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Suggestions for Studying the Federal Appellate System

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SUGGESTIONS FOR STUDYING THE FEDERAL APPELLATE SYSTEM

Carl Tobias*

I. ORIGINS AND DEVELOPMENT OF A NATIONAL STUDY COMMISSION .................. 192
   A. General Background .................................... 192
   B. Ninth Circuit ........................................ 196
      1. Earlier Proposals to Split the Ninth Circuit and Ameliorative Efforts ........ 196
      2. The 1990 Effort .................................... 197
      3. Activities of the 104th Congress ................... 198
         a. Circuit-Splitting Bills ......................... 198
         b. Commission Proposals ......................... 202
            i. The Senate Proposal ....................... 202
            ii. Additional Ninth Circuit-Specific Proposals ........ 204
      4. Activities of the 105th Congress .................. 205

II. SUGGESTIONS FOR THE FUTURE ......................... 214
   A. Suggestions for Resolving Unclear Aspects of the Study ......................... 214
   B. Suggestions for Efficacious Use of Commission Time ............................ 219
      1. Information Collection ............................. 219
      2. Identifying the Problems ......................... 221
         a. The Regional Circuits .......................... 221
         b. Ninth Circuit ................................. 223
      3. Identifying the Solutions ......................... 226
         a. The Regional Circuits .......................... 229

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i. Past and Present Internal Reforms 229
ii. Proposed Internal Reforms 231
iii. Past and Present External Reforms 234
iv. Proposed External Reforms 236

b. Ninth Circuit 239
i. The Efficacy of Approaches that the Ninth Circuit Has Applied or Might Employ 239
ii. The Efficacy of Structural Approaches for the Ninth Circuit 240
iii. The Systemic Efficacy of Structural Approaches for the Ninth Circuit 241
iv. Analysis of Structural Approaches 242

III. CONCLUSION 245

The United States Congress recently authorized the appointment of a Commission on Structural Alternatives for the Federal Courts of Appeals. That entity has an historic opportunity to analyze carefully the federal appellate system and make valuable suggestions for improvement, thereby charting the destiny of the intermediate appeals courts for the twenty-first century. The creation of this new commission is important because now is a critical time for the appellate courts. All twelve regional circuits have experienced exponential docket growth but have possessed insufficient resources to treat the cases: this crisis of volume now seriously threatens the system.

The Commission on Revision of the Federal Court Appellate System (Hruska Commission), which completed its work a quarter century ago, performed the last assessment that thoroughly scrutinized the appeals courts and enjoyed national recognition and respect. The timing of the Hruska Commission study was significant, as the early 1970s was the period when the regional circuits first began to encounter the dramatic rise in appeals that transformed the courts over the course of a generation. Because there is a crucial need to explore the appellate courts' condition and means of improving those circumstances, the

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3. See id. at 227.
recently-authorized study deserves analysis. This Article undertakes that effort.

The Article initially considers the developments that led Congress to approve a new commission. The background is particularly significant because assessment of the mandate that Congress assigned the entity suggests that the charge is unclear, very general, and amenable to multiple plausible interpretations. The convoluted and complex—if not arcane—legislative process that yielded the authorizing statute additionally frustrates understanding. For example, a House-Senate Conference Committee adopted the study measure as a substitute for an appropriations rider that would have divided the United States Court of Appeals for the Ninth Circuit. The commission, therefore, was ultimately the product of congressional machinations which had quite different purposes and of lengthy, controversial negotiations among senators and representatives who held extraordinarily diverse views.

These propositions mean that Congress effectively left significant features of the entity’s evaluation and its recommendations to the discretion of commission members and their staff. For instance, the authorizing legislation requires that the entity focus on the Ninth Circuit, but it is unclear how much emphasis this court should receive. Moreover, the commission and the staff must expeditiously resolve these issues, so that the entity can discharge its daunting assignment in the exceedingly short compass afforded. The Article accordingly probes the events that preceded adoption of the study commission statute to ascertain precisely what Congress intended. This inquiry proves somewhat inconclusive, although it is possible to extract certain ideas from the relevant legislative history.

The Article concludes with recommendations for conducting the study. Because all of the appeals courts have experienced burgeoning dockets over the last quarter-century and have developed a broad spectrum of measures for treating them, the entire system warrants comprehensive analysis. The finest solutions for the problems that every appellate court confronts can only be crafted after the commission systemically collects, assesses and synthesizes the maximum relevant empirical data on increasing appeals and mechanisms for addressing caseload growth. Once the entity has compiled and consulted the largest quantity of accurate information, it should be possible to identify the best remedies for the difficulties that the regional circuits will face in the twenty-first century.

4. See infra text accompanying notes 162-63.
5. See infra text accompanying notes 166-76.
I. ORIGINS AND DEVELOPMENT OF A NATIONAL STUDY COMMISSION

The origins and development of the recently-authorized national commission to study the appeals courts deserve comprehensive treatment in this Article, although certain aspects of the history have been examined elsewhere. Relatively thorough evaluation of the relevant background is justified because this type of assessment should increase understanding of the national study approved by Congress.

A. General Background

Congress implemented the modern appellate system by adopting the Circuit Court of Appeals Act of 1891, which was popularly known as the Evarts Act. Congress subsequently established two new appeals courts while reconfiguring the boundaries of two appellate courts. In 1948, Congress formally added the United States Court of Appeals for the District of Columbia Circuit, which primarily hears appeals of federal administrative agency decisions. In 1982, Congress created the Federal Circuit and afforded the court national jurisdiction over cases...
that primarily implicate customs, patents, trademarks, copyrights, and claims against the United States. 12

During 1929, Congress established the Tenth Circuit Court of Appeals by removing Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming from the Eighth Circuit and leaving Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota in that court. 13 Docket congestion in the Eighth Circuit prompted Congress to form the new appeals court. 14

Growing caseloads only became a systemic problem after the mid-twentieth century, however. Congress has vastly expanded federal court jurisdiction since that time. It has created numerous new civil actions and many additional crimes which, for example, fostered a 200 percent annual increase in appeals during the last two decades. 15 Congress did authorize many additional appellate court judgeships, but too few to resolve the substantial number of increasingly complex civil and criminal appeals that parties pursued. 16 All of the regional circuits have responded to burgeoning caseloads principally by imposing limitations on the number of written opinions that the appellate courts issue and oral arguments that they grant and by relying substantially on support staff. 17

It is important to understand that there is significant variation among the twelve regional circuits. All of the courts have experienced expanding dockets, although they have done so at different times, and at diverse rates. The circuit courts also have had varying resources, especially judges, to treat the rising appeals. They have employed various measures to address the mounting caseloads.


16. See id.

Concerns about these dockets, which numerous federal judges voiced led Congress to create the Hruska Commission in 1972. After the entity conducted a comprehensive assessment of the appellate courts, it recommended that Congress divide the two largest circuits, the Fifth and the Ninth, rather than advocating a more thoroughgoing remedy, such as realignment of all of the appeals courts’ boundaries. The Commission expressed reluctance to disrupt institutions that had secured the loyalty and respect of their constituents and to disturb the sense of community apparently enjoyed by judges and lawyers within the existing appeals courts.

The Hruska Commission premised its suggestion that Congress split the Fifth and Ninth Circuits on general standards relating to reconfiguration. Congress created the Eleventh Circuit by removing Alabama, Florida, and Georgia from the Fifth Circuit and leaving the Canal Zone, Louisiana, Mississippi, and Texas in that court. Congress divided the Fifth Circuit because of its magnitude in terms of geography, population, dockets, and judgeships and because the active judges of the court agreed on bifurcation. The Commission’s recommendation that Congress split California and reassign its district courts to different circuits was not foreseen and proved very controversial. The proposal delayed serious legislative examination of the Ninth Circuit’s division at the time.

Several extra-governmental agencies, such as the American Bar Association (ABA), undertook studies of the appellate courts after the Hruska Commission had completed its work. In 1988, Congress

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19. See Hruska Commission, supra note 2, at 228.

20. See id.

21. The standards provided that: (1) at least three states should constitute circuits; (2) appeals courts should not be established that would immediately require more than nine judges; (3) circuits ought to include states which have diverse populations, legal business and socio-economic interests; (4) realignment should not unduly interfere with existing appellate court boundaries; and (5) appeals courts should consist of contiguous states. See id. at 231-32.


23. See Baker, supra note 6, at 927.


authorized the Federal Courts Study Committee, an independent entity comprised of distinguished members of Congress, judges and attorneys, to analyze the federal courts and afford recommendations for their improvement.  

The Committee found that the appeals courts were experiencing a "crisis of volume" that had transformed them over the preceding quarter-century.  

It predicted that "more fundamental change" appeared inevitable, barring reduced appellate workloads, a possibility that seemed remote.  

The Committee's report assessed five basic structural alternatives for treating docket growth.  

It endorsed none of them, but discussed the options to foster future inquiry and debate among the legislative, judicial and executive branches and attorneys.  

The Committee proposed that Congress authorize a five-year evaluation of the appeals courts' caseloads and structural measures for responding to them. Senators and representatives, however, did not prescribe the recommended study.  

The Federal Judicial Center (FJC) concluded a 1993 examination of structural mechanisms at the instigation of the Committee and Congress.  

The Center ascertained that the appeals courts were experiencing stress that structural modifications could not significantly relieve.  

The Long Range Planning Committee of the Judicial Conference of the United States completed a relatively thorough assessment of the federal courts and issued a final report in December 1995.  

The Committee rather strongly opposed reconfiguring appeals courts: instead, it explored the prospects of assigning district court judges additional appellate responsibilities and decreasing the size of appeals court panels.

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27. See REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, supra note 26, at 109.  

28. See id.  

29. See id. at 116-23.  

30. See id.  

31. See id. at 116.  


33. See id. at 155.  

34. See JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS (1995) [hereinafter LONG RANGE PLAN].  

35. See id. at 43-45.
B. Ninth Circuit

Recent activity in the Senate and the House of Representatives relating to proposals for bifurcating the Ninth Circuit deserve considerable discussion here, even though some dimensions of the relevant background have received treatment elsewhere. 36 Applicable developments principally implicating the Ninth Circuit require exploration because they ultimately led to, and are inextricably intertwined with, congressional authorization of a national study commission.

1. Earlier Proposals to Split the Ninth Circuit and Ameliorative Efforts

Since before the Second World War, there have been a number of suggestions to bifurcate the Ninth Circuit. 37 The Hruska Commission's recommendation that Congress divide the court was foreseeable, even though its proposal that California be split and that the state's district courts be reassigned to two appeals courts was not anticipated. 38 The entity's suggestion to bifurcate California provoked much controversy and delayed contemporaneous legislative assessment of the court's division. 39 Congress evinced little additional interest in a circuit-splitting bill that senators introduced during 1983. 40

In 1978, Congress authorized appeals courts with more than fifteen active judges to restructure the courts by using administrative units and to prescribe streamlined processes for en banc proceedings. 41 The Ninth Circuit responded to this legislative invitation in several innovative ways. For instance, the court reorganized into three units to secure more decentralized and efficient administration. 42 The circuit also promulgat-

36. See supra note 6.
37. See Baker, supra note 6, at 928; see also OFFICE OF THE CIRCUIT EXECUTIVE FOR THE UNITED STATES COURTS FOR THE NINTH CIRCUIT, POSITION PAPER IN OPPOSITION TO S.1686 NINTH CIRCUIT COURT OF APPEALS REORGANIZATION ACT (Aug. 2, 1991) [hereinafter S. 1686 POSITION PAPER] (affording additional historical background).
38. See supra text accompanying note 24.
39. See id.
42. See Baker, supra note 6, at 929. See generally JOE S. CECIL, ADMINISTRATION OF JUSTICE IN A LARGE APPELLATE COURT: THE NINTH CIRCUIT INNOVATIONS PROJECT (1985); OFFICE OF THE CIRCUIT EXECUTIVE UNITED STATES COURTS FOR THE NINTH CIRCUIT, S. 948
ed a local rule providing for a limited en banc procedure, whereby the chief judge and ten active judges who are randomly chosen sit en banc to rehear cases on a majority vote of all active judges. 43

The court's judges have enhanced their productivity, and the circuit has effectuated a number of internal reforms. For example, prebriefing conferences narrow issues on appeal, restrict the size of briefs, and explore settlement prospects. 44 Circuit staff have become more efficient, and the court relies substantially on technological innovations. 45 In 1989, the circuit reported to Congress that the instituted reforms had enabled the court to resolve the system's largest docket efficaciously, that there was no reason to bifurcate the circuit, and that the measures employed even allowed the court to accommodate additional growth. 46

2. The 1990 Effort

Before 1995, Senate Bill 948 represented the "most credible effort" to split the Ninth Circuit. 47 Eight senators from states that the proposed division would have affected co-sponsored the bill, 48 and the United States Department of Justice endorsed the measure. 49 During March

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Ninth Circuit Court of Appeals Reorganization Act 6-7 (1989) [hereinafter S. 948 Position Paper].

43. 9TH CIR. R. 35-3 (formerly Rule 25). See generally ABA Report, supra note 25, at 542-44 (intracircuit conflict is not alleviated by en banc decisions); Paul D. Carrington et al., Justice on Appeal 161-63, 200-03 (1976) (asserting that the efficiency of en banc review declines as the number of judges increases); Steven Bennett & Christine Pembroke, "Mini" In Banc Proceedings: A Survey of Circuit Practices, 34 CLEV. ST. L. REV. 531 (1986).

44. See Baker, supra note 6, at 932; John B. Oakley, The Screening of Appeals: The Ninth Circuit's Experience in the Eighties and Innovations for the Nineties, 1991 B.Y.U. L. REV. 859, 861, 875-903 (describing the Ninth Circuit's model for screening cases during a six and a half year "study period"); see also Cecil, supra note 42, at 79-95 (explaining the Ninth Circuit's prebriefing conference program); S. 948 Position Paper, supra note 42, at 6-7.


46. The Judicial Council and United States Court of Appeals for the Ninth Circuit, Fourth Biennial Report to Congress on the Implementation of Section 6 of the Omnibus Judgeships Act of 1978 and Other Measures to Improve the Administration of Justice in the Ninth Circuit 1 (July 1989); see also S. 956 Position Paper, supra note 45, at 3-4 (finding court's experimentation has led others to follow its lead).

47. See Baker, supra note 6, at 932-33.


49. See Letter from Bruce C. Navarro, Acting Assistant Attorney General, U.S. Dep't of
1990, the Senate Judiciary Subcommittee on Courts and Administrative Practice held a hearing at which many advocates and opponents of circuit-splitting submitted much valuable information.50

At the 1989 meeting of the Ninth Circuit Judicial Conference, the entity adopted the official position that Congress should reject recommendations to divide the circuit, and most of the court's active judges opposed bifurcation.51 Proponents of the bill seemingly did not convince Congress to restructure the court, and critics of S. 948 apparently responded in a persuasive manner to the contentions of the bill's advocates.52 The Judiciary Committee ultimately refused to approve the measure.53 The most significant reasons favoring and opposing S. 948 warrant little treatment here as they differ minimally from the rationales that advocates have articulated since 1995.54

3. Activities of the 104th Congress
   a. Circuit-Splitting Bills

In late May 1995, senators from Pacific Northwest states introduced a bill that would have split the Ninth Circuit.55 This measure's introduction constituted the fourth effort to divide the appeals court in the last thirteen years.56 The proposal would have included Alaska, Idaho, Montana, Oregon, and Washington in a new Twelfth Circuit and would have placed Arizona, California, Hawaii, Nevada, Guam, and the Northern Mariana Islands in the Ninth Circuit.57 The proposed Twelfth Circuit would have been assigned nine active judges and the new Ninth Circuit would have had nineteen active members; Senate Bill 956 authorized no new judgeships.58
During September of 1995, the Senate Judiciary Committee held a hearing on S. 956, and the Committee received much cogent testimony and considerable additional information from champions and critics of circuit-division. In a December Committee markup session, the Judiciary Committee approved an amendment in the proposal as introduced. The amendment would have left California, Hawaii, Guam and the Northern Mariana Islands in the Ninth Circuit with fifteen judges and would have placed Alaska, Arizona, Idaho, Montana, Nevada, Oregon and Washington, the remaining states of the existing Ninth Circuit, in a new Twelfth Circuit with thirteen judges.

The Senate and Committee members received and assessed numerous well-considered ideas that favored and opposed splitting the Ninth Circuit. Division's advocates stressed the problems which the circuit's mammoth size has purportedly created. These encompassed the court's gigantic geographic magnitude, the circuit's significant number of judges (twenty-eight), the court's massive caseload, and the substantial expenses of operating the circuit.

Opponents of the court's division countered the above arguments in several ways. They claimed that the circuit has instituted reforms which treat complications ascribed to size. For instance, over a decade ago, the court established administrative units in Pasadena and Seattle where appeals can be filed and orally argued, and the change has proved responsive to the distances that counsel and litigants must travel. Creation of the projected Twelfth Circuit would not have modified this circumstance for many attorneys who now practice in the proposed circuit. Critics also suggested that the court's magnitude affords benefits. For example, it offers economies of scale, while large size provides considerable diversity in terms of the complexity and novelty of cases and in terms of judges' gender, race, political views and geographic origins.

60. See Senate Judiciary Committee Markup of S. 956, 104th Cong., 1st Sess. (Dec. 8, 1995) [hereinafter S. 956 Markup]; see also Senate Report, supra note 6, at 2.
63. See supra notes 41-43 and accompanying text.
64. See Baker, supra note 6, at 929. See generally Cecil, supra note 42.
65. See, e.g., S. 956 POSITION PAPER, supra note 45; Steve Albert, Congress Weighs Plan to Divide the 9th Circuit, LEGAL TIMES, Feb. 1, 1993, at 12, 13 (quoting former Chief Judge James Browning's assertion that court's diversity is an asset).
Another important contention of circuit-splitting’s proponents was that Ninth Circuit case law is inconsistent. The statistical possibilities for conflicting opinions on a twenty-eight judge court seem significant because 3276 combinations of three-judge panels could resolve an issue. The Ninth Circuit Executive Office and experts who have analyzed the circuit have found insufficient inconsistency to warrant concern. The court has instituted measures to reduce conflicts. For example, the circuit’s staff attorneys fully review every appeal and code into a computer the issues for resolution. The court then assigns to the same three-judge panel those cases which raise similar issues and are ready for resolution at the same time.

Another major argument of S. 956’s advocates was that the court’s California judges, perspectives, and appeals have dominated the Pacific Northwest. This contention partly reflected the champions’ dissatisfaction with Ninth Circuit decisions in fields such as environmental law and the death penalty. Some opponents of circuit-splitting responded by maintaining that the preferable way to effect substantive changes in the law is to convince Congress to alter it. Critics also challenged the proponents’ underlying premise that judges who were located in California were monolithic and idiosyncratic. Assessment of the judges’ viewpoints and the computerized, random selection of three-judge panels rendered untenable any effort to stereotype the circuit’s California judges. Finally, critics observed that a majority of the court’s active judges were not even stationed in California.

There are certain additional ideas that champions and critics enunciated in support of and against the Ninth Circuit’s division. Opponents emphasized that the proposed Ninth Circuit would have had

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66. See Baker, supra note 6, at 938.
67. See S. 956 POSITION PAPER, supra note 45, at 4-5; see also infra text accompanying notes 199-200. See generally Arthur D. Hellman, Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court, 56 U. CHI. L. REV. 541 (1989) (reviewing study of published opinions of the Ninth Circuit to determine if inconsistent decisions are a problem).
68. See Hellman, supra note 17, at 944-45; see also UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT GENERAL ORDER 4.1 (1987).
69. See Hellman, supra note 17, at 957-58.
70. See, e.g., Gorton Statement, supra note 62, at S7504.
73. See Baker, supra note 6, at 940-41; Tobias, supra note 7, at 1372-73.
74. See Baker, supra note 6, at 941-42.
75. See Tobias, supra note 7, at 68.
a significantly less beneficial ratio of three-judge panels to appeals than the new Twelfth Circuit and a considerably less advantageous ratio than the current Ninth Circuit.76 Projections indicated that panels of the proposed Ninth Circuit would have annually faced 1014 appeals and panels of the proposed Twelfth Circuit would have annually confronted 645 appeals, while panels of the existing Ninth Circuit address 868 appeals.77 Critics also argued that the proposed Twelfth Circuit would have imposed much new administrative expense and would have replicated functions that the Ninth Circuit now discharges satisfactorily.78 Moreover, opponents claimed that most active members of the court and many attorneys who practice before it opposed bifurcation.79

Proponents of circuit-splitting urged that judges on a smaller court, such as the proposed Twelfth Circuit—which would have had nine judges—would be more collegial, thereby enhancing efficiency. This proposition had some validity; however, additional evidence suggested that familiarity could have led to disadvantageous routinization, and in certain situations might have fostered disagreement.80 The circuit's small size may concomitantly have sacrificed the benefits of diversity and economies of scale that a bigger court offers.

On March 18, 1996, a few advocates of S. 956 attempted to have the Senate consider the circuit-splitting measure as an amendment to federal courts appropriations legislation.81 Critics of the bill sharply attacked this effort on procedural grounds; however, senators participated in much substantive debate over the court's division.82 Proponents and opponents ultimately agreed on a study commission proposal which received strong bi-partisan support, and the Senate approved a commission on March 20.83 Upon receipt of the Senate measure, the House

76. See S. 956 Position Paper, supra note 45, at 6.
77. See id. at 5-6 (based on filings in 1994); see also Office of the Circuit Executive for the U.S. Courts for the Ninth Circuit, Position Paper in Opposition to S. 956—Ninth Circuit Court of Appeals Reorganization Act of 1995 (12/7/95) and Companion Bill H.R. 2935 (2/1/96) 3 [hereinafter Second S. 956 Position Paper].
79. See Second S. 956 Position Paper, supra note 77, at 5; Senate Report, supra note 6, at 20-21; Tobias, supra note 7, at 1371.
82. See id.
83. See 142 Cong. Rec. S2544, S2545 (daily ed. Mar. 21, 1996). The decision to leave the court intact was advisable. Division would have been a limited reform and could have precluded implementation of more effective solutions, such as realigning the existing regional
assigned the proposal to the Judiciary Subcommittee on Intellectual Property and Judicial Administration which Representative Carlos Moorhead (R-Cal.) chaired. However, the House took no additional action on the Senate proposal during the 104th Congress. Congress did appropriate $500,000 for the commission’s work but failed to pass authorizing legislation.84

b. Commission Proposals

i. The Senate Proposal

The Senate proposal required that the commission “transmit its report to the President and the Congress no later than February 28, 1997” and that the Senate Judiciary Committee act within sixty days of the document’s transmittal.85 This measure differed somewhat from an earlier study commission proposal providing a two-year period for the work’s completion and requiring no Judiciary Committee action on the commission report, which Senator Dianne Feinstein (D-Cal.) had offered as an amendment and which the Judiciary Committee narrowly rejected during its December 7, 1995 markup.86

The time period that the March 21, 1996 proposal provided for the commission to conclude its assessment may have been insufficient when the Senate approved it. An informative yardstick for evaluating this temporal consideration is the time which analogous study entities have required to finish similar projects. The Federal Courts Study Committee conducted the most recent analogous endeavor, and that entity took a year and a half to conclude its work.87 Some federal courts observers found this time period inadequate and suggested that the temporal limitation might have prevented the Study Committee from assembling an even better report.88 The Hruska Commission undertook another similar analysis, and this group completed its study of the appeals courts after eighteen months.89

Comparison of the March 21, 1996 Senate proposal with these prior, analogous study commission efforts thus suggests that the measure

circuits or creating a third tier of appellate courts or more judgeships.

86. See S. 956 Markup, supra note 60 (statement of Sen. Feinstein); see also SENATE REPORT, supra note 6, at 19-20.
87. See supra note 26.
88. See Tobias, supra note 7, at 1408; see also Telephone Interview with Arthur D. Hellman, Professor of Law, University of Pittsburgh (June 1, 1996).
89. See supra note 18.
would have allotted too little time for the proposed commission to finish the finest possible study. Legislative inaction, therefore, was probably advisable. Congress should not have established a commission that lacked adequate time to collect the most accurate data and to formulate the best suggestions.

Rather similar difficulties involving scope also seemed to accompany the proposed commission’s mandated duties. The proposal provided that the entity’s functions were to:

(1) study the present division of the United States into the several judicial circuits;
(2) study the structure and alignment of the Federal courts of appeals with particular reference to the Ninth Circuit; and
(3) report to the President and the Congress 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 fundamental concepts of fairness and due process. 90

The charge appeared overly narrow. For instance, the initial two mandates required the commission to assess the country’s present division into several appeals courts and the structure and alignment of the federal circuits “with particular reference to the Ninth Circuit” 91 but did not speak to increasing appeals, which are the major complication that the appellate courts currently face. 92 The two strictures probably could have been interpreted, however, to include docket growth.

The third command did specifically prescribe suggestions for improvement that would lead to “expeditious and effective disposition” of appeals. 93 Nevertheless, those recommendations for alterations were limited to “such changes in circuit boundaries or structure as may be appropriate for” prompt and effective resolution. 94 Confining commission consideration to structural alternatives may have been too narrow. There are many other ways of treating the problems attributable to mounting caseloads, which should not be described as structural.

91. See id. Senator Feinstein’s proposal was similar, but it did not include “with particular reference to the Ninth Circuit.” See S. 956 Markup, supra note 60 (statement of Sen. Feinstein). However, any national analysis of the appeals courts might well have emphasized this circuit.
94. See id.
Examples are increases in the number of judges authorized and streamlining measures, such as those implemented by the Ninth Circuit, which a number of appellate courts have instituted. Precluding commission consideration of non-structural options might have been unwise because it eliminated numerous apparently promising approaches. This circumstance was worsened because it was quite difficult to ascertain which measures would have seemed most efficacious, until the commission that was established had carefully assembled, assessed, and synthesized the maximum applicable information.

ii. Additional Ninth Circuit-Specific Proposals

During the debate over the advisability of dividing the Ninth Circuit and of passing S. 956, Governor Pete Wilson (R-Cal.) and Ninth Circuit Judge Diarmuid O'Scannlain offered separate proposals that would have created a commission to study the court. Governor Wilson raised the possibility in a letter he sent to Senator Orrin Hatch (R-Utah), Chair of the Senate Judiciary Committee, on the eve of the December 1995 Committee markup. Judge O'Scannlain mentioned the prospect during his testimony in the September 1995 Judiciary Committee hearing.

Governor Wilson wrote Senator Hatch to register his fervent opposition to any division before the completion of an objective analysis of whether bifurcation would treat effectively concerns regarding the court’s size. The governor observed that the assessment should emphasize those questions aired about the Ninth Circuit and ascertain whether the court should be split. By way of illustration, he stated that “reform of our habeas corpus procedures and reforms which curb frivolous inmate litigation may do more to address a growing caseload than splitting the circuit.” Governor Wilson urged that “a study be commissioned to carefully examine the concerns raised about the Ninth Circuit and determine whether the concerns are legitimate and whether

95. See, e.g., SENATE REPORT, supra note 6, at 27-28; Tobias, supra note 7, at 1363-64, 1405-07; see also infra text accompanying notes 229-302.
96. See Letter from Pete Wilson, Governor of California, to Senator Orrin Hatch, Chair, U.S. Senate Judiciary Comm. (Dec. 6, 1995) [hereinafter Wilson Letter].
98. Wilson Letter, supra note 96.
99. Id.
a change in the circuit's boundaries is the best method of addressing them.”

Judge O'Scannlain proposed that Congress "direct the [C]ircuit [J]udges of the [N]inth [C]ircuit to reflect over the next few years and then to recommend, as did the judges of the Fifth Circuit Court of Appeals in the 1980's, what the proper division of their circuit should be." He suggested that the Ninth Circuit judges' recommendation be based on an analysis of those factors that would best enable the court to fulfill its future goals. The judge urged that any Ninth Circuit reconfiguration ensure accountability to all individuals whom the court now serves. Judge O'Scannlain admonished champions of prompt bifurcation that there had been "no recent systematic evaluation of division of the [N]inth [C]ircuit . . . since the Hruska Commission report in the 1970's."

4. Activities of the 105th Congress

The ongoing controversy over the Ninth Circuit's possible division led to the introduction of several legislative proposals for assessing the federal appellate courts early in the first session of the 105th Congress. When Congress convened during January 1997, Senators Dianne Feinstein (D-Cal.) and Harry Reid (D-Nev.) introduced a bill that would have authorized a national study of the appellate courts. Soon thereafter, and in apparent response, Senator Conrad Burns (R-Mont.) and Representative Rick Hill (R-Mont.) introduced identical study commission measures that differed somewhat from the bill introduced by Senators Feinstein and Reid. During March, Representative Howard Coble (R-N.C.) and Representative Howard Berman (D-Cal.)

102. See S. 956 Hearings, supra note 59, at 71 (statement of Judge O'Scannlain); see also Tobias, supra note 7, at 1361-62 (analyzing the Fifth Circuit).
103. See S. 956 Hearings, supra note 59, at 71 (statement of Judge O'Scannlain).
104. See id.
105. Id.; see also supra text accompanying note 89 (mentioning the Hruska Commission). The geographic scope of the analyses that the governor and the judge proposed was narrow. An assessment that was confined to the Ninth Circuit would by definition have been incomplete. The major difficulties that most circuits and the appellate system now face involve increasing caseloads, and the problems are essentially systemic complications which will require systemic treatment. A study limited to the Ninth Circuit, therefore, necessarily would not address all of the difficulties being experienced and would yield only partial recommendations.
106. See S. 248, 105th Cong., 1st Sess. (1997). The ideas in this paragraph and this subsection are premised on conversations with individuals who are knowledgeable about the developments that occurred.
introduced a proposal in the House that resembled the Feinstein-Reid measure. The House subsequently modified the proposal somewhat.\textsuperscript{108}

In March, numerous senators who represented states in the Pacific Northwest sponsored another piece of proposed legislation that would have divided the Ninth Circuit.\textsuperscript{109} The measure would have bifurcated the court by placing Alaska, Arizona, Idaho, Montana, Nevada, Oregon, and Washington in a new Twelfth Circuit and by leaving California, Hawaii, Guam and the Northern Mariana Islands in the present Ninth Circuit.

The Feinstein-Reid and Burns-Hill study bills, as introduced, were similar in some ways but differed in certain important respects. The Feinstein-Reid, Burns-Hill and Coble-Berman measures included the same or analogous provisions for reimbursement, personnel, the information which the commission can assemble, and congressional consideration of the entity’s suggestions.\textsuperscript{110} The three proposals also made identical prescriptions for some commission functions: to “study the present division of the United States into the several judicial circuits” and to “study the structure and alignment of the Federal Court of Appeals system, with particular reference to the Ninth Circuit.”\textsuperscript{111} The second provision thus modified the approach that Senator Feinstein followed in the 104th Congress because the 1997 bills added the word “system,” thereby clarifying and emphasizing the systemic nature of the analysis prescribed.\textsuperscript{112}

The study proposals included a third function which differed. The Feinstein-Reid and Coble-Berman measures required that the commission “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 fundamental concepts of fairness and due process.”\textsuperscript{113} The Burns-Hill proposal required the commission to “report recommendations to the President and Congress on appropriate changes in circuit boundaries or structure for the expeditious and effective disposition of


\textsuperscript{110} Compare S. 248, §§ 3-5, 7 and H.R. 908, §§ 3-5, 7 with S. 283, §§ 3-5, 7 and H.R. 639, §§ 3-5, 7.

\textsuperscript{111} Compare S. 248, § 1(b)(1)-(2) and H.R. 908, § 1(b)(1)-(2) with S. 283, § 1(b)(1)-(2) and H.R. 639, § 1(b)(1)-(2).

\textsuperscript{112} Compare S. 248, § 1(b)(2); H.R. 908, § 1(b)(2); S. 283, § 1(b)(2) and H.R. 639, § 1(b)(2) with S. 956, § 1(b)(2).

\textsuperscript{113} See S. 248, § 1(b)(3); H.R. 908, § 1(b)(3).
the caseload of the Federal Courts of Appeal, consistent with fundamental concepts of fairness and due process."\textsuperscript{114}

The measures prescribed rather dissimilar commission membership. The Feinstein-Reid proposal called for twelve members and authorized the President, the Chief Justice, the Senate Majority and Minority Leaders, the House Speaker and the House Minority Leader to appoint two members each.\textsuperscript{115} The Coble-Berman bill provided for similar composition but permitted the President and the Chief Justice to appoint only one member apiece.\textsuperscript{116} The Burns-Hill measure included eight members and empowered the President and the Chief Justice to name one member each and the Senate Majority Leader and the House Speaker to appoint three apiece.\textsuperscript{117}

The proposals also differed as to the time provided for completion of the evaluation. The Feinstein-Reid measure required the commission to report "[n]o later than 2 years following the date on which its seventh member is appointed."\textsuperscript{118} The Coble-Berman approach commanded the entity to report "no later than eighteen months following the date on which its sixth member is appointed."\textsuperscript{119} The Burns-Hill proposal mandated that the commission report "[n]o later than 1 year after the date of the enactment . . . or June 30, 1998, whichever occurs first."\textsuperscript{120}

The approaches differed as well over the funding that Congress would appropriate for completion of the study commission's work. The Feinstein-Reid measure would have allocated $1,300,000\textsuperscript{121} and the Coble-Berman bill would have allotted $900,000,\textsuperscript{122} while the Burns-Hill proposal would have authorized $500,000, which meant that no new funding would need to be provided because the 104th Congress had authorized this amount.\textsuperscript{123}

During March, the House Judiciary Subcommittee and Committee promptly approved the Coble-Berman bill, which was scheduled for a floor vote on March 18.\textsuperscript{124} However, members of the House, including Representative Hill and Representative Don Young (R-Alaska), from the

\begin{footnotes}
\item[114.] See S. 283, § 1(b)(3); H.R. 639, § 1(b)(3).
\item[115.] See S. 248, § 2(a).
\item[116.] See H.R. 908, § 2(a).
\item[117.] See S. 283, § 2(a); H.R. 639, § 2(a).
\item[118.] See S. 248, § 6.
\item[119.] See H.R. 908, § 6.
\item[120.] See S. 283, § 6.
\item[121.] See S. 248, § 8.
\item[122.] See H.R. 908, § 8.
\item[123.] See S. 283, § 8; see also supra text accompanying note 84.
\item[124.] The ideas in this paragraph and the next and the rest of this subsection are premised on conversations with individuals who are knowledgeable about the developments that occurred.
\end{footnotes}
Northwest prevented that vote because they differed with the Coble-Berman approach and because a satisfactory compromise agreement on a commission measure could not be reached.

Attention then focused on attempts to develop a compromise in the Senate. Meetings between staff for Senators Burns and Feinstein led to consensus in several areas as to which they had differed. They agreed that the commission would have ten members, that the appointments would be identical to those provided in the Feinstein-Reid measure, except that the President and the Chief Justice would name one individual each, and that the commission would have eighteen months to finish its work.

On June 3, the House passed an amended version of H.R. 908 that reflected numerous compromises struck by members of Congress in both chambers. This proposal included the original Feinstein-Reid provision for the commission’s third function and the Feinstein-Bums compromise on the entity’s membership, provided that the commission would report eighteen months from the date of appointment of its sixth member, and authorized $900,000 for the commission’s work. Upon transmittal to the Senate, H.R. 908 remained at the desk and awaited Senate action.

The legislative history that attended House approval of this bill is important because the measure essentially served as the basis for the national study commission that the House-Senate Conference Committee ultimately authorized. The House Committee Report accompanying H.R. 908 has considerable significance for several reasons. Neither the Judiciary Committee nor the Subcommittee conducted any hearings on the bill. Moreover, floor debate on H.R. 908 can fairly be characterized as terse. The floor statements of the measure’s foremost proponents, namely Representative Coble and Representative Henry Hyde (R-Ill.), chair of the Judiciary Committee, also appeared to be premised substantially on the House Committee Report. This report correspondingly informs understanding of the statutory language that authorizes the study, especially the phrasing that is cryptic or unclear. Furthermore, the report was effectively the last, most comprehensive, specific, and authoritative pronouncement, while it illuminates the convoluted, lengthy legislative process that culminated in the commission’s approval.

The House Committee Report afforded numerous instructive insights regarding the commission and its responsibilities. Perhaps most important, the report amplified and clarified the duties that Congress anticipated for the entity and the developments that led to its creation.

126. See id. at H3223.
The House Committee Report stated that the "legislation originated as a response to recurring attempts to divide the largest of the federal judicial circuits, the Ninth," but admonished that the commission proposal "represents a sound approach to a problem of national concern: explosive growth in the caseload of all of the courts of appeals." 

The report observed that appellate filings had grown by over 200 percent and that the number of judgeships had increased, albeit much more slowly, since the mid-1970s, although the appellate system's structure has remained essentially unchanged from its 1891 establishment. The Judiciary Committee declared that the "time is ripe for a careful, objective study aimed at determining whether that structure can adequately serve the needs of the 21st century" and that the commission's task would be to undertake the study.

The House Committee Report reiterated that the "immediate occasion for the Commission proposal was the debate over dividing the Ninth Circuit, [however,] the proposal has its origins in the work of the Federal Courts Study Committee, which was created by Act of Congress in 1988." The Study Committee's 1990 report concluded that the federal appellate courts were already experiencing a "crisis of volume" [and] ... expressed the view that "within as few as five years the nation could have to decide whether or not to abandon the present circuit structure in favor of an alternative structure that might better organize the more numerous appellate judges needed to grapple with a swollen caseload."

The Committee had explored several " 'structural alternatives' " but endorsed none, calling for " 'further inquiry and discussion.' "

The House Committee Report stated that the new commission would "take up where the Federal Courts Study Committee left off [and] would be the first of its kind since the [Hruska Commission] which completed its work in 1975." The report found it obvious that dramatic changes have taken place in the work of the federal courts in those two decades, including the explosive

127. See HOUSE REPORT, supra note 15, at 1.
128. See id.
129. See id. at 1-2.
130. See id. at 2; see also supra text accompanying notes 26-31.
132. See id.; see also supra text accompanying notes 30-31.
133. See HOUSE REPORT, supra note 15, at 2; see also supra text accompanying notes 18-24, 26-31.
growth noted above. . . . [but that] there have been no structural alterations except for the division of the old Fifth Circuit and the creation of the Court of Appeals for the Federal Circuit. 134

During the June 3 floor debate, the principal advocates of the study commission made numerous statements similar to those included in the report and occasionally quoted verbatim from that document. Illustrative are the remarks of Representative Coble, chair of the subcommittee with responsibility for the bill:

H.R. 908 was introduced in response to recurring attempts to divide the largest of the Federal judicial circuits, the [N]inth.

However, if properly implemented, the commission proposal represents a sound approach to a problem of national concern, and that is the explosive growth in the caseload of all of the courts of appeals.

The time is right, it seems to me, for a careful, objective study aimed at determining whether that structure can adequately serve the needs of the 21st century. The task of the commission would be to carry out that study. 135

Representative Coble added for emphasis that the entity was "not to be exclusively restricted to the [N]inth [C]ircuit [but] hopefully, will examine the entire system and come back with a recommendation that the commission deems appropriate," even as he observed that the "study is a responsible method to evaluate any prospective split in the [N]inth [C]ircuit and is generally overdue." 136

134. See House Report, supra note 15, at 2; see also supra text accompanying notes 12, 21-23.

135. See 143 Cong. Rec. H3223 (daily ed. June 3, 1997). He then offered comments nearly identical to those in the Report:

The proposed commission would be the first of its kind since the Commission on Revision of the Federal Court Appellate System, also known as the Hruska Commission, which completed its work in 1975, or more than two decades ago. Needless to say, dramatic changes have taken place in the work of the Federal courts in those two decades, but there have been no structural alterations except for the division of the old [F]ifth [C]ircuit and the creation of the Court of Appeals for the Federal Circuit.

Id.; see also supra notes 132-33 and accompanying text.

Representative Hyde, the House Judiciary Committee chair, echoed numerous propositions which appeared in the House Committee Report and a number of ideas that Representative Coble propounded. Perhaps most important, Representative Hyde reiterated that the “goal of the commission will be to study the entire Federal appellate court system, but, of course, with a particular view toward addressing the problems facing the largest and most diverse circuit we have, the [N]inth.” He characterized the study envisioned as a “responsible method to evaluate the structure of the Federal appellate courts and make recommendations that can provide a sound foundation for congressional action in the future,” even while recognizing that “[p]roblems do exist in the size and makeup of the [N]inth [C]ircuit,” which the commission would equitably analyze.

The Judiciary Committee chair repeated and elaborated the notions relating to the commission’s origins and purposes that were expressed in the report and in Representative Coble’s floor statement. For instance, Representative Hyde reaffirmed that the entity would “take up where the Federal Court Study Committee left off” and recounted several of this committee’s most important findings, such as its conclusion that the appellate courts were experiencing a “crisis of volume.”

Representative Zoe Lofgren (D-Cal.), a minority member of the Judiciary Committee, reaffirmed some of the above ideas, especially regarding the crisis of volume and the commission’s purposes, and expanded on certain propositions. Most significantly, she acknowledged that the study’s initial impetus were proposals to “split the [N]inth [C]ircuit.” Representative Lofgren emphasized, however, that the “proposed commission actually has a broader mandate . . . than studying the [N]inth [C]ircuit. In fact, as we enter the twenty-first century, we need to take a look at the entire range of possibilities.” She admitted that the entity could certainly make a suggestion “to split one of the circuits, to reconfigure the circuits and then Congress could follow the Commission’s recommendation or be free to choose another alternative.”

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137. See id.
138. See id.
139. See id. He found that the study “could not be more timely,” reciting data reflecting that “in fiscal 1996, the number of appeals filed in the 12 regional courts of appeals rose 4 percent to 51,991 [which was] an all-time high in filings, with eight circuits reporting increases.” Id.
140. See id.
141. Id.
142. Id.
143. Id. She added, “Whatever we intend to do, I know that we will be better off with the
In mid-July, Senators from the Pacific Northwest, including Senator Ted Stevens (R-Alaska), Senator Slade Gorton (R-Wash.) and Senator Burns, who are members of the Appropriations Committee, persuaded the committee to approve an appropriations rider that would have divided the Ninth Circuit. On July 29, the full Senate adopted this appropriations rider. The proposal would have left California, Nevada, Guam, and the Northern Mariana Islands in that court. The measure would have created a new Twelfth Circuit that encompassed Alaska, Arizona, Hawaii, Idaho, Montana, Oregon, and Washington. The rider authorized fifteen judges for the Ninth Circuit and thirteen judges for the Twelfth Circuit. The proposal afforded the Twelfth Circuit two co-equal seats and two co-equal court clerks located in Phoenix and in Seattle.

Republican senators—principally from the West—voiced many arguments, few of which were new, in favor of the Senate action during floor debate. For example, they contended that the Ninth Circuit’s size in terms of population, geography, caseload, and judges creates problems. The court’s geographic magnitude was said to impose travel expenses on attorneys and litigants, while its caseload creates delay and inconsistency in the court’s decisionmaking. Numerous Senate members also suggested that the rate at which the Supreme Court reverses the Ninth Circuit shows that the court is out of touch. They claimed that projected population growth in the region will exacerbate these difficulties.

Some circuit-splitting opponents argued that there is too much uncertainty about the precise nature of the problems facing the Ninth Circuit and other appellate courts and the most effective solutions for those difficulties to implement the dramatic step of dividing the Ninth Circuit today. Many important questions involving this court and the other regional circuits are ones about which there is insufficient expert advice that this commission will provide to us. It is always better to have good, thoughtful, expert advice than to simply move forward, especially in dealing with the judiciary."
information. For example, the circuit-splitting proponents have argued that the Ninth Circuit decides cases too slowly because of its size.\textsuperscript{154} However, no data correlate size with time to resolution. Indeed, vacancies in ten of the court's twenty-eight authorized judgeships and the Senate's confirmation of no judge for the court since January 1996\textsuperscript{155} better explain the time required to treat appeals.

The proposal to split the Ninth Circuit also posed very real pragmatic problems. It would have been an administrative nightmare to establish a new court, especially one with two co-clerks and co-equal headquarters, by October 1. One problem, for example, was that the existing courthouses in Phoenix and Seattle were not constructed to accommodate circuit headquarters.\textsuperscript{156} The statute that divided the old Fifth Circuit correspondingly took effect one year after passage, and the court only ceased to exist some three years later. Moreover, the division suggested improperly allocated the caseload. For instance, judges of the new Twelfth Circuit would have had to resolve 239 appeals annually, while judges of the proposed Ninth Circuit would have had to decide 363 cases annually—which would have been fifty percent more.\textsuperscript{157} During floor debate, senators defeated 55-45 along political party lines an amendment that would have authorized a study similar to the one that the House had approved.\textsuperscript{158}

The Senate appropriations rider provoked strong opposition from Representative Hyde, chair of the House Judiciary Committee, Representative Coble, chair of the House Judiciary Subcommittee on Courts and Intellectual Property, and members of the House who represent California.\textsuperscript{159} These members of Congress enunciated numerous reasons for their opposition. For example, the critics evinced concern that the bifurcation envisioned would improperly distribute the caseload between the two proposed courts and that the Senate was using the appropriations process to make an important substantive determination.\textsuperscript{160} They also suggested that dividing the Ninth Circuit would have been too dramatic an action to institute without clear comprehension of

\textsuperscript{154} See \textit{id.} at S8046 (statement of Sen. Hatch).
\textsuperscript{155} See \textit{id.} at S8045 (statement of Sen. Leahy).
\textsuperscript{156} See \textit{id.} at S8043 (statement of Sen. Feinstein).
\textsuperscript{157} See \textit{id.} at S8056 (statement of Sen. Feinstein).
\textsuperscript{158} See \textit{id.} at S8061 (a rollcall vote, no. 204, was taken).
\textsuperscript{159} See, \textit{e.g.,} Letter from Henry J. Hyde, Chair, House Judiciary Committee, to Robert Livingston, Chair, House Committee on Appropriations (Sept. 5, 1997); Letter from Jerry Lewis et al., Members of Congress from California, to Harold Rogers, Chair, Appropriations Subcomm. on Commerce, Justice, State and the Judiciary (Oct. 17, 1997). I also rely in this paragraph on conversations with individuals who are knowledgeable about the developments that occurred.
\textsuperscript{160} See 143 \textit{CONG. REC.} at S8042 (statement of Sen. Feinstein).
the exact difficulties that the court and the appellate system are experiencing, what impacts those complications are having, and the most effective means of addressing the difficulties. 161

In mid-November, the House-Senate Conference Committee on Commerce-Justice-State Appropriations rejected the appropriations rider that would have divided the Ninth Circuit. 162 The Conference Committee substituted a national study that incorporated numerous aspects of the proposals which both Houses had considered and that essentially embodied much included in H.R. 908. 163 The compromise measure provides for five commission members, all of whom the Chief Justice of the United States was to appoint within thirty days, accords the entity ten months to study and two months to prepare a report and recommendations, and adopts verbatim H.R. 908's charge. On December 19, Chief Justice Rehnquist appointed retired Supreme Court Justice Byron White, United States Court of Appeals Judges Gilbert Merritt of the Sixth Circuit and Pamela Rymer of the Ninth Circuit, United States District Judge William Browning of Arizona and N. Lee Cooper, the immediately past president of the American Bar Association (ABA). 164

In sum, the November 1997 statutory provision that authorizes a national commission to examine the federal appeals courts leaves unclear, overly general or unresolved several important features of that analysis while affording the entity a relatively short period to complete its work. The second Part of this Article, therefore, attempts to clarify those dimensions of the evaluation which remain ambiguous or which Congress did not specify or resolve and offers suggestions that should enable the commission to use its brief time most effectively.

II. SUGGESTIONS FOR THE FUTURE

A. Suggestions for Resolving Unclear Aspects of the Study

The legislation that approved the national assessment leaves unclear, overly general, or unresolved certain aspects of that analysis. The most significant features which require clarification, specification or resolution implicate the functions that the commission is to perform. The second part of the entity's charge that appears ambiguous states that it is to "study the structure and alignment of the Federal Court of Appeals

161. See id.
163. See id.; see also supra text accompanying note 135.
system, with particular reference to the Ninth Circuit."165 Perhaps least clear is exactly how much emphasis the commission should accord the Ninth Circuit in conducting the evaluation.

The above examination of the authorizing language and the legislative history that accompanied the measure's passage suggests that the Ninth Circuit will receive special consideration.166 The statutory phrase "with particular reference to the Ninth Circuit" and the applicable legislative history—such as ideas in the House Committee Report, namely that the study proposal was introduced in "response to recurring attempts to divide the largest of the Federal judicial circuits, the [N]inth,"167 and the pronouncements of the assessment's principal proponents168—show that the commission must specifically scrutinize this court.

My earlier discussion indicates that Congress also meant for the remaining regional circuits and the appellate system to receive considerable analysis.169 The statutory wording of the instruction to "study the structure and alignment of the Federal Court of Appeals system"170 and the declarations of the evaluation's major advocates support this view.171 Most importantly, prior iterations used the term "federal courts of appeal"; therefore, addition of the word "system" signifies legislative intent that the assessment include all twelve regional circuits.172 Champions of the endeavor concomitantly proclaimed that the commission's goal would be to analyze the "entire Federal appellate court system."173 These proponents and the House Committee Report apparently anticipated that the commission would examine the system's dozen units when they expressly stated that it would "take up where the Federal Courts Study Committee left off" because this entity had considered every circuit.174 The advocates and the report correspondingly characterized the commission as a "sound approach to a problem of national concern: explosive growth in the caseload of all of the courts of appeals."175 The commission's champions additionally observed that the study group "would be the first of its kind since the" Hruska

166. See supra text accompanying notes 111-12, 127, 130, 135-38, 141-43.
167. H.R. 908, § 1(b)(2); HOUSE REPORT, supra note 15, at 1.
168. See supra text accompanying notes 111-12, 127, 130, 135-38, 141-43.
169. See id.
170. See H.R. 908, § 1(b)(2) (emphasis added).
171. See supra text accompanying notes 111-12, 127, 130, 135-38, 141-43.
172. See supra text accompanying note 112.
173. See supra text accompanying notes 136-37.
174. See supra text accompanying notes 133, 139.
175. See HOUSE REPORT, supra note 15, at 1.
Commission, an entity that explored the whole system even while concentrating on the Fifth and Ninth Circuits. 176

The above information, accordingly, suggests that the commission ought to evaluate the Ninth Circuit, the remaining regional appeals courts, and the appellate system. The entity should focus on the Ninth Circuit but must not assess this court to the exclusion of the other regional circuits or the system. Congress, thus, seemed to afford the commission considerable latitude in deciding precisely how much to emphasize the Ninth Circuit.

The commission could exercise this discretion in several ways to maximize the advantages it can derive from the effort. For example, the entity may want to employ the Ninth Circuit as a surrogate for certain appeals courts that are similarly situated in terms of parameters—such as the problems that they experience, the courts’ judicial complements, their caseloads’ magnitude, the populations which the circuits serve, the time that the courts require to resolve appeals, and potential solutions to the difficulties being encountered. Illustrative might be the Fifth and Eleventh Circuits, which have memberships, dockets and disposition times, and use remedial measures that resemble those employed within the Ninth Circuit. Analysis and comparison of the three courts could yield instructive insights relating specifically to large circuits’ operation. 177

The commission might concomitantly attempt to evaluate as a group other appeals courts that seem analogous or share certain characteristics, perhaps deploying one as a template. Exemplary are the Eighth and Tenth Circuits, which encompass comparatively large land masses but are rather sparsely populated, and the Second, Third and Seventh Circuits, which include relatively few states, serve substantial numbers of people, and have somewhat similar caseloads that they treat in numerous comparable ways.

The initial two components of the commission’s charge require it to “study the present division of the United States into the several judicial circuits [and] study the structure and alignment of the Federal Court of Appeals system.” 178 The entity could narrowly read these instructions to preclude consideration of the burgeoning caseloads and the resource limitations that are the principal problems presently confronted by the

176. See supra text accompanying notes 133, 135; see also supra text accompanying notes 18-24, 38-39.

177. Analysis specifically could determine whether the size of the three large courts undermines collegiality or correlates with speed of resolution.

178. See H.R. 908, § 1(b)(1)-(2).
appellate courts. However, the third part of the commission’s mandate expressly prescribes suggestions which would foster the appeals’ “expeditious and effective disposition.” Moreover, much in the relevant legislative history clearly provides that mounting dockets are to be the study’s central focus. For instance, the House Committee Report characterizes the commission as a “sound approach to a problem of national concern: explosive growth in the caseload of all of the courts of appeals,” while several of the assessment’s proponents espoused similar sentiments.

The third constituent of the entity’s instructions commands it to report “recommendations for such changes in circuit boundaries or structure as may be appropriate for the expeditious and effective disposition of the [appellate caseload] consistent with fundamental concepts of fairness and due process.” This language seemingly envisions that the commission will only forward suggestions for modifications in appeals courts’ boundaries or structure which comport with essential tenets of equity and due process, while considerable, relevant legislative history speaks in terms of circuit structure and structural remedies.

The statutory phraseology employed and some legislative history, however, could be construed to encompass solutions other than structural ones. The legislation’s words can fairly be interpreted as empowering the commission to explore and recommend non-structural approaches, if it finds that “changes in circuit boundaries or structure [would not be] appropriate for the expeditious and effective disposition . . . of appeals, [or would not be] consistent with fundamental concepts of fairness and due process.” For example, the Ninth Circuit split that the 1997 Senate appropriations rider required would have assigned judges of the proposed Ninth Circuit fifty percent more cases annually than judges of the new Twelfth Circuit, so that the structural modification contemplated for the projected Ninth Circuit might have failed to facilitate appeals’ prompt or efficacious resolution or to honor basic principles of equity and due process. Should the commission determine that alterations in appellate court boundaries or structure would not foster expeditious or effective appellate disposition

179. See, e.g., supra text accompanying notes 15-18, 127-28, 135, 139.
180. See H.R. 908, § 1(b)(3).
181. See HOUSE REPORT, supra note 15, at 1; see also supra text accompanying notes 127-28.
182. See, e.g., supra text accompanying notes 135, 139.
183. See H.R. 908, § 1(b)(3).
184. See id.
185. See supra p. 216.
consistent with core precepts of fairness and due process, Congress apparently intended the entity to scrutinize additional measures and suggest those that would promote prompt and efficacious resolution while satisfying fundamental tenets of equity and due process.

Certain aspects of the legislative history, particularly those mentioning various alternatives to structural modifications, support this construction. For instance, the House Committee Report alludes to the prospect of authorizing more judgeships, which is an important non-structural option, and one which the Federal Courts Study Committee explicitly recommended, as well as to that entity's endorsement of no structural approach and its call for greater inquiry and discussion.\footnote{186. See supra text accompanying notes 128, 132. The report and the commission's advocates also stated that the entity would continue the Federal Courts Study Committee's work, thus intimating that the commission would study the options that the committee examined.} Moreover, during the House floor debate, one commission proponent observed that "as we enter the 21st century, we need to take a look at the entire range of possibilities."\footnote{187. See 143 Cong. Rec. H3224 (daily ed. June 3, 1997) (statement of Rep. Lofgren).} It is also important to remember that Congress did not adopt language in identical Senate and House bills that would have commanded the commission to recommend "appropriate changes in circuit boundaries or structure."\footnote{188. See S. 283, § 1(b)(3), 105th Cong., 1st Sess. (1997); H.R. 639, § 1(b)(3), 105th Cong., 1st Sess. (1997).}

Congress clearly envisioned that the commission would emphasize structural alterations when examining alternatives and making suggestions; however, confining the entity to structural modifications would have been overly narrow. Congress and the courts have many non-structural options that they can apply to address the complications created by docket growth and by other phenomena that appeals courts are addressing and will continue to meet. Illustrative are legislative authorization for additional judgeships; efficiency measures, such as administrative units and a limited en banc procedure, which the Ninth Circuit has deployed; and numerous other techniques, namely limitations on oral arguments and written decisions and various alternatives to dispute resolution (ADR), that all of the regional circuits have invoked.\footnote{189. See supra text accompanying notes 17, 41-46; see also infra notes 231-33, 266-68 and accompanying text.}

Finally, even if the commission concludes that Congress intended it only to consider and recommend changes in appellate court structure, the statutory terminology, "circuit boundaries or structure," which Congress employed could be read rather comprehensively.\footnote{190. See S. 283, § 1(b)(3); H.R. 639, § 1(b)(3).} For
instance, the Federal Courts Study Committee included in its examination of alterations that the committee characterized as structural the creation of a new appellate tier and national subject matter courts, possibilities which seem broader than merely reconfiguring the existing regional circuits. 191

B. Suggestions for Efficacious Use of Commission Time

Congress allotted the commission less than twelve months to complete a very significant, exceedingly difficult, and potentially enormous undertaking. The entity, therefore, must ensure that it makes the best use of the relatively limited time that Congress afforded. The commission could implement a number of approaches that could enable it to proceed most efficaciously.

1. Information Collection

One important issue that the entity must initially face is whether it should attempt to collect, analyze, and synthesize systematically original empirical data. Of course, the commission would prefer to have the maximum amount of this information feasible; however, the temporal restraints under which it is laboring may well preclude the compilation and assessment of any such material. For example, the resolution of complex appeals in many appellate courts and of numerous cases in the Ninth Circuit currently requires greater time than the entity has to conclude its work.

Perhaps the most that the commission might hope to achieve is selective or representative sampling of empirical data. Several reasons suggest that the Ninth Circuit would be an obvious candidate for this treatment. First, Congress specifically instructed the commission to emphasize the court. 192 Second, the Ninth Circuit typifies in significant ways the other large appellate courts. 193 Third, practically all of the appeals courts are experiencing and addressing many problems that the Ninth Circuit has encountered and treated. 194 Fourth, the Ninth Circuit itself and evaluators who are not affiliated with the court have assembled and analyzed considerable empirical information relating to the circuit. Insofar as the commission can collect empirical material on appellate courts apart from the Ninth Circuit, the entity may want to

192. See supra text accompanying note 163.
193. See supra text accompanying note 177.
194. See supra text accompanying notes 41-43.
focus on those that could function as exemplars for certain of the remaining courts. For instance, the apparent similarities between the Eighth and Tenth Circuits as well as among the Second, Third, and Seventh Circuits might mean that these courts deserve emphasis.\textsuperscript{195}

The commission should assemble empirical data on docket size, composition, and complexity in the regional circuits; the resources—especially judges—that courts have to treat appeals; and the time required, and the measures that they use, to resolve cases. The entity could glean material through interviewing or circulating questionnaires to judges, attorneys, and parties who participate in appeals. The commission might correspondingly consult or rely on the survey instruments employed by the FJC in its 1993 assessment and in other endeavors, such as the Center’s Rule 11 work, and those instruments on which additional entities, including the Federal Courts Study Committee and the Administrative Office of the United States Courts, have relied. The commission also could “take up where the Federal Courts Study Committee left off” by scrutinizing the committee’s findings as to problems and solutions, such as the five structural alternatives that the entity explored. The commission might concomitantly review the determinations and recommendations regarding the appeals courts in the 1995 Judicial Conference evaluation and the 1993 FJC analysis.

Regardless of whether the commission decides to gather original empirical information, it must assemble and consider the largest quantity of empirical data and other relevant material that evaluators have previously collected on the regional circuits. For example, there have been ten major analyses of the appellate courts since the time of the Hruska Commission endeavor.\textsuperscript{196} The FJC, the Judicial Conference and the Federal Courts Study Committee have recently completed assessments according varied emphasis to the appeals courts.\textsuperscript{197}

The efforts of Senator Charles Grassley (R-Iowa), chair of the Senate Judiciary Subcommittee on Administrative Oversight and the Courts, to evaluate appellate caseloads, judicial resources and practices also could be a helpful source of information.\textsuperscript{198} Moreover, the regional circuits

\textsuperscript{195. See supra p. 216.}
\textsuperscript{196. See supra text accompanying note 25.}
\textsuperscript{197. See supra text accompanying notes 32, 34. The FJC study is the only one whose principal focus is the appeals courts. See also REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, supra note 26.}
themselves as well as the FJC and the Administrative Office of the United States Courts have voluminous material on docket size, constitution, and complexity, resources to decide cases, the time needed to conclude appeals, and the measures that courts employ to expedite resolution.

The commission should seek the assistance of numerous public and private entities that possess considerable empirical information and additional relevant material as well as expertise relating to the appellate courts. Illustrative are the Senate and House Judiciary Committees, the American Law Institute, the ABA, and the National Center for State Courts. The commission must encourage the maximum possible involvement in its activities by interested institutions and individuals.

2. Identifying the Problems
   a. The Regional Circuits

   The commission must systematically identify the complications that pose now, and will continue to present, the greatest difficulty for the regional circuits and determine whether they are or will be sufficiently problematic to deserve remediation with measures in addition to those that the appeals courts now apply. The examination above—including considerable recent work, such as the assessments undertaken by the Federal Courts Study Committee, the FJC and the Judicial Conference—suggests that the increasing number and complexity of appellate filings as well as inadequate resources to decide the cases have been, and will continue being, the principal complications, but it remains unclear whether they are troubling enough to warrant the invocation of new approaches.

   There may presently or subsequently be other problems. For example, some federal courts observers contend that certain phenomena—namely the myriad combinations of judges who can resolve an issue in the larger circuits—that implicate multiplying dockets have fostered inconsistent decisionmaking among and within the appeals courts. However, no empirical data show that intercircuit conflicts have caused difficulty in the sense that the appellate system needs more authoritative precedents, and the FJC found “little evidence that intracircuit inconsis-

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tency is a significant problem.\textsuperscript{200} Rising caseloads and related factors, such as resource restraints, have correspondingly led to bureaucratization that impose disadvantages, namely the overdelegation of judges’ responsibilities and decreased judicial accountability and visibility. However, no empirical information demonstrates that bureaucratization has created serious complications.\textsuperscript{201}

The commission, therefore, should emphasize the crisis of volume by attempting to identify with precision its character and effects and whether the situation is problematic enough to justify the implementation of additional alternatives. For instance, the entity might evaluate dockets’ present and projected size, makeup, and complexity, the time that regional circuits require to decide appeals, and the resources of each appellate court. Illustrative are recent empirical data showing that pro se cases, many of which involve prisoner litigation, comprise forty percent of the 52,000 appeals that parties pursued during the 1996 fiscal year.\textsuperscript{202} Material compiled by researchers in 1995 also estimates that the regional circuits will receive 334,800 cases and will need 1660 judges under the existing formula to address their dockets in the year 2020.\textsuperscript{203}

After the commission systematically has collected, analyzed and synthesized all of the relevant information, it must attempt to ascertain as conclusively as possible whether the complications that the appellate courts do and will confront are so troubling as to require treatment with approaches that are distinct from those which they now apply.\textsuperscript{204} One means of making the determinations is by deciding whether the regional circuits currently resolve appeals fairly, promptly, inexpensively, and


\textsuperscript{203} See LONG RANGE PLAN, supra note 34, at 15-16; see also MCKENNA, supra note 32, at 23-53 (indicating courts address dockets of diverse size and complexity with disparate resources and consume different time reaching decisions and discrepancies in dependence on measures, namely ADR and staff, and in oral arguments and dispositions accorded appeals).

\textsuperscript{204} The entity also may attempt to identify instructive correlations, such as that between circuit size and time for resolution or case precedent’s consistency. See McKENNA, supra note 32, at 94. The entity as well might calibrate the above disparities’ effects in terms of parameters, including litigant satisfaction and resource savings.
consistently. Should the commission find that the courts do not so process cases, the deployment of additional options might be indicated. Another way of reaching these judgments is to identify the impacts that the applicable difficulties and remedial measures have on the appellate ideal: the traditional idea that judges hear oral arguments, closely confer, and write thoroughly-reasoned opinions that explain the results and that are publicly available in all appeals. The commission may ascertain that courts essentially honor this ideal because, for example, judges afford oral arguments and written decisions to those cases that need them. If the entity does so find, it should conclude that the complications are insufficiently problematic to justify the adoption of new mechanisms. Considerable information presently suggests, and the commission might well determine, that the regional circuits do not and will not face difficulties that are troubling enough to warrant employment of techniques other than the ones that the appeals courts now use.

b. Ninth Circuit

The commission must specifically focus on the precise complications that the Ninth Circuit is experiencing and will encounter and whether they cause sufficient concern to require the implementation of alternatives, particularly structural options, that would augment the many measures the court has already applied. Most important will be the current and future size, composition, and complexity of dockets; the resources, especially judges, for deciding appeals; and the time required for terminating cases. For example, the Ninth Circuit now has twenty-eight active judges to address the largest appellate docket of 8500 yearly filings, and these statistics prompted the Judicial Conference to request that Congress authorize ten additional judgeships for the court. Quite significant will be the efficacy of mechanisms, particularly the limited en banc procedure, which the Ninth Circuit presently applies.

The commission should scrutinize the pace of Ninth Circuit dispositions. Recent information suggests that the court resolves appeals more promptly in terms of certain parameters than most circuits and less expeditiously than some in other ways. The commission must refine this material and use it and any additional information that the entity can collect to ascertain whether the court needs greater time for treating cases than the remaining circuits, and, if so, the commission should attempt to identify exactly when and why temporal disparities arise in


206. See Second S. 956 Position Paper, supra note 77, at 7; see also McKenna, supra note 32, at 32-35 (analyzing circuit disposition times).
the appellate process. For instance, time to resolution may be a function of the docket's magnitude, constitution, or complexity; the available judicial resources, including the ten vacant judgeships; the comparatively high percentage of cases in which the court grants oral arguments and issues written opinions; or the circuit's substantial contingent of judges, a factor which purportedly erodes collegiality and, thus, may delay dispositions.\textsuperscript{207}

Some observers of the Ninth Circuit also claim that the size of the court, particularly the circuit's enormous docket, contributes to conflicts in the court's case law. However, no empirical information presently demonstrates that intracircuit inconsistency poses significant difficulty, while the only systematic study of the operation of precedent in a large appeals court found that the Ninth Circuit has generally succeeded in avoiding conflicts between panel decisions.\textsuperscript{208}

Individuals who favor bifurcating the court have concomitantly expressed dissatisfaction with its decisionmaking in substantive areas—such as natural resources, criminal law and the death penalty—proffering as evidence the substantial percentage of Ninth Circuit determinations that the Supreme Court reverses.\textsuperscript{209} Critics of circuit-splitting have responded that this concern primarily implicates certain statutory requirements with which these circuit-division proponents disagree and, therefore, the advocates should persuade Congress to change the applicable legislation.\textsuperscript{210} Moreover, the reversal rate is not very probative,\textsuperscript{211} partly because it can be attributed to many variables, most of which only tangentially involve Ninth Circuit decisionmaking. These include the factors that animate lawyers and litigants to appeal, the peculiar, and perhaps idiosyncratic, phenomena which prompt the Justices to review specific cases and the law, facts, and policy that lead the Supreme Court to resolve particular appeals as it does. The commission, accordingly, might examine the consistency of Ninth

\textsuperscript{207} See Second S. 956 Position Paper, supra note 77, at 5; infra text accompanying note 213. It presently appears that the region's population will dramatically increase in the near future and exacerbate certain of these phenomena, such as growing appeals.


\textsuperscript{209} See, e.g., 143 Cong. Rec. S8041, S8044 (daily ed. July 24, 1997) (statement of Sen. Gorton); id. at S8047 (statement of Sen. Burns); see also supra text accompanying note 71.

\textsuperscript{210} See supra text accompanying note 72.

\textsuperscript{211} See, e.g., David G. Savage, Getting the High Court's Attention, A.B.A. J., Nov. 1997, at 46 (quoting Ninth Circuit Chief Judge Procter Hug, Jr. and Ninth Circuit Judge Stephen S. Trott); see also Baker, supra note 6, at 943-44; Tobias, supra note 7, at 1373-74.
Circuit precedent and the court's substantive determinations more generally, although these inquiries may well prove unproductive.

Because the Ninth Circuit addresses the largest docket it probably places greater reliance on staff than other courts. For example, Ninth Circuit staff attorneys screen many cases, especially pro se and prisoner litigation, to help suggest the oral and written dispositions that those appeals will receive and to minimize the possibility of intracircuit inconsistency.212 The commission, therefore, should attempt to determine whether this enhanced bureaucratization has detrimentally affected case resolution by, for instance, overdelegating judicial tasks or disproportionately increasing the time that judges must devote to staff management.213

The commission must remember that important criticisms leveled at the court by circuit-splitting champions can be ascribed to phenomena for which the court has little responsibility. Illustrative are claims that circuit precedent is inconsistent, that the court consumes too much time in resolving appeals, and that its magnitude undermines collegiality—an attribute which allegedly limits potential conflicts in case law and expedites resolution. Insofar as circuit precedent lacks consistency, appellate dispositions are delayed, or there is insufficient collegiality, the phenomena appear to result principally from current vacancies in ten active judgeships and partly from the court's concomitant need to rely on judges who are not its active members.214

Finally, the commission must attempt to ascertain as definitively as possible whether the Ninth Circuit does or will address difficulties that are troubling enough to justify the application of approaches apart from the plethora of mechanisms that the court has used or could employ. For example, some material indicates, and the entity may find, that the measures instituted—including the resources committed—by the Ninth Circuit have enabled the court to resolve its gigantic docket equitably, promptly, economically, and consistently while minimally affecting the appellate ideal. Accordingly, retention of the status quo or continued experimentation with previously tested or new non-structural approaches will apparently be indicated.

212. See supra text accompanying notes 44-45, 68.
213. See supra text accompanying note 200.
214. For many years, the court's enormous docket has compelled this reliance, but the vacancies' large number and longstanding nature have rendered the need acute. See Carl Tobias, Federal Judicial Selection in a Time of Divided Government, 47 EMORY L.J. (forthcoming 1998).
3. Identifying the Solutions

If the commission conclusively determines that the regional circuits, the appellate system, or the Ninth Circuit does or will encounter complications that are sufficiently problematic to require remediation with alternatives which the courts have not applied, it must undertake the broadest feasible examination of potential solutions, including their advantages and disadvantages. The entity also should attempt to identify exactly what combination of measures alone and collectively will best address the difficulties.

It is impossible to denominate precisely those options that might prove effective and, therefore, deserve close evaluation until the commission has identified the most pressing complications and definitively concluded that they are troubling enough to warrant treatment. Moreover, quite a few study groups, including the Judicial Conference, the ABA, and the FJC, and many federal courts observers have assessed most of the prospects. It, therefore, principally provide descriptive analyses, rather than thorough catalogs of the benefits and detriments, of numerous possibilities that appear to be promising.

Assuming that the commission clearly will find that some regional circuits do or will confront problems posing sufficient difficulty to justify the invocation of mechanisms in addition to ones that these courts presently use, the entity should carefully canvass a wide range of approaches, including internal and external reforms, that federal and state courts have applied or might implement. The commission must survey a plethora of measures because evaluators have conducted more research on, and therefore better understand, the relevant complications than the applicable remedies.

When examining these options, particularly those which would restructure the regional circuits, the commission should recognize and allow for the different and sometimes conflicting reasons that observers propound for the courts. One traditional view, which is premised on an evaluation of congressional intent at the time of the original establishment of the modern appellate system in 1891, holds that the appeals courts consist of relatively few contiguous states sharing common

215. See, e.g., BAKER, supra note 25, at 106-286; MCKENNA, supra note 32, at 105-21, 123-39, 141-54; see also supra text accompanying notes 18-35.

216. Telephone Conversation with Professor Thomas E. Baker, Professor, Texas Tech University School of Law (Mar. 15, 1996); see also Tobias, supra note 17, at 1282. I emphasize the federal courts here, although Professor Baker suggests that state court reforms may be a fruitful source of ideas. See BAKER, supra note 25, at 298. When the commission surveys internal and external reforms' efficacy, the entity also may want to develop suggestions for improvement, if indicated.
interests, although phenomena like globalization and computerization may have made this idea somewhat obsolete today. Another related notion is that regional circuits must be close geographically, and in terms of perspectives, to the district courts whose decisions the appeals courts review and to the people whom they serve.

Additional conceptualizations differ significantly from these views. One idea is that the regional circuits should be diverse, for instance, in terms of judges' political perspectives, race, gender, or backgrounds as well as the economic, social and other interests of those jurisdictions which constitute the courts. A second important purpose of the regional circuits is their federalizing function: the responsibility to harmonize the Constitution and national policies with state and local concerns. These views resist felicitous reconciliation, although the commission should remember, and provide for, their inherent tensions.

The entity must extensively explore the advantages and disadvantages of applying the various alternatives, such as the options' effects on the Supreme Court, the district courts, the appellate ideal, and economic costs. For example, every regional circuit has addressed docket expansion by imposing limitations on the oral arguments granted and written decisions afforded and by relying more substantially on non-judicial staff. The commission should attempt to delineate the exact present and future impacts of these restrictions and of enhanced use of staff on the appellate ideal. Moreover, Congress's traditional solution to appeals court caseload growth of enlarging the bench and reconfiguring regional circuits may now be outmoded or only a palliative because the response apparently has negligible effect on appellate dockets. Authorizing additional judgeships could correspondingly increase resources and expedite dispositions. Nonetheless, this measure might erode collegiality and promote intracircuit inconsis-

218. See, e.g., 143 CONG. REC. at S8047 (statement of Sen. Burns); but see id. at S8058-59 (statement of Sen. Joseph Biden) ("[g]eography is relevant only in terms of convenience—not ideology").
219. See supra text accompanying notes 21 & 65; infra text accompanying notes 293, 317.
221. See supra text accompanying note 204. The entity also might consider the benefits for justice and the costs, especially economic, of reattaining the ideal. See generally William M. Richman & William L. Reynolds, Elitism, Expediency, and the New Certiorari: Requiem for The Learned Hand Tradition, 81 CORNELL L. REV. 273 (1996); Tobias, supra note 17, at 1281.
222. See Baker, supra note 6, at 945-49; Tobias, supra note 7, at 1386-90; see also infra text accompanying notes 223-25, 273-77, 309.
tency. Indeed, it may be an empty gesture if the President and the Senate cannot overcome their chronic inability to fill large numbers of vacancies in those judicial seats that Congress has already approved.\footnote{223 See generally Gordon Bermant et al., Judicial Vacancies: An Examination of the Problem and Possible Solutions, 14 Miss. C. L. Rev. 319 (1994); supra text accompanying note 213; infra text accompanying notes 273-76.}

The commission must then designate the finest remedies for each appeals court and the appellate system by comparing the options' relative efficacy in terms of these benefits and detriments. It is impossible to provide very specific guidance until the entity has carefully evaluated the relevant problems and solutions. However, the commission should employ a finely-calibrated analysis that, for instance, tailors the available approaches to the difficulties that particular regional circuits and the system confront and emphasizes alternatives that will offer the maximum advantages and impose the least disadvantages.

The individuals who serve on the commission and its staff should remember that there are numerous non-structural possibilities that have fostered prompt, fair, inexpensive, and consistent resolution of appeals and have essentially honored the appellate ideal. Moreover, these measures could prove preferable to realignment partly because they would be less extreme and disruptive. For example, the Judicial Conference seemingly considered the "disruption of precedent and judicial administration that [structural] changes generally entail" so troubling as to recommend emphatically that circuit reconfiguration "occur only if compelling empirical evidence demonstrates adjudicative or administrative disfunction in a court so that it cannot continue to deliver quality justice and coherent, consistent circuit law in the face of increasing workload."\footnote{224 See LONG RANGE PLAN, supra note 34, at 44. Circuit restructuring "should continue to be, as it has been historically, an infrequent event." Id. at 45 (citation omitted).} In 1993, the FJC clearly found that the appellate "system and its judges are under stress," but admonished that the pressure did "not appear to be a stress that would be significantly relieved by structural change."\footnote{225 MCKENNA, supra note 32, at 155.} Additional observers correspondingly contend that realignment is inefficacious and outmoded primarily because reconfiguration effectively reallocates, rather than directly addresses, workload.\footnote{226 See infra text accompanying notes 277, 309; see also infra text accompanying notes 304-06, 310-11 (affording more reasons why restructuring is inadvisable).} These ideas indicate that the commission must closely evaluate realignment, proceed cautiously in proposing it, and perhaps only suggest reconfiguration as a last resort. Indeed, some material shows, and the entity may well conclude, that the best approach...
today would be a refined mix of potential solutions, none of which seems to be structural.

Finally, the commission’s members and staff should keep in mind some salient phenomena when reviewing possible remedies for both the regional appeals courts and the Ninth Circuit. They must remember that the continuation of both caseload growth and almost exclusive reliance on periodic authorization of additional judgeships and occasional realignment of appellate courts by Congress and the judiciary means that the other eleven courts will increasingly grow to resemble the Ninth Circuit. These phenomena’s continuation, therefore, would provide an important reason why the Ninth Circuit should remain intact.227

a. The Regional Circuits

The commission must analyze the broadest possible spectrum of measures. I essentially rely upon the organizational format that Professor Thomas E. Baker followed in his recent thorough examination of the appellate courts and of the internal and external alternatives that the regional circuits have employed or might use.228 Thus, I initially examine internal reforms that appeals courts have implemented or could effectuate and then explore past and proposed external options.

i. Past and Present Internal Reforms

The regional circuits have applied a plethora of approaches to treat the difficulties that they confront. Every appellate court has imposed restrictions on the number of, and the time allotted for, oral arguments229 and has accorded appeals a wide spectrum of types of dispositions, including thoroughly-reasoned written opinions, unpublished decisions and various forms of summary determinations.230 These

227. I appreciate the tension between my exploration of many alternatives which Congress and the judiciary might implement and my assumption that their essential inaction will continue. However, this approach allows for the contingency that my assumption will be incorrect.

228. See BAKER, supra note 25, at xviii-xix, 106-286. Professor Baker employs the terms intramural and extramural; however, I employ the more traditional terminology of internal or procedural solutions and external or structural solutions.

229. See, e.g., 1ST CIR. R. 34.1; 5TH CIR. R. 34; see also FED. R. APP. P. 34; BAKER, supra note 25, at 108 (discussing experimentation with nonargument summary calendar); JOE S. CECIL & DONNA STIENSTRA, FEDERAL JUDICIAL CENTER, DECIDING CASES WITHOUT ARGUMENT: AN EXAMINATION OF FOUR COURTS OF APPEALS (1987). See generally BAKER, supra note 25, at 108-17.

230. See, e.g., 4TH CIR. R. 36(a)-(c); 11TH CIR. R. 36-1 to 36-3; see also BAKER, supra note 25, at 117-19 (discussing limitations on briefs). See generally BAKER, supra note 25, at 119-35.
limitations have apparently facilitated case resolution, but they may have undermined the appellate ideal. 231

Numerous regional circuits deploy civil appeal management plans (CAMP). 232 The plans have similar objectives, although their emphases and specifics differ. 233 Each CAMP attempts to encourage case terminations without court action, accelerate the consideration and disposition of appeals that receive oral argument, narrow and clarify the issues at stake, improve briefing and argument, and resolve motions and procedural questions informally and promptly. 234 The measures employed encompass prehearing conferences, appeal tracking forms that permit processing to commence before records and briefs are filed, staff monitoring and modification of briefing schedules, and early case assignments to panels. 235

Every court that uses a CAMP and even the circuits that do not rely substantially on staff to discharge certain responsibilities, such as the screening of appeals and the drafting of opinions. 236 The CAMP programs and enhanced dependence on staff generally have expedited case disposition and probably saved judicial resources. However, they have apparently eroded somewhat the appellate ideal and raised generic concerns—including overdelegation of judicial duties—about reliance on staff. 237 Some appeals courts employ numerous additional mechanisms. For example, a few circuits have instituted special procedures to facilitate the treatment of cases that involve capital punishment, 238 while each appellate court has depended on senior and visiting judges to help resolve expanding dockets. 239


233. See Baker, supra note 25, at 136.

234. See id.

235. See, e.g., 8th Cir. R. 33A; 10th Cir. R. 33.1.

236. See, e.g., 6th Cir. R. 18 (concerning pre-argument conferences); 9th Cir. R. 33-1 (stating conferences are to facilitate settlements); see also Baker, supra note 25, at 139-47.

237. See supra text accompanying notes 200, 212.

238. See Tobias, supra note 7, at 1406; see also 3rd Cir. R. 111 (regarding death penalty appeals); 9th Cir. R. 22-1 to 22-6 (same).

239. See Baker, supra note 25, at 198-201; McKenna, supra note 32, at 38-39; Richman & Reynolds, supra note 221, at 287. For more discussion of these reforms, see Baker, supra note 25, at 106-50; McKenna, supra note 32, at 38-33.
ii. Proposed Internal Reforms

Several study entities, such as the Judicial Conference, the Federal Courts Study Committee and the FJC, and many additional federal courts observers have analyzed a substantial number of internal reforms that the regional circuits might implement. Appeals courts have not effectuated some of these alternatives; however, others have received practical application, much of which may fairly be characterized as experimental in nature.

All of the regional circuits have relied on some form of technology, principally to realize efficiencies when treating docket growth. For instance, the Third Circuit was apparently the first court to institute an electronic mail system, while the Eleventh Circuit has employed an automated case management scheme and facsimile network for monitoring capital appeals. These and other courts apparently have saved resources. Nevertheless, Professor Baker has called for additional research and development in the field of computer-based case and court management information systems. He also has admonished that it "would be a misplaced hope to expect future technology to do more than provide added increments of efficiency" because judging is intrinsically a labor-intensive human endeavor.

Most, but particularly the larger, regional circuits have depended substantially on differentiated case management. I examined prototypical case management plans above, however, some observers have recommended this methodology's extension and a few courts have experimented with newer techniques. For example, the Fifth Circuit has tested a screening mechanism, which relies substantially on ad hoc, in-person, three-judge screening panels, and this project may evolve into a second generation procedure for appeals management. Some

242. See BAKER, supra note 25, at 152. See generally Nihan & Wheeler, supra note 240.
243. See BAKER, supra note 25, at 154. See generally Douglas E. Winter, Down-Time: A Fable, Litig., Fall 1986, at 48 (envisioning a future where all disputes are resolved by computers).
245. See supra text accompanying notes 229-35.
246. See BAKER, supra note 25, at 160; see also MCKENNA, supra note 32, at 127-29
circuits also employ inventorying, which is essentially a more sophisticated means to differentiate cases. 247 Another approach with which a few courts have successfully experimented is the screening of appeals for jurisdictional defects, so cases that are deficient might be dismissed as early in the appellate process as possible. 248 Perhaps the greatest concern about differentiated case management is that those appeals requiring conventional review will receive this treatment. 249

The appellate courts might implement reforms other than ones that implicate non-decisional, administrative matters. Some judges and writers have recommended ways to enhance the art of judging through the maintenance and improvement of judicial productivity. 250 A helpful illustration is the imposition of deadlines. Several regional circuits have profitably tested temporal requirements 251 and Professor Baker found that they "are an effective tool whose usefulness has not been fully developed in the Courts of Appeals." 252 Nonetheless, he doubted that exhorting judges to "do more and do better" work would yield significant benefits, given the substantial number of measures which regional circuits have applied over the last three decades. 253

Another possibility would be appellate court use of expert advisors. 254 District judges have occasionally depended on individuals with specialized expertise, and the Ninth Circuit recently appointed an appellate commissioner. 255 Congress could authorize these officials to resolve non-merits motions that implicate the time, place, and manner

(analyzing differentiated appeals management or two-track appellate review).

247. See BAKER, supra note 25, at 161-63; see also Hellman, supra note 17, at 957-64 (describing the inventory process used in the Ninth Circuit).


249. See McKENNA, supra note 32, at 129; Oakley, supra note 44, at 922.


251. See BAKER, supra note 25, at 167-68; Wald, supra note 201, at 785.


254. See BAKER, supra note 25, at 173-76.

of appeals and to oversee screening programs. A few commentators and study entities have asserted that reliance on the officers appears sufficiently promising to warrant controlled experimentation.

Some observers have correspondingly explored various efforts that may limit the pursuit of frivolous appellate filings through the increased imposition of sanctions under statute, rule, or inherent power. An expert ABA Committee concluded that more frequent invocation of sanctions would not appreciably decrease circuit workloads because only very weak appeals would be deterred, while several writers have evinced concern that greater sanctioning activity could threaten the appellate tradition.

The commission must scrutinize additional proposals, which neither Congress nor the federal regional circuits have officially adopted or applied. One option is authorizing fewer than three judges to resolve certain cases, such as those that involve single issues and that are reviewed under deferential standards. This approach would save judicial resources, but it might diminish the quality of decisionmaking in specific appeals or more broadly. A second possibility would increase oral argument and deemphasize written presentations. Limited experimentation indicates that this model could be workable and efficient within an inventory scheme for ordinary cases. Professor Baker concluded that "pursuing greater orality, selectively and in carefully chosen appeals, might prove a useful differentiation of the appellate practice."

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256. See Oakley, supra note 44, at 920.
257. See Baker, supra note 25, at 176; Report of the Federal Courts Study Committee, supra note 26, at 115-16.
260. See Baker, supra note 25, at 180; see also Fred Woods, Sanctions—Stepchild or Natural Heir to Trial and Appellate Court Delay Reduction?, 17 Pepp. L. Rev. 665, 681 (1990) (concluding that sanctions "consistently and properly imposed, in keeping with constitutional due process," will result in "a marked improvement in our backlogged calendars").
261. See ABA Report, supra note 25, at 115-16; Long Range Plan, supra note 34, at 131-32; McKenna, supra note 32, at 127-33; infra note 295.
262. See Baker, supra note 25, at 173; Tobias, supra note 7, at 1400.
265. Baker, supra note 25, at 166. Administrative units and the limited en banc are reforms aimed primarily at larger courts, and only the Ninth Circuit has used them extensively. See id. at 155-58; see also supra notes 42-43 and accompanying text. For more discussion of these reforms, see Baker, supra note 25, at 151-85; McKenna, supra note 32, at 127-39.
iii. Past and Present External Reforms

Congress and the regional circuits have implemented numerous external reforms, most of which deserve little treatment because they have previously been rather ineffective and will probably prove no more efficacious if applied in the future. For example, there have been, and might be, efforts to restrict the district courts' original jurisdiction, although Congress appears unlikely to cease adopting new criminal statutes or creating additional civil causes of action, much less circumscribe existing civil or criminal jurisdiction, in the foreseeable future.266 Congress and the courts could correspondingly implement various alternatives to dispute resolution that, similar to limitations on original jurisdiction, directly aim at the trial court level and only derivatively implicate the appellate tier.267 Numerous federal districts have applied a broad spectrum of these options, and the Civil Justice Reform Act (CJRA) of 1990 has recently propelled this development.268 Reliance on ADR in the trial courts will probably continue to increase, and that growth may reduce the demand for judicial resources, although the relatively nascent character of much experimentation precludes definitive conclusions.269

Another approach is improvement of the quality of federal legislation, the clarification of which would ostensibly reduce the judicial resources that courts must devote to statutory interpretation and limit inconsistent decisionmaking.270 The District of Columbia Circuit has instituted a pilot project meant to foster constructive communication regarding legislation between Congress and the judiciary.271 Some

266. See, e.g., Tobias, supra note 17, at 1269 & n.22 and sources cited therein.
270. See BAKER, supra note 25, at 224-27.
observers have concomitantly called for the implementation of jurisdictional impact statements or congressional checklists, addressing matters such as private causes of action, preemption, and statutes of limitation, that lawmakers would employ when drafting enactments. Numerous obstacles could frustrate successful application of these ideas. Illustrative are the generic, inherent complications in employing unambiguous phraseology; the considerable difficulty, including certain pragmatic, political restraints, in writing clearer statutes; the multiple plausible constructions that judges, lawyers and litigants can articulate; and the incentives that animate attorneys and parties to seek appellate review of legislative terminology.

Creating additional appellate judgeships is another possibility that I have mentioned at various junctures in this paper. Congress has traditionally employed this solution; however, the remedy has imposed disadvantages. For example, adding judges may exacerbate the problems of larger courts by increasing the likelihood of intracircuit inconsistency, by making en banc rehearings unwieldy, and by eroding collegiality. Professor Baker concomitantly contends that authorizing more judicial positions "does not achieve any lasting improvement" and has merely had a "kind of temporary braking effect." An increasingly cost-conscious Congress may be reluctant to approve additional judgeships, and many current members of the federal bench oppose its expansion. On balance, this approach apparently has limited present and future efficacy.


276. See Irving R. Kaufman, New Remedies for the Next Century of Judicial Reform: Time as the Greatest Innovator, 57 FORDHAM L. REV. 253, 258 (1988); see also Baker, supra note 6, at 948. But see Richman & Reynolds, supra note 221, at 304-07 (noting that the cost of additional judges must be considered in the broader context of the entire federal budget).

A concomitant of the option above is the division of regional circuits because these two alternatives have comprised the preferred solution historically employed by Congress. Splitting appeals courts is a limited reform that has apparently become outmoded. Most important, division affords no systemic benefit because, for instance, it only redistributes the workload and requires the appellate courts to resolve the identical number of appeals.\textsuperscript{278}

A related, but potentially more productive, option would be enhancement of the non-judicial resources that regional circuits have to resolve their burgeoning dockets. Examples are increases in the number of staff attorneys, judicial law clerks, and other court administrative and technical personnel. The devotion of these resources has apparently preserved judges’ time and effort and improved operations by, for example, enabling circuits to expedite case dispositions. However, this solution could impose the disadvantages entailed in greater bureaucratization.\textsuperscript{279}

Specialized appellate courts afford another possibility. “Court specialization holds out the promise of deepening expertise, uniformity and stability, as judges become more experienced and encounter the full dimension of their subject matter.”\textsuperscript{280} Nonetheless, numerous observers have criticized increased reliance on these tribunals for several reasons that principally implicate the threat which they would pose to the tradition of generalist judges.\textsuperscript{281} Illustrative are assertions that the courts’ judges would develop overly narrow viewpoints, the tribunals would promulgate balkanizing procedures, and limited subject matter jurisdiction could enable special interests to influence unduly a legal field.\textsuperscript{282}

iv. Proposed External Reforms

Some study groups, including the Judicial Conference, the ABA and the FJC, and numerous other evaluators have assessed a number of external reforms that the appellate courts could effectuate. The regional circuits have implemented relatively few of these alternatives, particular—

\textsuperscript{278} See supra notes 223-25; infra text accompanying note 309.
\textsuperscript{279} See supra text accompanying notes 200, 212, 235.
\textsuperscript{280} BAKER, supra note 25, at 222.
\textsuperscript{282} See Simon Rifkind, A Special Court for Patent Litigation? The Danger of a Specialized Judiciary, 37 A.B.A. J. 425, 425-26 (1951); see also BAKER, supra note 25, at 222. For more discussion of these reforms, see BAKER, supra note 25, at 186-228; McKENNA, supra note 32, at 141-54.
ly those that are structural, although several courts have applied certain measures principally for purposes of experimentation.

The Federal Courts Study Committee did not endorse, but explored and urged greater analysis of, five possibilities. The first suggestion was that Congress periodically redraw appeals court boundaries to establish regional circuits of nine judges and that the current system be dissolved.283 The approach would afford the benefits, especially collegiality, that courts with smaller judicial complements purportedly enjoy, but initial implementation could prove disruptive and subsequent effectuation might foster intercircuit conflicts and undercut the appeals courts' federalizing role.284 A second recommendation called for the creation of another appellate tier between the Supreme Court and the district courts.285 This proposal is premised on assumptions that the Justices confront an onerous workload which threatens their performance and that the federal courts' existing structure lacks adequate capacity to maintain sufficient consistency in national law.286 Each proposition is controversial, while Congress and the judiciary seem unlikely to implement an additional tier until they agree on the need for it and on an appropriate design.287

A third idea was the establishment of new national subject matter appeals courts in areas such as admiralty, civil rights and labor.288 This alternative offers specialization's advantages, namely expertise, efficiency, and greater uniformity in the designated field of federal law, but it contravenes the traditional notion of generalist judges because each court would have a narrow focus and might be vulnerable to capture.289 A few regional circuits have experimented with subject matter panels in various substantive areas, including oil and gas law.


284. See HRUSKA COMMISSION, supra note 2, at 228; Baker, supra note 6, at 946.


288. See REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, supra note 26, at 120-21; see also supra text accompanying notes 279-81 (exploring specialized appeals courts).

289. See Lawrence Baum, Specializing the Federal Courts: Neutral Reforms or Efforts to Shape Judicial Policy?, 74 JUDICATURE 217, 217 (1991); LONG RANGE PLAN, supra note 34, at 43 (Recommendation Sixteen).
which has enabled the courts to develop particularized expertise and realize certain economies. The Ninth Circuit successfully has employed Bankruptcy Appellate Panels that essentially embody this concept and correspondingly save the court's judicial resources.

The fourth proposal suggested the merger and reconfiguration of all present regional circuits into a single, centrally-organized entity. The option would provide certain efficiencies; however, initial institution could be disruptive and consequent implementation might be difficult to administer. The last recommendation was the consolidation of the existing appellate courts into approximately five "jumbo" circuits with larger judicial complements. This possibility would provide several benefits—such as diversity and some economies—that larger appeals courts have secured, although numerous observers, including judges, have criticized the approach because it could sacrifice collegiality and might erode consistency.

There are other alternatives that the Federal Courts Study Committee did not consider. One would place responsibility for error correction in three-judge district courts with certiorari jurisdiction in three-judge appellate panels, thereby capitalizing on district courts' larger judicial capacity. This idea would save appeals court resources, but the concept might necessitate an increase in the corps of district judges and it would impose substantial appellate responsibilities on these judicial officers, many of whom were appointed ostensibly because they possessed the expertise and temperament required for trial court service. Moreover, Congress and the judiciary could formally


291. See 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 208, at 65-91; see also 28 U.S.C. § 158(b) (1994) (prescribing panels for all appeals courts).


293. See REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, supra note 26, at 122-23. The existing circuits could be differently reconfigured or specific states, such as those in the Ninth Circuit, might be reassigned to courts, namely the Eighth or Tenth Circuits, other than those in which they are now situated. See Hruska Commission, supra note 2, at 236-37; see also Carl Tobias, Why Congress Should Not Split the Ninth Circuit, 50 SMU L. REV. 583, 596 (1997).


295. See LONG RANGE PLAN, supra note 34, at 131-32.

296. See Tobias, supra note 7, at 1401-02 (exploring related ways of assigning appellate
recognize the notion of discretionary review that the regional circuits may have already implemented de facto through devices, such as limitations on oral arguments and on written dispositions and enhanced reliance on staff, although discretionary review might not be constitutional and would substantially modify the appeal of right, which has a lengthy, rich history. 297

b. Ninth Circuit

Assuming that the commission will definitively determine that the Ninth Circuit does or will experience complications that are so problematic as to warrant treatment, it should assiduously explore the broadest feasible spectrum of potential solutions for addressing those difficulties. The most vexing issues that the entity must resolve are whether the many measures that the court has applied or might employ in the future will suffice, and if they will not, whether options that implicate Ninth Circuit realignment would improve the present or future circumstances of the court and the appellate system enough to justify implementation. It is impossible to predict exactly how the commission will answer these questions until the entity has comprehensively studied the relevant complications and applicable remedies. Nonetheless, some guidance can be afforded.

i. The Efficacy of Approaches that the Ninth Circuit Has Applied or Might Employ

The commission should first carefully scrutinize all of the approaches which the Ninth Circuit has effectuated or could use. The court has adopted, tested, or received most of the aforementioned past and present, and numerous proposed, internal and external reforms. 298 The Ninth Circuit has been a leader in developing and employing innovative mechanisms to treat the problems that it faces and that the other eleven appellate courts confront. Moreover, the Ninth Circuit has enthusiastically experimented with, and beneficially exploited, measures that the remaining appeals courts have invented or instituted.

297. See BAKER, supra note 25, 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); Tobias, supra note 7, at 1402-03; see also supra text accompanying notes 229-30. For more discussion of external reforms, see BAKER, supra note 25, at 229-86. 298. See supra text accompanying notes 228-96.
The Ninth Circuit also has relied upon certain alternatives that few courts have applied. Prominent illustrations are the administrative units, Bankruptcy Appellate Panels, and the limited en banc technique, the last of which deserves special attention because the mechanism's efficacy is critical to the future of the Ninth Circuit and of the large appeals courts. The Ninth Circuit correspondingly depends on an executive committee, which evaluates court operating procedures and makes proposals for their improvement to the entire circuit and which has authority to act between the court's regular meetings, during emergencies, and on less important matters. The Ninth Circuit concomitantly has implemented a special track for easily-concluded or less complex appeals that are submitted without oral argument. Moreover, court staff review all briefs and identify similar issues so that the circuit might consider them together and avoid conflicts, and staff conduct prebriefing conferences to clarify and narrow the issues for resolution and to explore settlement prospects. Furthermore, the court's enormous caseload has required it to maintain a substantially larger complement of judges than any other circuit and prompted the Judicial Conference to recommend that Congress authorize ten new judgeships for the court.

Much information now suggests, and the commission may determine, that the apparent efficacy of most non-structural solutions that the Ninth Circuit has employed as well as its longstanding and future willingness to invent and test novel concepts and to experiment with and adopt nascent alternatives that additional courts create or study groups or writers propose will suffice.

ii. The Efficacy of Structural Approaches for the Ninth Circuit

If the commission conclusively finds these measures to be deficient, numerous ideas indicate that structural approaches might not be efficacious enough to deserve implementation. First, reconfiguration would be disruptive for several reasons that not only implicate the generic adverse effects on precedent and judicial administration mentioned above but also that pertain more specifically to the Ninth Circuit. For example, the court's division could lead to inconsistent

299. See supra text accompanying notes 42-45, 290.
300. See BAKER, supra note 25, at 79.
301. See id. at 82; see also supra text accompanying notes 44-45.
302. See supra text accompanying notes 44, 68.
303. The court has applied many additional measures, most of which I alluded to earlier. See SECOND S. 956 POSITION PAPER, supra note 77, at 4.
304. See supra text accompanying notes 223-25.
application of business, maritime, and utility law in each new circuit on the West Coast, complicating commerce and requiring parties to research the precedent of multiple courts for any potential cross-circuit transaction.\footnote{305} Splitting the court might correspondingly fragment the unified construction of federal laws governing natural resources and other fields that the circuit has consistently applied across the West.\footnote{306} The court's bifurcation also may encourage forum shopping between the two appellate tribunals.\footnote{307} Even if realignment were less drastic and disruptive, as well as more effective, California's substantial population and caseload mean that the Ninth Circuit defies practical division; no felicitous way of restructuring the court has yet been devised.\footnote{308} These difficulties, accordingly, show that the commission should not seriously consider reconfiguration until the entity has meticulously scrutinized a broad spectrum of less disruptive, and ostensibly more promising, possibilities and clearly concluded that they are inadequate.\footnote{309}

iii. The Systemic Efficacy of Structural Approaches for the Ninth Circuit

Should the commission definitively determine that realignment of the Ninth Circuit is in the court's best interest, the entity must carefully consider whether restructuring is superior for the entire appellate system. Several ideas which complement the general complications relating to precedent and judicial administration,\footnote{310} suggest that division would be inadvisable. An important reason why reconfiguration is inappropriate is that Ninth Circuit bifurcation would afford virtually no systemic benefit.\footnote{311} Splitting the court fails to remedy any significant problems

\footnote{305. See Second S. 956 Position Paper, supra note 77, at 5-6.}
\footnote{306. See S. 948 Hearing, supra note 49, at 286 (statement of Sen. Wilson); id. at 508 (statement of Michael Traynor). Division also could increase the fragmentation of federal law more generally. See supra text accompanying note 283.}
\footnote{307. See Second S. 956 Position Paper, supra note 77, at 3. Division would require duplicative personnel, administration and courthouses and reduce the court's federalizing function and diversity. See id.; supra notes 78, 218-19 and accompanying text; see also infra notes 310-12 and accompanying text (affording more reasons why division is inadvisable).}
\footnote{308. See infra text accompanying notes 313, 317-21.}
\footnote{309. See supra text accompanying note 224 (recommending realignment "only when compelling empirical evidence demonstrates" adjudicative or administrative disfunction in a court so that it cannot continue to deliver quality justice and coherent, consistent circuit law in the face of increasing workload.). The court has invented or used many effective non-structural options which have apparently resolved its major problems.}
\footnote{310. See supra text accompanying notes 223-25.}
\footnote{311. See Baker, supra note 6, at 945-49; see also Alfred T. Goodwin, Splitting the Ninth Circuit—No Answer to Caseload Growth, Or. St. B. Bull., Jan. 1990, at 10, 11; Tobias, supra note 7, at 1386-90.}
that the circuit might be experiencing; division would simply defer resolution of two courts' difficulties. Distributing the current docket among multiple circuits will merely shift, rather than reduce, the workload. The total quantity of cases decided would remain identical, despite the number of courts that address the appeals. In short, bifurcating the Ninth Circuit today would minimally improve the appellate system.

The Ninth Circuit also has been, and will probably continue to be, the exemplar for most, but especially for the large, appeals courts. For instance, it has been the acknowledged leader in developing and applying creative measures to treat the complications that many regional circuits do and will confront. Thus, were the Ninth Circuit restructured, the appellate system would lose the preeminent appeals court for experimenting with salutary solutions to these problems. Splitting the Ninth Circuit could correspondingly be inadvisable because division effectively would eliminate a primary candidate for designation as, or inclusion in, a jumbo appellate court, should this approach be deemed superior. Moreover, Ninth Circuit reconfiguration may prove irrevocable because it might foreclose implementation of potentially efficacious alternatives, such as combining the twelve regional appeals courts into fewer jumbo circuits. The above examination, therefore, indicates that Ninth Circuit realignment would not be best for the appellate system.

iv. Analysis of Structural Approaches

If the commission conclusively decides that the finest solution for the Ninth Circuit and all of the appeals courts is restructuring the present Ninth Circuit, the entity should determine which reconfiguration is superior by consulting the numerous options that are available. The logical starting point would be the various approaches that Congress has examined over the years when considering realignment. It is important to remember that senators and representatives have adopted none of the proposals proffered partly because the court resists practical restructur-


313. If Congress adopts any proposals for dividing the Ninth Circuit that it has seriously considered, the court may well remain large, and this could dilute my ideas' force.

314. See supra text accompanying notes 253, 311. These problems indicate that the commission should only seriously evaluate realignment once it has exhausted many, less dramatic and disruptive, and more promising, prospects. Ideas in this paragraph will have more future importance if caseload growth and congressional and judicial inaction essentially continue so that the other circuits increasingly resemble the Ninth Circuit. See supra text accompanying note 226.
ing. This situation can be ascribed substantially to the California conundrum. The state is responsible for more than a majority of Ninth Circuit cases, and the only effective way to treat California is by creating a one-state appellate court or by dividing California and assigning some of its four federal districts to different appeals courts; both prospects are essentially unprecedented and would impose disadvantages.315

The most general possibilities for reconfiguring the Ninth Circuit include trifurcation and bifurcation. Fashioning three appellate courts warrants limited evaluation because the commission will probably find that this potential remedy is comparatively ineffective. For example, the insufficiently large caseload and certain administrative and political realities, including the expense and replication of management structures seemingly make trifurcation infeasible, although a few senators did allude to the idea during the July 1997 floor debate.316

Some observers have advanced and analyzed numerous methods of bifurcating the Ninth Circuit. One prominent illustration is the establishment of a new appeals court comprising the five states of the Pacific Northwest, although this alternative would unequally apportion the current docket.317 A related, recent proposal would add Arizona to these jurisdictions, but the approach fails to cure the imbalanced case distribution or to honor the notion of contiguity, which the Hruska Commission posited as an important criterion for creating appellate courts.318

Additional options frontally attack the problems, particularly implicating appeals, that California's great magnitude imposes. One controversial suggestion would divide the state and place certain of its districts in a specific regional circuit and the remainder in another.319 The potential for each appellate court to interpret California law differently might prove troubling.320 The Hruska Commission and a few writers have deemphasized the significance of possible conflicts partly because a similar situation presently obtains in the regional circuits.321 Nonetheless, the prospect of splitting California has engendered relatively limited support.

315. See infra text accompanying notes 317-21.
318. See supra text accompanying notes 21, 57-58.
319. See Hruska Commission, supra note 2, at 238-39; see also supra text accompanying note 24.
321. See id.; see also Hellman, supra note 24, at 1281.
A second alternative that similarly attempts to allocate the docket more evenly would be an appeals court which consists exclusively or essentially of California. The Hruska Commission found that a one-state circuit could lack the diversity which judges who have practiced and lived in different states afford.\(^\text{322}\) The entity expressed concern that a lone senator who served multiple terms and was actively involved in judicial appointments might shape a court for an entire generation.\(^\text{323}\) These disadvantages mean that this approach has received little serious consideration.

It also would be possible to reconfigure the Ninth Circuit by transferring states that are currently included in the court to other regional circuits, namely the Eighth or Tenth Circuits. For example, some observers have periodically entertained the idea of moving Arizona to the Tenth Circuit, and a few senators broached that proposition as recently as 1995.\(^\text{324}\) A related option might be the establishment of an appellate court comprising the states of the intermountain West, which are presently situated in the Ninth and Tenth Circuits.\(^\text{325}\) Those alternatives have secured minimal support because they apparently have been deemed quite unconventional.

In the final analysis, the existing Ninth Circuit seemingly defies feasible realignment. Much information now suggests, and the commission may well find, that the preferable approach would be to leave the court as currently constituted and attempt to improve it through continued application of the many effective mechanisms that the circuit has employed and through implementation of numerous efficacious measures that other courts have used or that study groups or writers have suggested. The ideal mix of reforms cannot be conclusively identified until the entity has completed its evaluation; however, I can proffer some guidance.

Devices, such as administrative units, Bankruptcy Appellate Panels, and computerized issue coding, that clearly have been beneficial deserve ongoing use.\(^\text{326}\) Options, including the limited en banc procedure and substantial reliance on staff, that have yielded unclear, and even controversial, results,\(^\text{327}\) and alternatives, such as the appellate commissioner,\(^\text{328}\) that appear promising probably warrant continued employ-

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322. See Hruska Commission, supra note 2, at 237. The commission characterized this attribute as a "highly desirable, and perhaps essential, condition" for creating circuits. See id.; see also supra text accompanying notes 65, 218, 293.
323. See Hruska Commission, supra note 2, at 237.
324. See id. at 236-37; supra note 124.
325. See Hruska Commission, supra note 2, at 236-37; Tobias, supra note 293, at 596.
326. See supra text accompanying notes 42, 68, 290.
327. See supra text accompanying notes 43-45, 300-01.
328. See supra text accompanying note 254.
ment or experimentation with close assessment of their effectiveness. The commission’s examination also should clarify the efficacy of various techniques that the regional appellate courts and the Ninth Circuit have applied.329

An important set of actions that Congress and President Clinton could implement in the near term involves the infusion of resources. One significant form that this activity might assume is the expeditious appointment of judges for the Ninth Circuit’s ten vacancies. Another is seriously considering authorization of the nine new judgeships recommended by the Judicial Conference. Congress correspondingly could approve more non-judicial personnel for the court. These increased resources would be responsive to concerns regarding the time that the Ninth Circuit consumes in deciding appeals; however, additional judges and staff may impose certain disadvantages, such as intracircuit inconsistency and greater bureaucratization.330

If the commission definitively concludes that the Ninth Circuit must be restructured, the entity should assess the potential reconfigurations canvassed above, and any new realignments that it can develop, in light of several criteria. One helpful group of standards is the factors that the Hruska Commission articulated a quarter century ago, most of which have much continuing validity.331 For example, the ideas that appeals courts should be comprised of at least three contiguous states and ought to include jurisdictions with diverse populations, legal business, and socioeconomic interests retain considerable vitality today. The commission also must attempt to divide the caseload evenly between the proposed courts and to allocate judgeships in a manner that affords each new regional circuit sufficient members to ensure the prompt, fair, inexpensive, and consistent resolution of appeals.332

III. CONCLUSION

Congress recently authorized a Commission on Structural Alternatives for the Federal Courts of Appeals. This entity must capitalize on its valuable opportunity to analyze comprehensively the regional circuits and formulate constructive recommendations that will enable the courts to treat the crisis of volume. If the commission systematically evaluates the problems that the regional circuits do and will face and efficacious remedies to these difficulties, the courts should be able to solve the complications that they will confront in the next century.

329. The Ninth Circuit also may want to review measures which other courts have successfully applied or which study groups or writers have proposed, and this survey could reveal mechanisms that the Ninth Circuit might profitably implement or test.
330. See, e.g., supra text accompanying notes 273-78.
331. See supra note 21.
332. See Tobias, supra note 7, at 1410-11; Tobias, supra note 293, at 600.