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NATURAL RESOURCES AND THE NINTH CIRCUIT SPLIT

BY

CARL TOBIAS*

Congress recently considered some proposals to split the Ninth Circuit, proposals that could have far-reaching effects on the environment, public lands, and natural resources. This Article first looks at some of the recent developments in Congress, particularly the authorization of a national study commission to examine the federal appeals courts. Professor Tobias predicts that the Ninth Circuit will be split during the next decade. He cautions against using political considerations to conduct legislative policymaking with respect to the federal courts. He suggests that those concerned about the environment gather reliable information and explore alternatives to circuit-splitting. If Congress decides to bifurcate the Circuit, he suggests that it examine how districts will be realigned, particularly in terms of concepts such as ecosystems, endangered species habitats, wildlife corridors, or river drainages, and in terms of specific natural resources such as old growth forests, salmon, and grizzly bears.

I. INTRODUCTION

Those concerned about the environment, public lands, and natural resources, as well as about the federal courts in the West and the nation, closely monitored the debate over a controversial proposal by the 104th Congress to split the United States Court of Appeals for the Ninth Circuit. In the initial session of the 104th Congress, the Senate Judiciary Committee approved Senate Bill 956 (Proposal), a proposal which would have created a new Twelfth Circuit comprised of Alaska, Arizona, Idaho, Montana, Nevada, Oregon, and Washington, leaving California, Hawaii, Guam, and the Northern Mariana Islands in the Ninth Circuit. The Judiciary Committee decision was significant because no proposal for bifurcating the Circuit had ever advanced so far, and the second session of the 104th Congress might well have divided the Circuit. A split of the Circuit could have substantially affected the environment, public lands, natural resources, the federal judicial system in the western United States, and the

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country. During March 1996, however, the sponsors of Senate Bill 956 decided that they lacked the necessary votes to pass the proposal and agreed to a compromise which would have authorized a national commission to study the federal appeals courts. The House of Representatives accorded this proposal little attention, and the 104th Congress adjourned in October without passing either the study commission proposal or the circuit-dividing bill.

There are several important reasons why those interested in natural resources and the federal courts cannot assume that the circuit-splitting issue is moot. First, bifurcation’s proponents introduced legislation that would have divided the Ninth Circuit relatively soon after the 105th Congress convened. The first session of the 105th Congress did not pass the proposed legislation. However, it did authorize a study which would emphasize the Ninth Circuit, an analysis that has apparently become a condition precedent to serious consideration of circuit-splitting. Second, the pressure to split the Ninth Circuit will probably build as the Circuit’s caseload, population, and perhaps membership, continue to increase, as more new judges join the Circuit who are less committed to maintaining its current structure, and as Congress persists in authorizing additional judgeships and splitting circuits as solutions to docket growth.

The remarkable quantity and quality of resources that exist within the Ninth Circuit also emphasize bifurcation’s critical nature. For instance, a significant number of the country’s national parks, such as Glacier, Grand Canyon, and Yosemite, are located within the Ninth Circuit. Moreover, numerous wilderness areas, including the Frank Church River of No Return and the Bob Marshall Wilderness Areas, and many wildlife refuges, such as the Arctic and Malheur National Wildlife Refuges, are within the Circuit’s jurisdiction. Indeed, an astounding seventy percent of the federal public lands in the entire United States are within the Ninth Circuit’s purview.

Finally, division today would be inadvisable in the absence of empirical data clearly demonstrating that the Circuit is experiencing severe difficulties and that circuit-splitting is the best solution.

These ideas mean that the possibility of bifurcating the Ninth Circuit warrants analysis. This Article undertakes that effort. Part II first evaluates developments relating to the circuit-dividing proposals that Congress explored during 1995, 1996, and 1997. Finding that the proposals acquired considerable momentum in the 104th Congress, Part III assesses the prospects for splitting the Circuit. Because the 105th Congress closely considered the bills sponsored by bifurcation’s advocates, this Article calls for the collection, analysis, and synthesis of sufficiently reliable information to support fully informed decisionmaking and for the development of fea-

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sible alternatives to the Ninth Circuit split. These are duties which the recently authorized commission will ostensibly discharge.

II. RELEVANT DEVELOPMENTS IN THE 104TH CONGRESS

In May 1995, senators representing Alaska, Idaho, Montana, Oregon, and Washington introduced legislation which would have bifurcated the Ninth Circuit. Senator Slade Gorton (R-Wash.) and Senator Conrad Burns (R-Mont.) led the battle to divide the Circuit, while Senator Orrin Hatch (R-Utah), Chair of the Judiciary Committee, conducted a hearing on Senate Bill 956 during September of that year.

Proponents enunciated three principal arguments in support of the proposal, and critics developed a number of responses as well as arguments against splitting the Circuit. First, the advocates claimed that the Circuit's gargantuan size creates complications. Those problems include geographic magnitude, travel and related costs, the population base served, the substantial complement of judges (twenty-eight), the Circuit's docket and concomitant time for deciding cases, and the costs of operating the Circuit.

Critics of Senate Bill 956 offered several responses to the ideas involving size. They asserted that the Circuit has instituted procedures which address the difficulties attributable to size. For example, the location of circuit administrative units in Pasadena and Seattle, where appeals can be orally argued, responds to the concern about the distances that counsel and parties must travel. Opponents also contended that great size is an advantage. For instance, it offers economies of scale, and size provides considerable diversity in terms of the complexity and novelty of appeals and in terms of judges' race, gender, political viewpoints, and geographic origins.

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9 Id.

Another major argument of the proposal's sponsors was that the Circuit's case law is inconsistent. They observed that the statistical opportunities for conflicts are substantial because, for example, 3276 combinations of three-judge panels might theoretically be comprised to address one question. The Ninth Circuit Executive Office and federal courts experts who have evaluated Circuit decision-making have found minimal inconsistency. The Circuit has correspondingly implemented mechanisms to treat possible inconsistency. For instance, staff attorneys review every case and code the issues for consideration into a computer. The Circuit then assigns to the same three-judge panel those appeals which raise analogous questions and are ready for resolution at the same time.

The third important contention of the proposal's advocates was that California judges, cases, and perspectives dominate the Pacific Northwest. This concept may reflect proponents' dissatisfaction with the Ninth Circuit's determinations in areas such as environmental law and natural resources. Senator Conrad Burns (R-Mont.), an original cosponsor

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11 See 141 Cong. Rec. S7504 (daily ed. May 25, 1995) (statement of Sen. Slade Gorton (R-Wash.)) (asserting that judges are unable to keep abreast of legal developments, and that the Circuit's legal opinions are narrow with little precedential value); see generally Tobias, supra note 6, at 1369-71 (presenting Sen. Mark Hatfield's (R-Or.) argument that the increased caseload creates greater opportunities for inconsistency).


14 Redrawing Circuit Boundaries, supra note 6, at 939; see also Position Paper, supra note 10, at 5-6 (discussing how size has improved decisionmaking and judicial administration); Arthur D. Hellman, Central Staff in Appellate Courts: The Experience of the Ninth Circuit, 68 Cal. L. Rev. 937, 945 (1980) (discussing the Ninth Circuit's calendaring process).

15 Redrawing Circuit Boundaries, supra note 6, at 939.

16 Id.

17 See 141 Cong. Rec. S7505-06 (daily ed. May 25, 1995) (statement of Sen. Conrad Burns (R-Mont.)) (stating that California generates the majority of Ninth Circuit cases); 141 Cong. Rec. S7504 (daily ed. May 25, 1995) (statement of Sen. Slade Gorton (R-Wash.)) (stating that California provides 55% of the Ninth Circuit case filings, and that the Ninth Circuit is dominated by California judges and judicial philosophies); see generally Tobias, supra note 6, at 1371-73 (quoting statements of Sen. Slade Gorton (R-Wash.), Sen. Conrad Burns (R-Mont.), and Sen. Mark Hatfield (R-Or.)).

18 See, e.g., Bennett v. Spear, 117 S. Ct. 1154 (1997) (reversing Ninth Circuit decision that held that farmers and irrigation district did not have standing to file a citizen suit under the Endangered Species Act); Meghrig v. KFC Western, Inc., 516 U.S. 479 (1996) (reversing Ninth Circuit decision that held citizen suit provision of Resource Conservation and Recovery Act authorized cause of action to recover the cost of prior clean up of toxic waste site that no longer posed a threat to health or the environment); Robertson v. Methow Valley Citizen Council, 490 U.S. 332 (1989) (reversing Ninth Circuit decision that upheld citizen group challenge to Forest Service issuance of a special use permit); Amoco Prod. Co. v. Gambell, 480 U.S. 531 (1987) (reversing Ninth Circuit decision granting a preliminary injunction against a Department of Interior sale of oil and gas leases).
of the proposed legislation, claimed that a significant reason for its introduction was an increase in litigation against economic activities, such as timber and mining, which jeopardizes local economic stability. Senator Burns subsequently stated that the current Ninth Circuit deprives states which rely heavily on resource management the opportunity to have judges who might be more sensitive to local needs decide appeals implicating environmental issues. Other proponents of Senate Bill 956, however, have specifically disclaimed these ideas. The Senate Committee Report (Report) attending the bill expressly disavowed discontent with the Circuit’s decisions in the natural resources field as a proper basis for splitting the Circuit, even as the Report recognized that some sponsors had evinced this concern.

Numerous opponents of dividing the Circuit denominated the bifurcation effort as environmental gerrymandering, claiming that Senate Bill 956 proponents were attempting to establish a new Twelfth Circuit which would be more responsive to the development of natural resources and suggesting that the preferable way to realize substantive legal change is by convincing Congress to alter the applicable laws. Critics have correspondingly challenged the sponsors’ basic notion that the Circuit’s judges who sit in California are idiosyncratic and identical. Analysis of the judges’ philosophies and the computerized, random selection of panels undermine efforts to stereotype those Circuit members from California. Opponents of the circuit-split proposal also claimed that the Circuit’s record in resolving environment disputes was relatively neutral.

Several additional contentions favored circuit-splitting. Advocates of bifurcation argued that members of a smaller circuit, such as the projected Twelfth Circuit (which would have thirteen judges) would be more collegial, thus improving efficiency. This idea could be correct, even though

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19 Conrad Burns, Gorton-Burns Bill Would Split the Ninth Circuit Court of Appeals; Burns to Hold Up Judicial Nominations Until Bill is Approved (May 25, 1995) (press release, on file with author).
23 S. 948 Hearings, supra note 22, at 284-85 (testimony of Sen. Pete Wilson (R-Cal.)); Redrawing Circuit Boundaries, supra note 6, at 941; Tobias, supra note 6, at 1372.
24 S. 948 Hearings, supra note 22, at 284-85 (testimony of Sen. Pete Wilson (R-Cal.)).
25 S. REP. No. 104-197, at 27; see infra Part III (specifying the breakdown of Ninth Circuit opinions that were “pro-environment” and “con-environment”).
26 Tobias, supra note 6, at 1385-86; see generally FRANK M. COFFIN, ON APPEAL: COURTS, LAWYERING, AND JUDGING 213-29 (1994) (stressing the importance of collegiality within a court to quality judicial work and describing how a court can achieve and maintain collegiality).
familiarity might also foster deleterious routinization and could even lead to strong disagreements. Critics of circuit-splitting contended that the proposed, smaller Ninth Circuit would have a significantly less advantageous ratio of three-judge panels to cases than the new Twelfth Circuit and a considerably less beneficial ratio than the current Ninth Circuit. Critics also claimed that the proposed Twelfth Circuit would impose substantial administrative costs, essentially replicating functions which the existing Ninth Circuit was already performing effectively. They argued that bifurcating the Circuit would fragment the Circuit’s unified construction of federal environmental and natural resources law which it has enforced consistently in the West and across ecosystems that span the political boundaries of the two proposed circuits.

In autumn 1995, the sponsors of Senate Bill 956 conducted discussions with some Judiciary Committee members and a few senators from states which the Ninth Circuit’s bifurcation would have affected. Arizona apparently assumed significance for Senate Bill 956 champions who considered the Committee vote of Senator Jon Kyl (R-Ariz.) important, and the state’s docket, population, and Ninth Circuit judges valuable in securing felicitous division. The advocates had first explored the possibility of placing Arizona in the Tenth Circuit, but abandoned this prospect because it violated the tradition of not shuffling states between courts of appeal.

In a December 1995 Senate Judiciary Committee markup session, the Committee agreed on an amendment which placed Arizona and Nevada in the proposed Twelfth Circuit, authorized thirteen judges for that Circuit, and located its headquarters in Phoenix. Committee members, except for Senator Howell Heflin (D-Ala.), approved the amended proposal in an 11-7 vote along party lines. Senator Dianne Feinstein (D-Cal.) vociferously fought the amendment for several reasons. Most important many advantages which the new Twelfth Circuit would have attained would have been at the expense of the proposed Ninth Circuit. For example, the proposed Ninth Circuit would have had a detrimental ratio of three-judge panels to cases and would essentially have been a one-state circuit.

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27 Position Paper, supra note 10, at 3; S. 956 Hearings, supra note 8, at 29-31 (testimony of Chief Judge Clifford Wallace).
29 S. 956 Hearings, supra note 8, at 30 (testimony of Chief Judge Clifford Wallace); Position Paper, supra note 10, at 5; see S. 948 Hearings, supra note 22, at 508 (testimony of Michael Traynor, Chair, Sierra Club Legal Defense Fund) (affording earlier expression of idea); S. 948 Hearings, supra note 22, at 285 (statement of Sen. Pete Wilson (R-Cal.)) (same).
30 See S. Rep. No. 104-197, at 5-6 (summarizing the hearing on September 13, 1995).
33 Markup Hearings, supra note 31; S. Rep. No. 104-197, at 19-20, 29-31 (Sen. Feinsten (D-Cal.) argued the amendment was a political move that amounted to judicial gerrymandering); Flynn, supra note 31.
tor Feinstein offered an amendment which would have authorized a national commission to evaluate the structure of the appellate courts; however, the Committee rejected her proposal by one vote.

The day before the Committee markup, Governor Pete Wilson (R-Cal.) wrote Senator Orrin Hatch (R-Utah) to register his vigorous opposition to any bifurcation of the Ninth Circuit until an objective assessment of the Circuit was concluded. He observed that the division would promote inconsistency along the West Coast in specific areas, such as natural resources law. Chief Judge Clifford Wallace contacted the one hundred senators to state why the Circuit Judicial Council and practically all of the Circuit’s active judges wanted the Circuit kept intact and to request that Congress authorize an evaluation of the appellate system. Ninth Circuit Judge Charles Wiggins wrote Senator Feinstein to express his strong opposition to Senate Bill 956, to encourage the Senator to fight the proposal on the floor, and to call for a national study commission.

During March 1996, the champions of Senate Bill 956 attempted to have the Senate consider the bill in the context of federal courts appropriations legislation. Much substantive debate on the proposed division's merits ensued; however, the bill's advocates concluded that they lacked the requisite votes to pass it. Proponents, therefore, agreed to a proposal for creating a national study commission which passed easily with bipartisan support. The proposal was assigned to the House Subcommittee on Intellectual Property and Judicial Administration, which Representative Carlos Moorhead (R-Cal.) chaired. The proposal for a national committee remained in that subcommittee until September, when several senators threatened to attach the study commission proposal to court appropriations legislation, and this led Representative Moorhead to move the proposal out of his subcommittee. However, Congress adjourned before both Houses could consider the study commission, although it did appropriate $500,000 for a study.

In short, individuals and entities interested in the environment, public lands, and natural resources, as well as the federal courts in the West, closely tracked legislative developments relating to Senate Bill 956 during the 104th Congress. The proposal's passage might have substantially affected environmental resources as well as the federal, civil, and criminal

34 Markup Hearings, supra note 31.
35 Id.
36 Letter from Pete Wilson, Governor of California, to Sen. Orrin Hatch (R-Utah), Chairman, U.S. Senate Judiciary Comm. (Dec. 6, 1995) (on file with author).
justice systems. In the end, Congress did not split the Ninth Circuit or approve a study commission.

III. PROSPECTS FOR THE NINTH CIRCUIT'S DIVISION

Members of Congress who favor division of the Ninth Circuit introduced a circuit-splitting proposal again in the 105th Congress. Once more, the three principal reasons articulated by advocates of bifurcation were the Circuit's enormous size, inconsistency of the Circuit's case law, and California's dominance of the Circuit. These justifications were at least as applicable at the outset of the 105th Congress as they were during the 104th Congress. Indeed, champions of circuit-splitting contended that certain aspects of the Circuit's operations had deteriorated since 1995.

Proponents of the split argued that the number of individuals whom the Circuit serves as well as the size of the Circuit's caseload have continued to grow and will increase in the future, while the Circuit had reduced only minimally the time which it requires for resolving appeals. Opponents of circuit-splitting could have responded by showing that the Circuit had improved its disposition of appeals in terms of several parameters, such as the speed with which judges write opinions once the cases are in their hands. Critics might also have observed that the Circuit could have significantly expedited appellate dispositions had it been operating with the full complement of active judges authorized. Indeed, one argument against the proposed split is that the Circuit could resolve appeals much more promptly if the nine additional judges whom the Judicial Conference has requested were authorized and appointed. Of course, if this occurred

42 See supra notes 7-25 and accompanying text (articulating reasons given for splitting the Circuit during the 104th Congress); see generally Tobias, supra note 6, at 1366-73 (discussing the arguments for bifurcation, including size, inconsistency, and California's dominance).
43 143 CONG. REC. S1104 (daily ed. Feb. 6, 1997) (statement of Sen. Conrad Burns (R-Mont.)); see S. REP. No. 104-197, supra note 20, at 9-10 (discussing how the Ninth Circuit's size has contributed to delay in processing cases); 141 CONG. REC. S7504 (daily ed. May 25, 1995) (statement of Sen. Slade Gorton (R-Wash.) (stating that the Ninth Circuit is the fastest growing circuit, and that caseloads are becoming larger).
44 S. REP. No. 104-197, at 28; POSITION PAPER, supra note 10, at 7; see also S. 956 Hearings, supra note 8, at 32 (testimony of Chief Judge Clifford Wallace) (stating out that the Ninth Circuit is the second most efficient court in deciding the cases once they are submitted to the judges).
45 See POSITION PAPER, supra note 10, at 7 (arguing that the median time of disposition is unlikely to improve substantially until the court is staffed with its full complement of judges); see also S. 956 Hearings, supra note 8, at 32 (testimony of Chief Judge Clifford Wallace) (same). During much of 1997, the Ninth Circuit Court of Appeals experienced vacancies in ten of its twenty-eight authorized judgeships. WILLIAM H. REHNQUIST, THE 1997 YEAR-END REPORT OF THE FEDERAL JUDICIARY (1997).
46 JUDICIAL CONFERENCE OF THE U.S., JUDICIAL CONFERENCE ACTS ON CAMERAS IN COURT (1996); Tobias, supra note 6, at 1411; see S. REP. No. 104-197, at 6 (pointing out that the issue to split the Ninth Circuit presents an immediacy not evident with respect to other circuits because the Ninth Circuit has requested an additional ten judges).
and the number of authorized judges increased to thirty-seven, circuit-splitting advocates might have made a stronger argument that the large judicial complement complicates the Circuit's management and, thus, compels bifurcation.

The other two major contentions advanced by supporters of the Ninth Circuit split, growing inconsistency in Circuit case law and California's dominance of the Circuit, seem less persuasive than the arguments relating to size. In fact, the Senate Judiciary Committee approved Senate Bill 956, even though considerable information suggested that intracircuit conflicts were not a serious problem and that California's dominance was not evident from analysis of the Circuit's environmental opinions. For instance, Professor Arthur Hellman, who has studied the Ninth Circuit more than any other legal academician, testified that evaluation of the Ninth Circuit precedent indicated minimal inconsistency. Senator Dianne Feinstein (D-Cal.) and Senator Edward Kennedy (D-Mass.) correspondingly found that an assessment of 129 recent opinions in the environmental area yielded 64 which were “pro-environment” and 65 which were “con-environment.” The Senate Committee Report concomitantly rejected dissatisfaction with the Circuit's decision-making in the natural resources field as an appropriate reason for bifurcation.

Certain factors examined above suggest that pressure to split the Ninth Circuit will continue increasing. For example, if nine more judges for the Circuit were authorized and appointed, a contingent of judges which exceeds by twenty the complement on the next largest circuit (the Fifth Circuit), the Ninth Circuit's size would afford proponents of bifurcation a strong argument. Thirty-seven judges could exacerbate the administrative problems of a circuit which may already be the most difficult circuit to manage. Moreover, expanding the Circuit's membership by nine

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47 See supra notes 11-25 and accompanying text (discussing these contentions in detail).


49 S. 956 Hearings, supra note 8, at 107.

50 S. Rep. No. 104-197, at 27; see supra notes 17-25 and accompanying text (discussing arguments of proponents of Senate Bill 956 that the Ninth Circuit be more responsive to the development of natural resources and arguments of opponents that the environmental record is relatively neutral). But see supra notes 17-25 and accompanying text (discussing the view that the Pacific Northwest's needs are underrepresented).

51 S. Rep. No. 104-197, at 27; see also infra notes 74-81 and accompanying text (arguing that political reasons such as attempting to secure court opinions favorable to the development of natural resources are inappropriate reasons for splitting the Circuit).

52 S. 956 Hearings, supra note 8, at 72 (testimony of Ninth Circuit Judge Diarmuid F. O'Scanlon); see supra note 46 and accompanying text (pointing out that increasing the number of judges may complicate the Circuit's management); see also supra note 26 and accompanying text (presenting the argument of circuit split proponents that a small court is more collegial). But see supra Part II (suggesting potential problems with familiarity between judges). The Fifth Circuit has seventeen judges.
judges may multiply the statistical opportunities for conflicting opinions which the Circuit's critics already contend are significant.\textsuperscript{53}

Even if Congress does not authorize additional positions for the Ninth Circuit, numerous judges will join the Circuit as replacements for members who assume senior status or resign. The future appointees will probably be less concerned about keeping the Circuit intact than the Circuit's members have historically been. Indeed, prior to the 104th Congress, no judge of the Ninth Circuit had publicly stated that the division was advisable.\textsuperscript{54} New appointees, who are not steeped in the Circuit's traditions, may simply be less committed to maintaining it's century-old structure.

Pressure to bifurcate the Circuit also will continue to build until the focus shifts to treating caseload increases rather than authorizing additional judgeships and dividing appellate courts.\textsuperscript{55} There are numerous structural and non-structural approaches besides adding judges and dividing circuits which may respond more effectively to mounting dockets. For example, Congress might restrict civil or criminal jurisdiction, create subject matter courts, or limit the right of appeal.\textsuperscript{56}

The Senate Committee Report accompanying the proposal that the Judiciary Committee approved apparently summarized and epitomized the views that increasing numbers of judges and congressional members will probably hold regarding the Ninth Circuit. The Report found that the Circuit "stands well apart from the other Federal judicial circuits and remains in a unique position. . . . [as] by far the largest court of appeals in the Federal system by any measure."\textsuperscript{57} The Report correspondingly asserted that "no other circuit presents anywhere near as compelling a case for being split" and that the Circuit's request for ten additional judges gave circuit-splitting an immediacy which was not evident for any other circuit.\textsuperscript{58}

In short, the 104th Congress seriously considered bifurcating the Ninth Circuit; the 105th Congress devoted some attention to the prospect and even could have split the Circuit. However, Congress decided instead to authorize a commission that will study the appellate courts. In any

\textsuperscript{53} See \textit{supra} note 12 and accompanying text (noting that 3,276 combinations of three-judge panels are possible). \textit{But cf. supra} notes 13-14 and accompanying text (finding minimal inconsistency in the Ninth Circuit's decisions).

\textsuperscript{54} S. Rep. No. 104-197, at 8, 20. Judge Diarmuid O'Scannlain suggested in testimony at the Senate hearing that he considered division appropriate and inevitable, but not imminent. See \textit{S. 956 Hearings, supra} note 8, at 69-71 (testimony of Judge Diarmuid O'Scannlain) ("I am convinced that it is inevitable that the [N]inth [C]ircuit be split and that the time for that split, while not yet imminent, may well be fast approaching.").

\textsuperscript{55} Tobias, \textit{supra} note 6, at 1386-95; see S. Rep. No. 104-197, at 18 (arguing that adequate and timely information is needed to find a better solution).

\textsuperscript{56} For a thorough analysis of these and numerous other options see \textit{RATIONING JUSTICE, supra} note 6, at 106-236. \textit{See also infra} notes 91-96 and accompanying text (discussing the creation of a court with national subject matter jurisdiction over appeals concerning environmental, public lands, and natural resources law).

\textsuperscript{57} S. Rep. No. 104-197, at 6.

\textsuperscript{58} \textit{Id.}; see \textit{supra} notes 46, 52 and accompanying text (arguing that adding judges may make it easier to resolve appeals but suggesting that proponents of bifurcation might then have a stronger argument).
event, pressure to divide the Ninth Circuit will only grow over the near term, and Congress probably will bifurcate the Circuit during the next decade. Part IV, therefore, explores potential responses to the possibility of bifurcation.

IV. SUGGESTIONS FOR THE FUTURE

Recommendations for the future warrant relatively brief examination in this Article because many broad suggestions regarding the appellate system and the Ninth Circuit have been afforded elsewhere. However, recommendations relating specifically to the Circuit and natural resources are rather difficult to formulate without better information on the Circuit and the entire appellate system. Nevertheless, it is possible to provide some general and particular ideas.

A. General Suggestions

1. Caseload Growth and the Appellate System

Numerous experts and institutions which have analyzed the appeals courts believe that the traditional congressional approach of approving additional judgeships and splitting circuits is ineffective and outmoded, especially as a solution to multiplying dockets. For instance, dividing the courts only redistributes, rather than diminishes, caseload, which is the real problem that the circuits face. Splitting circuits also irrevocably decreases the circuits' federalizing responsibility to harmonize the Constitution and national policy concerns with state and local policies, thereby reducing their role as national courts.

59 See, e.g., RATIONING JUSTICE, supra note 6, at 106-286 (discussing past, present, and future internal and external reforms of the federal courts of appeals); Tobias, supra note 6, at 1395-1415 (discussing solutions to the problems of docket growth, time needed to resolve appeals, and the large number of new judges needed in the Ninth Circuit); supra notes 36-38 and accompanying text (discussing the proposal to evaluate the appellate system).

60 See, e.g., RATIONING JUSTICE, supra note 6, at 99-105 (presenting the argument for a moratorium on dividing the Ninth Circuit); Martha J. Dragich, Once a Century: Time for a Structural Overhaul of the Federal Courts, 1996 Wis. L. Rev. 11, 45-49, 55-57 (discussing the impact of adding more judges and adjusting the Circuit structure); see also COMM. ON LONG RANGE PLANNING, JUDICIAL CONFERENCE OF THE U. S., LONG RANGE PLAN FOR THE FEDERAL COURTS 44-45 (1995) [hereinafter LONG RANGE PLAN] (recommending circuit restructuring only if compelling empirical evidence demonstrates adjudicative or administrative dysfunction in a court so that it cannot continue to deliver quality justice and coherent, consistent circuit law).

61 See, e.g., Redrawing Circuit Boundaries, supra note 6, at 948 (referring to a detailed study of the omnibus judgeship statute which found only a one year impact on the appeals-per-panel ratio); Alfred T. Goodwin, Splitting the Ninth Circuit—No Answer to Caseload Growth, Or. St. B. Bull., Jan. 1990, at 10-11 (predicting that the number of cases that must be heard by three-judge panels nationwide would remain the same and continue to grow no matter how many new circuits are formed); Patrick Higginbotham, Bureaucracy—The Carcinoma of the Federal Judiciary, 31 Ala. L. Rev. 261, 270 (1980) (seeing an increase in judges as the last resort and certainly not an option before discarding diversity jurisdiction).

62 CHARLES A. WRIGHT, THE LAW OF FEDERAL COURTS 10-13 (5th ed. 1994); John M. Wisdom, Requiem for a Great Court, 26 Loy. L. Rev. 787, 788 (1980); see also infra note 76 and
There is an imperfect understanding of the precise effects of mounting appeals and of many other phenomena which affect the modern appellate court system and specific regional circuits. This lack of comprehension correspondingly complicates efforts to formulate efficacious solutions to those difficulties that the courts are currently experiencing. Indeed, no thorough evaluation of the entire system or even individual courts has been conducted since the 1973 report of the Commission on the Revision of the Federal Court Appellate System (Hruska Commission Study).

The lack of reliable information about the gravest problems confronting the circuits and effective remedies for these problems has numerous important consequences. Most significant, the lack of information leaves unclear the wisdom of applying various approaches and means that the implementation of many apparent solutions, including a particular circuit’s division, could prove misguided. For example, it would be unfortunate to split the Ninth Circuit today, possibly committing the nation to an irretrievable course of action, only to learn subsequently that a different remedy would have been preferable for the Ninth Circuit or the country.

These ideas suggest that it was appropriate for Congress to authorize a national study commission. The Commission’s purpose is to “study the present division of the United States into the several judicial circuits [and] the structure and alignment of the Federal Court of Appeals system, with particular reference to the Ninth Circuit,” for ten months and two months thereafter, the Commission must report “recommendations for such changes in circuit boundaries or structure as may be appropriate for the

63 See RATIONING JUSTICE, supra note 6, at 31-51 (discussing the crisis of volume); Carl Tobias, The New Certiorari and a National Study of the Appeals Courts, 81 CORNELL L. REV. 1264 (1996) (discussing whether increases in appellate filings have transformed the Ninth Circuit and whether an increase in judgeships will solve the problem); see also Dragich, supra note 60, at 25-28 (discussing current conditions in the Federal Courts of Appeals).

64 COMM. ON REVISION OF THE FED. COURT APPELLATE SYS., THE GEOGRAPHICAL BOUNDARIES OF THE SEVERAL JUDICIAL CIRCUITS: RECOMMENDATIONS FOR CHANGE, 62 F.R.D. 223 (1973) [hereinafter Hruska Commission]; see also S. REP. No. 104-197, supra note 20, at 3-4, 16-17 (presenting the view that the fundamental problem of circuit realignment is the lack of data and that a study commission like the Hruska Commission should be formed); infra note 72 and accompanying text (pointing out that the last study done was by the Hruska Commission in 1973).

65 In mid-November, a House-Senate Conference Committee agreed on a compromise which authorized a five-member study commission appointed by Chief Justice Rehnquist to study the issue for ten months. H.R. 2267, 105th Cong. § 305 (1997). Congress initially had been considering two study commission proposals. One proposal called for a report to be completed in two years. S. 248, 105th Cong. (1997); H.R. 908, 105th Cong. (1997). The other proposed that a report be returned within one year, or by June 30, 1998. S. 283, 105th Cong. (1997); H.R. 639, 105th Cong. (1997). The House passed House Bill 908 in June, which authorized a report to be completed within eighteen months. 143 CONG. REC. H3229-25 (daily ed. June 3, 1997) (statement of Sen. Howard Coble (R-N.C.)) (passed by a voice vote with two-thirds in favor of the bill). However, in July, the Senate passed an appropriations rider that would have split the Ninth Circuit. See S. 1022, 105th Cong. § 305 (1997) (passed by a vote of 55 to 45).
expeditious and effective disposition of the caseload of the federal Courts of Appeal, consistent with fundamental concepts of fairness and due process.\textsuperscript{66}

2. The Ninth Circuit

Much of the above also applies to the Ninth Circuit. Perhaps most importantly, the Circuit may not be experiencing difficulties that are sufficiently problematic to require treatment, especially with solutions which are as radical, potentially ineffective, and irrevocable as circuit-splitting. Even if it were clear that the Circuit is facing complications which are troubling enough to warrant remediation with circuit-splitting, bifurcation may be inadvisable primarily because California's size apparently precludes workable division.\textsuperscript{67} For instance, the realignment that Senate Bill 956 proposed would have created a sprawling Twelfth Circuit, dubbed the "stringbean circuit," and would have left an unprecedented two-state Ninth Circuit comprised of only California and Hawaii.\textsuperscript{68} Unless Congress authorizes three courts of appeal, the only way in which Congress can evenly split the Circuit caseload is by bifurcating California and by assigning the state's four federal districts to different appellate courts.\textsuperscript{69} This solution would also be unprecedented and could be problematic\textsuperscript{70} because the two new circuits might interpret California law differently.\textsuperscript{71}

In short, there is currently inadequate information on many relevant phenomena that affect the Ninth Circuit, particularly docket growth. The 1973 Hruska Commission study constituted the last comprehensive analysis of the Circuit.\textsuperscript{72} This dearth of reliable material seriously complicates efforts to evaluate the desirability of changes in the Circuit and the efficacy of proposed remedies, especially ones that are as potentially far-reaching as division. These propositions show the need for a thorough

\textsuperscript{66} H.R. 2267.
\textsuperscript{67} Tobias, supra note 6, at 1409-15.
\textsuperscript{68} S. 956, 104th Cong. (1995); S. REP. No. 104-197, at 7, 29-30 (1995); Hruska Commission, supra note 64, at 237 (discussing disadvantages of Circuit dominated by California). The appropriations rider that the Senate passed in the 105th Congress would have left California and Nevada in the Ninth Circuit and would have placed the remaining states and territories in the proposed Twelfth Circuit. S. 1022, supra note 65.
\textsuperscript{69} S. REP. No. 104-197, at 5-7; Hruska Commission, supra note 64, at 238-39; S. 956 Hearings, supra note 8, at 69-71 (testimony of Judge Diarmuid O'Scannlain); see generally Arthur D. Hellman, Legal Problems of Dividing a State Between Federal Judicial Circuits, 122 U. PA. L. REV. 1188 (1974) (exploring the consequences of dividing California between two circuits and mechanisms for avoiding or resolving conflicts).
\textsuperscript{70} S. REP. No. 104-197, at 7; Tobias, supra note 6, at 1413. But see Hruska Commission, supra note 64, at 238-39 (asserting that the dividing of judicial districts of California between two circuits raises no insolvable or unmanageable problems); Hellman, supra note 69, at 1281 (admitting that none of the conflicts that are likely to arise in the divided state situations are unique).
\textsuperscript{71} Hruska Commission, supra note 64, at 238-39.
\textsuperscript{72} More recent, but considerably less comprehensive, studies are the Long Range Plan, supra note 60; Judith A. McKenna, Federal Judicial Center, Structural and Other Alternatives for the Federal Courts of Appeals (1993); Report of the Federal Courts Study Comm. (1990) [hereinafter Federal Courts Report].
assessment of the Ninth Circuit, the difficulties that it is now confronting and will experience in the future, and developing solutions to those complications. The study should focus on problems that are attributable to increasing appeals and solutions to these problems. The analysis of the Circuit ought to be part of, or be coordinated with, a broader examination of the appellate system.\textsuperscript{73} If bifurcation is indicated, evaluators should attempt to designate the preferable division, while they must remember that no feasible method for reconfiguring the Ninth Circuit has yet been devised.

\textbf{B. Suggestions Relating More Specifically to Natural Resources}

\textit{1. Political Factors}

The desire to secure appellate court rulings which are more favorable to interests that would develop natural resources is an inappropriate basis on which to premise circuit-splitting. Indeed, the Senate Committee Report, which accompanied Senate Bill 956 and was ostensibly prepared as an advocacy document for bifurcating the Circuit, expressly and comprehensively delineated the reasons why the Judiciary Committee considered this motivation improper.

The Report first observed that "some proponents of a [Ninth Circuit] division have indicated support for splitting the Circuit based on outcomes in certain cases or on a perceived liberal bias on the part of California judges . . . [and] [f]requently cited . . . environmental cases affecting the northwest States."\textsuperscript{74} The Report next proclaimed that "[t]he committee does not support a split of the [N]inth [C]ircuit on those bases."\textsuperscript{75} The Report relied upon the testimony of then Chief Judge Wallace at the Senate Bill 956 Committee Hearing who stated that division of a "circuit in order to accommodate a regional interest is the antithesis of the federalizing function," and the contention of Senators Joseph Biden, Jr. (D-Del.) and Dianne Feinstein (D-Cal.) that a "split on such grounds would amount to insupportable political 'gerrymandering.'"\textsuperscript{76}

The Report further stated:

Although a number of parties have registered their dissatisfaction with certain environmental and other decisions of the [N]inth [C]ircuit, the committee finds such dissatisfaction an improper rationale for splitting the [C]ircuit [and] does

\textsuperscript{73} See \textit{supra} note 65 and accompanying text (explaining that House Bill 2267 directs the Commission to study the structure and alignment of the federal circuits in general with particular reference to the Ninth Circuit).

\textsuperscript{74} S. Rep. No. 104-197, at 8; see \textit{supra} notes 17-29 and accompanying text (discussing the argument that the Ninth Circuit should be split because of insensitivity to local needs in deciding environmental issues and the counter-argument that those critical of the Ninth Circuit's decisions should change the substantive laws and not restructure the court).

\textsuperscript{75} S. Rep. No. 104-197, at 8, 25-27 (asserting that regionalism and ideology play no part in the drawing of circuit boundaries).

\textsuperscript{76} Id., at 8; see \textit{supra} notes 29, 62 and accompanying text (stressing the importance of a unified construction of federal environmental and natural resources law within the Ninth Circuit).
not support altering circuit boundaries in order to achieve a given ideological outcome on the merits in any case or to benefit any regional interest.\textsuperscript{77}

The Committee was also “highly skeptical as a practical matter as to whether any significant ideological shift in appellate decisions could be achieved through a circuit split.”\textsuperscript{78} The Report found that the “philosophical tendencies of a particular judge are far more likely to be aligned with the President who appointed that judge than the State from which the judge came”\textsuperscript{79} and that the precedent of the former Ninth Circuit would probably have bound the proposed Twelfth Circuit.\textsuperscript{80} The Report concluded by characterizing as “questionable” the “propriety of considering the judicial philosophies and resulting opinions of particular judges or regions when examining circuit boundaries.”\textsuperscript{81}

During earlier 1990 hearings on a bill to split the Ninth Circuit, Senator Mark Hatfield (R-Or.) suggested that establishing a new Twelfth Circuit comprised of the five Pacific Northwest jurisdictions would honor Congress’s original intent when drawing appellate boundaries—to create circuits reflecting a regional identity by combining a “small set of contiguous states that shared a common background.”\textsuperscript{82} This idea might also support appellate court reconfiguration whereby current Ninth Circuit districts, such as Idaho and Montana, and present Tenth Circuit districts, such as Colorado, Utah and Wyoming, all of which are located in the intermountain West, could become part of the same appellate court.

Several propositions, more compelling than these concepts, also essentially derive from the notion of regionalism. First, basing an appellate court’s creation in 1998 on the aspiration to implement Congress’s century-old intent when delineating circuit boundaries appears outmoded.\textsuperscript{83} Indeed, it seems preferable to rely upon the idea of diversity, definable in terms of geographical, political, environmental or demographic differences, when constituting modern courts of appeal in a culture that relies on “law as the adhesive force binding a diverse population together.”\textsuperscript{84}

\textsuperscript{77} S. Rep. No. 104-197, at 8. The Committee expressed its “hope that the court of appeals will reach correct decisions on the law” and its view that “litigants are entitled to a full, fair, and expeditious determination of the merits of their case.... [but] [t]hey are not entitled to a given result.” Id.

\textsuperscript{78} Id.

\textsuperscript{79} S. Rep. No. 104-197, at 8-9. Sen. Jon Kyl (R-Ariz.) stated that “when we look at predictors of how a judge might rule, it is a far greater predictor as to who appointed that judge than the region of the country from which the judge comes.” Id.

\textsuperscript{80} S. Rep. No. 104-197, at 9; see also Bonner v. Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981) (holding that the new Eleventh Circuit is bound by precedent of the former Fifth Circuit); see generally Thomas E. Baker, Precedent Times Three: Stare Decisis in the Divided Fifth Circuit, 35 Sw. L.J. 687 (1981) (discussing the 1980 split of the former Fifth Circuit and correctly predicting that the new Fifth and Eleventh Circuits would be bound by the precedent of the former Fifth Circuit).

\textsuperscript{81} S. Rep. No. 104-197, at 9.

\textsuperscript{82} S. 948 Hearings, supra note 22, at 252 (testimony of Sen. Mark Hatfield (R-Or.)).

\textsuperscript{83} Tobias, supra note 6, at 1372.

\textsuperscript{84} Paul D. Carrington, A New Confederacy? Disunionism in the Federal Courts, 45 Duke L.J. 920, 940 (1996); see also Dragich, supra note 60, at 35-39 (noting society’s expectation and need for uniform laws throughout the country); see generally Martha Minow, MAK-
To the extent that regional factors might have applicability in particular cases, district judges arguably can examine the considerations. In appellate courts, the locales where judges are stationed ought to be irrelevant. The circuits also have an important federalizing responsibility. In short, local favoritism offends the essence of an appeals court, and the fragmentation of national law contravenes principles of federalism while political factors are rarely satisfactory premises for federal court policy making as significant as circuit-splitting.

2. Environmental Factors

Congress must insure that substantial, valid empirical data conclusively demonstrate that docket growth and other phenomena affecting the Ninth Circuit are troubling enough to warrant treatment and that division is the optimal solution before implementing this remedy. Nevertheless, bifurcation may be inevitable because other concerns, particularly political ones, could influence the ultimate determination. For example, most senators who represent the states of the Pacific Northwest possess rather conservative political views, especially regarding natural resources, and may continue to favor a split of the Ninth Circuit. Political considerations should not dictate legislative policymaking with respect to the federal courts. However, there is a limited sphere, which even Article III of the Constitution recognizes, where appropriate political factors can operate.
Persons and entities that are concerned about natural resources, the federal judicial system in the western United States, and the country must think realistically and creatively about potential approaches. These individuals and organizations should develop a broad range of feasible options which would make sense in terms of the West's natural resources, while honoring important values relating to the federal courts, such as expeditious, inexpensive, and fair resolution of appeals. Concerned people and groups may want to anticipate renewed calls for circuit-splitting by formulating viable alternatives to that possibility.

Illustrative is the creation of a court with national subject matter jurisdiction which would hear all appeals that involve the environment, public lands, and natural resources. The District of Columbia Circuit effectively functions as such a tribunal when environmental, public lands, and natural resources statutes require or permit appeals to that court. The Federal Circuit is also a helpful, general analogue. Scholars have specifically explored the ideas of science and environmental courts, which would offer certain benefits, namely specialized expertise in the substantive areas being reviewed. Nonetheless, this type of tribunal may entail


92 See, e.g., Clean Air Act, 42 U.S.C. § 7607(b)(1) (1994) ("A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title, any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5) of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia."); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9613(a) (1994) ("Review of any regulation promulgated under this chapter may be had upon application by any interested person only in the Circuit Court of Appeals of the United States for the District of Columbia."); see generally Sunstein, supra note 88 (discussing D.C. Circuit and "sagebrush venue").


94 FEDERAL ENVIRONMENTAL LAW 233-35 (Erica Dolgin et al. eds., 1974); see, e.g., James L. Oakes, Developments in Environmental Law, 3 ENVTL. L. REP. 50001, 50011-12 (1973) (discussing and advising against a special environmental court); Scott C. Whitney, The Case For Creating a Special Environmental Court System, 14 WM. & MARY L. Rev. 473 (1972) (discussing the creation of a special environmental court); G.J. Zimmerman, Synergy and the Science Court, 38 U. TORONTO FAC. L. Rev. 170 (1980) (discussing the structure, implications, problems, and limits of a Science Court with particular regard to Canada).
some disadvantages, primarily the potential for developing tunnel vision and for being captured by various constituencies, like regulated interests or specialized practitioners.95 Moreover, the federal judicial system has never formally employed subject matter courts in the natural resources field, partly because Congress and the judiciary have apparently preferred general courts.96

If Congress restructures or bifurcates the Ninth Circuit, those concerned about the treatment of natural resources and the federal courts may want to consider how the districts that are currently part of the Ninth Circuit should be realigned, particularly in terms of concepts such as ecosystems, endangered species habitat, wildlife corridors, and river drainages, or in terms of specific natural resources, such as old growth forests, salmon, or grizzly bears.

Concerned persons and entities could also examine realignment in terms of the distribution of natural resources or perceived viewpoints of judges in specific districts. Elevating these considerations over additional important substantive factors, such as economic growth, or significant procedural values, including federal court access, may be shortsighted or counterproductive.97 Concerned individuals and organizations might also think about the possibility of combining certain districts in the present Ninth Circuit with districts in other appellate courts. For instance, the resources and political perspectives in a few Ninth Circuit districts, namely Idaho and Montana, may resemble more closely those of several Tenth Circuit districts, such as Colorado and Wyoming.98 This approach could create appeals courts that have larger quantities of similar resources or more compatible viewpoints. This approach, however, may sacrifice diver-

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95 See, e.g., Harold H. Bruff, Specialized Courts in Administrative Law, 43 ADMIN. L. REV. 329, 335-36 (1991) (discussing disadvantages in the context of the Commerce Court and the Tax Court); Meador, supra note 91, at 482-84 (discussing disadvantages such as boredom and lack of intellectual challenge); William M. Richman & William L. Reynolds, Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition, 81 CORNELL L. REV. 273, 320 (1996) (discussing boredom, tunnel vision, and loss of prestige).

96 See supra notes 60, 66 and accompanying text (discussing legislation that requires or permits appeals of natural resources cases to D.C. Circuit). Of course, subject matter panels could be constituted within existing circuits. See FEDERAL COURTS REPORT, supra note 72, at 120-21 (discussing national subject matter courts); RATIONING JUSTICE, supra note 6, at 261-69 (same); see also Meador, supra note 91, at 477 (reporting that oil and gas appeals are assigned to a special panel of several judges in the Fifth Circuit who have developed expertise in the area).

97 See supra notes 88-90 and accompanying text (stressing that political factors should not dictate legislative policy making with respect to the federal judiciary); see also supra note 84 and accompanying text (discussing diversity).

98 For example, these states have similar landscapes, climates, and wildlife. They are also large, sparsely populated areas. Moreover, there is a large percentage of federally-owned land in these states. The political views of numerous senators from these states, such as Alaska's Ted Stevens (R), Idaho's Larry Craig (R), and Montana's Conrad Burns (R), are conservative, typically embracing the growth of local economies and control over private lands, rather than environmental preservation and conservation. See generally PENDLEY, supra note 89 (presenting the ideology of senators from the West).
sity of resources and perspectives.\textsuperscript{99} For example, circuit-splitting proponents encountered strong resistance when they broached the prospect of moving Arizona to the Tenth Circuit during the 104th Congress.\textsuperscript{100}

\textbf{V. Conclusion}

Those concerned about the environment, public lands, and natural resources as well as federal courts in the West and the nation should carefully monitor the work of the national study commission that the first session of the 105th Congress authorized. Those concerned must think imaginatively and pragmatically about the proposed bifurcation of the Ninth Circuit. Feasible alternatives to the Circuit's division are needed. The 104th Congress seriously considered the proposals that the 105th Congress evaluated and the Commission will now analyze. Systematic, creative anticipation would help to protect the enormous, exquisite natural resources of the West and honor values that are important to the federal judicial system.

\textsuperscript{99} For a discussion of diversity, see \textit{supra} note 84 and accompanying text and Oakes, \textit{supra} note 94.

\textsuperscript{100} See \textit{supra} notes 30-31 and accompanying text (discussing Senate Bill 956).