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## The Next Step for the Ninth Circuit

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# COMMENTARY

  

## THE NEXT STEP FOR THE NINTH CIRCUIT

CARL TOBIAS\*

Professor Arthur Hellman recently published a trenchant critique<sup>1</sup> of the report compiled by the Commission on Structural Alternatives for the Federal Courts of Appeals.<sup>2</sup> In *The Unkindest Cut: The White Commission Proposal to Restructure the Ninth Circuit*, he emphasizes that the report adduced little empirical data which demonstrate that the Ninth Circuit operates ineffectually.<sup>3</sup> Indeed, the commissioners candidly declared: “There is no persuasive evidence that the Ninth Circuit . . . is not working effectively . . .”<sup>4</sup> Despite this admission, the Commission prescribed drastic change with a divisional concept,<sup>5</sup> which Professor Hellman finds flawed.<sup>6</sup> He thus urges that Congress “reject the proposal and allow” the

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\* Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas. I wish to thank Michael Higdon, Peggy Sanner and Jeff Stempel for valuable suggestions, Angela Dufva for processing this piece, and Jim Rogers for generous, continuing support. Errors that remain are mine.

1. See Arthur D. Hellman, *The Unkindest Cut: The White Commission Proposal to Restructure the Ninth Circuit*, 73 S. CAL. L. REV. 377 (2000).

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

3. Hellman, *supra* note 1, at 378.

4. COMMISSION REPORT, *supra* note 2, at 29 (affording the identical admission for all of the regional circuits).

5. See *id.* at 40–50. See also *id.* at 60–62 (proposing that Congress authorize divisions for the other circuits as their numbers of appeals grow).

6. See Hellman, *supra* note 1, at 402. See also Recent Cases, *Final Report of the Commission on Structural Alternatives for the Federal Courts of Appeals*; and S. 253, *the Ninth Circuit Reorganization Act*, 113 HARV. L. REV. 822, 824–27 (2000) [hereinafter *Commission Critique*].

circuit to continue the successful experimentation which it has pursued for twenty years.<sup>7</sup>

The next step is crucial. Congress is now seriously considering three major bills. One would implement the Commission plan.<sup>8</sup> Another would split the court.<sup>9</sup> A third would treat Commission concerns by regionally assigning judges and modifying the limited en banc process.<sup>10</sup> The Ninth Circuit itself endorses the last option as a “reasoned, responsible alternative to [Senate Bill 253’s] radical restructuring.”<sup>11</sup> These proposals are among two dozen recommendations of an Evaluation Committee which is assessing the administrative structure and the operations of the circuit.<sup>12</sup> This essay undertakes an analysis of the Commission’s work, *The Unkindest Cut*, the Senate Bills, and the Ninth Circuit’s own efforts. I initially evaluate the article and then compare the measures being explored. My essay concludes with an examination of the best approach.

## I. DESCRIPTIVE ANALYSIS OF *THE UNKINDEST CUT*

Professor Hellman carefully assesses the Commission. He first discusses its origins, statutory charge, and the introduction of a bill that embodies the Commission plan.<sup>13</sup> The writer then scrutinizes the divisional suggestion for reorganizing the Ninth Circuit into three regionally based divisions. These divisions would function as semiautonomous decisional units<sup>14</sup> and have their own three-judge panels and en banc courts, whose opinions would only bind specific divisions.<sup>15</sup> A Circuit Division would resolve square interdivisional conflicts.<sup>16</sup> The author finds “abandonment of

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7. Hellman, *supra* note 1, at 402. For support of this view, see *infra* notes 69–70 and accompanying text.

8. See Federal Ninth Circuit Reorganization Act of 1999, S. 253, 106th Cong.

9. See Ninth Circuit Court of Appeals Reorganization Act of 2000, S. 2184, 106th Cong.

10. See Ninth Circuit Court of Appeals En Banc Procedures Act of 1999, S. 1403, 106th Cong.

11. Chief Judge Procter Hug, Jr., Responding to Ninth Circuit Concerns: The Innovative Work of the Evaluation Committee 4 (2000) (unpublished manuscript, on file with author).

12. NINTH CIRCUIT EVALUATION COMMITTEE, INTERIM REPORT (Mar. 22, 2000) [hereinafter COMMITTEE INTERIM REPORT].

13. Hellman, *supra* note 1, at 378–81. For a similar account, see *Commission Critique*, *supra* note 6.

14. See COMMISSION REPORT, *supra* note 2, at 41–45; Hellman, *supra* note 1, at 381–82.

15. See COMMISSION REPORT, *supra* note 2, at 41–45; Hellman, *supra* note 1, at 382–83.

16. See COMMISSION REPORT, *supra* note 2, at 45. The circuit chief judge and twelve active judges—four from each regional division—would serve staggered three-year terms. See *id.* See also Hellman, *supra* note 1, at 383.

circuit-wide stare decisis" the plan's "most radical aspect."<sup>17</sup> It would authorize intracircuit inconsistency by permitting judges to reject another division's precedent.<sup>18</sup> The Circuit Division is the chief response to this concern; absent the entity "there could be no pretense that the Ninth Circuit Court of Appeals remained intact in anything but name."<sup>19</sup> Professor Hellman ascertains that the Circuit Division's limited authority is a central problem.<sup>20</sup> For example, the body would resolve only clear conflicts between the divisions and could hear no appeals on its own motion.<sup>21</sup> In addition to eliminating the circuit-wide en banc court, the concept would jettison informal processes whereby all judges can alert panel members to apparent deviations from circuit precedent and preserve uniformity without en banc hearings.<sup>22</sup> The writer claims that divisions would discharge law-declaration duties almost as separate courts and develop their own precedent,<sup>23</sup> which Circuit Division decisions would affect so minimally that the "law of the circuit would shrink to near-insignificance."<sup>24</sup> The plan would essentially divide the Court of Appeals and, thus, is not the ostensible compromise proffered.<sup>25</sup>

Professor Hellman next says the approach, despite its deficiencies, "might be worth pursuing" had the Commission delineated any complications which smaller decisional units could remedy.<sup>26</sup> However, no evidence suggests such a problem.<sup>27</sup> The author finds the rationale for the Commission plan—that appeals courts' law-declaring function demands fewer judges than the present Ninth Circuit<sup>28</sup>—is premised on two related ideas: a big court's members cannot monitor all of its opinions and large

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17. Hellman, *supra* note 1, at 382–83. See also Chief Judge Procter Hug, Jr., *The Commission on Structural Alternatives for the Federal Court of Appeals' Final Report: An Analysis of the Commission's Recommendations for the Ninth Circuit*, 32 U.C. DAVIS L. REV. 887, 909 (1999).

18. See Hellman, *supra* note 1, at 384. See also *Commission Critique*, *supra* note 6, at 825 (voicing concern about intercircuit inconsistency).

19. Hellman, *supra* note 1, at 384. He describes the entity as the "keystone of the Commission plan." *Id.*

20. See *id.* at 384–88.

21. See *id.* It will foster "time-consuming and uncollegial disput[es] over whether [a] new case creates a 'square' conflict" or will be unable "to eliminate less blatant inconsistencies of the kind" that now create concern. *Id.* at 388.

22. See *id.* at 390. See also Hug, *supra* note 17, at 907.

23. See Hellman, *supra* note 1, at 391–92.

24. *Id.* at 391 (internal quotation marks omitted). Hellman finds that the Circuit Division would issue relatively few decisions. *Id.*

25. See *id.* at 392–93. See also *Commission Critique*, *supra* note 6, at 825–26 (affording additional criticisms).

26. Hellman, *supra* note 1, at 393.

27. See *id.* See also Hug, *supra* note 17, at 899–906.

28. See COMMISSION REPORT, *supra* note 2, at 47; Hellman, *supra* note 1, at 393.

circuits “have difficulty developing and maintaining consistent and coherent law.”<sup>29</sup> Neither concept withstands close analysis. The writer criticizes as “a relic of the pre-computer era” the theory that judges must read each case to track precedent.<sup>30</sup> The Commission also conflates “very different activities: keeping up with circuit law and monitoring panel opinions.”<sup>31</sup> The commissioners mistakenly speak of decisions’ “volume,”<sup>32</sup> which does not correlate with circuit size,<sup>33</sup> while the judges clearly conduct much monitoring.<sup>34</sup>

The author believes equally deficient the claim that big units cannot preserve uniform and coherent law,<sup>35</sup> denominating the Commission’s allusion to “‘perceptions’ of inconsistency” and to its own “‘judgment, based on experience’” as a remarkably weak foundation for so substantial a structure.<sup>36</sup> The entity does mention, but in essence ignores, empirical research on Ninth Circuit uniformity.<sup>37</sup> He finds the absence of examples and few specifics “emblematic of . . . flimsy evidentiary support.”<sup>38</sup>

Professor Hellman concludes by describing the Commission plan as a “conscientious attempt to respond to criticisms” of the court<sup>39</sup> and preserve an “administrative structure that no one has seriously challenged.”<sup>40</sup> However, the writer characterizes the idea as flawed “in conception and in execution” and suggests that Congress eschew the notion and that the Ninth Circuit continue the profitable testing that it has performed for two decades.<sup>41</sup>

29. Hellman, *supra* note 1, at 393. See also COMMISSION REPORT, *supra* note 2, at 47.

30. Hellman, *supra* note 1, at 394 (citing Letter from Chief Judge Procter Hug, Jr. to Justice Byron White (Aug. 29, 1998) (visited Jan. 1, 2000) <<http://app.comm.uscourts.gov/hearings/submitted/hug.htm>>).

31. Hellman, *supra* note 1, at 394.

32. *Id.* at 395. See also COMMISSION REPORT, *supra* note 2, at 47.

33. See Hellman, *supra* note 1, at 395. Three circuits issued more opinions than the Ninth Circuit in 1998. See *id.*

34. See *id.* at 395–96 (arguing that there is much evidence of monitoring).

35. See *id.* at 397–401. See also COMMISSION REPORT, *supra* note 2, at 47. For similar views, see J. Clifford Wallace, *The Case for Large Federal Courts of Appeals*, 77 JUDICATURE 288 (1994).

36. Hellman, *supra* note 1, at 397 (quoting COMMISSION REPORT, *supra* note 2, at 47). The “perceptions” apparently derive from surveys that “raise some doubt about the conclusions drawn.” *Id.* at 398. See also COMMISSION REPORT, *supra* note 2, at 47.

37. See Hellman, *supra* note 1, at 397. See also COMMISSION REPORT, *supra* note 2, at 39; *infra* notes 75–76 and accompanying text.

38. Hellman, *supra* note 1, at 401. The Commission identified no problems that the divisional idea would cure. See *id.*

39. *Id.* at 401.

40. *Id.* at 402 (quoting COMMISSION REPORT, *supra* note 2, at 57).

41. *Id.* at 402. See also *infra* notes 69–70 and accompanying text.

## II. ANALYSIS OF POSSIBLE MEASURES

There are now three principal attempts to address the Ninth Circuit situation. They are (1) the Commission prescriptions incorporated in Senate Bill 253; (2) the circuit-splitting concept included in Senate Bill 2184; and (3) the court's ongoing application of, and experimentation with, effective mechanisms, some of which are in Senate Bill 1403 and which the Evaluation Committee is presently considering. Certain facets of these approaches might also apply in various combinations.

### A. THE DIVISIONAL APPROACH: SENATE BILL 253

Because many ideas, most cogently espoused by Professor Hellman, require rejection of the Commission plan embodied in Senate Bill 253, I analyze them mainly for emphasis here.<sup>42</sup> Divisions are deficient primarily because they abandon circuit-wide stare decisis.<sup>43</sup> The measure's use in one circuit would require another level of appeals.<sup>44</sup> The Supreme Court may also be unwilling to review cases from one division which conflict with opinions of a circuit. Even were the Justices less reluctant, pressure to harmonize federal law would increase.<sup>45</sup> Despite those flaws, the plan might deserve application if there were problems that it would rectify. However, no empirical data clearly show severe difficulty, which is a prerequisite for radical change in a century-old institution. The divisional concept's rationale—that law-declaration demands rather few judges—is based on the inability of a large circuit's judges to track its cases and of big courts to develop and preserve uniform and coherent law.<sup>46</sup> However, Professor Hellman persuasively criticizes both notions.<sup>47</sup>

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42. The remarks upon S. 253's introduction add little to the Commission's reasons for its plan and, thus, receive less analysis than the remarks upon introduction of S. 2184 and S. 1403. See *infra* notes 47–55, 88–93 and accompanying text. See also 145 CONG. REC. S742 (daily ed. Jan. 20, 1999) (affording remarks).

43. See Hellman, *supra* note 1, at 382–90; Hug, *supra* note 17, at 909.

44. See *Final Report of the Commission on Structural Alternatives for the Federal Courts of Appeals: Hearing Before the Subcomm. On Courts and Intellectual Property of the House Comm. on the Judiciary*, 106th Cong. 169 (1999) [hereinafter *Final Report Hearing*] (statement of Ronald L. Olson, Esq., Munger, Tolles & Olson); *Commission Critique*, *supra* note 6, at 825.

45. See *Commission Critique*, *supra* note 6, at 825.

46. See *supra* notes 28–29 and accompanying text.

47. See *supra* notes 30–38 and accompanying text. For more discussion of these, and additional, criticisms, see Hug, *supra* note 17, at 909–15 and *Commission Critique*, *supra* note 6, at 824–27.

## B. CIRCUIT-SPLITTING: SENATE BILL 2184

In March, Senator Frank Murkowski (R-Alaska) and Senator Orrin Hatch (R-Utah) introduced Senate Bill 2184,<sup>48</sup> which would leave Arizona, California and Nevada in the Ninth Circuit and create a new Twelfth Circuit.<sup>49</sup> Because some lawmakers were “not too happy with” divisions, Murkowski offered the bill as a “more direct and simplified solution” which would foster a “more cohesive, efficient and predictable judiciary.”<sup>50</sup> He claimed that judges “cannot follow the number of cases pending” and that “[i]nconsistent decisions and improper constitutional interpretations are not unusual.”<sup>51</sup> He further explained that the court has a high reversal rate,<sup>52</sup> which Senator Hatch ascribed to the “lack of internal decisional consistency.”<sup>53</sup> Hatch also found judges unable to monitor, and correct, opinions that “stray from the law of the circuit,” which undermines coherence.<sup>54</sup> The senator elaborated: unless the active judges read all decisions, insuring en banc calls for review of appropriate cases is difficult, while the limited en banc court convenes too infrequently and its opinions may not reflect a majority’s view.<sup>55</sup> He concluded that two courts, whose judges must read half as many of “their colleagues’ opinions,” would better foster error-correction and coherence.<sup>56</sup>

Congress must not pass Senate Bill 2184 for numerous reasons, most of which the commissioners enunciated.<sup>57</sup> They clearly rejected bifurcation, seeing “no good reason to split the circuit solely out of concern for its size or administration [or] the consistency, predictability and coherence of circuit law.”<sup>58</sup> The Commission eschewed bifurcation as a permanent remedy for

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48. See 146 CONG. REC. S1233 (daily ed. Mar. 7, 2000) (statement of Sen. Hatch, chair of the Senate Judiciary Committee).

49. See S. 2184, 106th Cong. (2000). Alaska, Guam, Hawaii, Idaho, Montana, the Northern Mariana Islands, Oregon and Washington would comprise the new Twelfth Circuit. See *id.*

50. 146 CONG. REC. S1233 (daily ed. Mar. 7, 2000) (statement of Sen. Murkowski).

51. *Id.* at S1233–34. He ascribed these undesirable outcomes to size, which includes geography, population and cases. See *id.*

52. In the 1996–1997 term, the Supreme Court reversed an “astounding 96 percent of the cases reviewed,” and, in the last three years, a third of the reversals were Ninth Circuit opinions. See *id.* at S1234.

53. *Id.* at S1235 (statement of Sen. Hatch).

54. *Id.* at S1234. Senator Hatch, like Senator Murkowski, ascribed these ideas to size, which includes geography, population and judges. See *id.*

55. See *id.* at S1235. See also *Commission Critique*, *supra* note 6, at 825–26.

56. See 146 CONG. REC. S1235 (daily ed. Mar. 7, 2000) (statement of Sen. Hatch).

57. Many arguments for rejecting the divisional plan similarly apply to circuit-splitting.

58. COMMISSION REPORT, *supra* note 2, at ix.

docket growth experienced by many courts,<sup>59</sup> which would reduce federal law's uniformity and increase pressure on the Supreme Court to resolve intercircuit inconsistency.<sup>60</sup> It admonished that a split would forfeit administrative benefits,<sup>61</sup> such as flexible case assignments and certain economies of scale,<sup>62</sup> and declared that having one court in the West interpret federal law, especially "commercial and maritime laws that govern relations with other nations on the Pacific Rim, is a strength . . . that should be maintained."<sup>63</sup> The commissioners reiterated the practical administrative gains and that divisions obviated the need for bifurcation, which would erode consistency.<sup>64</sup> However, they "examined over a dozen proposals for splitting the circuit and found no merit in any".<sup>65</sup> "[I]t is impossible to create from the current Ninth Circuit two or more circuits [with an] equitable number of appeals per judge and courts of appeals small enough to operate with [adequate] collegiality [absent dividing California] between judicial circuits—an [undesirable] option."<sup>66</sup>

Because the Commission's rejection of bifurcation is partly premised on the Commission's espousal of the divisional approach, and the Commission did not specifically address the sponsors' arguments, elaboration is warranted. The present court resists bifurcation, as the commissioners and others have shown.<sup>67</sup> Senate Bill 2184, like many prior bills, would require the new Ninth Circuit's judges to resolve a much larger, more complex caseload than members of the proposed Twelfth

59. *Id.* at x, 44. See also COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, WORKING PAPERS 93 (1998) [hereinafter COMMISSION WORKING PAPERS] (docket data); THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL—THE PROBLEMS OF THE U.S. COURTS OF APPEALS 99–105 (1994); *Commission Critique*, *supra* note 6, at 824.

60. See Thomas E. Baker & Douglas McFarland, *The Need for a New National Court*, 100 HARV. L. REV. 1400, 1404–09 (1987). See also *supra* note 59; *supra* note 45 and accompanying text.

61. See COMMISSION REPORT, *supra* note 2, at ix–x, 36.

62. See *id.* See also *Commission Critique*, *supra* note 6, at 827. One Ninth Circuit Judge, Commission member, and avid proponent of its plan testified: "no one seriously questions how the circuit performs its administrative functions. The circuit's size allows for flexibility in assignment [and] economies of scale . . ." *Final Report Hearing*, *supra* note 44, at 80 (prepared statement of Pamela Ann Ryiner, Circuit Judge, Ninth Circuit Court of Appeals) (emphasis removed).

63. COMMISSION REPORT, *supra* note 2, at 49–50. The Commission similarly stated that a split would "deprive the West and the Pacific seaboard of a means for maintaining uniform federal law in that area." *Id.* at x.

64. See *id.* at 52.

65. *Id.* at 53.

66. *Id.* at 52. But cf. *Commission Critique*, *supra* note 6, at 827 (urging a split).

67. See *supra* notes 65–66 and accompanying text. See also Thomas E. Baker, *On Redrawing Circuit Boundaries—Why the Proposal to Divide the United States Court of Appeals for the Ninth Circuit is Not Such a Good Idea*, 22 ARIZ. ST. L.J. 917, 945–46 (1990); Carl Tobias, *The Impoverished Idea of Circuit-Splitting*, 44 EMORY L.J. 1357, 1409–15 (1995). But see *Commission Critique*, *supra* note 6, at 827.



Circuit.<sup>68</sup> A split would also eliminate the circuit that has applied and tested, over many years, cutting-edge concepts for addressing docket growth.<sup>69</sup> The Commission mentioned this attribute when it said the court's administration was "on a par with that of other circuits, and innovative in many respects"; reliance on Bankruptcy Appellate Panels (BAPs) epitomizes this creativity.<sup>70</sup> The court must continue rigorous experimentation; burgeoning appeals and scarce resources mean that most circuits will resemble the court and the Ninth Circuit may well function as a prototype.<sup>71</sup>

The senators' specific claims warrant a response here, although most are treated above. The co-sponsors seemingly echoed the two Commission notions<sup>72</sup> and elided different actions: keeping abreast of circuit law and tracking cases.<sup>73</sup> However, the notion that judges need to review every decision is a relic of the pre-computer era,<sup>74</sup> and Ninth Circuit members perform much opinion monitoring.<sup>75</sup> Professor Hellman also persuasively showed the dearth of empirical support for the second idea.<sup>76</sup> His research, which the Federal Judicial Center characterized as the only systematic assessment of precedent's operation in a large court,<sup>77</sup> found: "[T]he pattern [of multiple relevant precedents] exemplified by high visibility

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68. See, e.g., S. 431, 105th Cong. (1997); S. 956, 104th Cong. (1995); Carl Tobias, *Why Congress Should Not Split the Ninth Circuit*, 50 SMU L. REV. 583, 590-91 (1997). These sources refute Senator Hatch's claim that each new court's judges must read only half as many cases. See *supra* note 56 and accompanying text.

69. See JOE S. CECIL, FED. JUDICIAL CTR., ADMINISTRATION OF JUSTICE IN A LARGE APPELLATE COURT: THE NINTH CIRCUIT INNOVATIONS PROJECT (1985). See generally RESTRUCTURING JUSTICE: THE INNOVATIONS OF THE NINTH CIRCUIT AND THE FUTURE OF THE FEDERAL COURTS (Arthur D. Hellman ed., 1990) [hereinafter RESTRUCTURING JUSTICE] (detailing Ninth Circuit innovations in structure and internal procedures).

70. COMMISSION REPORT, *supra* note 2, at ix, 68 (praising the successful Ninth Circuit use of BAPs). See also Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 104(c), 108 Stat. 4106, 4109-10 (suggesting that the court used BAPs so effectively that Congress required all circuits to evaluate them); *infra* notes 114-15 and accompanying text (analyzing special Ninth Circuit screening panels).

71. See, e.g., Carl Tobias, *Suggestions for Studying the Federal Appellate System*, 49 FLA. L. REV. 189, 239-40 (1997); Wallace, *supra* note 35.

72. They are that a large court's judges cannot read all cases, while big units have difficulty developing and maintaining consistency and coherence. See *supra* notes 50-56 and accompanying text.

73. The Commission also did this. See *supra* note 31 and accompanying text. Insofar as the senators' concern is the volume of opinions, other courts issue more. See *supra* notes 32-33 and accompanying text.

74. See *supra* note 30 and accompanying text.

75. See *supra* note 34 and accompanying text.

76. See *supra* notes 35-38, 72 and accompanying text.

77. See JUDITH MCKENNA, FED. JUDICIAL CTR., STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS: REPORT TO THE UNITED STATES CONGRESS AND THE JUDICIAL CONFERENCE OF THE UNITED STATES 94 (1993). The Federal Judicial Center is the principal research arm of the Federal Judiciary. See 28 U.S.C. §§ 620-629 (1994).

issues . . . is not characteristic of Ninth Circuit jurisprudence generally. Nor is intracircuit conflict."<sup>78</sup> The senators also voiced concern about the reversal rate,<sup>79</sup> but that lacks relevance to administration and court structure. The Commission appeared to recognize this.<sup>80</sup> Ninth Circuit Judge, and Commission member, Pamela Rymer, speaking on behalf of the Commission, testified: "[T]he problem [is not] the reversal rate. That is not something that the White Commission thought was important. I completely agree that it should not be a factor."<sup>81</sup> Even if the rate had greater applicability, the ten-year figures show that the quantity of Ninth Circuit decisions reviewed annually was the highest among the circuits for most years yet never eclipsed thirty decisions, which is less than 0.5% of its merits terminations.<sup>82</sup> The court's reversal rate was lower than the median for three years, within 8% of the median for two years, and was greatest in only one year.<sup>83</sup>

Senator Hatch also said that the en banc process is neither representative nor employed enough.<sup>84</sup> There are several responses to these claims. The court finds that the device conserves limited institutional resources and honors the needs of all judges to participate in law-declaration,<sup>85</sup> while a statistical study showed eleven members "fairly represent the court as a whole."<sup>86</sup> Notwithstanding this determination, the committee proposed, and the circuit endorsed, two changes which would enlarge the number of appeals heard en banc.<sup>87</sup> Those ideas are

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78. Arthur D. Hellman, *Maintaining Consistency in the Law of the Large Circuit*, in RESTRUCTURING JUSTICE, *supra* note 69, at 86. The study involved two discrete years of Ninth Circuit opinions, which the court resolved over a much longer period. See MCKENNA, *supra* note 77, at 94.

79. See *supra* notes 52-53 and accompanying text.

80. See COMMISSION REPORT, *supra* note 2, at 6.

81. *Final Report Hearing*, *supra* note 44, at 74 (statement of Pamela Ann Rymer, Circuit Judge, Ninth Circuit Court of Appeals).

82. See Ninth Circuit Court of Appeals Law Library, Reversal Rate 1995-96 Term (revised 7/25/96, organized by circuit) (unpublished table, on file with the *Southern California Law Review*); Ninth Circuit Court of Appeals Law Library, Reversal Rate 1997-98 Term (revised 8/18/98, organized by circuit) (unpublished table, on file with the *Southern California Law Review*).

83. See *supra* note 82. See also Jerome Farris, *The Ninth Circuit—Most Maligned Circuit in the Country—Fact or Fiction?*, 58 OHIO ST. L.J. 1465 (1997); Marybeth Herald, *Reversed, Vacated, and Split: The Supreme Court, the Ninth Circuit, and the Congress*, 77 OR. L. REV. 405 (1998).

84. See *supra* note 55 and accompanying text. These claims are internally inconsistent.

85. See Hug, *supra* note 11, at 3. Every active and senior judge can request en banc reconsideration, while the whole process fosters valuable interchange respecting legal issues. See *id.* See also Hug, *supra* note 17, at 907.

86. Hug, *supra* note 11, at 3-4.

87. See COMMITTEE INTERIM REPORT, *supra* note 12, at 4; Hug, *supra* note 11, at 4. For a thorough critique of circuit-splitting, see BAKER, *supra* note 59, at 99-105.

among many proffered by the committee, and they are in a third bill<sup>88</sup> that I discuss next.

C. CONTINUED NINTH CIRCUIT APPLICATION OF, AND EXPERIMENTATION  
WITH, PROMISING MEASURES: SENATE BILL 1403  
AND THE EVALUATION COMMITTEE

1. *Senate Bill 1403*

In July 1999, Senator Dianne Feinstein (D-Cal.) introduced Senate Bill 1403,<sup>89</sup> which would reduce the votes for en banc rehearing from a majority of active judges to 40 percent, increase the panel size from eleven to a majority and have a judge in the geographical unit from which an appeal arises hear the case.<sup>90</sup> The sponsor claimed that requiring fewer votes would resolve "conflicts before they reach the Supreme Court,"<sup>91</sup> and expanding the panel would mean more judges could raise and treat "potential conflicts in controversial cases."<sup>92</sup> The senator also argued that regional assignments would "address[] the appearance of . . . any actual regional bias."<sup>93</sup> She concluded: insofar as the court is outside the jurisprudential mainstream, the bill would "help corral stray decisions."<sup>94</sup>

2. *The Evaluation Committee*

Since early 1999, an Evaluation Committee has been analyzing the circuit vis-à-vis the Commission study and crafting constructive responses, which include Senate Bill 1403's reforms and many others.<sup>95</sup> Last July, the committee circulated a notice to bar members seeking input on court operations.<sup>96</sup>

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88. See S. 1403, 106th Cong. (1999). This bill would also prescribe regional assignments. See *infra* notes 90, 93, 106 and accompanying text.

89. See 145 CONG. REC. S8884 (daily ed. July 20, 1999) (statement of Sen. Feinstein). The July 20 date of introduction was between the dates on which the Senate and House held hearings. See *supra* notes 44, 62.

90. See S. 1403, 106th Cong. (1999).

91. 145 CONG. REC. S8885.

92. *Id.*

93. *Id.*

94. *Id.* See also *supra* notes 86-87 and accompanying text.

95. Chief Judge Hug named the committee. See COMMITTEE INTERIM REPORT, *supra* note 12; Hug, *supra* note 11.

96. See COMMITTEE INTERIM REPORT, *supra* note 12, at 1-2; Hug, *supra* note 11, at 2. The committee sought ideas on the en banc process, uniformity and certainty, regional concerns and calendaring, delay and productivity, written and oral advocacy, mediation and technology. See *id.*

Consistency was one committee priority. No empirical data show that circuit precedent is disuniform;<sup>97</sup> however, the committee believed that court magnitude might foster a perception of inconsistency.<sup>98</sup> It, thus, emphasized the ability to detect early, and treat promptly, potential or apparent inconsistencies by, for example, having the Office of Staff Attorneys circulate reports that identify cases raising similar issues and that summarize panel decisions two days before publication.<sup>99</sup> The committee requested that judges and lawyers inform the court of conflicts involving unpublished memorandum dispositions and between those opinions and published ones.<sup>100</sup> At the Evaluation Committee's suggestion, the Advisory Rules Committee has proposed a two-year experiment, which would enable counsel to cite unpublished memorandum dispositions in petitions for en banc rehearing and in requests to publish dispositions.<sup>101</sup> Moreover, the committee prescribed, and the circuit is testing, a regime in which staff attorneys rely on substantive expertise and objective factors, such as issuance of a dissent or a concurrence, to monitor petitions for rehearing en banc and to help identify early possible conflicts for close evaluation by judges.<sup>102</sup>

The limited en banc process was a related focus of committee inquiry. The court thinks that it saves limited resources and honors all judges' interest in law-declaration,<sup>103</sup> but the committee sensed a perception that the en banc process may be unrepresentative and, thus, sponsored an analysis which confirmed its validity.<sup>104</sup> Notwithstanding this finding and the committee's perception of a change in the circuit en banc culture favoring more grants, the committee called on the court to consider increasing the size of the en

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97. See *supra* notes 36–40, 76–78 and accompanying text.

98. See COMMITTEE INTERIM REPORT, *supra* note 12, at 8–9; Hug, *supra* note 11, at 2.

99. See COMMITTEE INTERIM REPORT, *supra* note 12, at 9–10.

100. See *id.* See also Hug, *supra* note 11, at 4; Office of the Clerk, U.S. Court of Appeals for the Ninth Circuit, Memorandum Re: Possible Intracircuit Conflict (Jan. 2000) (on file with author) (requesting assistance from members of the academic community in identifying intracircuit conflicts and providing the conflicts form).

101. They can also alert the court to conflicts. See Hug, *supra* note 11, at 2.

102. See COMMITTEE INTERIM REPORT, *supra* note 12, at 9–11; Hug, *supra* note 17, at 907. Moreover, the committee is assessing the idea of internal review of all opinions for uniformity before issuance. See Hug, *supra* note 11, at 2. The committee concluded that the “court is properly monitoring its opinions for consistency and resolving potential conflicts.” COMMITTEE INTERIM REPORT, *supra* note 12, at 12.

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

104. See Hug, *supra* note 11, at 3–4. The limited en banc court has issued more than 170 decisions since its 1980 authorization. One third were unanimous, and seventy-five percent had a majority of eight to three or more, which strongly indicates that the full court would have decided similarly. See *id.* at 3.

banc panel and decreasing the requisite votes, which would enlarge the number of cases that receive en banc rehearing.<sup>105</sup> The court adopted the reforms as more measured than Senate Bill 253 out of concern with perceptions as much as realities.<sup>106</sup> Because the alterations will expand en banc reconsideration, the court has prescribed experimentation with quarterly sessions of the en banc court.<sup>107</sup>

The Commission said the circuit has insufficient interpersonal communication and collegiality, even while stating that technology's continued use will enhance communication and case disposition.<sup>108</sup> However, no empirical data show that the court is uncollegial, and the committee's experts suggest the opposite.<sup>109</sup> Nevertheless, the committee developed proposals on regionalism and calendaring as responses to these concerns and others regarding circuit links with the areas in its jurisdiction and the importance of regional perspectives in appellate decisionmaking.<sup>110</sup> The committee recommended, and the court is experimenting with, regional assignments in the northern administrative unit; this practice requires one judge stationed in the region to serve on three-judge panels which hear appeals from that administrative unit.<sup>111</sup>

The committee has proffered concepts to improve productivity and disposition. At the committee's instigation, the court has experimented with greater "batching" of appeals, which implicate similar issues or

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105. See COMMITTEE INTERIM REPORT, *supra* note 12, at 5; *supra* note 87 and accompanying text.

106. See Hug, *supra* note 11, at 4. See also Hellman, *supra* note 1, at 378 (describing Senate Bill 253 as a "novel approach to federal appellate structure that is flawed both in conception and in execution"). The court also endorsed regional assignments. See *supra* notes 90-93 and accompanying text; *infra* note 111 and accompanying text.

107. See Hug, *supra* note 11, at 4. See also *Final Report Hearing*, *supra* note 44, at 117 (prepared statement of David R. Thompson, Circuit Judge, Ninth Circuit Court of Appeals).

108. See COMMISSION REPORT, *supra* note 2, at 35. See also *Commission Critique*, *supra* note 6, at 823. The Commission frankly conceded that collegiality "cannot be quantified or measured." COMMISSION REPORT, *supra* note 2, at 40. For analyses of collegiality, see FRANK COFFIN, ON APPEAL 215 (1994); Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335, 1358-62 (1998); Deannell Reece Tacha, *The "C" Word: On Collegiality*, 56 OHIO ST. L. J. 585 (1995).

109. See COMMITTEE INTERIM REPORT, *supra* note 12, at 14.

110. See *id.* at 12-13.

111. See *id.* at 8. See also *Final Report Hearing*, *supra* note 44, at 113 (prepared statement of David R. Thompson, Circuit Judge, Ninth Circuit Court of Appeals) (stating that critics argue that the notion violates the tradition of "random selection of judges" and the idea that they apply federal law). The court has increased sittings in more cities together with bench-bar activities to foster communications across the circuit. See COMMITTEE INTERIM REPORT, *supra* note 12, at 13. In 1999, it held "oral arguments and bench-bar meetings" in Anchorage, Coeur d' Alene (Idaho), Missoula (Mont.), San Diego, Phoenix, and Honolulu. *Id.*

legislation before the identical argument panel for quicker resolution.<sup>112</sup> The committee urged the court to release the identity of motion panels on the first day of every month and to resolve pending procedural motions before oral arguments on the merits.<sup>113</sup> The committee has also suggested that the circuit continue to employ the creative oral motions and screening calendars.<sup>114</sup> A special panel resolves monthly almost 350 motions and 150 cases involving comparatively routine appeals that clear precedent easily decides.<sup>115</sup>

The court can implement numerous committee proposals absent legislative authorization,<sup>116</sup> but Congress would need to approve a few Commission prescriptions, including two-judge, and district court appellate, panels.<sup>117</sup> Prompt Senate confirmation of nominees to the present openings in two of the twenty-eight active authorized judgeships that have remained unfilled since 1996 would also enable the circuit to function more efficaciously.<sup>118</sup>

### III. SUGGESTIONS FOR THE FUTURE

Many reasons suggest why the third option is best. It is a cautious, constructive effort to address valid concerns about the court. This approach would achieve major Commission goals but not disrupt features of circuit administration that have fostered expeditious, economical and fair disposition. The method should specifically maintain and promote consistency, primarily with additional monitoring; increase the en banc process's legitimacy, principally through greater use; and cultivate

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112. See COMMITTEE INTERIM REPORT, *supra* note 12, at 4–5; *Final Report Hearing*, *supra* note 44, at 115 (prepared statement of David R. Thompson, Circuit Judge, Ninth Circuit Court of Appeals).

113. See COMMITTEE INTERIM REPORT, *supra* note 12, at 7.

114. See Hug, *supra* note 11, at 2. See also *Final Report Hearing*, *supra* note 44, at 115 (prepared statement of David R. Thompson, Circuit Judge, Ninth Circuit Court of Appeals).

115. See Hug, *supra* note 11, at 3. See also *Final Report Hearing*, *supra* note 44, at 116 (prepared statement of David R. Thompson, Circuit Judge, Ninth Circuit Court of Appeals); COMMISSION REPORT, *supra* note 2, at 31. These and additional actions show the court is attempting to treat concerns other than ones the Commission airs and to be responsive to all its consumers. The process is continuing, and the court is committed to introspection, testing, and innovation which will be even more effective. See Hug, *supra* note 11, at 4. See also *Final Report Hearing*, *supra* note 44, at 118 (prepared statement of David R. Thompson, Circuit Judge, Ninth Circuit Court of Appeals).

116. Congress could authorize some ideas. See *Final Report Hearing*, *supra* note 44, at 117 (prepared statement of David R. Thompson, Circuit Judge, Ninth Circuit Court of Appeals).

117. See COMMISSION REPORT, *supra* note 2, at 62–65. See also JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS 131–32 (1995) (analyzing these panels).

118. See Carl Tobias, *Filling the Federal Appellate Openings on the 9th Circuit*, 19 REV. LITIG. 233 (2000). See also COMMISSION REPORT, *supra* note 2, at 30; *Commission Critique*, *supra* note 6, at 822.

regionalism, in part by assigning judges regionally. The course of action would also leave the court intact and, thus, retain a large circuit's chief benefits, such as uniform application of law across the West, flexible judicial assignments, and economies of scale. Moreover, the concepts would limit the great risks posed by divisions, namely their radical, untested and irrevocable character, and bifurcation, which might be an ineffective stop-gap and may well foster intercircuit inconsistency. If these ideas prove insufficient, their incremental, conservative nature minimizes the detriments, meaning that relatively little would have been lost, so that Congress and the judiciary could then institute more drastic remedies, if indicated.

The approach which legislators and the court should follow warrants rather limited analysis here, because I assessed many particulars and sketched the broad outline above. However, some treatment is required, as this should inform understanding and future experimentation and reform. Congress must reject the divisional plan and circuit-splitting, while senators and representatives must encourage application and testing of measures that seem productive. Lawmakers should enact Senate Bill 1403, which permits changes in the en banc process and regional assignments.<sup>119</sup> Congress could also consider authorizing experimentation with a few Commission suggestions, namely two-judge, and district court appellate, panels, should it find them promising.<sup>120</sup> Moreover, the Senate must promptly fill the present circuit vacancies.<sup>121</sup>

The court should continue to explore, test and apply felicitous approaches. The Evaluation Committee must assess aspects of operations which have prompted concern and develop creative ideas for the circuit to examine. It might consult Commission data showing that the court's judges resolve cases most expeditiously once in their hands, even as the circuit is slowest from notice of appeal to final disposition.<sup>122</sup> Scrutiny of other courts could also be instructive. For instance, Seventh Circuit analysis may reveal how it offers oral arguments and published opinions at percentages 12% and 30% higher, and relies on visiting judges at a rate

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119. See *supra* notes 87-94, 106 and accompanying text.

120. See *supra* note 117. *But cf.* Memorandum from Chief Judges Harry T. Edwards, Juan R. Torruella, Ralph K. Winter, Edward R. Becker, J. Harvie Wilkinson, III, Richard A. Posner, and Pasco M. Bowman, II to Members of the Commission on Structural Alternatives for the Federal Courts of Appeals (Nov. 10, 1998) (on file with author) (criticizing district court appellate panels).

121. See *supra* note 118 and accompanying text.

122. See COMMISSION WORKING PAPERS, *supra* note 59, at 95 tbl.7.

42% lower, than the Ninth Circuit.<sup>123</sup> The court should be receptive to committee proposals and remain as responsive as possible to valid criticism and to all consumers of circuit services. When experimentation indicates that concepts are efficacious, the court should permanently implement them in local rules or internal operating procedures or seek congressional authorization, if necessary.

### CONCLUSION

Professor Hellman greatly improves Ninth Circuit comprehension, incisively criticizes the Commission work and concludes that Congress must reject its plan and permit ongoing application of, and experimentation with, effective measures. Because the Commission and the sponsors of Senate Bill 2184 suggested radical change with minimal support, lawmakers should eschew both the divisional and circuit-splitting approaches. Congress, however, might want to adopt Senate Bill 1403, while the Evaluation Committee must continue its valuable efforts.

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123. See *id.* at 93 tbls.2 & 3, 108 tbl.6a. Compare *supra* note 102 with 3RD CIR. IOP 5.6 and 4TH CIR. IOP 36.2 (suggesting that the circuit may have derived the idea for prepublication reports from other courts' prepublication circulation of opinions).