingly foster different interpretations of California substantive law which apply within the state.⁷⁶ These difficulties mean that neither major method of treating California has garnered much support, particularly in Congress.

Other Ninth Circuit realignments which respond less directly to California and which senators and representatives have evaluated and federal courts observers have proposed appear comparatively inefficacious. Several alternatives that Congress has seriously considered would not effectively distribute the circuit caseload and active judges or might contravene applicable criteria for boundary alteration, such as the standards which the Hruska Commission enunciated.⁷⁷ For instance, proposals to create an appeals court constituting the five jurisdictions of the Pacific Northwest would have allocated the docket and judgeships in an unbalanced manner.⁷⁸

73. See Schwarzer Statement, *supra* note 16, at 3; Tobias, *supra* note 14, at 241 n.307.

74. See Hruska Commission, *supra* note 68, at 237; Wallace Statement, *supra* note 70, at 5.

75. See Hruska Commission, *supra* note 68, at 237; see also Gribbin, *supra* note 67, at 384. California is obviously quite diverse.

76. See Hruska Commission, *supra* note 68, at 238-39. But see O'Scannlain Statement, *supra* note 49, at 5-6; cf. Becker Letter, *supra* note 35, at 3 (suggesting California's recently-instituted certification procedure would ameliorate problem).

77. See *supra* note 68 and accompanying text.

78. See, e.g., S. 853, 104th Cong. (1995); S. 948, 101st Cong. (1990); see also *supra* notes 31-32 and accompanying text.

An analogous suggestion included Arizona with these states; however, this composition would have minimally ameliorated the uneven caseload and would have violated the idea of contiguity.⁷⁹

Additional possibilities deserve little assessment because they seem even more impracticable. For example, trifurcation would disrupt precedent and judicial administration while requiring unnecessary, new expenditures, such as the costs of redundant court staff and administrative structures.⁸⁰ The notion of transferring jurisdictions—namely Arizona, Idaho and Montana, which are currently in the Ninth Circuit—to the adjacent courts of the Eighth or Tenth Circuits would concomitantly disturb multiple appellate courts and federal districts and impose expense.⁸¹ In short, the Commission could well conclude that the Ninth Circuit, principally because of the conundrum presented by California, defies efficacious restructuring.⁸²

2. The Ninth and Other Circuits

Several provocative recommendations which Third Circuit Chief Judge Edward Becker recently provided the Commission correspondingly illustrate the application of the above general approach to the Ninth Circuit, other appeals courts and the system.⁸³ Chief Judge Becker proposed that the Commission evaluate the prospect of moving Arizona, Idaho and Montana from the Ninth to the Tenth Circuit. However, the earlier analysis indicates that neither appellate court seems to be resolving cases slowly, ineffectively and unfairly⁸⁴ and, even if one were, Chief Judge Becker's suggestion is less workable than numerous limited, circuit-specific measures. His recommendation could detrimentally affect two appeals courts and three federal districts, primarily by disrupting precedent and judicial

79. See, e.g., S. 431, 105th Cong. (1997); S. 956, 104th Cong. (1995); see also Gribbin, *supra* note 67, at 385-87; *supra* notes 39-41, 68 and accompanying text.

80. See O'Scannlain Statement, *supra* note 49, at 7; see also *supra* note 73 and accompanying text.

81. See Hruska Commission, *supra* note 68, at 236-37; Tobias, *supra* note 14, at 245.

82. For analysis of additional problems that could attend the Ninth Circuit's division, see Carl Tobias, *Why Congress Should Not Split the Ninth Circuit*, 50 SMU L. REV. 583, 596 (1997); Hug, *supra* note 14, at 41; Tobias, *supra* note 14, at 241-42. But see Gribbin, *supra* note 67, at 389-91.

83. See Becker Letter, *supra* note 35, at 3-5; see also *supra* pages 19-20 (affording general approach). The proposals illustrate the approach by way of comparison.

84. See *supra* notes 15-19 and accompanying text.

administration,⁸⁵ and would apparently decrease the diversity of both appellate tribunals.⁸⁶

What Chief Judge Becker characterized as the “small workload” of the D.C. Circuit led him to tender the “dramatic” proposal that this court be “merged with the Fourth or Federal Circuit.”⁸⁷ The jurist supported his suggestion by acknowledging that the court’s “administrative law caseload is celebrated, but [asserting that] all the circuits have those cases, if in smaller numbers, and the D.C. Circuit also has many drug and sentencing cases, just like the other circuits.”⁸⁸ This approach, which Chief Judge Becker premised on a Judicial Conference recommendation in its Long Range Plan that workloads be “equalized among judges of the courts of appeals nationally,”⁸⁹ arguably misconceives the relevant inquiry. The Commission should consider proposing boundary changes only after it has definitively identified slow, ineffective and unfair appellate resolution and has exhausted many other options. Nevertheless, once the Commission allows for the complexity of the D.C. Circuit’s docket, which the enormous records underlying challenges to federal agency decisions typify, the entity may ascertain that the court’s workload is so insubstantial as to suggest delayed, inefficacious and inequitable disposition. Should the Commission reach this determination, it might find relatively modest solutions, such as reductions in the circuit’s authorized judgeships, to be less disruptive and, thus, superior.⁹⁰

Even if the Commission concludes that the situation resists remediation with measures which are more moderate than boundary-alteration, the entity could decide that approaches different from the one recommended by Chief Judge Becker would prove rather salutary in part because they would disturb less significantly the three courts’ precedent, judicial administration, and traditions. After all, the D.C. Circuit is the preeminent court for reviewing appeals of agency decisionmaking, which comprise half of the circuit’s caseload, while the court’s judges often possess substantial understanding of administrative law, practice, procedure and policy.⁹¹ The Federal Circuit

85. See *supra* note 81 and accompanying text.

86. See *supra* note 68 and accompanying text. Moreover, the recommendation would minimally ameliorate the impact of the large Ninth Circuit caseload.

87. Becker Letter, *supra* note 35, at 4.

88. *Id.*

89. *Id.*; LONG RANGE PLAN, *supra* note 33, at 45.

90. The Republican Senate has partly effected this idea by not filling a vacancy in one of the court’s twelve positions. See, e.g., 143 CONG. REC. S2515-S2541 (daily ed. Mar. 19, 1997); Neil A. Lewis, *Clinton Has a Chance to Shape the Courts*, N.Y. TIMES, Feb. 9, 1997, at 30.

91. See, e.g., Spottswood W. Robinson, III, *The D.C. Circuit: An Era of Change*, 55 GEO. WASH. L. REV. 715, 716-17 (1987); Carl Tobias, *The D.C. Circuit as a National Court*, 48 U. MIAMI L. REV. 159, 174-75 (1993). It is also the “least regional” of the regional circuits.

concomitantly has national subject matter jurisdiction over narrow, technical fields, and the court's members frequently have specialized expertise, particularly involving science and technology.⁹²

Should the Commission definitively determine that the Fourth Circuit is not expeditiously, effectively and fairly resolving appeals, that the authorization of a few judgeships for the court or other limited, circuit-specific solutions would be inadequate and that boundary modifications are preferable, the entity might entertain the prospect of transferring Maryland from the Fourth to the Third Circuit. This realignment would affect only one jurisdiction, which is a single-district state and which is contiguous to the Third Circuit, and it would distribute the caseloads of the two appeals courts more evenly.⁹³

In short, Chief Judge Becker has formulated several thought-provoking proposals. Unfortunately, those propositions seem unlikely to improve the situations of the regional circuits for which he posits suggestions or of the appellate system. However, his recommendations trenchantly illustrate the need for the Commission to exercise caution when proposing change in the appeals courts that have served the nation so well for more than a century.

V. CONCLUSION

If the Commission on Structural Alternatives for the Federal Courts of Appeals implements the suggestions afforded above, the entity can comply with the congressional mandate and complete its substantial task in the limited time which is available. These recommendations should enable the Commission to ascertain whether any regional circuits are not deciding cases promptly, efficaciously and equitably now and, if the entity so determines, to propose measures that will facilitate expeditious, effective and fair resolution. Best of luck in this endeavor, which is critical to the future of the federal appellate courts.

92. See *supra* note 47 and accompanying text. It is not even considered a regional circuit.

93. See *Terminated Cases*, *supra* note 15. The transfer would disturb two circuits but is less disruptive than merging the Federal or D.C. Circuits. See *supra* note 81 and accompanying text. The Fifth and Eleventh Circuits warrant minimal analysis. The evaluation above suggests that neither court may promptly, efficaciously and equitably treat cases today. See *supra* notes 15-19, 67 and accompanying text. However, controversy over, and inability to resolve, this issue and the two courts' relatively recent creation mean that they and Congress might resist realignment.