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A Split by Any Other Name . . .

Procter Hug, Jr.[†] and Carl Tobias[‡]

INTRODUCTION

We applaud the contribution that the Commission on Structural Alternatives for the Federal Courts of Appeals (White Commission) has made to the public debate regarding how the federal courts of appeals can cope with the demands of ever increasing caseloads and no new judicial resources.¹ The White Commission has conscientiously discharged its challenging assignment in the very brief period which Congress allotted. We believe, however, that a careful review of the Commission's research reveals no significant evidence of dysfunction in any court of appeals, and certainly none sufficiently severe to warrant its ultimate recommendation to restructure the Ninth Circuit Court of Appeals into three autonomous adjudicative divisions. We submit that the Commission has not met its burden of persuasion for such sweeping change. Therefore, we urge Congress to authorize the Ninth Circuit, which has been the acknowledged national leader in experimenting with innovative methods of resolving large caseloads, to continue and expand upon that record of successful experimentation.

In this article, we suggest that those who propose to change a successful, century-old institution must bear the burden of persuasion regarding the need for modification. In the first section of this article, we explore some of the principal concerns that the members of the Commission, as well as certain observers of the Ninth Circuit, have raised during the study process. In the second section, we show that, by standard measures of judicial administration and performance, the Ninth Circuit Court of Appeals is operating as well as or better than the

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[‡] Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas. We wish to thank Mark Mendenhall, Assistant Circuit Executive, for invaluable assistance in the preparation of this article as well as Eleanor Davison for processing this piece. Professor Tobias wishes to thank Peggy Sanner for valuable suggestions and Jim Rogers for his generous, continuing support. These remarks are those of the authors, although they reflect the position of two-thirds of the members of the Ninth Circuit.

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

other courts of appeals which were not the focus of the White Commission's recommendations. The next section reviews how the untested restructuring proposed by the Commission will cause more problems than it was intended to fix. Finally, in the fourth section, we offer a constructive alternative approach that the Ninth Circuit has already implemented. We examine the work of the Ninth Circuit's Evaluation Committee, which is developing innovative solutions to address many of the same concerns that the Commission sought to alleviate through its restructuring proposal. Through more modest modifications to court operations, the Ninth Circuit will be able to maintain its flexibility and adaptability in order to meet the caseload demands of the next millennium. We conclude by suggesting that Congress authorize the Ninth Circuit to continue experimenting with measures that promise to enhance court operations.

I. WHAT WAS THE COMMISSION TRYING TO FIX?

The origins and development of the Commission on Structural Alternatives for the Federal Courts of Appeals do not require exposition here because other authors, in this journal and elsewhere, have comprehensively explored them.² Drawn from the Commission's series of six public hearings, surveys of judges and appellate lawyers, and receipt of written comments, its final report includes a summary of the arguments that proponents and critics of circuit-splitting have articulated in the longstanding debate over the Ninth Circuit. These claims and counterclaims "concern the effects of the size of the court of appeals, its geographic jurisdiction, and the court's place within the federal appellate system."³

Among its findings were, first, that advocates of circuit division assert that the Ninth Circuit's size precludes it from functioning in a timely and effective fashion.⁴ Second, proponents of circuit-splitting claim that the court cannot maintain a consistent, coherent, and predictable body of circuit law.⁵ Third, those who favor bifurcation question the ability of

² See, e.g., Jennifer E. Spreng, *The Icebox Cometh: A Former Clerk's View of the Proposed Ninth Circuit Split*, 73 WASH. L. REV. 875 (1998); Carl Tobias, *Suggestions for Studying the Federal Appellate System*, 49 FLA. L. REV. 189 (1997).

³ Final Report, *supra* note 1, at 34.

⁴ See *id.*

⁵ See *id.* at 34-35.

the court to perform its *en banc* function efficiently, principally because it is thought to convene too few *en banc* proceedings to foster the development of stable circuit law.⁶ Fourth, circuit division proponents contend that the size of the court's geographic jurisdiction undermines regionalism and frustrates effective court operations.⁷ In its attempt to evaluate these allegations, the Commission concluded that:

We have reviewed all of the available objective data routinely used in court administration to measure the performance and efficiency of the federal appellate courts, but we cannot say that the statistical criteria tip decisively in one direction or the other. While there are differences among the courts of appeals, differences in judicial vacancy rates, caseload mix, and operating procedures make it impossible to attribute them to any single factor such as size.⁸

The commissioners correspondingly consulted "subjective criteria, such as consistency and predictability of the law [which] are obviously more difficult to evaluate but are widely regarded as a high priority for the courts of appeals."⁹ The commission members frankly acknowledged that they lacked adequate time to conduct a statistically meaningful analysis of Ninth Circuit decision making to reach an objective determination of how the court compares with others, and they eventually concluded that uniformity and predictability defy statistical evaluation.¹⁰ We, however, believe that a careful examination of court management statistics and available empirical research over the past ten years convincingly demonstrates that the Ninth Circuit Court of Appeals is operating within the mainstream of the federal appellate courts and that it is efficiently and effectively maintaining control of its caseload.

II. WHAT OBJECTIVE AND EMPIRICAL MEASURES DEMONSTRATE

We have assembled below—covering the last ten years—a compilation of six of the objective criteria routinely used to compare core court of appeals operations. They relate to the time it takes to resolve appeals, the amount of workload per judge, the volume of opinions that judges

⁶ See *id.* at 35.

⁷ See *id.* at 36.

⁸ See *id.* at 39.

⁹ *Id.*

¹⁰ See *id.* at 39-40 (citation omitted).

need to keep up with, and the circuit's reversal rate by the United States Supreme Court. Although other issues relating to consistency and predictability of decision-making are much more difficult to measure and are not routinely collected by the courts, we have cited some additional empirical research on these topics. We submit that, when these major concerns are viewed from the perspective of objective operational data and scientific inquiry, the Ninth Circuit Court of Appeals fares as well as or better than the other eleven geographic-based circuits in the nation.

Delays in resolving cases are measured through median time intervals. Median time intervals in cases terminated after hearing or submission have been maintained in the courts of appeals for decades and serve as a starting point for comparing the circuits.¹¹ Median time interval charts further subdivide the time from filing a notice of appeal to final disposition into four subparts: (1) the time from filing a notice of appeal to filing last brief; (2) the time from filing of last brief to hearing or submission; (3) the time from hearing to final disposition; and (4) the time from submission (without oral argument) to final disposition.¹² The latter two categories are important as they are the only two categories over which the judges themselves have full control—that is, the cases are in their hands for resolution. The first segment depends largely upon timely action by the lawyers. The second depends upon prompt filling of judicial vacancies to assure the sufficient number of judges to maintain regular calendars for hearing appeals. A glance at these time intervals over the past ten years demonstrates several points:

- Ninth Circuit times from filing of notice of appeal to final disposition have remained relatively consistent, ranging from a high of 16.0 months (after the 1989 earthquake closed the courthouse) to a low most recently of 13.8 months, while the national median has gradually increased from 10.1 months to 11.6 months.¹³ Generally, the Ninth Circuit's median time from filing the notice of appeal to final disposition has averaged less than four months longer than the national median time

¹¹ See 1998 FEDERAL COURT MANAGEMENT STATISTICS viii.

¹² See 1998 ADMIN. OFFICE OF THE UNITED STATES COURTS ANN. REP. 111-13.

¹³ See 1989-1998 ADMIN. OFFICE OF THE UNITED STATES COURTS ANN. REP'S. (Median Time Interval Charts) 111-13.

(except in 1989-1992, when the court was forced to relocate because of the earthquake).¹⁴ The most recent figures show that the Ninth Circuit's median is only 2.2 months longer than the national median.¹⁵

- The District of Columbia, Tenth, and Eleventh Circuits have frequently reported higher median times than the Ninth Circuit over the ten year period.¹⁶
- The judges in the Ninth Circuit are among the fastest in the nation in terms of the median time from hearing to final disposition, varying from 1.6 to 2.8 months, usually in the top third among the circuits.¹⁷
- Similarly, Ninth Circuit judges are among the fastest in the nation in the median time from submission to final disposition, varying from .1 to .9 months, which places them usually in the top quarter of the circuits.¹⁸

It is all the more remarkable that the court has been able to maintain its pace of case dispositions and output of published opinions since it has experienced a one-third reduction in the number of active judges. The Ninth Circuit has generally operated with between four and ten vacancies since 1994, reflecting a significant diminution in judicial resources available to handle its growing caseload.¹⁹ Innovations in caseload management, increases in mediated settlements, and generous contributions by senior and visiting judges have prevented the court from falling as far behind as the numbers appear to indicate. There comes a point of diminishing returns, however, when heavy and unremitting reliance on these resources can no longer continue to

¹⁴ *See id.*

¹⁵ *See id.*

¹⁶ *See id.*

¹⁷ *See id.*

¹⁸ *See id.*

¹⁹ *See* FINAL REPORT, *supra* note 1, at 30.

produce the results the court requires to operate effectively. The Ninth Circuit believes strongly that with a full complement of active judges, its performance would improve even further and eliminate much of the concern raised before the Commission.

One indication of judicial workload is the number of case terminations on the merits per judge, a figure that is a standard objective measure of the workload levels of the courts of appeals. These numbers have increased over time as federal appellate caseloads have expanded and no new judges have been added to handle the increases. However, there appears to be no correlation between the size of the court and the number of merit terminations per judge. A review of ten years of statistics reveals several findings:

- Ninth Circuit merit terminations per judge have increased from a low of 257 in 1988 to a high of 518 in 1997, while the range for all circuits has fluctuated between a low of 173 and a high of 792.²⁰
- For five of the past ten years, the number of Ninth Circuit merit terminations per judge has hovered within 30 cases of the median range for all courts, placing the Ninth Circuit output at the level deemed most appropriate for a federal court of appeals.²¹
- For most of the years in the decade, the Fifth and Eleventh Circuit Courts of Appeals had the highest numbers of merit terminations per judge, reflecting the exceptionally heavy caseload burdens in those circuits.²²

An additional comment heard in connection with the Ninth Circuit is that the volume of published opinions is so large that judges and lawyers have trouble keeping current with the development of new circuit law. A review of the figures for the past ten years shows:

²⁰ See 1989-1998 FEDERAL COURT MANAGEMENT STATISTICS (Overall Caseload Statistics Tables) 26.

²¹ See 1998 FEDERAL COURT MANAGEMENT STATISTICS 20.

²² See *id.* at 26.

- In the Ninth Circuit, the number of published opinions has fluctuated between a high of 986 and a low of 682 per year, with no particular trend toward increasing or decreasing significantly during that period.²³
- Nationwide, the range of published opinions has varied from a low of 232 (the low figure has almost always reflected the output of the District of Columbia Court of Appeals) to a high of 1,079, with the Ninth Circuit generally on the high end of the range.²⁴
- The Ninth Circuit's output of published opinions has remained relatively constant during a period in which the number of cases filed in the court has more than doubled.²⁵
- The Fifth, Seventh, and Eighth Circuits have occasionally exceeded the output of the Ninth Circuit and generally issue only 100 fewer opinions per year than the Ninth Circuit.²⁶

In the electronic age, however, the relevance of the number of written, published opinions to the debate is questionable. First, the volume of published opinions does not correlate with circuit size. For example, in 1998, three other circuits issued more published opinions than did the Ninth Circuit.²⁷ Second, the White Commission states that the Ninth Circuit's large volume of published opinions makes it "impossible for all the court's judges to read all the court's published opinions when they are issued" and implies that the volume is so large that it hampers judges from being able to "monitor the decisions of all panels of the court so that their own decisions are consistent with earlier decisions of the court."²⁸

²³ See 1989-1998 FEDERAL COURT MANAGEMENT STATISTICS (Table on the Types of Opinions or Orders Filed in Cases Terminated on the Merits After Oral Hearings or Submission on Briefs) 54.

²⁴ See *id.*

²⁵ See *id.*

²⁶ See *id.*

²⁷ See *id.*

²⁸ FINAL REPORT, *supra* note 1, at 47.

Professor Arthur Hellman, in his written testimony to the House Judiciary Subcommittee on Courts and Intellectual Property, suggested that the Commission's reliance on this theory is misplaced. Distinguishing between keeping up with circuit law and monitoring panel opinions, he wrote,

Keeping up with circuit law is something done by individual judges. . . . With all circuit law now easily retrievable by computer when it is needed, there is no particular reason for individual judges to acquire familiarity with decisions that have no relevance for any of their current cases. . . . Monitoring panel opinions, in contrast, is something that the court does as an institution. . . . But effective monitoring does not require that all judges keep up with all opinions. As long as each opinion receives some scrutiny by off-panel judges, the objectives can be met. . . . One would think that, other things being equal, an annual output of 800 opinions could be monitored more easily by 28 judges than by 14. . . . The larger the number of judges engaged in the monitoring process, the greater the likelihood that a particular error or inconsistency will catch the eye of at least one member of the court.²⁹

The Ninth Circuit's relatively high rate of reversal in the United States Supreme Court has also been mentioned by some as cause for concern, requiring circuit restructuring. A look at the ten year reversal rates reveals:

- The number of Ninth Circuit cases reviewed each year by the United States Supreme Court is usually in the 16-24 range and has never exceeded 30 cases, representing less than one-half of 1 percent of merit terminations by the Ninth Circuit.³⁰

²⁹ *Oversight Hearing on the Final Report of the Commission on Structural Alternatives for the Federal Courts of Appeals Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary, 106th Cong. 7 (1999)* (statement of Professor Arthur D. Hellman, University of Pittsburgh School of Law) [hereinafter Hellman Statement].

³⁰ See NINTH CIRCUIT COURT OF APPEALS LAW LIBRARY TABLE ON UNITED STATES SUPREME COURT REVERSAL RATES 1 (1998) [hereinafter Reversal Rate Table].

- For most years, the Ninth Circuit has had the highest number of cases selected for review by the Supreme Court — sometimes three or four times more cases than other circuits.³¹
- In only one year in the last ten did the Ninth Circuit have the highest reversal rate of all of the circuits. For three years its reversal rate was lower than the median for all circuits, and for two years its rate was within eight percentage points of the median.³²
- The Supreme Court generally reviews cases with an eye toward reversal, as the median reversal rate for all years except two exceeded 50 percent, and the overall reversal rate exceeded 60 percent in five of the ten years under consideration.³³

However, the relevance of the Supreme Court reversal rate to matters of court of appeals administration and configuration is questionable. The concept of judicial independence is threatened when the substantive decisions of a court serve as the basis for circuit division or realignment, ostensibly for the purpose of changing the outcome of decisions before the court. The Commission itself recognized this principle in its statement: “It is wrong to realign circuits . . . and to restructure courts . . . because of particular judicial decisions or particular judges.”³⁴

For many years observers have also raised concerns about the ability of a large court to maintain coherency, consistency, and predictability in its case law. With no time to conduct its own study and no routinely maintained court data to review, the Commission seemed to throw up its hands by saying: “But when all is said and done, neither we nor, we believe, anyone else, can reduce consistency and predictability to

³¹ See The Honorable Jerome Farris, *The Ninth Circuit - Most Maligned Circuit in the Country - Fact or Fiction?*, 58 OHIO ST. L.J. 1465, 1465-66 (1997), for an insightful examination of the circuit’s reversal rate for 1997.

³² See Reversal Rate Table, *supra* note 30, at 4.

³³ See *id.* at 1.

³⁴ FINAL REPORT, *supra* note 1, at 6.

statistical analysis.”³⁵ Without more, however, the members of the Commission then concluded that “large appellate units have difficulty maintaining consistent and coherent law”³⁶ and leapt to their ultimate determination that such coherence “is best fostered in a decisional unit that is small enough for . . . close, continual, collaborative decision making”³⁷ The divisional restructuring proposal is the result of that reasoning.

What the Commission apparently rejected in reaching its conclusion was systematic empirical research that found that inconsistency in the law is neither a serious problem in the Ninth Circuit nor a factor of circuit size. An objective, highly praised scholarly study of consistency of the law in the Ninth Circuit concluded that “the pattern of [multiple relevant precedents] exemplified by high visibility issues . . . is not characteristic of Ninth Circuit jurisprudence generally. Nor is intracircuit conflict.”³⁸ A subsequent national study by the Federal Judicial Center reached a similar conclusion when it stated, “In sum, despite concerns about the proliferation of precedent as the courts of appeals grow, there is currently little evidence that intracircuit inconsistency is a significant problem. Also, there is little evidence that whatever intracircuit conflict exists is strongly correlated with circuit size.”³⁹

We believe that the objective operational data and empirical evidence show that the Ninth Circuit Court of Appeals is and has been operating as well as or better than the other circuit courts of appeals across the country. No evidence has been produced to demonstrate any dysfunction or inability to deliver quality justice and coherent, consistent circuit law that would justify circuit restructuring of the magnitude proposed by the White Commission. Those who propose dramatic alteration to a century-old institution, which now resolves appeals promptly, fairly, and consistently and that operates efficiently, must bear the burden of proving that such a change is necessary and will better deliver appellate services than the time-tested methods and structure

³⁵ *Id.* at 40.

³⁶ *Id.* at 47.

³⁷ *Id.* at 40.

³⁸ RESTRUCTURING JUSTICE: THE INNOVATIONS OF THE NINTH CIRCUIT AND THE FUTURE OF THE FEDERAL COURTS 86 (Arthur D. Hellman ed. 1990).

³⁹ JUDITH MCKENNA, STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS 94 (1993).

that have worked so well in the Ninth Circuit and in all of the other courts of appeals across the country. Indeed, the Commission candidly admitted that Ninth Circuit administration was at least equal to that of other circuits and "innovative in many respects."⁴⁰ Critics of the Ninth Circuit, therefore, must conclusively demonstrate that the court is operating so ineffectively as to deserve a remedy as radical and untested as the divisional approach. These critics, as well as the Commission, have not sustained this burden.

III. THE FLAWED DIVISIONAL SOLUTION

The centerpiece of the Commission's Final Report is the recommendation that Congress require the Ninth Circuit Court of Appeals to implement a divisional arrangement, and authorize the remaining courts to apply this approach when they attain a certain size.⁴¹ The Commission proposed that lawmakers create three divisions for the Ninth Circuit Court of Appeals.⁴² Each of these divisions would hear appeals arising within its geographic jurisdiction, each would have its own *en banc* process, and each would function autonomously in that it would not have to follow precedent issued in the other divisions.⁴³ The Commission also suggested the establishment of a Circuit Division which would resolve "square inter-divisional conflict"⁴⁴ between two divisions.

The preceding section shows that the Commission did not prove that the Ninth Circuit experiences difficulties which require remediation, especially with a solution as dramatic and disruptive as the divisional approach appears.⁴⁵ Even if, for the sake of argument, the Commission had clearly shown that the Ninth Circuit faces the problems to which the members of the Commission alluded, the Commission failed to demonstrate that the divisional arrangement would remedy those complications. The divisional proposal is a drastic idea which no federal appeals court has ever adopted, which would disrupt effective aspects of

⁴⁰ FINAL REPORT, *supra* note 1, at ix.

⁴¹ *See id.* at iii, x, 40-47, 60-62.

⁴² *See id.* at 41.

⁴³ *See id.* at 41-43.

⁴⁴ *Id.* at 45.

⁴⁵ *See* Hellman Statement, *supra* note 29, at 2; *see also* Procter Hug, Jr., *The Commission on Structural Alternatives for the Federal Courts of Appeals' Final Report: An Analysis of the Commission's Recommendations for the Ninth Circuit*, 32 U.C. DAVIS L. REV. 887 (1999).

current Ninth Circuit administration, and which might well exacerbate the very conditions that it is intended to address. Indeed, Second Circuit Chief Judge Ralph Winter wrote the Commission expressing his court's "strong and unanimous opposition" to the divisional notion while stating that there is no experience with the divisional idea and that the courts are "hardly working so badly that . . . resort to a very different and untested form of organization is called for."⁴⁶ The chief judge asserted that the divisional approach would "lead . . . to more incoherence in case law," would increase forum shopping, and would require more judges.⁴⁷ The essential question is whether the recommended change achieves the goal of "having a single court interpret and apply the federal law in the nine western United States and the Island Territories in an efficient and effective manner."⁴⁸

Perhaps the critical flaw in the divisional scheme is its abandonment of the concept of circuit-wide stare decisis, a rule of law which is crucial to the maintenance of a consistent, coherent, and predictable body of circuit law in the Ninth Circuit and in every other federal court of appeals.⁴⁹ Under current practice, three-judge panel decisions are binding throughout the circuit and on all subsequent panels, unless they are overruled by the court of appeals *en banc* or by the Supreme Court.⁵⁰ "The limited *en banc* procedure provides a mechanism whereby all judges can participate in the *en banc* process through a variety of different procedures including: the 'stop clock' procedure, requests for *en banc*, memos circulated to the entire court arguing for and against *en banc* review, and by a vote of all of the active judges on whether to take a case *en banc*."⁵¹

The divisional arrangement abrogates circuit-wide stare decisis and, thus, jeopardizes uniformity, coherence and predictability.⁵² "Each regional division would function as a semi-autonomous decisional unit."⁵³ This would affect present operations in two important ways.

⁴⁶ Letter from Chief Judge Ralph K. Winter, U.S. Court of Appeals for the Second Circuit, to Justice Byron White (Nov. 5, 1998) (last modified Nov. 16, 1998) <<http://app.comm.uscourts.gov/report/comments/Winter.pdf>>.

⁴⁷ *Id.*

⁴⁸ Hug, *supra* note 45, at 887.

⁴⁹ See Hellman Statement, *supra* note 29, at 2; see also Hug, *supra* note 45, at 909-10.

⁵⁰ See Hellman Statement, *supra* note 29, at 3.

⁵¹ Hug, *supra* note 45, at 888.

⁵² See Hellman Statement, *supra* note 29, at 3; see also Hug, *supra* note 45, at 909-10.

⁵³ FINAL REPORT, *supra* note 1, at 43.

First, the proposal would eliminate the circuit-wide *en banc* process; *en banc* courts in each division would perform that function.⁵⁴ Second, panel and *en banc* decisions of the divisions would have binding effect only within each division, essentially creating three separate circuit courts.⁵⁵

The Commission also suggested a Circuit Division “whose sole mission would be to resolve conflicting decisions between the regional divisions,” that is, those opinions which present “square interdivisional conflicts.”⁵⁶ It is important to appreciate that the authority of the Circuit Division is sharply circumscribed. First, the notion of square conflicts is so narrow that jurisdiction will rarely be invoked. Second, only the parties to a case can invoke jurisdiction and “only after the panel decision ha[s] been reviewed by the division *en banc* or a divisional *en banc* ha[s] been sought and denied.”⁵⁷

The Circuit Division concept would also impose additional disadvantages that do not currently exist. One general difficulty is that the proposal could foster incessant wrangling and time-consuming satellite litigation over what actually constitutes a “square inter-divisional conflict” that triggers the jurisdiction of the Circuit Division.⁵⁸ The divisional recommendation would also effectively institute another level of appellate review, thus imposing greater cost and delay in resolving disputes.

The divisional concept would also have a particularly detrimental impact on litigation in the state of California. The Commission proposal places the Eastern and Northern Districts of California in the Middle Division and the Central and Southern Districts of California in the Southern Division. This means that different interpretations of federal law could apply within different parts of California.⁵⁹ For example, if the Middle and Southern Divisions ruled differently on a challenge to a statewide initiative in California, the state and those individuals and entities subject to state authority might be obligated to comply with inconsistent legal decrees. This situation would undermine uniformity and respect for the law, would cause confusion for attorneys

⁵⁴ See *id.* at iii.

⁵⁵ See *id.* at 43.

⁵⁶ *Id.* at 45.

⁵⁷ *Id.*

⁵⁸ See Hellman Statement, *supra* note 29, at 3.

⁵⁹ See Hug, *supra* note 45, at 898.

and litigants, and would increase forum shopping within California to secure favorable rulings. An alternative proposal to place all of California in its own division would isolate the development of its law from that of its economic partners, and it would not spare the state from the stare decisis defects of the divisional proposal.

In sum, the divisional arrangement will not remedy the problems that the Commission stated it would address, and, instead, the approach will have numerous deleterious consequences. Even though the Commission expressly stated that circuit division was not warranted for any circuit, including the Ninth, the divisional proposal effectively constitutes a split of the Ninth Circuit. It is also important to appreciate that the divisional approach may be irrevocable. Once the divisional idea is implemented and circuit-wide stare decisis is abandoned, it may be extremely difficult to return to the status quo and, thus, outright circuit splitting may be inevitable. Fortunately, there is a readily available approach that promises to be more effective and less disruptive than the divisional arrangement. That approach is the Evaluation Committee and its suggestions for improving Ninth Circuit operations. We explore it next.

IV. THE EVALUATION COMMITTEE APPROACH

Although there are serious flaws in the divisional restructuring proposal, the Ninth Circuit acknowledges that some observers have raised concerns regarding the circuit with the White Commission. Any circuit would be remiss if it failed to take such concerns seriously, assess their validity, and take appropriate steps to remedy them. That is exactly what the Ninth Circuit did in January 1999 when it appointed a distinguished ten member Evaluation Committee “to examine the existing policies, practices, and administrative structure of the Ninth Circuit Court of Appeals, in order to make recommendations to its judges to improve the delivery of justice in the region it serves.”⁶⁰ This approach, the court believes, is a far more responsible manner of addressing and resolving legitimate concerns than the imposition of a disruptive and untested restructuring with countless unanticipated and potentially counterproductive side effects.

The Evaluation Committee, chaired by Senior Circuit Judge David R. Thompson of San Diego and consisting of circuit judges from all of the

⁶⁰ See “Notice and Request for Comment,” July 13, 1999 (source available with the authors).

administrative units, a representative of the district court bench, a prominent scholar of the federal appellate courts, and an experienced appellate practitioner,⁶¹ has been meeting regularly for the last year to investigate and study concerns and issues raised in relation to the Ninth Circuit Court of Appeals. It has focused on consistency of decisions, regional sensitivity, productivity and delay, and the *en banc* process. In addition to meeting regularly and reviewing research work from its staff attorneys, the Committee has heard from academics and has conducted bench-bar focus groups at a variety of locations in the circuit to obtain the views and suggestions of the Ninth Circuit bar. It has also widely circulated a detailed call for comments from judges, lawyers, and other interested parties from across the circuit and across the country.

The initial results of this initiative have been encouraging. As the process is an ongoing one, it should continue to yield positive benefits for circuit operations for years to come. In the area of consistency of decisions, we have already noted the lack of any objective evidence that Ninth Circuit decisions are subject to greater inconsistency than those in other circuits. We believe that any conflicts among decisions that have occurred have been resolved by the circuit's *en banc* process. However, the perception still remains that such a large circuit cannot avoid inconsistencies with so many panels issuing so many opinions.

The Committee has focused its efforts on increasing the court's ability to recognize potential or perceived conflicts early and address them directly and immediately. To obtain assistance, the Committee has widely circulated to the bench, bar, and law schools within the circuit, a call for help in identifying perceived conflicts among its unpublished memorandum dispositions and among published opinions and unpublished memorandum dispositions. The court is also considering an experiment to relax its citation rules to permit counsel to cite to unpublished memorandum dispositions for their persuasive value or to highlight conflicts between a published opinion and an unpublished disposition.

⁶¹ In addition to the chair, the committee members are Chief District Judge David A. Ezra of Honolulu, Ninth Circuit Judge Michael Daly Hawkins of Phoenix, Professor Arthur D. Hellman of the University of Pittsburgh School of Law, Assistant United States Attorney Miriam Krinsky of Los Angeles, Senior Ninth Circuit Judge Edward Leavy of Portland, Ninth Circuit Judge M. Margaret McKeown of Seattle, Ninth Circuit Judge Thomas G. Nelson of Boise, Ninth Circuit Judge Mary M. Schroeder of Phoenix, and Ninth Circuit Judge Kim M. Wardlaw of Los Angeles.

Two other Committee ideas in this area which the court of appeals has implemented include establishment of an “electronic mailbox” through which judges and lawyers can notify the court of perceived conflicts, and the use of staff attorney specialized expertise to spot potential conflicts and sensitive decisions and bring them to the court’s attention for extra scrutiny.

The Committee is also experimenting with the regional assignment of judges in response to various concerns about the need for a regional perspective in appellate decision making. The court has already adopted and implemented a recommendation that at least one judge who resides in the administrative unit (northern, middle, southern) where the case originated be assigned to the appellate panel hearing that case. The court also is experimenting with holding more panel sittings in additional cities across the circuit and combining them with bench-bar activities to increase outreach to and communication with all parts of the region.

The court has achieved substantial increases in productivity from the use of its innovative motions and screening calendars. Every month a screening panel of three judges sits in San Francisco to consider less complex cases that can be easily resolved by the application of clearly defined circuit precedent. These screening panels will decide an average of 340 motions and dispose of an average of 140 appeals on the merits. With more judges, the court could increase this output. The Committee is also considering other approaches to increase productivity that include increased “batching” of cases with common issues before the same argument panel for quicker dispositions (something that is being done now but would be expanded on a larger scale) and designating “lead cases” in which the panel decision would affect a whole series of subsequent cases with a common issue. The court is expected to experiment with these and other combinations of proposals to see if it can continue to make gains in productivity without the benefit of additional resources.

The Ninth Circuit also believes its unique limited *en banc* process is an efficient and effective use of scarce institutional resources which operates in a manner that respects the needs and interests of each judge to have a role in the process of declaring circuit law. After a three-judge panel has rendered its opinion in a case, any judge on the court, including a senior judge, may call for a rehearing *en banc* and write memos in support of the call. Within certain time limits, all judges may write memos for or against the *en banc* call. This results in an insightful

exchange where every active and senior member of the court is able to express a view on the call and on the underlying substantive legal issues in the case. After a prescribed period of time for this exchange, all of the active judges on the court vote on whether to take the case *en banc*. If a majority is not attained, it represents a decision of the full court that the panel opinion should stand. By tradition and understanding in the Ninth Circuit, limited *en banc* decisions are fully accepted by the court as being the final decision of the court as a whole. Since 1980, when Congress authorized the court to employ the limited *en banc* process, there have been more than 170 limited *en banc* decisions, one third of which were unanimous and three quarters of which were rendered by a majority of 8 to 3 or greater. This is a strong indication that a full *en banc* court would have reached the same decision.

The Evaluation Committee recognizes that some observers perceive that the *en banc* decision may not reflect the views of all of the judges because not all of the active judges sit on the *en banc* court. The Committee enlisted the assistance of a distinguished group of academic scholars from the economic, political science, and statistics disciplines to advise it on the issue of representativeness. They concluded that the court could achieve approximately 93 percent representation of the views of all of the judges of the court if the limited *en banc* court consisted of seven judges; increasing that number to eleven judges achieved a representational percentage of approximately 95 percent (and 13 yielded 96 percent). Nonetheless, the court is as concerned with perception as it is with reality, and the Committee has since recommended an increase in the size of the *en banc* court.

Some observers, including the United States Department of Justice and the Circuit Justice, have suggested that the court take more cases *en banc* each year. A statute currently requires a majority vote of the active judges to take a case *en banc*.⁶² In the United States Supreme Court, just under a majority vote (4 of 9) is sufficient to grant certiorari, and the Committee is exploring a similar device to take a case *en banc*. Both of these proposals, relating to the size of the *en banc* court and the vote required to go *en banc*, along with the requirement of geographical representation on all panels mentioned above, are the subject of proposed legislation by Senator Dianne Feinstein.⁶³ The court has voted

⁶² See FED. R. APP. P. 35(a).

⁶³ Ninth Circuit Court of Appeals En Banc Procedures Act of 1999, S. 1403, 106th Cong. (1999).

to endorse Senator Feinstein's bill as a reasoned, responsible alternative to the radical restructuring proposed by The Federal Ninth Circuit Reorganization Act of 1999.⁶⁴ Anticipating that the number of *en bancs* will increase in the future, the court has adopted a new procedure, on an experimental basis, for the *en banc* court to sit quarterly throughout the year to keep pace with the additional hearings required.

This is a sampling of the myriad issues explored and acted on by the Evaluation Committee as the court seeks to fashion appropriate responses to perceived concerns about its operations. The process is an ongoing one and reflects the Ninth Circuit's continuing commitment and willingness to re-evaluate itself and to further the process of experimentation and innovation that will lead to even greater efficiency and effectiveness in the years to come.

V. CONCLUSION

The White Commission conscientiously discharged its challenging responsibilities in the brief time allotted by Congress. However, its research has produced no substantial objective or subjective evidence of dysfunction in Ninth Circuit administration or court of appeals operations that would warrant the Commission's preference for smaller decisional units. The Commission's proposal to divide the Ninth Circuit Court of Appeals into three autonomous divisions to achieve smaller decisional units is a drastic, untested, and flawed approach that will lead to less, rather than more, uniformity, consistency, and coherence in the development of circuit law.

The Ninth Circuit itself is seriously considering the concerns raised by the Commission. The Ninth Circuit has created an Evaluation Committee to reassess thoroughly every aspect of the court's operations. The measured approach of the Evaluation Committee, as distinct from the disruptive and untested remedy of divisional restructuring, is a much more responsible and flexible solution that is grounded in the best aspects of what has worked in the past and will succeed in the future.

We urge Congress to follow carefully the work of the Evaluation Committee and to support its approach through legislation that authorizes the circuit to continue and expand its experimentation with innovative measures to address the large appellate caseload.

⁶⁴ S. 253, 106th Cong. (1999).