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June 8, 1998

Commission on Structural Alternatives
for the Federal Courts of Appeal
Thurgood Marshall Federal Judicial Building
One Columbus Circle, N.E.
Washington, D.C. 20544

Dear Justice White and Honorable Commissioners:

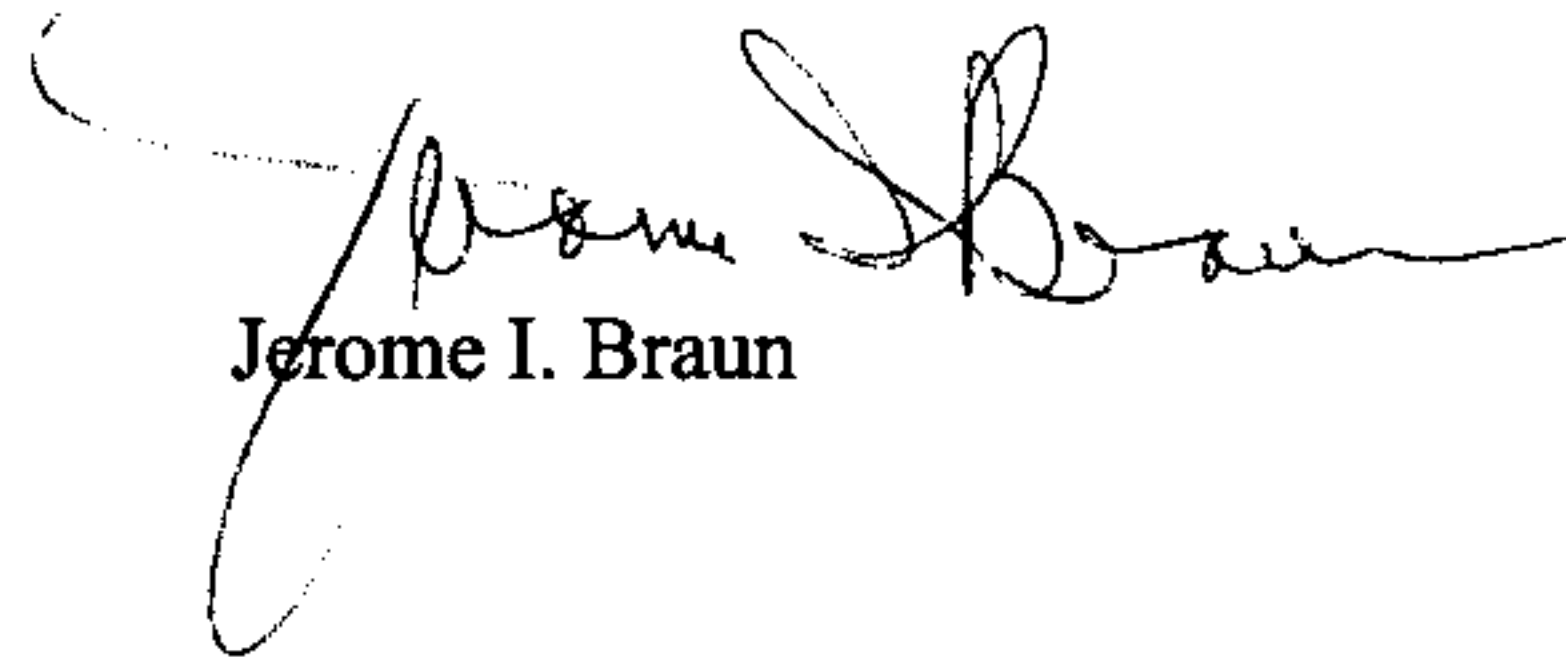
Thank you for allowing me the privilege of testifying before the Commission in San Francisco on Friday, May 29. Due perhaps to the lateness of the hour and my obligation to use some of my time to present the position of the California Academy of Appellate Lawyers, I was not able to give deserved emphasis to important points. As they were also not treated in my official written submission, at the conclusion of the hearing my associate David Phillips inquired of Judge Merritt about filing a supplemental submission. We understood Judge Merritt to say that it would be permissible to do so. Accordingly I enclose two short papers.

- One shows how **District Court Appellate Panels** can solve the problems the crisis in volume presents to the Courts of Appeals, while preserving the core values of those on both sides of the circuit-splitting controversy.
- The other points out the **weaknesses of Sanford Svetcov's proposal** to subdivide the Ninth Circuit into divisions without formally splitting it. Because this proposal may have attracted some interest on the Commission, I felt it important that the Commission have a full understanding of its drawbacks.

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I would be pleased to provide further submissions (including draft legislation for creating the district court appellate panels) if that could be useful to the Commission.

Very truly yours,

A handwritten signature in black ink, appearing to read "Jerome I. Braun". The signature is fluid and cursive, with a large initial "J" and "B".

Jerome I. Braun

JIB:ks

Enclosures

cc: Hon. Dairmuid F. O'Scannlain
Hon. Proctor Hug
Sanford Svetcov, Esq.

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DISTRICT COURT APPELLATE PANELS WOULD SOLVE THE CRISIS IN VOLUME IN THE CIRCUIT COURTS

by Jerome I. Braun*

The Commission has encountered opposing views on how to deal with the crisis in volume affecting the Ninth Circuit (and by extension other circuits also). Many distinguished judges and commentators have argued that the existing circuit structure should be preserved; but others have urged that reducing volume pressures is so important a goal that the circuit should be split (either directly or, following Sanford Svetcov's proposal, indirectly into divisions) to relieve the pressure. Using District Court Appellate Panels to meet a substantial part of the demand for appellate review could meet the requirements of both camps without sacrificing the core values of either.

Judge Diarmuid F. O'Scannlain pointed the way in his statement given before this Commission in New York on April 24, 1998, where he suggested that if district court appellate panels could be formed to relieve the Circuit Court of some of the routine appellate work which does not really require the authority of the Circuit Court, that would reduce pressures on the Court while keeping it intact as an institution and increasing its control over its caseload. While Judge O'Scannlain apparently saw this as a limited reform, it appears that if this were done on a more comprehensive scale than he suggested, it could save the existing circuit system for the indeterminate future without sacrificing the quality of appellate justice.

We start from two generally accepted premises. The first is that every litigant should have at least one appeal as of right by Article III judges. The second, as stated by theorists such as Karl Llewellyn and Roscoe Pound, is that an appellate court has two basic functions: correction of error and statement of the law. Under our present appellate system, stating the law of the circuit is a core function of the Court of Appeals. No other body is suitable for discharging this function.

Correction of error at the district court level, in cases where the existing law of the circuit is applied in relatively routine circumstances without novel features, is now also a function of the Court of Appeals. But as this function does not affect the law of the circuit, there is no principled reason why it needs to be performed

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by the Court of Appeals if caseload pressures do not permit the Court to continue performing it.

In fact, only 17% of the Ninth Circuit's decisions are now published and form law of the circuit. The remaining 83% correct error (or pronounce that there is no error) without forming law of the circuit. By circuit rule they are not permitted to be cited except for case-specific purposes such as law of the case, res judicata, and so on. As these decisions do not state the law of the circuit in a precedential way, there is no need to have them emanate from the Circuit Court.

A system of District Court Appellate Panels (called for convenience DCAPs) could work like this.

1. Congress would amend the law to permit (rather than require) Courts of Appeals to establish a system of DCAPs within their circuits. These could be established circuit-wide, or on an experimental basis by district, or by some other formula as decided by circuit rule.
2. Where established, an appeal of right from a district court decision would go to a DCAP. The DCAP would consist of three district judges. It would be chosen by rotation, or by lot, or term, or by some other method to be decided by circuit or district rule. Every judge (including senior judges) would be eligible except the chief judge and the judge from whose ruling the appeal was taken. Visiting judges would be eligible to participate.
3. The DCAP would act in the first instance just as the Court of Appeals now acts, not only deciding appeals from final judgments but also hearing interlocutory appeals (where otherwise permitted), petitions for writs of mandate, appeals from denial of injunction, and so on.
4. If it appears to the DCAP that the appeal or other cause before the DCAP requires a decision stating the law of the circuit, it could certify the appeal to the Circuit Court on its own motion. The DCAP would then cease to have jurisdiction over the matter, and the Circuit Court (after its own decision) would remand to the original district court in the ordinary way.
5. Reasons for such a certification might include the following (without limitation):
 - a) The matter requires a statement of the law of the circuit on an unsettled point.

- b) The matter involves a novel application of the law of the circuit.
- c) The matter requires construction of a new statute.
- d) The matter presents a serious occasion for reconsidering the law of the circuit (changed conditions, compelling reasoning to the contrary in another circuit, intervening Supreme Court decision, unwise circuit precedent needing reconsideration, etc.
- e) The matter requires certification to a state Supreme Court, but state law (as in California) permits certification only from a United States Court of Appeals.
- f) The matter is of constitutional importance, or of particular gravity, or of particularly broad application, and so justifies applying the authority of the Circuit Court.
- g) Other reasons in the discretion of the DCAP.

Such reasons coming from a panel of judges are entitled to be taken more seriously than if they came from advocates involved in the case.

6. In every case the parties would be permitted, *after* decision by the DCAP, to petition the Circuit Court for review by certiorari. If the panel (or perhaps only a single judge on the panel) of the Circuit Court to which the certiorari petition is referred wished to hear the case, the panel would grant certiorari and the case would become a regular Circuit Court case. As when certification came from a DCAP panel, once the matter went before the Circuit Court the role of the DCAP would be concluded and later remand would be to the original district court.
7. Two judges out of three on the DCAP should probably be required to certify the appeal to the Circuit Court. Permitting a single judge to do this seems inadvisable as it could be a vehicle for a judge in a minority position to make an end run around his or her colleagues.
8. The trial judge might also have the option to certify the case to the Circuit Court, bypassing the DCAP. This power, which would be expected to be used sparingly, would allow for skipping the DCAP stage where the features of the case (for example an important novel constitutional issue of first impression in the circuit) make it plain that Circuit Court review will be needed. The parties might request the trial court to certify the case, but the trial court would be under no obligation to justify its decision not to do so.

9. The Court of Appeals would of course have the authority to order certiorari on its own motion. Given the other routes available it is unlikely this power would be often used, but it should be retained by the court to protect its freedom to declare the law of the circuit.
10. DCAP decisions, like the non-precedential unpublished circuit decisions they would replace, would be unpublished and non-precedential. This is necessary to avoid complicating the law with an additional layer of precedent. Decisions would be accompanied by a brief statement, sufficient to inform the litigants of the bases for the decision and to provide the basis for certiorari review.
- 11 Review by DCAP could be phased in incrementally, using a random feature such as case number, until the district court was able to absorb the additional demand on its resources.

This proposal differs in some respects from Judge O'Scannlain's. He suggested that only cases involving "fact-intensive" claims, such as diversity cases, social security disability cases, non-habeas prisoner claims, and some criminal appeals, be sent in the first instance to DCAPs; but that cases involving "claims of constitutional deprivation" might continue to be reviewed directly by the Circuit Court. This procedure could involve a dispute in almost every case as to which panel should hear the appeal. Almost every case can be pleaded to include a "claim of constitutional deprivation" if such a claim would give the pleader an advantage. Putting a premium on such a claim would encourage baseless constitutional claims.

Some cases in every category will indeed justify Circuit Court review; others in every category will not. The decision whether a case does or does not require precedential review by the Court of Appeals should be made by judges rather than litigants, and should be based on the circumstances of each case and the current state of the law of the circuit, without regard to abstract categories. Permitting the case to be referred to the Court of Appeals by the trial court *or* by DCAP certification *or* by certiorari on the motion of a party *or* on the Circuit Court's own motion would allow ample opportunity for the Court to Appeals to hear those cases it wants or needs to hear.

Other changes from Judge O'Scannlain's proposal include exclusion of the district's chief judge from the DCAP panel and permitting direct certification by the trial court to the Court of Appeals. The alternative of the DCAP is not yet fully developed and many variations are possible.¹

This solution has the advantage that it meets the core concerns of those on both sides of the circuit-splitting issue without sacrificing the core values of either side. It would keep the Ninth Circuit intact while reducing the caseload dramatically. As 83% of the court's current written opinions are now unpublished, this procedure could reduce the Court's workload at least by half and probably by a lot more. True, the net reduction would not be as high as 83%, because the Court would have to decide certiorari petitions. But every one of those unpublished opinions now requires full-dress briefing and decision-making; denying a certiorari petition (where denial is just) would accomplish a vast saving of time and effort without degrading the law of the circuit at all.

Also, the certiorari procedure would give the Circuit Court a measure of docket control analogous to that exercised by the Supreme Court. Presumably the Circuit Court would be more liberal than the Supreme Court in granting certiorari, but it would retain a measure of freedom from the inexorable rise in filings.

As Judge O'Scannlain pointed out, under a DCAP system most appeals would be resolved without the need for the litigants or their counsel or the judges to travel outside the district. Localizing the appeal of right would permit substantial savings in time and money.

By placing the initial appeal in the district court where the authority of the Circuit Court is not required, the bulk of any future increase in appeals resulting from increasing federal litigation could be handled at the bottom tier, which can be increased almost *ad infinitum* without creating structural problems. This is one of the greatest advantages of the DCAP system. The Circuit Court is obliged to maintain its identity as a single unified bench, but as the district court is not under this obligation its numerical growth does not conflict with its theoretical function. If federal filings should triple, the district court bench could be tripled without harming the institution; whereas tripling the circuit court bench could impose substantial institutional pressures.²

It is certainly true that a DCAP solution would require more district judges. But *any* solution that really addresses the crisis in volume would require more judges at one level or another, no matter what. (This is another reason why splitting the circuits would not solve volume problems.) It makes more sense institutionally to add them at the district level rather than at the circuit level.

The initial reduction in demand on the judicial resources of the Circuit Court would give the court an immediate margin of relief from caseload pressures. It

would cease at once to function at the edge of capacity and further reforms and refinements could be accomplished with less urgency.

Many observers have complained that the Ninth Circuit Court of Appeals suffers from having attained its present size-- in loss of collegiality, in multiplicity of opinions and intra-circuit conflicts, and in other ways. Others say that the Ninth Circuit has managed to stay effective despite its growth due to heroic measures of innovation and institutional adaptation. Wherever the truth lies on this, there will be continuing debate and pressure for restructuring as long as increases in federal litigation require corresponding increases in the circuit's appellate capacity. **By allowing the largest portion of the circuit's appellate capacity to be accommodated at the district level, which can be increased without *institutional* problems, the debate about whether the Ninth Circuit can continue to meet the rising pressures will be mooted.**

In his statement of May 19, 1998, Chief Judge Hug suggested similar reforms in the appeal structure for administrative decisions where there are already several more levels of appeal built into the system than for ordinary litigation and where the standard of review is extremely narrow. He suggested routing these administrative appeals to new independent courts, not answerable to the agency, with a less deferential standard of review; and the same for immigration appeals. Such a segmentation of the appellate function, and its possible delegation to Article I courts, offers many advantages but also poses serious policy and constitutional questions. By reforming the general appellate structure of the circuit with DCAP, many of the benefits of Chief Judge Hug's suggestion could be achieved and the pressure for reform sufficiently relaxed that his proposal could be considered on its independent merits, separate from the urgency of providing relief to an overburdened Circuit bench.

NOTES

- ¹ A few commentators have suggested it in alternative formats, sometimes accompanied by a national court of appeals or other undesirable features. See Thomas E. Baker, *RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS* 258-261 (1994); Martha J. Dragich, "Once A Century: Time For A Structural Overhaul of the Federal Courts," 1996 *Wisconsin Law Review* 11, 58-62; Federal Judicial Center, *STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS* 133-140 (1993). The Parker Report (*REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT TO THE JUDICIAL CONFERENCE COMMITTEE ON LONG RANGE PLANNING*) (February 16, 1993) suggested a form of the DCAP as an alternative to its suggested two-tier review system. See also Daniel Meador, "Enlarging Federal Appellate Capacity Through District Level Review," presented to the ABA Appellate Judges' Conference in December 1996.

In drafting a DCAP proposal for this Commission's consideration, the experience of state systems incorporating this feature, and the experience of the Ninth Circuit Bankruptcy Appellate Panels, should be considered also. I would be pleased to submit a more detailed proposal, including draft legislation, if that would be useful to the Commission.

- ² See, e.g., Baker, *op. cit.* at 259 ("more judges can always be added more easily at the district court level[;] * * * "the district court might turn out to be a more resilient location for the error correction function and it does have a greater capacity for continued growth.")

**SANFORD SVETCOV'S PROPOSAL
TO RESTRUCTURE THE NINTH CIRCUIT INTO DIVISIONS
IS UNWISE AND WOULD NOT SOLVE
THE PROBLEM OF THE CRISIS IN VOLUME**

by Jerome I. Braun*

In his statement to the Commission dated April 24, 1998, Sanford Svetcov proposed that the Ninth Circuit be reorganized into Northern and Southern Divisions as a way to meet the crisis in volume and avoid a more drastic restructuring of the Circuit by Congress. Even though it comes from a very distinguished practitioner, this proposal is unsatisfactory in many respects. Because I understand that it may have attracted some interest on the Commission, I write to point out its defects.

The most important failing of the Svetcov proposal is that, like other proposals based on substituting two entities for our present single entity, it would not affect the crisis of volume. The "disposition of cases would be divided in half," as he says, but so would the judicial resources to deal with them, thus accomplishing nothing. There would still be the same number of cases and the same number of judges. To the extent one of the proposed new divisions had a lower ratio of cases per judge, the other would have a higher one. (The same is true of the other issues he adverts to, such as the circuit's reversal rate: division into smaller units would leave them unaffected.)

At the hearing in San Francisco on May 29, 1998, Judge Rymer noted that implementing the Svetcov proposal would work if there were more circuit judges. But if more circuit judges were appointed (even enough to fill the existing vacancies) the caseload per judge would fall and Svetcov's proposed restructuring (even if it would have helped) would no longer be needed.

Svetcov says that his proposal would not create a new circuit. But whatever these new divisions might be called, they would face the same problem that affected the old Fifth Circuit as it considered how to divide itself. If the decisions of a Unit were to have precedential force within the Unit, they might conflict with those of the other Unit. If on the other hand they were not to have precedential force, the new Units would amount to mere administrative divisions and it would accomplish little of significance to create them. For purely administrative purposes we already have three divisions in the circuit. Such

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marginal benefits as saving on air travel can more easily be accomplished within our existing administrative divisions and by innovative procedures such as e-mail and video conferencing.

Indeed, a regional alignment of the circuit was tried in 1979, and abandoned after only five months. The judges voted to abandon it because they missed the mix of cases and the diversity of the panels, felt there was a negative effect on collegiality, and were concerned that the law would develop differently in the different regions.¹ There is no reason to expect a different experience now.

The insoluble problem of maintaining a unified law of the circuit with two separate divisions is what doomed attempts to maintain the old Fifth Circuit.² Autonomous units were created in the old Fifth Circuit only to “facilitate” an eventual complete split.³ Even the Hruska Commission stated that creating two divisions within the existing circuit was not likely to solve the circuit’s problems.⁴ As the Commission said in its report:

“In all likelihood ... the two divisions would soon act and be perceived as separate courts. As a result the circuit would soon be divided in fact though not in law. Enormous administrative difficulties might be created by the need to coordinate the activities of two divisional headquarters and the directives of the two divisional chief judges. The present problems of avoiding intra-circuit conflicts would be exacerbated, inasmuch as only a proceeding that included judges from both divisions could speak with authoritative finality.”⁵

To function as appellate courts, the new divisions would each need a division-wide en banc procedure to resolve internal panel conflicts within the division. Svetcov sees this as a solution, but it is really only another layer of complexity in the appellate process. A provision for further circuit-wide en banc review to settle the inevitable conflicts between divisions would add yet another level, with attendant delays and uncertainty. There could therefore be as many as four layers of circuit review of a panel decision (panel rehearing, divisional en banc review, circuit-wide limited en banc review, circuit-wide full en banc review) before reaching the Supreme Court certiorari stage with attendant delay, expense and uncertainty at each level.⁶ Svetcov reports that “many observers” complain about delay and uncertainty. Dividing the circuit into autonomous divisions and multiplying layers of intermediate review would increase both delay and uncertainty.

Svetcov says he thinks the present en banc procedure is underused, and it is therefore a value implicit in his proposal that using it more would be good for its own sake. But the judges of the circuit (to whom this judgment is confided under the Rules of Appellate Procedure) obviously do not agree, as they are the ones who vote on using it. Circuit statistics show only 24 cases in the 18 years from 1980 to 1997 where intra-circuit conflict was even a partial reason for granting en banc review. Only three requests for full en banc review have been made in all that time, and none has been granted. En banc review is costly in resources and requires more judge time per case than any other procedure, and on a case already decided once by a panel. The less it has to be used, the better. Svetcov's proposal would not only increase its use, it would make increased use an institutional necessity.

Requiring six of the eleven members of the limited en banc panel to come from those who voted for review, as Svetcov suggests, may or may not be a good idea, but it should be considered on its own merits independently of this restructuring proposal. If it is a good idea it can be implemented by circuit rule. (Almost the same may be said of the Department of Justice's suggestion that an order for rehearing en banc require only a "strong minority" rather than a majority of active circuit judges.⁷ While this proposal would require amendment of F.R.A.P. Rule 35 (rather than just a circuit rule), the wisdom of the change should be considered independently of the question of restructuring the circuit.)

Splitting California between divisions would be a mistake. As noted, either the new divisions would have a coherent body of precedent or they would not. If they *would not* have a coherent body of precedent, they would not function as proper appellate courts and there would be no point to having two divisions. But if they *would* have a coherent body of precedent, both federal law and state law could be interpreted inconsistently within the state, with resulting major confusion. That is one very good reason states have never been split before. Particular problems would arise when a statewide law is challenged in federal court. A special jury-rigged en banc procedure for dealing with this would add yet another level of complexity to the appellate process. Even Arthur Hellman, who was counsel to the Hruska Commission which recommended dividing the state between two circuits, no longer feels its recommendations should be implemented.⁸

Svetcov says that his non-division by divisions would provide a "mechanism for transition." That is an additional problem-- when the unworkability of the new structure is proved in practice, and the two divisions have begun developing inconsistent case law, the pressure to complete the process by formal division

would be substantially strengthened. But dividing the circuit is not a good idea for many reasons, the most important being that it would not answer the problem of volume (or vacancies) because judge-to-case ratios would remain the same overall. It would destroy our successful innovative laboratory of reform and the only working model of a large circuit. It is not necessary because adaptations are successfully meeting the problems of size and volume. It yields to pressure based on political rather than institutional grounds, and is opposed by the bench and bar (unlike the situation in the old Fifth Circuit). Therefore it would be unwise to begin breaking the circuit into smaller units as a “mechanism for transition”-- the transition itself should be resisted rather than encouraged.

Svetcov says that we must do “something” voluntarily to fend off having something worse imposed on us, a “legislative fix” that “will gain momentum and produce a political solution.” But this approach is one of appeasement which accepts a half-measure of unnecessary change to avoid a full measure of unnecessary change. It would be a disservice both to the Circuit and to Congress for the Commission to accept any proposal otherwise than on its merits. If change is not justified on its merits, it should not be supported out of fear.

Finally, *if* a split is justified it should be a clean split. The “sort-of” split Svetcov recommends would give us the disadvantages of a split without even gaining its possible benefits.

NOTES

- ¹ See Statement of Cathy A. Catterson, given before the Commission on May 29, 1998; see also Statement of Judge James R. Browning, given the same day.
- ² See Judge Thomas M. Reavley in "The Split of the Fifth Circuit: Update and Finis," 12 Texas Tech Law Review 1, 5-7 (1981); see also Professor Thomas E. Baker, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS 76 (1994), at 62-64.
- ³ See Reavley, *loc. cit. supra*, at 7; see also Harvey C. Crouch, A HISTORY OF THE FIFTH CIRCUIT 1891-1981 191 (1984) ("the functioning of the separate units served as a rehearsal for the split of the circuit").
- ⁴ See Commission on Revision of the Federal Court Appellate System: THE GEOGRAPHICAL BOUNDARIES OF THE SEVERAL JUDICIAL CIRCUITS: RECOMMENDATIONS FOR CHANGE (Hruska Commission Report) at 241-242.
- ⁵ *Id.* at 242.
- ⁶ Requests for rehearing at each en banc level could push this to seven layers. If there were a provision for limited en banc review on the divisional level that would make five circuit layers before certiorari, or eight with rehearings. It is uncertain whether the limited en banc procedure would be permitted on the division level. The Omnibus Judgeship Act of 1978, which permitted this procedure, limited it to "any court of appeals having more than 15 active judges." Would these new division be courts of appeals, or not?
- ⁷ See Submission of the United States Department of Justice to the Commission, dated June 1, 1998, at 13-14.
- ⁸ See Arthur D. Hellman, "Dividing the Ninth Circuit: An Idea Whose Time Has Not Yet Come," 57 Montana Law Review 261, 264-274.