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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.

Thomas E. Baker*

I. INTRODUCTION

Senate Bill 948, now pending before the Senate Judiciary Committee, would divide the United States Court of Appeals for the Ninth Circuit into two circuits: a new Ninth Circuit composed of Arizona, California, and Nevada, and a new Twelfth Circuit composed of Alaska, Hawaii, Idaho, Montana, Oregon, Washington, Guam, and the Northern Mariana Islands. This is not a good idea.

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The author served as Associate Reporter to the Subcommittee on Structure of the Federal Courts Study Committee (1989-90). This article has been adapted from a background paper written for the Subcommittee on Structure—Judge Levin H. Campbell (Chair); General Counsel J. Vincent Aprile II; Morris Harrel, Esquire; Senator Howell T. Heflin; Judge Judith N. Keep; and Reporter Denis J. Hauptly—and this article has benefited from this involvement. The author also thanks the various witnesses before the Senate Judiciary Subcommittee on Courts and Administrative Practice who provided their statements, which are relied on here. The views expressed here, however, are those of the author alone.

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Representative Morrison (Wash.) recently introduced a related bill that also would divide the present Ninth Circuit but would reassign the states and territories differently to create a new Ninth Circuit composed of Arizona, California, Nevada, Hawaii, Guam, and the Northern Mariana Islands, and a new Twelfth Circuit composed of Alaska, Idaho, Montana, Oregon, and Washington. H.R. 4900, 101st Cong., 2d Sess. (1990). The House bill was referred to committee and a hearing was held before the Committee on the Judiciary's Subcommittee on Courts, Intellectual Property, and the Administration of Justice on June 13, 1990. 136 Cong. Rec. D730 (daily ed. June 13, 1990). This difference in possible realignments could detract significantly from the momentum to divide, as was true during the protracted congressional consideration of dividing the Fifth Circuit. See infra text accompanying notes 38-54. Bar leaders in Guam and Hawaii oppose any arrangement that assigns California to a different circuit. Hawaii State Bar Association, Resolution in Opposition to Senate Bill 948 (June 26, 1989) (contained in letter from Charles W.
Not that there is anything wrong per se with redrawing circuit boundaries. Even a brief historical account demonstrates that Congress has redrawn circuit boundaries quite regularly. Indeed, my own inclination is that Congress ought to redraw the circuit boundaries most dramatically. However, splitting the Court of Appeals for the Ninth Circuit into two new courts is not a good idea now, because, first, it will do nothing to help the problems of that particular court, and, second, the problems of the courts of appeals generally might be helped by a more systematic approach.

The "crisis" presently facing the Ninth Circuit is in no way atypical of what other courts of appeals are experiencing, and, adjusting for scale, a good argument can be made that Ninth Circuit innovations in administration are ahead of other circuits. Furthermore, there is no evidence that simply dividing the Ninth Circuit would result in any lasting improvements for the two new circuits. For now, it is more desirable to continue the careful study of the Ninth Circuit as one possible model of national reform. Indeed, the preferable congressional inquiry would be to reconceptualize the system of intermediate courts and, perhaps, to consider whether a radical restructuring is in order. Congress should accept the general suggestion of the Federal Courts Study Committee for a careful five year study of structural alternatives for the entire tier of federal intermediate courts.

II. A BRIEF HISTORY

The existing circuit boundary lines—depicted on that map of the United States for lawyers in the front of Federal Reporter, Second

Key, President Hawaii State Bar Association, to Hon. Harold Fong, Chief Judge, United States District Court, Hawaii (June 26, 1989) (copy on file at Arizona State Law Journal); Letter from William J. Blair to Senator Howell T. Heflin (Mar. 6, 1990) (copy on file at Arizona State Law Journal). The sponsors of the Senate bill have retreated somewhat to say that "Hawaii and the territories ought to be able to choose the circuit best suited to their location." Senators Slade Gorton, Mark O. Hatfield, and Ted Stevens, Response to Tentative Recommendations of the Federal Courts Study Committee 1 (Jan. 31, 1990) [hereinafter Response to Tentative Recommendations] (copy on file at Arizona State Law Journal). This would not be enough for Senator DeConcini, who opposes division generally and has promised that, if the legislation goes forward, he will "see to it that Arizona and California are not in the same circuit." Hearing on S. 948 Before the Subcomm. on Courts and Admin. Practice of the Senate Judiciary Comm., 101st Cong., 2d Sess. 289 (statement of Sen. DeConcini) [hereinafter Statement of Senator Dennis DeConcini].

The Senate version will be the first object of analysis because the debate over Senate Bill 948 has developed more fully and, second, because, presumably, the arguments over H.R. 4900 can be expected to follow similar lines. See 136 Cong. Rec. E1700-01 (daily ed. May 24, 1990) (statements of Reps. Morrison and Craig).
Series and the Federal Supplement—are the arbitrary products of history.\(^2\) And the point that this geography-for-lawyers is imaginary, the fiction of a statute, should not be overlooked.

Congress first drew circuit boundaries in section 4 of the Judiciary Act of 1789, which created the original intermediate tier of federal courts—three named circuits ("Eastern," "Middle," and "Southern") geographically encompassing the original thirteen district courts.\(^3\) The district courts were exclusively trial courts of limited jurisdiction. The circuit courts were the principal trial courts, with original jurisdiction over more serious criminal controversies, diversity suits above a set figure, and civil cases in which the United States was a party. The three circuit courts had some appellate jurisdiction to review specified categories of district court decisions, but the Supreme Court was the primary appellate court. The circuit courts had no judges of their own; instead, two Supreme Court justices "rode circuit" to sit with one district judge as a panel. This enhanced the federalizing influence of the third branch and was designed to assure uniformity in the national law.\(^4\) In order to lessen the travel burden on the justices, Congress soon reconstituted the circuit courts to require a panel of one justice and one district judge.\(^5\) Three named circuits became numbered circuits with the passage of the short-lived "Midnight Judges" Act in 1801.\(^6\) The 1801 statute created circuit judgeships enough to reconstitute the circuit courts as one three-judge panel in each of the six redrawn and numbered circuits. The repealing statute undid this the next year, but preserved the numbered circuits, reassigned some states, and further reduced the circuit court quorum to one district judge sitting alone.\(^7\)

The technical duty of Supreme Court justices riding circuit obliged Congress to add to the membership of the Supreme Court and to create new circuits in order to accommodate westward expansion. A Seventh

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4. See J. Goebel, 1 History of the Supreme Court—Antecedents and Beginnings to 1801, at 457-508, 552-661 (1971).


Circuit was added for Kentucky, Ohio, and Tennessee in 1807. Reluctant to increase the size of the Supreme Court, however, Congress went on for a generation without bringing new states into the circuits.

In 1837, Congress acceded to the built-up judicial needs by increasing the number of justices to nine and by redrawing the country into nine redrawn circuits. Again, some states were reassigned from one circuit to another. California was included in 1855. In 1862, the states that had been admitted to the Union since the major rearrangement in 1837 were assigned to circuits by enlarging the existing circuits; a Tenth Circuit and a tenth justice were added in 1863. Back then Congress was quite willing to redraw circuit boundaries to shift a state from one circuit to another as, for example, when Indiana was moved from the Seventh Circuit to the Eighth Circuit.

Again in 1866, Congress rearranged the circuits, reshuffling the states to draw nine circuits. This statute grouped California, Nevada, and Oregon in a newly-numbered Ninth Circuit to which Montana, Idaho, and Washington soon were added. An 1869 statute created a circuit judgeship for each circuit and further reduced Supreme Court justice circuit-riding to a symbolic minimum.

The period between 1870 and 1891 has been labeled quite aptly as "the nadir of federal judicial administration." Federal dockets grew

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15. Act of Apr. 10, 1869, ch. 22, 16 Stat. 44 (current version at 28 U.S.C. § 43 (1988)). This act also restored the Supreme Court bench to nine seats.
dramatically as a result of geographical expansion, population growth, commercial development, and congressional extensions of jurisdiction. The federal courts were hard-pressed to keep up. When congressional reformers could not agree on what to do, nothing was done and matters worsened: "The federal judicial system, ill-equipped to handle the pre-Civil War demands on its resources, nearly ground to a halt during this post-war period, buried in work."\textsuperscript{17} The country's western vastness had made circuit-riding wholly unfeasible. A complement of ten circuit judges, one in each numbered circuit,\textsuperscript{18} could not realistically supervise the growing number of district courts, which by then had reached sixty-five districts. An appeal from a district court to a circuit court "panel" of one district judge was viewed practically as a waste of time. The number of appeals exceeded the system's capacity for appellate review.\textsuperscript{19}

With the Circuit Court of Appeals Act of 1891, popularly known as the Evarts Act, Congress made the most significant structural change since the creation of the federal courts.\textsuperscript{20} The statute created a new court—the circuit court of appeals—for each of the nine circuits. Each court was comprised of two circuit judges (a second judgeship was added in each circuit) and either one circuit justice or one district judge. The original circuit court continued as a trial court, but its whole appellate jurisdiction was transferred to the new circuit court of appeals. A second appeal as of right to the Supreme Court from the circuit court of appeals was limited by subject matter and jurisdictional amount. In the remaining cases, the circuit court of appeals was reviewed only with discretionary leave of the Supreme Court. The anachronistic circuit courts were finally abolished and their remnant original jurisdiction was transferred to the district courts in 1911.\textsuperscript{21}

During this period, the modern Ninth Circuit took shape with the addition of Alaska, Arizona, Hawaii, and Guam.\textsuperscript{22} The national struc-
ture became more stable in 1925 when Congress dramatically expanded the Supreme Court's discretion over its docket. This design contemplates the district court for trial to resolve disputes, the court of appeals for the appeal as of right to correct error, and the Supreme Court for the discretionary final review to establish a uniform national law.

Even after the structure and functions of the modern federal courts stabilized, Congress continued to redraw circuit boundaries. In 1929, the Court of Appeals for the Tenth Circuit was added to the nine circuits created by the Evarts Act by detaching six states from the Eighth Circuit. Those two circuits have remained geographically constant since then. In 1948, Congress formally added the District of Columbia Circuit. The Judicial Code of that same year renamed the circuit courts of appeals as the "United States Court of Appeals" for the (numbered/named) Circuit. The Court of Appeals for the Eleventh Circuit was created in 1980 by cleaving Alabama, Florida, and Georgia from the former Fifth Circuit to leave Louisiana, Mississippi, and Texas in the new Fifth Circuit. And two years later, Congress added a new circuit to the list, the Federal Circuit, which represents a notable experiment with a national boundary and appellate subject matter jurisdiction. Thus, over two centuries Congress has demonstrated a ready willingness to redraw circuit boundaries and to reassign states to existing or newly created circuits. Viewed historically, these boundary lines, far from being chiseled in stone, appear to be quite evanescent. Viewed functionally, these incidents of redrawing may be recognized as a frequent exercise of the congressional power to "from time to time


III. DIVIDING COURTS OF APPEALS

During the modern period, Congress twice has divided existing circuits into two new circuits: in 1929 to separate the new Tenth Circuit from the Eighth Circuit, and in 1981 to separate the new Eleventh Circuit from the Fifth Circuit. The attendant circumstances surrounding these divisions and the new courts' experiences since should help to inform the contemporary debate over whether to separate a new Twelfth Circuit from the Ninth Circuit, the proposal in Senate Bill 948.

In 1925, efforts to alleviate the congestion in the circuit dockets centered on the Eighth Circuit. That court then covered thirteen states from Minnesota in the north to New Mexico in the south and from Iowa in the east to Utah in the west. In 1927, an ABA committee, without the formal endorsement of the ABA, proposed to redraw all the existing circuit boundaries and in the process create a new Tenth Circuit to include Arizona, California, Idaho, Montana, Nevada, Oregon, Utah, and Washington. The opposition to the proposal proved diverse and effective. Opponents complained chiefly about switching states from one circuit to another and the consequent changes in the law, although buttressing arguments were heard: that the workload in the Eighth Circuit did not justify a division, that the bill would not adequately address the docket problem because it failed to create new judgeships, and that the one-to-one ratio of circuits to justices on the Supreme Court should not be abandoned. After that, Chief Justice Taft, exercising characteristic leadership, suggested that Congress could divide the Eighth Circuit and let alone all the others. Members of the bar and the judges on the Eighth Circuit supported this proposal and, after debating various bills to divide the court in different ways, Congress passed a statute in 1929 dividing the court and creating two new judgeships.

29. U.S. CONST. art. III, § 1 (“inferior” is the term in article III); see E. CHEMERINSKY, FEDERAL JURISDICTION § 1.1, at 3 (1989).
32. Id. at 124-28.
Since then, the Eighth Circuit has included Arkansas, Iowa, Minnesota, North Dakota, and South Dakota, and the Tenth Circuit has included Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming. Since 1929, active judgeships have increased in the Eighth Circuit from five to ten and in the Tenth Circuit from four to ten. The dockets of the courts of appeals in 1929, the year of the division, have so little in common with contemporary dockets in size or in scope, however, that a comparison is not very helpful. These two courts of appeals today are typical in that increased staff and procedural innovations continue to keep them afloat. What is interesting is the noted reluctance to redraw all the circuit boundaries and the congressional strategy to focus, instead, on dividing one large "problem" circuit. The same strategy was espoused again and was explained further in 1973 by the so-called "Hruska Commission":

We have not recommended a general realignment of all the circuits. To be sure, the present boundaries are largely the result of historical accident and do not satisfy such criteria as parity of caseloads and geographical compactness. But these boundaries have stood since the nineteenth century, except for the creation of the Tenth Circuit in 1929, and whatever the actual extent of variation in the law from circuit to circuit, relocation would take from the bench and bar at least some of the law now familiar to them. Moreover, the Commission has heard eloquent testimony evidencing the sense of community shared by lawyers and judges within the present circuits. Except for the most compelling reasons, we are reluctant to disturb institutions which have acquired not only the respect but also the loyalty of their constituents.

That comprehensive study recommended, instead of a national reconfiguration, that Congress divide the two largest courts of appeals—the

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35. The Tenth Circuit is a candidate for a question of "federal jurisdiction trivial pursuit." Because the District of Wyoming includes all of that state and such portions of Yellowstone National Park as are within Montana and Idaho, the Tenth Circuit contains areas outside the six listed states. 28 U.S.C. § 131 (1988); see C. Wright, supra note 26, § 2, at 8 n.3. An even more obscure provision, perhaps a "daily double" question, is the Ninth Circuit's statutory mandate to decide issues arising out of the Snake River Watershed via the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. §§ 839-839h (1988). 9TH CIR. R. 15-2.1. This gets the Ninth Circuit into Wyoming, a Tenth Circuit state, as far as Jackson Lake. See generally Hellman, Legal Problems of Dividing a State Between Federal Judicial Circuits, 122 U. PA. L. REV. 1188 (1974).


Fifth Circuit, which has happened, and the Ninth Circuit, which is being considered anew.

Nearer in time and more similar in complexity than the division of the Eighth Circuit, the division of the Fifth Circuit is the most significant legislative precedent for the current debate over dividing the Ninth Circuit. One could write a book about the story of the division of the Fifth Circuit, and it would tell an involved story of judicial politics. The docket problems of the Fifth Circuit first became a concern two decades before Congress moved to divide. In 1964, an ad hoc committee of the Judicial Conference of the United States recommended a division of the Fifth Circuit into a new fifth circuit composed of Alabama, Florida, Georgia, and Mississippi, and a new eleventh circuit composed of Louisiana, Texas, and the Canal Zone. Congress added four temporary judgeships to the Fifth Circuit in 1966, and in 1968 made those judgeships permanent and added two more, increasing the total to fifteen judges. Between 1950 and the mid-1970s, the filings in the Fifth Circuit multiplied by a factor of nine and "Congress simply could not add judges fast enough." The court survived by exceeding norms of productivity and by implementing intramural procedural reforms that cumulatively transformed the intermediate appellate court.

Responding to the urgings of Chief Justice Burger and others, Congress created the Commission on Revision of the Federal Court Appellate System, the so-called Hruska Commission. After extensive hearings, the Hruska Commission recommended in 1973 that Congress divide the Fifth Circuit and the Ninth Circuit. The states of the Fifth Circuit were to be grouped in two new circuits: Alabama, Florida, and Georgia in one circuit, and Mississippi, Louisiana, and Texas in another
circuit. The Commission also proposed two alternative realignments: (A) grouping Alabama, Florida, Georgia, and Mississippi in one circuit and grouping Arkansas (from the Eighth Circuit), Louisiana, and Texas in another circuit; or (B) grouping Alabama, Florida, Georgia, and Mississippi in one circuit and grouping Louisiana and Texas in another circuit.

This recommendation and these two alternatives satisfied most of the general criteria for realignment that the Commission established: (1) circuits would be composed of at least three states; (2) no circuit should be created that would immediately require more than nine judges; (3) a circuit should contain states with a diversity of legal business, socio-economic interests, and population; (4) realignment should avoid excessive interference with established circuit boundaries; and (5) no circuit should contain noncontiguous states. Bills were introduced in Congress tracking each of the three proposed divisions, but a compromise measure, seemingly unsatisfactory to everyone, emerged: to reorganize the Fifth Circuit into two internal divisions, each with its own chief judge, clerk, circuit executive, and judicial council. Objections voiced against the creation of two new courts ranged from the ridiculous to the sublime: a concern over which new court would bear the name Fifth; resistance to grouping Mississippi with the civil law state of Louisiana and with Texas; a worry about creating an oil and gas circuit dominated by Louisiana and Texas; and reverence for the history and tradition of the Fifth Circuit. The matter stalled.

In 1978, Congress tried again. A bill passed the Senate that would have added long overdue judgeships and would have created two separate circuits: a new Fifth Circuit comprised of Alabama, Florida, Georgia, Mississippi, and the Canal Zone, and a new Eleventh Circuit comprised of Louisiana and Texas. The House passed a bill that would have increased the number of judgeships, but would not have divided the court. The conference committee had a difficult time of it: the Senate's bill would have violated two criteria of the Hruska Commission to create a two-state circuit and to create two new courts each with more than nine judges. The civil rights industry opposed creating the proposed Fifth Circuit with, as-perceived, more conservative, deep-

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46. Commission on Revision, supra note 37, at 231-32.
south judges, and the worry was raised again that the proposed eleventh circuit eventually would become little more than an oil and gas subject matter court. With the important nationwide patronage of more than 150 new judgeships providing the "will," however, Congress found the "way" to compromise in 1978. The Fifth Circuit was increased to twenty-six judges and the statute authorized any court of appeals with more than fifteen active judges (the Ninth Circuit was the only other) to constitute itself into administrative units and to adopt a rule to perform the en banc function with fewer than all its members.\textsuperscript{51} Congress had added judges and had left the problem with them.\textsuperscript{52}

The Fifth Circuit Judicial Council followed the congressional lead and appointed a committee to study the feasibility of an internal reorganization into administrative units and to propose an en banc procedure. After much debate and deliberation, in May 1980, the Fifth Circuit Judicial Council arranged the court into two administrative units: Unit A, composed of Louisiana, Mississippi, and Texas, and Unit B, composed of Alabama, Florida, and Georgia. The unities of the en banc court and the judicial council were maintained. But significantly, the judicial council for the first time unanimously petitioned Congress to divide the court into two autonomous circuits.\textsuperscript{53} Congress found this judicial unanimity compelling and, when numerous bar associations and other organizations supported the measure and when more general opposition from civil rights groups and others fell away, the former Fifth Circuit was divided.\textsuperscript{54}

Congress divided the former Fifth Circuit essentially because of its largeness—in geography, population, docket, and judgeships. Redrawing the circuit boundaries, however, did absolutely nothing to relieve the press of the caseload. The new Fifth Circuit reached the pre-division


\textsuperscript{53}See Reavley, supra note 52, at 5-7; see also Hearing on S. 948 Before the Subcomm. on Courts and Admin. Practice of the Senate Comm. on the Judiciary, 101st Cong., 2d Sess. 642 (1990) (statement of Gilbert F. Ganucheau).

crisis level of filings in less than five years. The Eleventh Circuit Judicial Council reached the point of passing a formal and unanimous resolution last March asking Congress not to add any more circuit judgeships, despite statistical-caseload justifications, because that court of appeals simply would grow too large.

IV. THE CURRENT PROPOSAL TO DIVIDE THE NINTH CIRCUIT

A. Background

Proposals to divide the Ninth Circuit have circulated since before World War II, and it was no surprise in 1973 that the Hruska Commission recommended it be divided, along with the Fifth Circuit. What was surprising was the Commission’s proposal to carve up California and reassign district courts in the same state to different circuits. That was enough to quiet the matter for then, although the idea has been persistent: The last bill to divide the Ninth Circuit went nowhere in 1983.


57. Commission on Revision, supra note 37, at 234-35; see supra text accompanying notes 45-48.


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In 1978, Congress authorized courts of appeals with more than fifteen active judges to reorganize into administrative units and to streamline the en banc hearing procedure.60 The Ninth Circuit has accepted Congress' invitation to innovate in numerous ways.61

The court reorganized itself internally into three administrative units to allow for a more decentralized and more efficient administration. The most senior active judge acts as the administrative judge for each unit. The chief judge,62 the three administrative judges, and five active judges drawn by lot from among those willing to serve, constitute an executive committee, which is authorized to act between court meetings in emergencies and on lesser matters. The committee's chief function is to review proposals on operating procedures and to make recommendations to the full court.63 There is the argument that "[s]ooner or later, the Ninth Circuit will be divided, either by Act of Congress or on a de facto basis by the creation of regional administrative units within the circuit."64 Even conceding that division is best accomplished by statute, the Ninth Circuit's administrative arrangement is far from a de facto division. Besides, my ultimate position is not that the court never be divided but the more short term argument that it not be divided now.

By circuit rule, as authorized by Congress, the court has adopted a limited en banc court procedure.65 The chief judge and the ten active

60. The authorization reads:
   Any court of appeals having more than 15 active judges may constitute itself into administrative units complete with such facilities and staff as may be prescribed by the Administrative Office of the United States Courts, and may perform its en banc function by such number of members of its en banc courts as may be prescribed by rule of the court of appeals.


judges chosen by lot sit on each en banc panel; however, an en banc rehearing is granted only on the vote of a majority of all active judges. Retired Chief Justice Burger seems to think this is a practice that will not work in theory. Critics of the limited en banc complain that the device is expensive and time-consuming without being effective to maintain a unity in the law of the circuit. The “luck of the draw” selection procedure in particular weakens allegiance to the en banc holdings and makes the reconciliation of precedents even less likely. Based on its institutional experience, the Department of Justice has concluded that the Ninth Circuit judges themselves have “a strong aversion to using even this limited en banc procedure.” It is common for the judges not to vote on petitions for en banc rehearing—on average only nine cases are reheard en banc each year—and the “super-en banc” convening all twenty-eight judges, though still possible, has never once been held. Necessarily part of this reluctance is due to the unwieldy nature of any en banc rehearing, in costs and delay. These rehearings are judicial-labor intensive, requiring consideration of motions for rehearing, convening, and conferencing, and building and maintaining a more complicated consensus. Besides the workload, there

66. This was his main objection to retaining the current boundary:

Now calling that panel of eleven judges an en banc hearing is what the modern-day law students call an oxymoron. It is a horrible word—an inherent contradiction. It isn’t an en banc hearing at all. If you take the very words “en banc,” French or English, it means all of the judges involved. And, of course, the Ninth Circuit judges saw from the experience of the Fifth Circuit that they had to do something.

... I don’t think there is an en banc procedure in the Ninth Circuit at all. An en banc procedure would be every judge who, under the law, by virtue of active service, is entitled to a vote.


is the not yet completely fantastic expectation that the Supreme Court will grant review.

These are telling criticisms. First, I too am skeptical of the continued efficacy of the en banc mechanisms in general, in the Ninth Circuit and in other courts of appeals. The procedure is costly in terms of judicial resources. Today's larger courts with their expansive dockets do not seem to be as manageable by an en banc majority policing for consistency among three-judge panels. Often a year's delay results only in a fragmented series of opinions that do not provide an authoritative resolution of an issue of law of the circuit. Second, there are further compromises attendant on the limited en banc procedure with fewer than all judges. The raison d'être of the en banc court is to establish the law of the circuit by a majority of all the judges, not by a simple majority of a subset of judges randomly chosen, whose decision may not be representative. But these shortcomings have been traded off against the wholly unworkable concept of a hearing panel with twenty-eight members. After all, these trade-offs were made first by Congress in the controlling statutory provision and then by the Ninth Circuit. The court hardly can be faulted for choosing a legislated option and avoiding the demonstrated problems of the other choice. Concern for the necessary evil of limited en banc participation may be allayed somewhat by the testimonials of some judicial participants. For example Judge Clifford Wallace has observed:

Having sat on seven of these limited en banc cases, my impressions are positive. The critical question is whether each judge of the court of appeals will conclude that he or she need not vote on every en banc case. From my own observations, I sense a different climate when the selected judges represent the court. En bancs under the traditional system often centered around attempts by the author of the panel opinion to justify his or her position, in the face of repeated attacks by the panel dissenter. Now, only by chance is a member of the panel on the en banc court, and, so far, I have not witnessed any great defensiveness.  

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70. See Baker, supra note 36, at 291-92.
71. Cf. supra text accompanying notes 38-44 (discussing docket problems in the Fifth Circuit).
73. Address by Judge J. Clifford Wallace at the Univ. of Cal. Law School at Berkeley (Dec. 2, 1982), reprinted in Lateef, supra note 63, at 9 (Judge Wallace succeeded Judge Goodwin as Chief Judge after this article was written).
From the point of view of lawyers and litigants, one might suppose a six-five decision by a limited en banc court to be as trustworthy a precedential datum as a five-four decision by the Supreme Court. Finally, the report of the Federal Courts Study Committee is persuasive: It recommends that the limited en banc mechanism actually be extended to other courts "to allow more efficient use of court of appeals resources . . . [since] [t]he growth in the number of circuit judges is likely to continue, increasing the potential for in banc courts of unwieldy size." The Ninth Circuit judges also have increased their judicial output and have adopted a number of intramural reforms, including a submission-without-oral-argument track for more straightforward appeals and a prebriefing conference program to narrow issues, shorten briefs, and encourage settlements. The role of support staff has been made more efficient. The Ninth Circuit likewise has been a leader in judicial utilization of advances in technology in such areas as electronic mail and computerized case management.

In their most recent biennial report to Congress, the judges of the Ninth Circuit have concluded that their experiment is over and may be deemed a success. The first report in 1982 described the planned changes. The second report in 1984 noted progress and acknowledged problems. The third report in 1986 concluded that a large court could dispose of a huge caseload effectively. The fourth report in 1989 carefully documents the judges' conclusion that there is no reason to divide their court. Indeed, the judges seem confident that "the innovations of the past decade provide a solid foundation for the continued growth of the Ninth Circuit.";

B. Senate Bill 948

Senate Bill 948, currently before the Courts and Administrative Practice Subcommittee of the Senate Judiciary Committee, seems to

75. FEDERAL COURTS STUDY COMM., 101ST CONG., 2D SESS., REPORT 115 (Apr. 2, 1990) [hereinafter FEDERAL COURTS STUDY REPORT].
76. But see Position Paper of Senator Slade Gorton, supra note 69, at 8 (critical of "bureaucratic procedures").
79. Id. (emphasis added). These studies and reports are often highly persuasive with members of Congress; see Statement of Senator Dennis DeConcini, supra note 1, at 288.
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have a good chance of overcoming the judges' conclusion.\textsuperscript{80} Introduced by senators from the Northwest, the redrawn boundaries would leave Arizona, California, and Nevada in a new Ninth Circuit, and would transfer Alaska, Hawaii, Idaho, Montana, Oregon, Washington, Guam, and the Northern Mariana Islands to a new Twelfth Circuit.\textsuperscript{81} This is not just some warning shot fired by Senator Gorton on behalf of the Pacific Northwest. Although efforts to divide have been cyclical, this is the most credible effort yet, as eight senators have joined as co-sponsors.\textsuperscript{82} In something of a surprise move, the Department of Justice has endorsed the measure, after having taken an official "no position" during earlier consideration.\textsuperscript{83} On March 6, 1990, a full-scale hearing was held before the Subcommittee on Courts and Administrative Practice of the Senate Judiciary Committee, and a full schedule of witnesses gave lengthy and serious testimony, some in favor and some opposed to the measure. Five senators from affected states have gone on record as opposed to division.\textsuperscript{84} Senator DeConcini, the only member of the Judiciary Committee to testify, opposed the bill. Other members of the committee, including Senator Joseph R. Biden, who chairs the committee, and Senator Howell T. Heflin, who chairs the subcommittee, have not yet declared their positions.

While the assertion by former Chief Judge Goodwin of the Ninth Circuit seems correct, that this proposal is "blatantly political,"\textsuperscript{85} most all issues having to do with federal courts are political. Ultimately, federal jurisdiction is politics. Furthermore, in public debates with Congress over the administration of the courts, "federal judges in the United States are by nature and necessity politicians."\textsuperscript{86} Published news


\textsuperscript{81} S. 948, 101st Cong., 1st Sess. (1989).

\textsuperscript{82} Original sponsors included Senators Burns (Mont.), Gorton (Wash.), Hatfield (Or.), Packwood (Or.), McClure (Idaho), Murkowski (Ala.), and Stevens (Ala.). \textit{See generally} 135 Cong. Rec. S5027 (daily ed. May 9, 1989) (statements of Introduction). Senator Symms (Idaho) and Senator Baucus (Mont.) later were added as cosponsors. \textit{See} 135 Cong. Rec. S5847 (daily ed. May 31, 1989); 135 Cong. Rec. S5198 (daily ed. May 11, 1989).

\textsuperscript{83} Letter from Bruce C. Navarro, \textit{supra} note 68. \textit{But see generally infra} note 198 (statement of Attorney General Richard Thornburgh).


\textsuperscript{85} Trigoboff, \textit{Northwest Favors Splitting 'California' Circuit}, Legal Times, June 12, 1989, at 2, col. 1 (quoting former Chief Judge Alfred Goodwin). In a later interview, former Chief Judge Goodwin said he no longer felt it appropriate to comment on the motivation of the measure's sponsors. N.Y. Times, Mar. 9, 1990, at B6, col. 3.

\textsuperscript{86} D. Barrow \& T. Walker, \textit{supra} note 38, at ix.
accounts suggest that this bill is the latest round in "a long running fight between the Northwest's pro-growth developers and the environmentalists." The point is that proponents of division are serious and committed and this bill deserves careful analysis.

One would suppose that those who would redraw circuit boundaries would bear the burden of persuasion, a burden which has gone unmet so far in the consideration of Senate Bill 948. In their formal responses, those who oppose the bill have persuasively rebutted the allegations of the Senate sponsors.

1. Size

Senator Gorton, who has lead the effort to divide the Ninth Circuit, deems the size of the circuit to be a problem in and of itself, just as the size of the former Fifth Circuit was a problem. He concludes:

In a nutshell: the Ninth Circuit is simply too large. This huge circuit requires too much travel, and has too many judges handing down too many opinions that breed inconsistency and lack of uniformity, and require judges and lawyers too much reading, in too little time, encouraging frivolous lawsuits and overburdening the court calen-

87. Trigoboff, supra note 85, at 2, col. 1. The alleged political motive is to overcome the so-called California-judge dominance of the Ninth Circuit, which lately has delivered too many "decisions—frequently reversals of district judges in Washington and Oregon—favoring such plaintiffs as Save the Yaak (a river in Montana) and Friends of the Earth. Often the defendants are governmental agencies cooperating with private concerns attempting to develop or draw resources from public lands." Id. at 2, 15; see, e.g., Portland Audubon Soc'y v. Hodel, 866 F.2d 302, 303 (9th Cir. 1989). The popular press also figures that the Ninth Circuit's decisions to stay state executions of various murderers from Washington and Montana have contributed to a regional hostility toward the court. Murphy, Critics say 9th Circuit Is Too Big for the Job, Seek To Secede, L.A. Times, June 27, 1989, at 3; see, e.g., Campbell v. Kincheloe, 829 F.2d 1453, 1457 (9th Cir. 1987) (affirming the denial of relief, but after a stay pending appeal). See generally Hearing on S. 948 Before the Subcomm. on Courts and Admin. Practice of the Senate Comm. on the Judiciary, 101st Cong., 2d Sess. (1990) (statement of Kenneth O. Eikenberry) [hereinafter Statement of Kenneth O. Eikenberry]. The debate has become personal on both sides. Senator Gorton has responded: "As expected, this bill has been taken personally by the Ninth Circuit hierarchy—God bless their souls—who has set out to defeat this bill and protect their power base." Position Paper of Senator Slade Gorton, supra note 69, at 5.


89. 135 CONG. REC. S5026 (daily ed. May 9, 1989) (statement of Sen. Gorton); see also Statement of Senator Conrad Burns, supra note 67; Testimony of Senator Hatfield, supra note 64.
dar, which costs the public too much money and delivers too slowly, too little justice.  

The Ninth Circuit covers nine states and two territories totaling approximately fourteen million square miles. Distances and expenses for lawyers are greater as a result. Travel expenses for the Ninth Circuit are the highest in the federal courts. But any circuit with Alaska will be the largest geographically. A typical panel sitting away from chambers usually involves only two hours travel time each way for a twenty to thirty hour stint on the bench.

The Ninth Circuit serves a population of almost forty-four million people, fifteen million more than the next largest, the Sixth Circuit, and about twenty million more than all the other courts of appeals. This is roughly one-sixth of the nation's population, the approximate proportion in the old Eighth Circuit when Congress divided it in 1929. But nearly any conceivable circuit with California will be among the largest in population.

With twenty-eight judgeships, the Ninth Circuit has twelve more than the next largest, the Fifth Circuit, and sixteen more than the average of the other circuits. The Ninth Circuit courts are staffed by twenty-eight circuit judges, eleven senior circuit judges, eighty-seven district judges, forty senior district judges, and sixty-two active plus eight recalled bankruptcy judges. By the estimate of Senator Gorton, as many as ten additional circuit judgeships are justified by the standard caseload formula, which would mean thirty-eight appellate judges. In the abstract, size may be viewed as an asset. The bench is enriched by diversity, and there is a flexibility in the court of appeals and in the district court to shift judges around to meet episodic needs. The most recent experience has been to the benefit of the Pacific Northwest and particularly Washington. During 1988 alone, forty-two assignments of judges were made from districts in the proposed new Ninth Circuit to

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90. Position Paper of Senator Slade Gorton, supra note 69, at 1; see also Letter from Bruce C. Navarro, supra note 68, at 3-5.

91. Lawyers and litigants from the large cities in the Pacific Northwest often are obliged to travel 600-1000 miles, at about that dollar cost, to San Francisco sittings. Statement of Mark C. Rutzick, supra note 72, at 8.


93. Population estimates indicate an increase of 17% over the 1980 census. Letter from Bruce C. Navarro, supra note 68, at 4.

94. Statement of Mark C. Rutzick, supra note 72, at 8.

districts in the proposed Twelfth Circuit. Maintaining the Ninth Circuit to allow such transfers, however, is not preferable to the forthright solution of appointing the number of judges that are needed in the burdened districts.

The Ninth Circuit’s caseload of more than 6000 appeals is 2000 larger than the next largest court of appeals and accounts for nearly one-sixth of the total appeals in all the twelve regional courts of appeals. Projections promise an even more Brobdignagian docket as the current rate of growth would double the 1980 docket well before the year 2000. In calendar year 1988, the Ninth Circuit terminated 6170 appeals, 17.7% more than the previous year. Despite three unfilled vacancies, the court’s calendar is current: Once an appeal is fully briefed by counsel, it is scheduled for the next argument calendar. Statistics should not be the final word, however, for they are too often difficult to assess meaningfully. Increases in quantity and in the complexity of appeals have come to be a given in the federal system. Intuitively, we might assume that division would ameliorate somewhat the burden on district judges and attorneys to keep up with the law of the circuit.

One sponsor noted that 14.5 months was the median time the Ninth Circuit took to process an appeal, the longest in the nation. Of that period, however, only a fraction is spent in judges’ chambers, from submission to disposition: 2.5 months for orally argued cases and 0.9


100. Id. at 3.


months for submitted cases. These figures are less than the national average. The remainder of the 14.5 months is spent by court reporters and attorneys in record preparation and briefing. Still this is a troubling statistic, for half the appeals take longer than two years. Some opponents of the division maintain that practicing attorneys do not complain of undue delay. And the point is repeated that dividing the circuit will have absolutely no effect in reducing the aggregate workload.

Finally, the Ninth Circuit may be sized by cost. Circuit expenses for 1988 totalled $25.3 million, about one-fifth of the total for all the courts of appeals. With an initial expenditure to establish the new Twelfth Circuit confidently estimated at $1.4 million, there is some speculation against logic and the whole experience of the federal government that the two new circuits would be more cost efficient and would produce a net savings.

This discussion of the size of the Ninth Circuit—its dimensions of geography, population, judgeships, docket, and cost—more often then
not suffers from a lack of context. Two comparisons illustrate this. Consider that the Ninth Circuit is today larger than the entire federal appellate judiciary of 1939, with nearly twice the total national caseload of 1939. There are approximately the same number of federal judges, trial and appellate, in the entire Ninth Circuit as there are state judges, trial and appellate in the single state of Arizona. Workload, not size, is the problem of the Ninth Circuit. Even if one were disposed in favor of circuit-splitting, it seems inescapable that any bill which keeps Arizona and California together, as does Senate Bill 948, cannot promise anything but a few speculative and marginal gains.

2. Consistency

Senator Gorton and Senator Hatfield expressed a serious concern for decreased consistency and the latter gave as one main reason for division "the increased likelihood of intracircuit conflicts."\(^{108}\) Statistically, opportunities for conflicting holdings are numerous: on a twenty-eight judge court there are 3,276 combinations of panels that may decide an issue, without counting senior judges, district judges, and judges sitting by designation. In 1989, there were 9,310 judge participations in panels.\(^{109}\)

Defenders from the Ninth Circuit respond:

Preservation of a single circuit with a single court of appeals has resulted in the creation of a consistent and predictable body of federal law throughout the western states and the Pacific maritime area, facilitating trade and commerce and contributing to stability and orderly progress. If [the admiralty and commercial law of the Pacific ports] were divided between two separate and independent Courts of Appeals, conflicts would inevitably develop and predictability of the law would be diminished in this vitally important region.\(^{110}\)

If the popular press' explanation that politics is behind this current proposal is correct, the sponsors apparently want conflicts between the two proposed circuits. Then the federal law in the Pacific Northwest would differ substantially from the federal law in Arizona, California, and Nevada.\(^{111}\) The sponsors are after a change in federal law, not

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108. 135 Cong. Rec. S5026 (daily ed. May 9, 1990) (statement of Sen. Gorton); Id. at S5027 (statement of Sen. Hatfield); see also Statement of Senator Conrad Burns, supra note 67, at 275; Response to Tentative Recommendations, supra note 1, at 6-9.


110. Position Paper of the Circuit Executive, supra note 88, at 5-6; see also Statement of former Chief Judge Alfred T. Goodwin, supra note 92, at 314-16.

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consistency. Senator Hatfield made much to do about a survey of judges and attorneys conducted by the Ninth Circuit in which a majority of judges and lawyers disagreed with the statement ""There is consistency between panels considering the same issue."" Whatever else might be said about the polling validity of this phrasing, a contrary impression appears from other questions in the same survey. A majority of both judges and lawyers agreed with statements that the ""Ninth Circuit decisions generally adhere to law announced in earlier opinions"" and that the ""quality of published opinions is good."" As one practicing lawyer testified at the subcommittee hearing: ""[S]plitting the Ninth Circuit is not something that the lawyers who practice before the Ninth Circuit have requested.""

Arguably, the Ninth Circuit has done more than other circuits to deal with intracircuit conflicts. All fully briefed cases are reviewed by central staff attorneys who code the issues on appeal into a computer. Cases that raise the same issue and become ready for calendaring around the same time are assigned to the same three-judge panel. This computer program also informs later panels when an earlier panel has heard but has not yet decided the same issue; the first panel that gets the issue then decides it authoritatively. Even judges who are not on the hearing panel write memoranda that result not infrequently in modification and clarification of a panel opinion. The limited en banc procedure already described decides conflicts that arise despite these procedures. A recent empirical study has concluded: ""On the basis of an admittedly limited sample, it does not appear that intracircuit


113. Position Paper of the Circuit Executive, supra note 88, at 8. A follow-up, more detailed, survey is underway currently to identify inconsistent lines of precedent, and preliminary results suggest there are few particular examples. Id. at 8-9.

114. Statement of Eric Redman, supra note 74, at 3. At the 1989 Judicial Conference of the Courts of The Ninth Circuit, in a secret ballot among all judges and lawyer representatives attending, 90% voted to oppose S. 948.

Lawyers voted 69 to 10 to oppose the measure. S. 948 is opposed by Bar Associations in Arizona, California, Hawaii, Idaho, Montana, Nevada and the Northern Mariana Islands. S. 948 has been endorsed by the Washington Bar Association and the Conference of Western Attorneys General.


A more recent innovation with the Staff Attorneys Office illustrates the effort to monitor and manage the law of the circuit. The Office reviews all appeals in the volatile area of sentencing guidelines and notifies the panel of any relevant published or unpublished opinions. The system will be computerized soon.

inconsistency is as much of a problem as many lawyers think."117 One indication of the effectiveness of this scheme is the relatively small number of en banc rehearings that are granted each year.

The gain in consistency to be expected from a division is that judges, lawyers, and litigants could cope better with a smaller and more predictable universe of case law. Perhaps the most troubling aspect of the debate over consistency is the cynical charge of "discretionary justice." The charge is that there is so much case law in the Ninth Circuit that it has become increasingly easy for panels to act like legal realist tribunals, that is to pick out the precedents that lead to the desired result. In such an environment, philosophy becomes controlling and such subjectivity generates uncertainty that attracts more appeals. To the extent this argument is true, however, it is true throughout the country and only more pronouncedly so in jurisdictions such as the Ninth Circuit that have larger bodies of case law.118 The problem would persist in two new courts. Dividing the court simply will not stop it.119

3. California Attitudes

Senator Gorton complained that the Northwest states "are simply dominated by California judges and California attitudes."120 He is concerned for a kind of geographical representation and for a regional familiarity with his Pacific Northwest he says California judges lack. He wants appellate judges who better understand the unique issues of the Northwest.121 Senator Burns said that "it is [not] fair or in the best interest of the judicial process" for citizens of states such as Montana to suffer because California "continues to experience an economic and population boom."122 He compares the six circuits on the east coast with the one circuit on the west coast to call for "judicial fairness,"


119. See Hellman, supra note 103, at 597-601.


invoking a kind of representation theory. Senator Hatfield, another co-sponsor, seems to distance himself from the California xenophobia to state positively the desirability of a Northwest circuit comprised of a small set of contiguous states with common interests—interests, presumably that are not common with California's.

Although "California attitudes" may be antithetical to the Pacific Northwest, the sponsors' underlying premise that California judges are idiosyncratic and monolithic, a subset among Ninth Circuit judges, is nonsense. One need not be a Turnerian historian to observe, first, that the coastal zeitgeist moves from either coast inward, and, second, that western influence on the nation's life and law is in the ascendency. Hostility to California judges is more pronounced regarding environmental law, and it seems to be an unfounded stereotype. Anyone who studied the judicial philosophies on the Ninth Circuit and then took the time to understand the way hearing panels are constituted would know better. Panels are drawn by computer from a pool that

123. Statement of Senator Conrad Burns, supra note 67, at 276.
124. 'Testimony of Senator Hatfield, supra note 64, at 253. Senator Hatfield explained: Opponents of the Bill respond to such an argument by branding it as an illegitimate attempt to "gerrymander" the make-up of the Court, or impermissibly balkanize federal law. The former is not the motivation, and the latter will not be the result. Circuit court boundaries were originally created to reflect this regional identity. Circuit size was determined, in part, by identification of a small set of contiguous states that shared a common background. The goal is not to avoid differences of opinion on various legal issues, nor to splinter the uniform development of federal caselaw. Rather, it is to foster reasoned decisions (which take into account the social, economic and historical circumstances from which legal issues arise) by judges who share similar backgrounds and experiences.

Id.

125. See San Francisco Chron., Mar. 12, 1990, at A16, col. 1 (editorial—Don't Split the Ninth Circuit). The Sierra Club Legal Defense Fund, admittedly an institution without claim of objectivity, surveyed the published opinions of the Ninth Circuit since 1987 on environmental issues and found them to be "about evenly split between affirming and reversing judgments."

Hearing on S. 948 Before the Subcomm. on Courts and Admin. Practice of the Senate Comm. on the Judiciary, 101st Cong., 2d Sess. 514 (1990) (statement of Michael Traynor, Chair, Sierra Club Legal Defense Fund) [hereinafter Statement of Michael Traynor]. The study "reveal[ed] neither domination of a particular region by judges appointed from states outside the [northwest] region nor an overall tendency in the existing Ninth Circuit to side with environmental interests."

Id. It seems noteworthy, however, that environmental groups are so visible in the opposition to the proposal to divide the Ninth Circuit. Something must be at stake for them. Republican Senator Wilson, a candidate for Governor in California, where environmental issues are important, has raised an environmental hue and cry. See Moore, Debating an Appeals Court Boundaries, Nat'l J., Mar. 10, 1990, at 582.

126. See Position Paper of the Circuit Executive, supra note 88, at 8-9; see also Hellman, supra note 103, at 547 n.20. The price for the arrangement of panels is not small, in time and energy of judges. One thoughtful critic has suggested this is not worth it, that "the net is a pattern of having judges sit together far too few times in the course of a cycle which requires
includes all the judges on the Ninth Circuit. The program is designed so that each judge sits with every other judge in the pool an equal number of times, and sits at each place for holding court an equal number of times. It is quite rare that all three judges from a panel are from the same place. Except for the chief judge, the en banc court is randomized in each case. To date, no one has tried to correlate decisions with the geographic origins of the judges in order to test the validity of the California stereotype.

To the extent that a "regional milieu" is relevant in a case, the district court can be expected to take it into account.127 At the appellate level, a judge's hometown, as distinct from judicial philosophy, should not be expected to play any role. Local bias is offensive to the notion of a federal court. Balkanization of federal law is contrary to federalism. The proper function of the regional courts of appeals is to federalize the law.128 The complaint that California judges dominate has never been proven.129 Even if it were true, however, Senate Bill 948 would be of greater concern, for the supposed dominance of California judges in the new Ninth Circuit would be strengthened drastically by the division. The comparison to the East Coast, while instructive, should not be pushed too far. Granted, the East Coast, with multiple circuits, has a commercial viability that does not seem to be weakened by the

argo of Senator Roman L. Hruska].
127. Statement of Eric Redman, supra note 74, at 6. There is also some question whether the division of the Ninth Circuit would generate and maintain appellate "victories" for the northwest. Id.
128. Judge Wisdom explains why circuit splitting threatens this function:
If this process were carried to its logical conclusion, the states of Texas, California and New York would each constitute a circuit. A United States Court of Appeals does not just settle disputes between litigants. It has a federalizing function as well as a purely appellate function of reviewing errors. The federal courts' role is to bring local policy in line with the Constitution and national policy. Within the framework of "cases and controversies" and subject to all the appropriate judicial disciplines, federal courts adjust the body politic to stresses and strains produced by conflicts (1) between the nation and the states and (2) between the government (national, state and local) and private citizens asserting federally-created or federally-protected rights. The federalizing role of circuit courts should not be diluted by the creation of a circuit court so narrowly based that it will be difficult for such a court to overcome the influence of local prides and prejudices.
Wisdom, Requiem for a Great Court, 26 Loy. L. Rev. 787, 788 (1980). Arguments to the contrary are simply wrong. See Statement of Mark C. Rutzick, supra note 72, at 565 ("The argument for extra-regional appellate judges is at bottom historically ignorant and incorrect.").
129. Letter from former Chief Judge Goodwin to Senator Heflin 2 (Apr. 2, 1990) ("If there is a California domination I am afraid that Diogenes and his lantern will have to find it.").
existence of multiple federal appellate venues. But this resulted from
designed and the accident of accumulated ad hoc redrawing of circuit
boundaries, accelerated in the East by earlier population growth and
economic development. It seems more prudent to recognize that history
has provided the West Coast with an opportunity to be a region in a
sense that the East Coast is not. We should be reluctant to unalterably
divide the West Coast without careful reflection. Finally, if a political
decision mandates different federal law in different parts of the country,
then Congress should legislate those variations; they should not be
created by changing the structure of the federal court system.

4. Mastery of State Law

Upon the introduction of Senate Bill 948, Senator Packwood urged
that dividing the Ninth Circuit “will allow judges and their clerks to
develop an even greater mastery of the State laws which their circuit
encompasses than the high level of expertise which they currently
exhibit.” First, the current “high level of expertise” does not appear
inadequate. Second, the statistics call the significance of this argument
into question. The Ninth Circuit currently decides about 225 appeals
in diversity cases each year and in three-fourths of those the district
judge, who in the typical case was a practitioner in that state’s law, is
affirmed. The remaining 5,800-plus cases raise issues of federal law.

5. Reducing the Reversal Rate

Senator Packwood suggested that dividing the Ninth Circuit might
reduce the reversal rate by the Supreme Court. Admittedly, the
statistics fluctuate from term to term, but as recently as October Term
1986 the Ninth Circuit ranked tenth among the twelve regional circuits
in reversal rate with a forty-seven percent reversal rate compared to a
national average of sixty-two percent. This argument seems to be a
non sequitur. Dividing the Fifth Circuit did not appreciably affect

130. 135 Cong. Rec. S5027 (daily ed. May 9, 1989) (statement of Sen. Packwood); see also
Statement of Kenneth O. Eikenberry, supra note 87, at 632.
F.2d 1395, 1397 (9th Cir. 1984) (en banc) (questions of state law are reviewable under same
independent de novo standard as are questions of federal law).
132. 135 Cong. Rec. S5027 (daily ed. May 9, 1989) (statement of Sen. Packwood); see also
Statement of Chief Judge Owen M. Panner, supra note 118, at 449.
134. See Spaeth, Supreme Court Disposition of Federal Circuit Court Decisions, 68 Judicature
245, 249-50 (1985); Uelmen, The Influence of the Solicitor General upon Supreme Court Disposition
of Federal Circuit Court Decisions: A Closer Look at the Ninth Circuit Record, 69 Judicature
361, 366 (1986).
the number of cases claiming Supreme Court review from the regions of the new Fifth and Eleventh Circuits. There is a rough perception that the Ninth Circuit was a conservative court in the 1970s, which the Carter appointments made more liberal for a time, and which the Reagan appointments since have made more conservative. The popular press’ explanation is that the reversal rate was high for a time when the Ninth Circuit was out of synchrony with the Supreme Court. This argument may prove ultimately only that labelling any bench as large as the Ninth Circuit must be a gross generalization and at best only temporarily accurate.

6. A Postscript

At least in part, these arguments appear to be efforts to justify an underlying political goal to shift the direction of law in the Ninth Circuit, notwithstanding protests to the contrary. This strategy may be attributable, perhaps, to some unarticulated realization that the traditional means of influencing the judiciary through appointment and confirmation have become less effective, either because of the party division between the President and the Congress or because the Ninth Circuit bench has grown too large to pack easily. Nothing may be inherently wrong with that goal. Indeed, the desire on the part of those in the Pacific Northwest to have a circuit of their own, independent of the California presence, goes back to the 1940s and likely will continue. The judges who resist the division are practicing “politics” as well.\textsuperscript{135} Their apparent desires for size and stability likewise fuel this debate. The judges opposing the division may just be more “conservative” of institutions not necessarily in ideology; some judges may relish judicial administration on the grand scale; some might find it attractive to be a member of a court larger in size than the first Senate; some judges might prefer the status quo in order to hold on to the perquisite of sittings in Hawaii.\textsuperscript{136}

The overall senatorial impatience exhibited by Senate Bill 948 exhibits a certain irony, however. The Ninth Circuit has a Republican majority now, which can be expected to be quite substantial by the end of the


\textsuperscript{136} Judge Kozinski was quoted, tongue-in-cheek, as saying that he did not want to give up circuit meetings in Hawaii. Trigoboff, supra note 85, at 15. Stranger considerations have controlled redrawing decisions. See Baker, supra note 2, at 726 n.288 (Canal Zone alignment in the Fifth Circuit depended on scheduled airline connections).
current administration.\textsuperscript{137} When this ineluctable constitutional influence of nomination and confirmation was disregarded during the ill-fated court-packing plan of 1937,\textsuperscript{138} Senator James Byrnes of South Carolina observed, "{n}ever run for a train after you have caught it."

As a matter of politics, the national interest is the larger context in which Congress must decide. The defenders of the Ninth Circuit boundary assert a powerful defense against division sounding in our national prominence in Pacific Rim commerce. Former Chief Judge Goodwin testified: "Commercial law affecting worldwide maritime trade, aircraft and automobile manufacturing plants, agriculture and the entertainment industry is applied uniformly throughout a vast area of land and water from which emerges about one-fifth of the federal litigation in the United States."\textsuperscript{139} Moreover, the active circuit judges virtually unanimously oppose division. Their opposition, alongside that of environmental groups and several prominent senators from some of the affected states may be sufficient to stave off Senate Bill 948. Division of the Fifth Circuit came after a protracted legislative debate, and only when all three branches and their constituencies reached a general consensus that the legislation was the only viable alternative.

\section*{C. Limits to Circuit Splitting}

Beyond the particulars of the Ninth Circuit, the technique of splitting circuits has an inevitable downside. It irreversibly lessens the "federalizing function of courts of appeals."\textsuperscript{140} Subdividing courts of appeals is a limited strategy and a reform that simply does not work.\textsuperscript{141} The division of the Fifth Circuit did not perform any lasting miracle. The larger courts of appeals, with the larger problems—the District of Columbia, Second, and Ninth Circuits—practically resist any feasible division.\textsuperscript{142}


\textsuperscript{140} C. WRIGHT, \textit{supra} note 26, at 974; Wisdom, \textit{supra} note 128, at 788.

\textsuperscript{141} Gee, \textit{supra} note 42, at 806 ("[A]re we to continue the splitting process until it becomes mincing, with a United States Court of Appeals for the Houston Metropolitan Area?").

In the abstract, dividing circuits might be more feasible if the entire geographical scheme could be redrawn, the approach rejected by the Hruska Commission in 1973 as too unsettling.\textsuperscript{143} This would permit an initial levelling of caseload and judgeships. We might have twenty circuits of nine judges organized with roughly equal caseload under a completely redrawn system of boundary lines.\textsuperscript{144} This symmetry would be gained, however, at a high cost in disruption. Much federalizing influence of the courts of appeals would be lost. The balkanized precedent of the law of the circuits would be worsened without any compensating improvements. More circuits multiply intercircuit conflicts, and the resulting hegemony of national law is one of the principle banes of the federal appellate court system.\textsuperscript{145} If circuit-splitting is a bad idea, circuit-mincing is even worse.

Dividing the Ninth Circuit or using it as an excuse to create a system of microcircuits simply does not address the real problem. The cure is worse than the disease, for circuit-splitting does not solve the problems of one circuit and merely postpones solution of the problems of two.\textsuperscript{146} Again, former Chief Judge Goodwin summed up the problem:

Splitting the Ninth Circuit, or other circuits, would not address the real problem facing the Federal Courts of Appeals. The problem is not structure, but workload. Creating more regional circuits would not diminish the work, but merely divide it. 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.\textsuperscript{147}

V. RECONCEPTUALIZING THE COURTS OF APPEALS

Congress must learn the common sense that dockets are mathematically distributive: to distribute the Ninth Circuit’s current docket between the new ninth circuit and the new twelfth circuit will not diminish the workload but merely will divide it. The number of appeals to be heard would be the same whether those same western states comprised one circuit or two circuits. The problems of the large circuit, for which

\textsuperscript{143} See supra text accompanying notes 37 and 45-56.
\textsuperscript{144} See Rubin, \textit{Views from the Lower Court}, 23 UCLA L. Rev. 448, 459 (1976); see also \textit{infra} note 198 and accompanying text.
\textsuperscript{146} See Baker, \textit{A Postscript on Precedent in the Divided Fifth Circuit}, 36 Sw. L.J. 725, 742 (1982).
\textsuperscript{147} Goodwin, \textit{supra} note 80, at 11.
splitting is offered as a solution, are chiefly the result of adding judgeships without doing more to meet the rising caseload. The “add and divide” approach undermines important characteristics of the federal intermediate appellate courts.

A. Limitations on Creating Judgeships

The framers of the Constitution contemplated a minimal number of federal judges to staff a few courts of quite limited jurisdiction. Alexander Hamilton, perhaps naively, wrote in Federalist No. 81 of a single federal judge in “four or five, or half a dozen federal districts.” Today we have ninety-four federal districts with 575 federal judges. During their first decade, the nine courts of appeals were assigned thirty judgeships; today there are thirteen federal circuits with 168 circuit judges. Increases have followed the congressional policy of dealing with caseload growth by creating judgeships. Recent growth of the bench, however, still has not kept pace. Circuit judges have been delivered in litters by omnibus acts, and the litters have been getting larger. Ten new circuit judgeships were created in 1961; only five years later, six more were added; two years later thirteen more; in 1978 thirty-five new circuit judgeships were created; and in 1984, after incremental additions in 1982 and 1983 were insufficient, another twenty-four judgeships were added. Adding judges is a way to respond to growth in caseload, of course, but this ad hoc solution may contribute more to the problems of the large court. The turn-of-the-century design for consistency and harmony in the law—that the same three-judge panel would decide all the appeals in a circuit—passed from the scene a long time ago. (No one is heard to advocate sixty circuits of three judge panels.) Today there are thousands of permutations of three-judge panels in the large courts of appeals. Monitoring the law becomes

149. Carrington, supra note 142, at 580 n.165.
150. 28 U.S.C. § 44(a) (1988). Between 1900 and 1988, the population of the United States tripled and the number of appeals increased thirty-four-fold.
more onerous. Intracircuit conflicts become more likely. En banc re-
hearings become unwieldy.156 Relationships of judge to judge, panel to
panel, and panel to en banc court become more complex and tenuous.157
Worse, adding judgeships does not achieve any lasting improvement.
A detailed study of the omnibus judgeship statutes found only a one
year impact on the appeals-per-panel ratio.158 The major benefit thus
has been merely a kind of braking effect. To go on merely adding
judges will worsen the unintended effects on the courts of appeals.
Increasing the number of circuit judgeships, within the existing struc-
ture, should be a reform of last resort.159 Even proponents of dividing
the Ninth Circuit admit this.160 Moreover, economic concerns may make
Congress a more reluctant midwife, as new judgeships become more
expensive in an era of tightening budgets.
A decade ago, one federal jurisdiction seer predicted that in the
twenty-first century 5,000 circuit judges would be filling 1,000 volumes
of Federal Reporter, umpteenth series, disposing of approximately a
million appeals—each year.161 More recent estimates from the Admin-
istrative Office of the United States Courts predict an increase from
38,000 filings in 1988 to 66,000 filings in 2000.162 Increases in filings
of this magnitude will render the creation of additional judgeships an
inevitable last resort.
This inevitability raises the question whether there is some maximum
size of a court sitting in panels.163 A committee of the Judicial Con-

L. REV. 523, 526-28; Tate, The Last Year of the "Old" Fifth (1891-1981), 27 LOY. L. REV. 689,
157. See Edwards, The Rising Work Load and Perceived "Bureaucracy" of the Federal Courts:
A Causation-Based Approach to the Search for Appropriate Remedies, 68 IOWA L. REV. 871,
918-19 (1983); Ginsburg, Reflections on the Independence, Good Behavior, and Workload of
158. W. McLAUCHLAN, FEDERAL COURT CASELOADS 107 (1984) ("The increase in judges only
delayed what appears to be a nearly inexorable climb in appeals taken to the courts of appeals.").
See generally Markey, On the Present Deterioration of the Federal Appellate Process: Never
159. Heflin, Fifth Circuit Court of Appeals Reorganization Act of 1980—Overdue Relief for
an Overworked Court, 11 CUMB. L. REV. 597, 616 (1980) (citation omitted) ("Congress recognize[s]
that a point is reached where the addition of judges decreases the effectiveness of the court,
complicates the administration of uniform law, and potentially diminishes the quality of justice
within a circuit."); see also Higginbotham, Bureaucracy—The Carcinoma of the Federal Judiciary,
160. See Response to Tentative Recommendations, supra note 1, at 12.
163. Posner, supra note 28, at 762 ("There is general recognition today that there is a natural
upper limit on the number of federal court of appeals judges and that we are either near, or
ference selected the number nine in 1964, apparently based on the
numerology of the Supreme Court that became revelation at the failure
of the 1937 court-packing plan. The Judicial Conference's last official
position, in 1974, was to set the maximum per court of appeals at
fifteen judgeships. Senate sponsors of Senate Bill 948 initially used
this argument and this figure to urge the division of the Ninth Circuit.
A hardline approach likewise would call for the division of the Fifth
Circuit, previously divided just nine years ago, because it has fifteen
judgeships and has requested two more. If Congress passes the pending
judgeship bill, five of the twelve circuits will have fifteen or more
judges. In fact, the new Ninth Circuit to be created by Senate Bill
948 with nineteen judgeships would itself be a candidate to suffer an
immediate division under a rule of fifteen.

The strategy of adding judges shows signs of playing out. Enlarging
the federal judiciary is costly. It places strains on the appointment
process and makes more likely the possibility that unqualified or
unworthy candidates will be given life tenure. A larger appellate judi-
ciary results inevitably in more conflicting opinions, which in turn
creates greater uncertainty and generates more litigation. The larger
the appellate branch, the less familiar and less collegial the judges become,
and the esprit de corps suffers along with the work product. As the
opportunity for individual contribution and recognition diminishes, so
too do accountability and the attractiveness and prestige of the position.
The Federal Courts Study Committee dramatically described the current
situation:

In the past three decades the number of appellate judges nationally
has almost trebled, ranging now from six in the First Circuit to
twenty-eight in the Ninth. The average court of appeals has thirteen
judges. If caseload were the sole determinant, and using the Judicial
Conference's 255 participations standard, there would today be 206
judgeships for the twelve regional circuits, not the present 156. The

have already exceeded, that limit."; see also C. Wright, A. Miller & E. Cooper, Federal
Judicial Conference of the United States 15 (1964). But see Judicial Conference of the
United States, Report of the Proceedings of the Judicial Conference of the United States
9 (1968) (recommendation of 13 and 15 judges respectively for the Ninth and Fifth Circuits).
average court would have seventeen judges, and at least four of the courts would be on the brink of twenty judgeships. Applying the same standard to conservative caseload projections suggests a need by 1999 for 315 appellate judges, with an average court of twenty-four judges (and forty-nine on the Ninth Circuit). Tribunals of seventeen, much less twenty-four, sitting in panels of three, may resemble a judgeship pool more than a single body providing unified circuit leadership and precedent. Still, large courts such as these may be workable. Whether tribunals of thirty or forty judges will be workable is more problematic. The question is not simply one of administration but of the effect, both within the circuit and nationally, of so many uncoordinated opinions from so many judges.\textsuperscript{169}

The Committee's final report offers some new alternatives.

\textbf{B. Some Other Possibilities}

In November 1988, the 100th Congress created the Federal Courts Study Committee ("Committee") as an ad hoc committee within the Judicial Conference of the United States.\textsuperscript{170} Appointed by Chief Justice Rehnquist, the fifteen-person committee included representatives of the three branches of federal government, state government officials, practitioners, and academics. Congress gave the Committee fifteen months to examine the problems facing the federal courts and to develop a long term plan for the judiciary. Among the subjects within the explicit charge to the Committee, Congress asked for an evaluation of the structure and administration of the courts of appeals. Perhaps the timing of the introduction of Senate Bill 948 was a not so subtle attempt to influence the Committee's deliberation about dividing the Ninth Circuit. The sponsors of Senate Bill 948 did in fact respond to the Committee's tentative recommendations\textsuperscript{171} and directly requested that

\begin{footnotesize}
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\item \textsuperscript{169} Federal Courts Study Committee Report, \textit{supra} note 75, at 114. The same projection would predict a need for 392 circuit judges by 2009 (33 per circuit with the Fifth at 49 and the Ninth at 61 judges). \textit{See generally} V. Flanigan, \textit{Appellate Court Caseloads: A Statistical Overview} Table 22 (1989).
\item \textsuperscript{171} Senators Gorton, Hatfield, and Stevens repeatedly agreed with the direction of analysis of the Committee. \textit{See generally} Response to Tentative Recommendations, \textit{supra} note 1.
\end{itemize}
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the Committee's final report include a specific endorsement for the proposal. The Committee resisted these efforts, for the most part, and in the final report took "no position" on the proposal, deciding instead to defer to the political process. The section of the Committee's final report on appellate structure, however, is something akin to a Chinese menu of structural reforms and provides an important framework for understanding the debate over dividing the Ninth Circuit.

The Committee begins this section of the final report with the given that the federal appellate courts are faced with a "crisis of volume" that will continue and require some "fundamental change." The present geographic circuits share a few essential characteristics that define their function: they are the only courts between the district courts and the Supreme Court; their jurisdiction is an appeal as of right; their basic decisional unit is the three-judge panel; they are geographically based; and their total number (thirteen) still reflects, though somewhat faintly, the congressional history that once correlated the number of circuits to the number of Supreme Court justices. The Committee's recommendation: "Fundamental structural alternatives deserve the careful attention of Congress, the courts, bar associations and scholars over the next five years. The Committee itself has studied various structural alternatives. Without endorsing any, it lists a few here to stimulate further inquiry and discussion."

First, the present geographic circuits could be dissolved and new circuit boundaries could be drawn and redrawn periodically to achieve

172. Letter from Senators Slade Gorton and Mark O. Hatfield to Judge Joseph F. Weiss, Chair of the Federal Courts Study Committee (Sept. 5, 1989).
173. FEDERAL COURTS STUDY COMMITTEE REPORT, supra note 75, at 123 ("We take no position on whether the Ninth Circuit should be split. That question involves issues peculiar to that region that we are not qualified to address, given our deadline and resources.")

The Ninth Circuit otherwise was featured prominently in the Committee's report. Its uniqueness and size were emphasized. Id. at 114. As previously mentioned, the limited en banc procedure was endorsed. Id. at 115. The court's administrative innovations were found praiseworthy. Id. at 115-16.
175. FEDERAL COURTS STUDY COMMITTEE REPORT, supra note 75, at 113.
176. Id. at 116-17. The Committee did label changing the appeal-of-right feature of appellate jurisdiction to a discretionary, certiorari-like, jurisdiction to be a "last resort." Id. at 116. The Committee straightforwardly rejected the "single national appellate court" proposal. Id. at 117. See generally Baker & McFarland, The Need for a New National Court, 100 HARV. L. REV. 1400 (1987).
smaller regional courts with nine members. All the regional courts could be bound to follow the prior precedent of any other panel in every other region, subject to Supreme Court overruling. One central division of representative judges could review panel decisions and resolve remaining conflicts as a kind of national en banc court. This would reduce the expectation of more frequent conflicts generated by more circuits without relying on the Supreme Court.

Second, an additional appellate tier could be created. Twenty to thirty regional appellate divisions of nine judges each could be created to replace the present thirteen to hear appeals as of right, and four or five upper-tier appellate courts could be created with larger regions to consider discretionary appeals from the regional divisions, with Supreme Court jurisdiction to hear a second discretionary appeal from the upper-tier courts. This structure could absorb the expected large cohorts of additional judgeships and, again, would handle the expectation of more frequent conflicts.

Third, national subject matter courts could be created with specialized national jurisdiction over such subjects as tax, admiralty, criminal, civil rights, labor, administrative, and other subjects alongside the present circuits. Alternatively, subject matter panels could be created within the existing circuits.

Fourth, the federal courts of appeals could be merged into a single centrally-organized court that could also create and abolish special subject matter panels as appropriate. The new organization could develop internal mechanisms for resolving conflicts.

Fifth, the existing circuits might be consolidated into perhaps five "jumbo" circuits that might resemble in many ways the current Ninth Circuit. Judges in the jumbo circuits could rotate among specialized subject matter panels.

The Federal Courts Study Committee entreats us to reconceptualize the debate over the courts of appeals. The direction of analysis in Senate Bill 948, that "big is bad"—that we must add circuit judges to keep up with caseload and then divide courts of appeals to keep them recognizable as courts—is one direction of thought. Admittedly, it has been the congressional approach now for one hundred years. But, the Committee's challenge to us is to stop thinking linearly, or at least to think against the direction taken in the past:

178. Id. at 119-20.
The current debate between the Ninth Circuit and the other circuits revolves around two very different conceptions of an appellate court. The Ninth Circuit works as a rotating system of three-judge panels (over 3,000 combinations are possible) covering an enormous geographic area, bonded by a very capable administration and serviced by the nation's only small, or limited, in banc of ten randomly selected judges and the chief judge. Other courts prefer the traditional concept of a smaller, more intimate, unitary tribunal, even as their growing caseload makes this ideal more and more difficult to sustain. Perhaps the Ninth Circuit represents a workable alternative to the traditional model. If not, the entire present appellate system needs restructuring before other circuits become the "jumbo" courts toward which they are gradually evolving.\(^\text{181}\)

Let us suppose, therefore, that "bigger is better," that we might reconceptualize the system of federal intermediate appellate courts in the direction of the evolution of the Ninth Circuit.

C. An Elaboration on the Possibility of Consolidation

Adding judges and dividing courts of appeals is a strategy that seems to have played out. It is exactly the wrong direction for reform. If the addition of judges is accepted as an inevitable response to an even more inevitable growth in the appellate caseload, Congress ought to consider consolidation of the intermediate tier. The Ninth Circuit thus may be better viewed as a harbinger than an aberration. Since 1978, the Ninth Circuit has pursued reorganization and modernization while exceeding each successively-announced norm of the maximum number of judges, calling into question those norms and the very notion that there is a norm. Innovations in appellate procedures have been augmented with technology. Reorganization into administrative units has helped manage caseload. A reformed en banc has been limited for the larger scaled court. Computers have helped improve caseload monitoring. Modern communications link chambers in San Francisco and Honolulu almost as instantaneously and just as reliably as two chambers on different floors of the same courthouse. Rather than divide the Ninth Circuit to make two new courts that soon will resemble the beleaguered other circuits, Congress ought to hold the mirror the other way. The tentative lesson to be learned from the Ninth Circuit may be that reorganization and modernization make possible a consistent and efficient court of appeals regardless of size, or at least for a number

\(^{181}\) Id. at 122-23.
of judgeships far beyond currently articulated norms. Therefore the alternative legislative attitude in the direction of consolidation ought to be considered.

Consolidation of the intermediate tier holds the promise of eliminating, or at least drastically reducing, intercircuit conflicts, a peculiar evil of our current structure.\textsuperscript{182} Two innovations against caseload growth and judgeship creation, the en banc rehearing and the law of the circuit, today work in tandem to generate an ersatz autonomy that makes the intercircuit conflict possible. When Congress continued to create judgeships to deal with increases in filings, more permutations of three-judge panels began to threaten two institutional values of the intermediate court: consistency among panel decisions and the control of a majority of the judges over the law of the court of appeals. The en banc court evolved as a mechanism to preserve these two values. However, en banc rehearings result in considerable expense and delay, for litigants and courts alike. Consequently, there developed a concept of the law of the circuit or the law of interpanel accord. This concept was conceived to minimize en banc rehearings by preventing intracircuit conflicts: A three-judge panel must adhere to previous panel decisions as binding precedent, absent an intervening decision by the en banc court or the Supreme Court. This regional stare decisis results in fewer intracircuit conflicts, but it makes possible intercircuit conflicts, because decisions by other courts of appeals are merely persuasive authorities. As a result, each court of appeals has become a junior supreme court, final if not infallible on an issue of federal law in each circuit unless and until the Supreme Court grants review. Because the Supreme Court reviews less than one percent of appellate decisions, the balkanization of federal law has grown more serious with the growing circuit dockets over the years.\textsuperscript{183} A radical solution to this problem, one of the directions of thought highlighted in the Final Report of the Federal Courts Study Committee, would be to reorder a complete consolidation of the existing circuit boundaries.\textsuperscript{184}

The idea of a single, unified national court of appeals has an alluring simplicity: Eliminate altogether the geographical boundaries between the courts of appeals and consolidate them into one unified administrative and jurisdictional tier of an intermediate court. Logically, then, there could be no such thing as an intercircuit conflict. The unified

\begin{footnotesize}
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\item \textsuperscript{182} See Baker & McFarland, supra note 145, at 1404-09; Baker, supra note 2, at 720-24; see also Lateef, supra note 63, at 7-8.
\item \textsuperscript{183} See Baker & McFarland, supra note 145, at 1406.
\item \textsuperscript{184} See supra text accompanying notes 170-81.
\end{enumerate}
\end{footnotesize}
court, however, would require some appropriate mechanism to deal with the equally logical inevitability of more numerous intracircuit conflicts among three-judge panels.

From time to time, various commentators have considered this proposal. The unified model depends on a concept that there be a single United States Court of Appeals. All geographical circuits would be abolished, and presumably the Federal Circuit would be absorbed as well. Professor Paul D. Carrington, a proponent of this model, believes that this would relieve the circuit judges of their preoccupation with maintaining the law of the circuit (an effort he discredits as misguided) and also would make more efficient use of judicial personnel. A unified model presents sophisticated organizational options for administering such a necessarily complex institution. The present discussion relies on Professor Carrington’s blueprint for dealing with the judicial diseconomies of scale, although admittedly with some poetic license.

There are many possible variations on this theme. This discussion is intended to illustrate the direction of thinking toward consolidation to generalize from the experience of the Ninth Circuit. Professor Carrington’s formulation includes “General Divisions,” “Special Divisions,” and a national “Administrative Panel” that presumably would resemble the present Judicial Conference of the United States.

Appeals would continue to be decided by three-judge panels. Three-judge panels, however, would be consolidated from among “General Divisions,” usually comprised of four judges from four different but proximate states. Thus there would be forty or more regular general divisions. Active circuit judges would be assigned to general divisions by a national administrative panel that would be chosen by seniority to serve for a substantial term of years. Some provision might be made for automatic rotation among general divisions that prove too stable in membership (for example, no change in membership for three years).

Each general division would have jurisdiction to hear appeals from an appropriate number of specifically identified district judges. The district judges whose appeals were earmarked to a particular general division would sit in one of the four states represented on the general division. Although different general divisions of the court of appeals


186. See generally Carrington, supra note 142; Carrington, supra note 19.
would regularly review different district judges in the same district, still each individual district judge and the litigants in the case would have a fairly good idea of the appellate panel from the moment a matter was assigned to the trial judge. The argument is that any cost of greater perceived differences among trial judges in the same district, because they would be reviewed by different three-judge panels, would be offset by the benefit of the identifiable and stable appellate panel.

Appellate procedures would be characterized by greater orality. Indeed, the new appellate procedure in the typical appeal would imitate the English tradition with an emphasis on oral presentations by the advocates and an oral decision, with assurance of disclosure of the reactions of each panel member, delivered from the bench without conference. The written opinion for the court, John Marshall's innovation of the nineteenth century, would no longer be the norm. Every effort would be made to take full advantage of modern technology, by experimenting, for example, with closed circuit televised hearings.

This plan assumes that few appeals would require the three-judge hearing panel to write full opinions. This determination might be made at the oral presentation just described. In these appeals, the hearing panel would be augmented to seven judges, as described below. The likely case for this augmented hearing would be an appeal raising a substantial issue of federal law, such as a difficult issue of statutory construction. Only these augmented hearings would result in the published opinion produced in the Marshall manner, with a conference of the judges, collegial deliberation, and extended revisions of drafts. With the exception of a special division en banc rehearing explained below, these augmented panel decisions would be the law of the land, normally without expectation of further review in the Supreme Court, given their statutory nature. Thus the current notion of the law of the circuit would be expanded nationally. More correctly, this would undo the perversion of "percolation" that is fundamentally "hurtful to the inherent nature of a national law."

The augmentation of the hearing panel from three to seven judges in the Marshall-style opinion-of-the-court appeals would come from the

membership of "Special Divisions." Assignment of a judge to a special division of approximately eight judges, by subject matter, would be supplementary to the general division assignment, keyed to the identity of the district judge, already described. Thus, each active circuit judge would have a general division assignment and a special division assignment. Special division assignments would last perhaps as long as eight years and would be made by the national administrative panel by some calculus to include preference, seniority, location, and lot. There might be some provision for rotation, one judge off/one judge on, each year, but the special divisions would be selected to assure substantial stability.

There would be a special division for each subject in which a substantial number of full opinions would be required, for example antitrust and related economic regulation, taxation, intellectual property, bankruptcy, government contracts, labor law, securities regulation, federal tort claims, federal crimes, federal civil procedure, federal criminal procedure, and civil rights legislation. Special divisions could be created or abolished by the national administrative panel. These assignments might be analogized to committee assignments in the Congress that develop a particular expertise, to go along with a generalist's competence. Each special division would be expected to maintain a coherent body of law on its subject matter. The present en banc responsibility would be shifted to the special divisions that, if necessary, could sit en banc and review the augmented seven judge hearing panel.

This unified model, distinguished from the current system by greater orality and greater subject matter specialization, is designed to realize the ideal of an appellate system that is speedy, inexpensive, and just. Greater coherency in the national law is an important purpose behind this design. An effort to compromise the generalist-court versus specialist-court debate is much in evidence. Subject matter grouping of appeals, which would be of dubious worth within the present regional circuits, would offer substantial efficacy in dealing with a national docket of a national court. Intercircuit conflicts would be eliminated by definition. The increased likelihood of intracircuit conflicts would be lessened, first by the constancy of the general division in less significant appeals decided orally in summary fashion, and second by


the expertise of the special division in augmented panels and the capability of en banc rehearing. The delay and cost of panel rehearing and en banc rehearing in the current system would be replaced by the augmented panel and special division en banc rehearing, presumably with comparable measures of cost and delay, but with an expectation for greater coherency in the law.

The most obvious criticism of the unified model is that it fragments and specializes the federal judiciary. As has been suggested, however, this model is more fairly viewed as a compromise of that larger debate, which will not be rehearsed here. Other objections are more substantial.

First, each general division, unrestrained by publishing an opinion in the run of the cases, is a potential aberration from the national law. This risk seems no different, however, from the current system of three-judge panels often deciding appeals with unpublished opinions, subject to altogether rare en banc review and Supreme Court discretionary review. There is an admitted tradeoff between the geographical stability in the present system and the doctrinal stability promised in the model, but the conceded purpose of the model is to shift judicial emphasis from making the law of the circuit to making the national law on a particular subject.

Second, administrative worries appear daunting. Case assignment, however, would be just as automatic in most courts of appeals in the current system. Techniques and technologies developed in the larger circuits, especially the Ninth Circuit, might suggest the feasibility of administering a unified intermediate court. Of course, regional administration, similar to the current clerks' offices in the circuits, would be possible.

What might be called ancillary decisional differences may be exacerbated in the model. For example, the Special Division on Antitrust might interpret the same ancillary procedural issue differently from the Special Division on Civil Rights Legislation. Arguably, the harmony in the principal subjects divisions might justify this, and, perhaps, the procedural special division could reconcile such differences. Any loss of judicial collegiality from eliminating the current geographic circuits would be more than made up for in the assignments to a four-member general division and an eight-member special division.

Finally, the criticism that this organization would make it easier for Congress to add judges is quite apt, for the unified model can absorb

an indeterminate number of circuit judges to be arranged in greater numbers of general and special divisions of expanding membership. This weakness may be the model's greatest strength, however. Although adding judges to the court of appeals is a remedy to be resisted, the political reality of the last fifty years suggests judgeship creation is virtually inevitable. Therefore, any model ought to be designed to absorb new circuit judges.

Although this proposal is a radical departure from our present court system, our contemporary reality begs for some sort of radical solution. At worst, this proposal provides an alternative to the short-sighted Senate Bill 948 proposal to divide the Ninth Circuit. The Federal Courts Study Committee characterized the Ninth Circuit as being in a kind of debate with the other circuits over the future design of the intermediate appellate tier. If Senate Bill 948 is enacted and the Ninth Circuit is divided into two courts of appeals that resemble all the others, that debate is silenced, and viable alternatives to our current structure will be lost forever.

The co-sponsors of Senate Bill 948 respond to judges, committees, and scholars that maintaining the court as an "experiment" is a disservice to their Ninth Circuit constituents. They say the problems are immediate and growing. This is a telling argument. But the premise of this article is not to keep the Ninth Circuit intact at any cost. Rather, the position here is to wait and see if the Ninth Circuit provides a preferable future appellate structure, at least until the process contemplated by the Federal Courts Study Committee plays itself out, and at least for the anticipated five year period of debate and study called for by the Committee. The former chief judge of the Ninth Circuit once delivered an appropriate "closing argument":

The Ninth Circuit is the only remaining laboratory in which to test whether the values of a large circuit can be preserved. If we fail, there is no alternative to fragmentation of the circuits, centralization of administrative authority in Washington, increased conflict in circuit decisions, a growing burden on the Supreme Court, and creation of a fourth tier of appellate review in the federal system. If we succeed, no further division of circuits will be necessary. Indeed, combining the circuits into four or five might well be feasible—creating stronger and more effective appellate courts, lightening the burden on the Supreme Court, and resulting in a decen-

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194. See, e.g., Response to Tentative Recommendations, supra note 1, at 3-4; see also Statement of Kenneth O. Eikenberry, supra note 87, at 629.
Thus, to divide the Ninth Circuit now would be to lose the benefit of an experiment in judicial administration that has not yet run its course, an experiment that may be critical to understanding the future of the federal appellate courts.

VI. Conclusion

Admittedly, some do not deem the current circuit boundary lines to be as ephemeral and arbitrary as this article and the consolidation proposal make them out to be. There are certain settled expectations of substantive law, practice, and procedure drawn up with the twelve regional courts of appeals. But the strategy of adding judges and dividing circuits simply has been played out and is no longer defensible as a long-range plan. Senate Bill 948 is an idea whose time has come and gone. The justifications offered so far for dividing the Ninth Circuit simply do not withstand a close scrutiny. Everyone must admit that any change is likely to be less than wholly desirable in itself, and thus proposals must be weighed not against the ideal, but against other possibilities.

Arguably, on the occasion of a congressionally-commissioned evaluation recently conducted by the Federal Courts Study Committee, assumptions and settled expectations ought to be set aside or, at least, ought to be drawn into question. The history of the circuit boundaries teaches that "merely redrawing court boundaries would have the same effect on the present federal appellate crisis that a weatherman's map marks have on the weather." That is why Senate Bill 948 is so unsatisfactory, the approach so anachronistic. Dividing the Ninth Circuit is the least available application of the strategy of division. It will prove nothing that has not been demonstrated repeatedly, most recently


We hope, however, that one message will penetrate: we are headed for times where every circuit may look like today's Ninth, and the Ninth (and others) may double in size. In the time left, we must ask ourselves whether a different structure is preferable, or whether we will be best served by retaining in place as we begin the third century of the federal courts the same scheme the Evarts Act established a century ago as the federal courts began their second century.


CIRCUIT BOUNDARIES

at the division of the Fifth Circuit. And that is why consolidation is so oppositely intriguing. Consolidation of the circuits into a single, unified court of appeals would allow for other innovations in case management and subject matter specialization that, at least theoretically, promise to help solve the profound problems facing the intermediate tier. If complete consolidation is considered too radical, then Congress at least ought to consider regrouping the existing circuits into four to six “mega-circuits” to achieve at least some of the economies of consolidation. This idea deserves more studied consideration. The Ninth Circuit ought to be thought of as a model for the courts of appeals, not as a problem.

197. This is a reason to resist, not to embrace this strategy for the Ninth. But see Letter of Bruce C. Navarro, supra note 68, at 7.


What the Committee has not done, nor could it have reasonably been expected to do in the short time allotted, is to evaluate measures to return logic to the chaos and historical accident of circuit boundaries. It makes little sense to have one circuit with six judges (the First Circuit) and another with 28 judges (the Ninth Circuit).

We must ultimately come to grips with the historical anomalies of the regional circuits and develop ways to maintain consistency and predictability.


I am in full agreement with Senator Hatfield, who explained: “one of the major goals of the sponsors of S. 948 has been accomplished. . . . For too long, the problems facing the Ninth Circuit, and the entire federal court system for that matter, have not received the thoughtful attention of Congress and the public discussion they deserve.” Statement of Senator Hatfield, supra note 64, at 250. My effort here is to join the debate and to bring more attention to it.