

COMMISSION ON
STRUCTURAL
ALTERNATIVES
FOR THE
FEDERAL COURTS
OF APPEALS

Tentative Draft Report

OCTOBER 1998

COMMISSION ON STRUCTURAL ALTERNATIVES
FOR THE FEDERAL COURTS OF APPEALS

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NOTICE

In these pages the Commission presents a tentative draft of its report recommending to the Congress and the President “such changes in circuit boundaries or structure as may be appropriate for the expeditious and effective disposition of the caseload of the Federal Courts of Appeals, consistent with fundamental concepts of fairness and due process,” as required by statute. Judges, other public officials, private attorneys, and others have been generous in the time they have devoted to producing materials and commentary for the Commission, which it has carefully considered.

The Commission is issuing this draft of its report for public comment and invites suggestions and advice from members of the bench and bar and from other interested parties. Comments should not be repetitious of those already submitted and should address matters not already included in submissions to the Commission. (Submissions are available on the Commission’s website.)

Comments should be as brief as possible and submitted as soon as convenient and in any event not later than November 6, 1998, in order that they may be considered in the preparation of the Commission’s final report, which must, by the terms of the statute, be submitted to the Congress and the President by December 19, 1998.

Comments can be sent to the Commission using one of the following means: (1) by electronic mail through the internet to the following address — Appellate_Commission_Comments@ao.uscourts.gov; (2) by electronic mail to the following address for those within the judicial branch using cc:Mail — Appellate Commission Comments; or, (3) by mail or fax to the Commission on Structural Alternatives for the Federal Courts of Appeals, Thurgood Marshall Federal Judiciary Building, One Columbus Circle, N.E., Washington, DC 20544 (fax: 202-208-5102). For those using regular mail or fax, the Commission asks that if feasible a copy of the comments also be submitted on a computer diskette in a format readable by a standard word processing program. Further instructions about sending submissions by electronic mail are available on the Commission’s website at <http://app.comm.uscourts.gov>.

Comments will be placed on the Commission’s website.

Byron R. White
Chair

October 7, 1998

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Foreword and Summary

Congress created this Commission on Structural Alternatives for the Federal Courts of Appeals in late 1997. It did so in the wake of controversy over whether the court of appeals for the Ninth Circuit—the largest federal court of appeals—has grown to a point that it cannot function effectively and whether, in response, Congress should split the Ninth Circuit to create two or more smaller courts. The statute directed the Commission to study the present circuit configuration and the structure and alignment of the courts of appeals, with particular reference to the Ninth Circuit. It further directed it to submit by December 19, 1998, recommendations to the President and Congress on changes in circuit boundaries or structure as may be appropriate for the expeditious and effective disposition of the appellate caseload, consistent with fundamental concepts of fairness and due process.

We have, as directed, given particular attention to the Ninth Circuit and its court of appeals but have done so as part of our examination of the nationwide system of appellate courts. The thirteen United States courts of appeals are in practical effect courts of last resort: the Supreme Court reviews but a small fraction of their decisions. If we are to have a rule of law, those courts must function effectively, rendering decisions promptly and consistently and through a process that accords to every case the deliberative attention of the judges. Those courts are operating under the pressure of caseload increases that have transformed them into different judicial entities from what they were at mid-century. The pressures continue, and there is little likelihood that caseloads and work burdens on the judges will lessen in the years ahead.

Fundamental to the Commission's analysis is the distinction between a circuit as a territorial-administrative unit of the federal judiciary and the circuit's court of appeals, an adjudicative body, the highest of numerous courts in each circuit. Our study has revealed that the administration of the Ninth Circuit is, at the least, on a par with that of other circuits, and innovative in many respects. We see no good reason to split the circuit solely out of concern for its size or administration.

Neither do we see a need to split the Ninth Circuit in order to solve problems having to do with the consistency, predictability and coherence of circuit law. These are adjudicative attributes of its court of appeals, not administrative functions of the circuit. Those who believe these are important values that are best achieved in a decisional unit that is smaller than the number of judgeships now authorized or needed in the future for the Ninth Circuit Court of Appeals have argued that the circuit should be split because splitting circuits has been the way that courts of appeals, deemed too large, have been reduced to optimal levels in the past.

But to split the Ninth Circuit in an effort to correct these and other conditions would deprive the courts now in the Ninth Circuit of the administrative

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advantages afforded by the present circuit configuration and deprive the West and the Pacific seaboard of a means for maintaining uniform federal law in that area. We conclude that such a step should not be taken unless there is no other means of responding to perceived problems in the court of appeals and of creating an effective adjudicative structure within the existing circuit boundaries. We believe there is an effective alternative for the Ninth Circuit Court of Appeals, that should also be made available to all courts of appeals as they grow, through the organization of the court into divisions, thereby creating smaller decisional units.

Therefore, we recommend that Congress enact a statute organizing the Ninth Circuit Court of Appeals into three regionally based adjudicative divisions—the Northern, Middle, and Southern—each division with a majority of its judges resident in its region, and each having exclusive jurisdiction over appeals from the judicial districts within its region (Chap. 3, sec. D). Each division would function as a semi-autonomous decisional unit. To resolve conflicts that might develop between regional divisions, we recommend a Circuit Division for conflict correction, which would replace the current limited en banc system. With from seven to eleven judges serving together on each regional division over an extended period of time, this plan would increase the consistency and coherence of the law, maximize the likelihood of genuine collegiality, establish an effective procedure for maintaining uniform decisional law within the circuit, and relate the appellate forum more closely to the region it serves. The circuit would remain intact as an administrative unit, functioning as it now does.

If Congress were to reject our recommendation to restructure the court of appeals and decide instead to split the circuit, the challenge of finding a workable solution is daunting. We examined over a dozen proposals and found each without merit. We describe the only plans that are even arguable in Chap. 3, Sec. E, but each is flawed and we endorse none of them.

Mindful of the Commission's charge relating to the federal appellate system nationwide, we have developed the concept of divisional organization not only as a solution to the immediate Ninth Circuit situation but also as an alternative to circuit splitting for all other courts of appeals as their size increases. Many of the reasons offered for splitting the Ninth Circuit would counsel the immediate or near-term splitting of several other circuits as well. Circuit splitting is not a feasible long-range means of creating smaller appellate courts, however. We agree with our predecessor body, the Commission on Revision of the Federal Court Appellate System, which in 1973 concluded that no regional circuit should consist of fewer than three states. Applying that principle, there are now eight circuits (not counting the D.C. Circuit) that cannot be split. Yet the courts of appeals in those circuits are likely to continue to expand.

Enactment of our recommended divisional organization of the Ninth Circuit Court of Appeals would create a model that could be copied or adapted in later

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years by courts of appeals in other circuits. With that in view, we also recommend that Congress enact a statute of general applicability authorizing any court of appeals with more than thirteen judgeships to organize itself into adjudicative divisions. The court would have an option in this regard until its membership exceeds seventeen judgeships, at which time it would be required to adopt a divisional plan (Chap. 4, sec. A). We recommend a statute that would leave much leeway to each court in designing a divisional structure, and there are various ways that can be done. The Ninth Circuit regional plan that we describe here is only one model.

Apart from authorizing and requiring a divisional structure in the large appellate courts, Congress can best equip those courts to cope with future, unforeseen conditions by according them a flexibility they do not now have. Rather than impose a fixed set of structures or procedures for all courts of appeals (beyond the divisional organization for large courts), we recommend statutes that would give the courts of appeals and the circuit councils a flexibility, within a prescribed framework, to shape structure and process to fit the particular needs of each court as they emerge over time. Specifically, we recommend that Congress authorize each court of appeals to decide some types of selected cases using panels of two rather than three judges (Chap. 4, sec. B) and authorize circuits to establish district court appellate panels (DCAP) to provide appellate review in designated categories of cases with panels of two district judges and one circuit judge, with discretionary review available thereafter in the court of appeals (Chap. 4, sec. C).

Collectively, these measures, if implemented, should equip the courts of appeals with a structure and sufficient flexibility to accommodate continued caseload growth into the indefinite future, while maintaining the quality of the appellate process and delivering consistent decisions - assuming, of course, that the system has the necessary number of judges and other resources.

Given its statutory charge, a majority of the Commission does not address overall federal jurisdiction. We did, however, consider the structural implications of some specific aspects of appellate jurisdiction. We recommend that Congress not authorize direct court of appeals review of bankruptcy decisions, but rather consider several specific alternatives described in Chap. 5, sec. A. We also analyze the proposal that court of appeals jurisdiction be made generally discretionary but make no specific recommendation (Chap. 5, sec. B), and discuss the place of the U.S. Court of Appeals for the Federal Circuit in the federal appellate system, indicating certain categories of cases that have been suggested for that appellate resource, again without making any specific recommendations (Chap. 5, sec. C).

We submit this report to the President and Congress to discharge our statutory responsibility, and to provide alternative structures for the federal courts of appeals that we believe will further the administration of justice in our country for years to come.

Chapter 1

The Commission: Creation, Mission, and Activities

Congress created the Commission on Structural Alternatives for the Federal Courts of Appeals in Pub. L. No. 105-119, signed by the President on November 26, 1997. Appendix A contains the text of the statute. This is the final report that section (a)(4) of the statute directed the Commission to submit to the President and Congress within a year after the appointment of a quorum of Commission members.

A. Background

Congress created the Commission in the wake of disagreement within the Congress and the country over the desirability of splitting the Ninth Circuit into two or more separate circuits, and if it were to be split, how best to do so. In 1973, the Commission on Revision of the Federal Court Appellate System recommended splitting both the Fifth and the Ninth Circuits.¹ More recent proposals to split the Ninth Circuit have been introduced in Congress, and at the same time, others proposed instead creation of a study commission.² In 1997, the Senate approved a bill that would have split the Ninth Circuit, but the House of Representatives did not concur. The result was passage of the Act creating this Commission.

B. Commission Structure and Activities

1. Creation and composition

On December 19, 1997, Chief Justice William H. Rehnquist appointed the Commission's five members pursuant to the statute's directive that he do so within thirty days of its enactment.³ The Chief Justice appointed as commissioners Retired Supreme Court Justice Byron R. White, Judge Gilbert S. Merritt of the U.S. Court of Appeals for the Sixth Circuit, Judge Pamela Ann Rymer of the U.S. Court of Appeals for the Ninth Circuit, Judge William D. Browning of the District of Arizona, and N. Lee Cooper, Esq., a member of the Alabama bar and past president of the American Bar Association. Brief biographies of the Commission members are in Appendix B.

1. Commission on Revision of the Federal Court Appellate System, *The Geographical Boundaries of the Several Judicial Circuits: Recommendations for Change* (1973).

2. *See, e.g.*, S. Rep. 104-197 at 16-17.

3. The statute is silent on the branch of government, if any, of which the Commission is a part.

The statute directed the Commission to elect “a chair and vice chair.” At its first meeting, on January 16, 1998, the Commission elected Justice White as chair and Mr. Cooper as vice chair. The statute also authorized the Commission to appoint an Executive Director, and the Commission at its first meeting voted to ask Professor Daniel J. Meador to assume that post, an assignment he accepted. Pursuant to another provision in the statute, the Administrative Office of the U.S. Courts (AO) provided the Commission “administrative services” and the Federal Judicial Center (FJC) provided it “research services.” The only other Commission staff consisted of one full-time secretary in the Commission office and a research assistant at the University of Virginia Law School. In light of the small size and limited authorized life of the Commission, it decided not to create formal advisory groups or subgroups or to retain officially designated reporters, as some earlier commissions have done.

The AO created an office for the Commission in the Thurgood Marshall Federal Judiciary Building, and the AO’s Office of Public Affairs provided its services to the Commission.

2. Activities in pursuit of statutory charge

Although the need to study the Ninth Circuit was the major impetus for the Commission’s creation, the statute charged it with a broader task. First, Congress directed it to “study the present division of the United States into the several judicial circuits” and “study the structure and alignment of the Federal Courts of Appeals system, with particular reference to the Ninth Circuit.”⁴

Second, Congress told the Commission to “report to the President and the Congress its recommendations for such changes in circuit boundaries or structure as may be appropriate for the expeditious and effective disposition of the caseload of the Federal Courts of Appeals, consistent with fundamental concepts of fairness and due process.”⁵

The statute directed the Commission to conduct its studies during the ten months following its appointment and to file its report with the President and Congress two months later.⁶

a. Hearings and other means of receiving information

Pursuant to its study function, the Commission, in its first month, reviewed previous studies of the appellate system, workload information developed by the FJC, and some other statistical data provided by the AO. At its second meeting,

4. Sec. 305(a)(1)(B)(i, ii), Pub. L. No. 105-119, 111 Stat. 2491.

5. Sec. 305(a)(1)(B)(iii), Pub. L. No. 105-119, 111 Stat. 2491. Our statutory recommendations, throughout the report, are directed to the President and the Congress, although for convenience the text may often say only “We recommend that Congress” or words to that effect.

6. Sec. 305(a)(6), Pub. L. No. 105-119, 111 Stat. 2491.

on February 17, the Commission scheduled and announced nationwide through correspondence and press releases six public hearings, starting in Atlanta on March 23, and subsequently in Dallas, Chicago, New York, Seattle, and finally, on May 29, in San Francisco. Pursuant to the statute,⁷ at least two commissioners were present at each hearing. Tape recordings of the hearings were provided to Commissioners not able to be present. A total of eighty-nine witnesses testified at the six hearings. Sixty-four of those appeared at the Seattle and San Francisco hearings.

The Commission also invited anyone not testifying to submit a written statement, and received ninety-two such statements. The AO created a website for the Commission (<http://app.comm.uscourts.gov>) and placed on it verbatim transcripts of the hearings and statements of witnesses who testified or submitted written comments in lieu of testifying. The Executive Director wrote to each judge of the courts of appeals closest to the respective hearing sites, informing them of the hearing and inviting their testimony. For the two hearings in the Ninth Circuit, he likewise wrote to all chief district judges in the circuit and to all members of Congress from states within the circuit. Justice White wrote to each member of the Senate and House Judiciary Committees, to each Supreme Court Justice, and to each circuit chief judge, inviting comments and suggestions regarding the Commission's work.

Because the Commission held no public hearing in Washington, D.C., the Chair and the Executive Director met with judges of the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Appeals for the District of Columbia Circuit to obtain their views. For a similar purpose, the entire Commission met with representatives from the Department of Justice and the White House Counsel's office. Early in its life, the Commission also convened a meeting with a small number of law professors in order to learn more about pertinent research and writings on the federal appellate system. At the request of the Executive Committee of the Judicial Conference of the United States, the Commission gave status reports on its work to the Conference through the Conference's Committees on Court Administration and Case Management, and on Federal-State Jurisdiction.

b. Research

Upon appointment, Commissioners and the Executive Director presented the FJC with preliminary discrete research requests, most of which could be answered by assembling information already available. At its April 9 meeting, the Commission endorsed the outlines of a limited research agenda to gather additional information about areas of analysis the Commission identified as high priorities for its work. Pursuant to this and later requests, FJC personnel prepared numerous special analyses of appellate workload and related information for the Commission's use, only a small part of which is set out in this report.

7. Sec. 305(a)(2)(E), Pub. L. No. 105-119, 111 Stat. 2491.

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In consultation with the Commission, the FJC also prepared and administered separate surveys of circuit and district judges, both active and senior. Completed surveys were received from 207 circuit judges (an 85% response rate) and 726 district judges (an 81% response rate). A third survey was sent to a national sample of more than 5800 lawyers who had handled appeals in the federal courts in the preceding twelve months. Completed surveys were received from 2,740 lawyers (for a response rate of 47%). The responses from all three surveys form an important part of the Commission's analysis.

To facilitate meaningful comparisons of the courts of appeals, the FJC also prepared profiles of the case management procedures that each court of appeals uses; differences in procedures can affect the comparability of statistical information about each court's performance. Justice White wrote to the chief circuit judges to enlist their cooperation and that of their courts and court staffs in the development of these profiles.

The AO provided the Commission with additional statistical reports on the work of the courts of appeals and with other information concerning the federal judiciary.

c. Draft report and final report

The Commission determined at its April 9 meeting to prepare and disseminate a draft report of its tentative recommendations, so as to receive public comment before submitting its final report. On October 7, 1998, the Commission made the draft report available on its website. Written copies were distributed to almost 1,000 interested parties, including all who testified or submitted written statements to the Commission. The Commission invited written comments on the tentative report, to be received by November 6, 1998. It received _____ comments.

C. Budget

The statute authorized an appropriation of \$900,000 for Commission activities,⁸ which amount Congress appropriated in the same statute creating the Commission. At the date of this final report, the Commission estimates it will incur total direct costs of _____ chargeable to its appropriation.

* * *

Before proceeding with our analysis and the development of our recommendations concerning the federal appellate system, we think it appropriate to state several matters that have guided and influenced our deliberations.

8. Sec. 305(b), Pub. L. No. 105-119, 111 Stat. 2491.

1. Sources of information and analysis

We have described above and in Chapter 3 the different means by which we have gone about our work. Throughout that work, we have benefited also from the analyses in previous studies of the federal appellate courts specifically or the federal judicial system generally. These include the Judicial Conference's 1995 *Long Range Plan for the Federal Courts*, and the 1990 *Report of the Federal Courts Study Committee*. We are particularly in the debt of the Commission on Revision of the Federal Court Appellate System, chaired by Senator Roman Hruska (thus informally known as the Hruska Commission). Like this Commission, the Hruska Commission had as a major concern the Ninth Circuit. That Commission submitted its first report, *The Geographical Boundaries of the Several Judicial Circuits: Recommendations for Change*, exactly twenty-five years ago. That report provided valuable analysis and criteria that have informed our work and sharpened our perspective. However, during the quarter century since that report, vast changes have occurred in the federal appellate system and particularly the Ninth Circuit.

We have also given special attention to the views of judges in the Ninth Circuit and elsewhere. In our system, judges are both producers and consumers of the products of the courts of appeals, and they have unique insights from both perspectives. Reports of their experiences have been an important source of information for the Commission, as have their opinions about proposed structural alternatives for the federal appellate system. At the same time, the Commission does not regard the preferences of judges as dispositive, and has not treated them as such in developing its recommendations.

2. Jurisdiction and structure

Structure and circuit alignment in the federal appellate system are profoundly affected by the volume of appeals. That volume, in turn, is significantly driven by the jurisdiction of the federal district courts. The Commission recognizes that significant changes need to be made in the jurisdiction of the federal district courts, but because of our statutory charge, the majority of the Commission makes no recommendations in that regard. (On this point, however, see the dissenting statement of Judge Merritt, joined by Justice White, following Chapter 6.) But we do note that restraint in conferring new jurisdiction on the federal courts, particularly in areas traditionally covered by state law and served by state courts, should not be overlooked. Maintaining an appropriate balance of federal-state jurisdiction is an important way to keep the federal caseload at a level that enables the federal courts, including the courts of appeals, to perform their core constitutional functions within our federal system. Nor should the possibility of curtailing diversity of citizenship jurisdiction be overlooked, at least to the extent that it has outlived its historic justifications.

3. Considerations of judicial independence and judicial administration

There is one principle that we regard as undebatable: It is wrong to realign circuits (or not realign them), and to restructure courts (or leave them alone) because of particular judicial decisions or particular judges. This rule must be faithfully honored, for the independence of the judiciary is of constitutional dimension and requires no less.

In conducting our analysis and developing our recommendations, we have proceeded on the premise that decisions about judicial structure and circuit alignment should be based on objective and principled considerations of sound judicial administration. Moreover, such decisions should be made with a long-range perspective and not be motivated by short-range, temporary circumstances. Views about the merits or correctness of specific judicial decisions or about individual judges presently serving on a court are transient matters and are inappropriate bases for constructing long-range institutional arrangements.

Chapter 2

The Federal Appellate System: Past and Present

This chapter sketches the history and evolution of “the present division of the United States into the several judicial circuits” and “the structure and alignment of the Federal Court of Appeals system.”⁹ The number, boundaries, and functions of judicial circuits have changed over time, as have the functions and operations of those circuits and the appellate courts in each.

A. Creating the Geographic Design of the System

The Judiciary Act of 1789¹⁰ implemented the Constitutional provision that “The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress shall from time to time ordain and establish.”¹¹ It created a federal judicial district and a one-judge district court in each of the then-eleven states, largely for admiralty, forfeitures and penalties, and minor federal crimes and U.S. plaintiff cases. The Act arrayed the districts into an eastern, a middle, and a southern circuit. Circuit courts sat twice each year in each district of the respective circuits to hear diversity of citizenship cases, major federal crimes, and larger U.S. plaintiff cases. They also had a limited appellate function for some of the larger civil and admiralty cases in the district courts.¹²

Rather than create separate judgeships for the system’s major trial courts, Congress directed Supreme Court justices to travel around each circuit to convene circuit courts with the respective district judges. This approach saved the money a separate corps of judges would require, exposed the justices to the state laws and legal practices that affected the Supreme Court docket, and promoted familiarity with the government in the country’s far reaches.

The circuits, thus, were a means of allocating the trial work of Supreme Court justices. Each circuit was served by two of the six justices. By 1802, Congress had realigned the three circuits into six (see Figure 2-A), each served by one justice. Then, as states joined the Union, Congress created new circuits and gradually enlarged the Supreme Court to provide justices for their circuit courts.

9. Act of Nov. 26, 1797, Pub. L. No. 105-119, § 305 (a)(1)(b)(i, ii), 111 Stat. 2491. The maps and much of the analysis in this chapter are drawn from Russell Wheeler & Cynthia Harrison, *Creating the Federal Judicial System* (Federal Judicial Center 2d ed. 1994), which contains additional maps chronicling the evolution of the federal appellate system. (This chapter omits many of the specific statutory and source materials, although they may be found in *Creating the Federal Judicial System* and secondary sources cited there.)

10. Act of Sept. 24, 1789, ch. 20, § 1, 1 Stat. 73.

11. U.S. Const. art. III, § 1.

12. Act of Sept. 24, 1789, ch. 20, §§ 21 & 22, 1 Stat. 83-84.

Figure 2-A
The Circuits in 1802



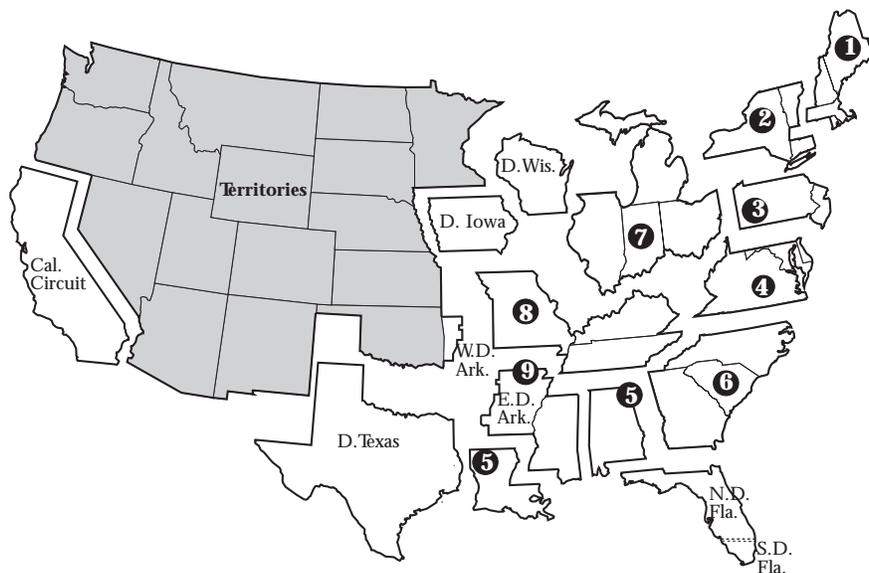
Between 1789 and 1866, Congress realigned the circuits thirteen times, in each case to adjust the Supreme Court justices' trial court assignments. The number of circuits reached its nineteenth century high point in 1855 (see Figure 2-B), when Congress added to the nine numbered circuits a separate California circuit for the large number of land claims stemming from the gold rush.¹³ As a harbinger of future judgeship arrangements, Congress also created the position of circuit judge for the California circuit. It did so in part because as the Court's docket grew, the Justices spent less time riding circuit.

President Lincoln's 1861 state of the union message reflected an emerging consensus when it warned that "the country has outgrown our present judicial system."¹⁴ The 1855 configuration shown in Figure 2-B, for example, left outside of the circuit system districts in Arkansas, Florida, Iowa, Texas, and Wisconsin. Lincoln knew that the circuit system could not accommodate the western territories that would become states without making the Supreme Court "altogether too numerous for a judicial body of any sort." Equally unacceptable was leaving some states out of the circuit system.

13. Act of Mar. 2, 1855, 10 Stat. 631.

14. Message to Congress (Dec. 3, 1861), in 5 *The Works of Abraham Lincoln* 41-42 (R. Basler ed., 1953).

Figure 2-B
The Circuits in 1855



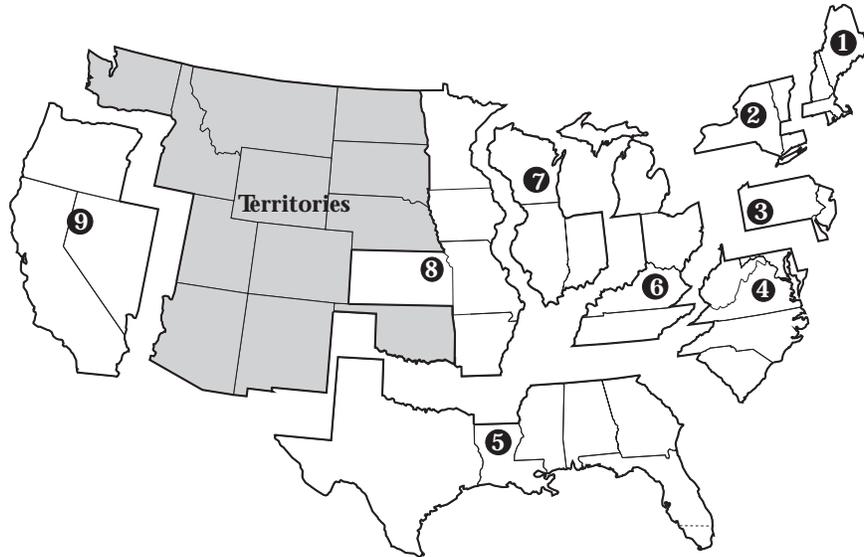
A partial solution was in place by the end of the decade. Lincoln had proposed fixing the Supreme Court at a “convenient number,” irrespective of the number of circuits, and then dividing the country “into circuits of convenient size,” to be served by the Supreme Court justices or by separate circuit judges, or both. Although Congress created a tenth seat on the Court in 1863 to accommodate the reconfigured tenth circuit of California and Oregon,¹⁵ it soon undid that step, reducing the number of justices from ten to eight and then, by 1870, fixed the number at nine, where it has been ever since.¹⁶ Also, in 1869 Congress created nine circuit judgeships—one in each circuit—because the Supreme Court justices could attend only a fraction of the circuit court sessions. Finally, an 1866 statute¹⁷ redrew most of the circuit boundaries (see Figure 2-C), creating new boundaries that are largely still in existence. Since 1866, Congress has accommodated new states by adding them to existing circuits rather than creating new circuits.

15. Act of Mar. 3, 1863, 12 Stat. 794.

16. Act of Apr. 10, 1869, 16 Stat. 44.

17. Act of July 23, 1866, 14 Stat. 209.

Figure 2-C
The Circuits in 1866



B. Establishing the Appellate System

Although the system’s geographic contours were largely set by 1866, it would be more than two decades before Congress created separate intermediate appellate courts for each circuit. A near-breakdown of the judicial system brought that design into existence.

After the Civil War, statutes promoting economic growth and enforcing the Reconstruction Amendments fueled a vast expansion of judicial business. The Judiciary Act of 1875¹⁸ established a general federal question jurisdiction for cases involving \$500 or more and made the federal trial courts “the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States.”¹⁹

This large increase in work, almost no increase in judgeships, and a structure designed for a different era, resulted in “the nadir of federal judicial administration.”²⁰ By the 1880s, district judges sitting alone handled close to 90% of the circuit court caseload and often sat on appeals from their own decisions.²¹

18. Act of Mar. 3, 1875, 18 Stat 470.

19. Felix Frankfurter & James Landis, *The Business of the Supreme Court* 64–65 (1928).

20. Paul M. Bator et al., *Hart & Wechsler’s The Federal Courts and the Federal System* 37 (3d ed. 1988).

21. Frankfurter & Landis, *supra* note 19, at 79.

Appellate review was statutorily foreclosed in many cases—almost all criminal cases and in all civil cases involving less than \$5,000.²² Even so, the Supreme Court’s docket grew steeply. From 310 cases in 1860, the Court’s docket increased to 1,816 in 1890.²³ The Court, obliged to decide almost all cases brought to it, fell years behind. The search for a solution was compounded by conflict between Northern and Eastern interests that wanted a strengthened federal court system and Southern and Western interests that did not. Congress considered numerous proposals to expand federal appellate capacity, such as an intermediate court of appeals and an enlarged Supreme Court, sitting in divisions.

The culmination of this controversy was the Circuit Court of Appeals Act of 1891,²⁴ fashioned by Senate Judiciary Committee chairman William Evarts of New York. It created a new court—the circuit court of appeals—in each of the nine circuits and shifted to these new courts much of the Supreme Court’s appellate caseload. In doing so, it made the federal district courts the system’s primary trial courts.²⁵ As a result of the Act, circuit boundaries no longer allocated Supreme Court justices’ trial court duties; rather circuit boundaries defined the territorial reach of appellate court jurisdiction.

Each court of appeals consisted of the circuit judgeship created in 1869 and another created by the 1891 Act, with either a district judge or a Supreme Court justice as the third judge. It provided direct Supreme Court review as of right from the district courts in some categories of cases and from circuit courts of appeals in others. The Act routed all other cases—notably criminal, diversity, admiralty, revenue, and patent cases—to the courts of appeals for final disposition. The appellate court could certify questions to the Supreme Court, or the Supreme Court could grant review by certiorari. The Act’s effect on the Supreme Court was immediate—filings dropped from 623 in 1890 to 275 in 1892.²⁶

C. Evolution of the Supreme Court’s Discretionary Docket

Twentieth-century changes in the appellate system have in the main been functional, not structural. One such change occurred in the first half of the century: the Supreme Court’s transformation from a law-declaring and error-correcting court into a court almost exclusively for law declaring. Under the Evarts Act, the forum for direct review of trial level decisions shifted from the Supreme Court to new circuit courts of appeals, and the 1925 “Judges’ Bill”²⁷ significantly

22. Act of Feb. 16, 1875, 18 Stat. 315.

23. Frankfurter & Landis, *supra* note 19, at 101–02.

24. Act of Mar. 3, 1891, 26 Stat 826.

25. The old circuit courts were abolished, albeit not until 1911. Act of Mar. 3, 1911, § 301, 36 Stat. 1087, 1169.

26. Frankfurter & Landis, *supra* note 19, at 102.

27. Act of Feb. 13, 1925, 43 Stat. 936.

enhanced the Court’s discretionary jurisdiction through the writ of certiorari. The statute thus helped the Court to serve the objectives that Chief Justice Taft enunciated in arguing for its passage: “expounding and stabilizing principles of law . . . , passing upon constitutional questions and other important questions of law for the public benefit [and preserving] uniformity of decision among the intermediate courts of appeals.”²⁸ The culmination of this extension of discretionary jurisdiction came in 1988, when Congress removed almost all vestiges of the Court’s obligatory jurisdiction.²⁹

Table 2-1 shows that the Court’s plenary docket has remained relatively steady, but courts of appeals’ merits dispositions have grown by 1,000%. The result is a greatly reduced percentage of courts of appeals decisions reviewed by the Supreme Court. The Court has been able to develop as a national law-declaring court, while the courts of appeals have become the only federal error-correcting courts, for practical purposes, the federal appellate courts of last resort.

Table 2-1
Supreme Court Review of Federal Courts of Appeals Decisions³⁰

Year	Supreme Court Plenary Decisions in Cases from Courts of Appeals	Court of Appeals Decisions on the Merits	Percentage of Merits Decisions Given Supreme Court Plenary Review
1950	70	2,355	3.0%
1978	101	8,850	1.1%
1984	124	14,474	0.9%
1997	76	26,566	0.3%

D. Transformation of the Courts of Appeals and Their Work

The courts of appeals of 1998 are very different bodies from what they were 100 years ago. Changes in the nature and size of their workloads required courts to request more judges and to adapt their procedures to the changed circumstances.

28. Frankfurter & Landis, *supra* note 19, at 257 (quoting 1922 testimony before the House).

29. Act of June 27, 1988, Pub. L. No. 100-352, 102 Stat. 662.

30. Supreme Court plenary disposition data are drawn from the annual Supreme Court review in the November issue of the *Harvard Law Review*. Those annual Supreme Court reviews do not tell whether a case was heard below by a three-judge district court or a court of appeals. The figure for 1997 was drawn from the Supreme Court data base at Cornell University’s Legal Information Institute. Data on regional court of appeals merits decisions are from Administrative Office of the U.S. Courts, Annual Report of the Director, 1950, 1978, 1984 and 1997 (Table B-1); Federal Circuit data from Annual Report, 1984 (Table G-3b) and 1997 (Table B-8).

1. Growth in judgeships and workload

The intermediate appellate courts grew gradually during the first part of the 1900s and more rapidly since then.³¹ As displayed in Table 2-2, four decades after their creation, the modal number of judgeships in the courts of appeals had risen to four. As they grew, the courts began to sit in more than one panel of three, convening occasionally en banc, a practice approved by the Supreme Court and then codified in the 1940s.³² By 1950, the modal number of judgeships had risen to six. By 1984 the modal number had risen to twelve.

Table 2-2
Summary of Authorized Circuit Judgeships for Selected Years, 1892–1990

Year	Largest Court	Smallest Court	Modal Court	Total Judgeships
1892	3	2	2	19
1930	5	3	4	55
1950	9	3	6	75
1964	9	3	9	88
1978	26	4	11	144
1984	28	6	12	168
1990	28	6	12	179

Note: Years 1930–1978 combine the Court of Customs and Patent Appeals and Court of Claims.

The work assigned to these courts, however, has increased disproportionately to the increase in judgeships, as shown in Table 2-3. Over the last 100 years, filings per appellate judgeship have increased by almost a factor of six. By contrast, filings per judgeship in the district courts have not even doubled.

31. The data in this paragraph and the next one, and in Table 2-2, are from Administrative Office of the U.S. Courts, *History of Federal Judgeships*, Table K (1991).

32. As more courts grew larger than three judgeships in the 1930s, some of them provided by rule for convening en banc for some cases. The Supreme Court upheld this practice in 1941, *Textile Mills Securities Corp. v. Commissioner of IRS*, 314 U.S. 272, 278 (1941), clarifying ambiguities left over from the Evarts Act, and in the 1948 revision of the Judicial Code, Congress specifically authorized the courts of appeals to order hearings or rehearings en banc (currently codified as 28 U.S.C. § 46(c)).

The Federal Appellate System: Past & Present

Table 2-3³³
Authorized District and Circuit Judgeships and Filings per Judgeship

Year	District Courts			Courts of Appeals		
	Judgeships	Filings	Filings per Judgeship	Judgeships	Filings	Filings per Judgeship
1892	64	18,388	287	19	841	44
1930	139	135,630	976	55	2,874	52
1950	212	82,805	391	75	2,678	36
1964	301	92,826	308	88	6,023	68
1978	510	173,690	341	144	18,863	131
1984	571	297,630	521	168	31,426	187
1990	645	266,325	413	168	40,877	228
1997	645	322,390	500	179	53,777	300

Note: Years 1930–1978 combine the Court of Customs and Patent Appeals and Court of Claims.

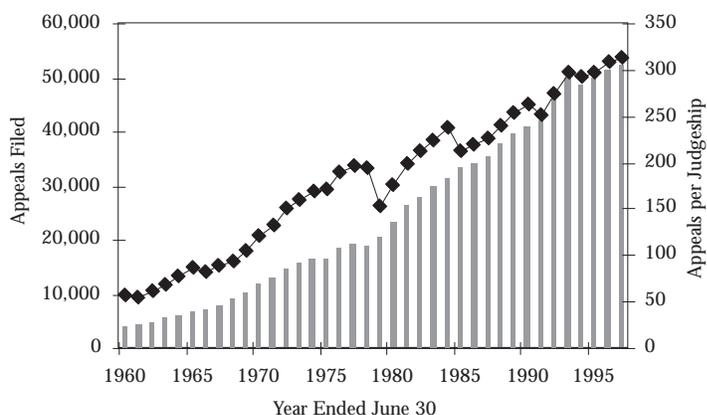
By any measure, the courts of appeals of today are handling more cases, and more work, than their predecessor courts. With only brief respites after new judgeship bills took effect, circuit judges have been faced with relentlessly increasing caseloads since the beginning of the upswing in appeals in the 1960s. Although increases in judgeships have been substantial, judgeships have not increased as rapidly as raw appellate filings. Since 1960, circuit judgeships have grown by roughly 160%, but appeals per judgeship have grown by 450%. Figure 2-D plots the increase in total filings and filings per judgeship since 1960.

Perhaps as important as the increase in the numbers of appeals is the change in the nature of those appeals over time. As Table 2-4 shows, appeals of all types have increased, but the proportion of the courts' dockets accounted for by each type has changed. Most striking is the overall effect of the increase in appeals associated with the growth in criminal prosecutions. There has been substantial growth in direct criminal appeals over the past few decades, most dramatically since November 1987, the effective date of the sentencing guidelines developed and promulgated pursuant to the 1984 Sentencing Reform Act.³⁴ After a slight decline in the 1970s and early 1980s, criminal appeals rose precipitously—from 4,377 in 1981 to 10,521 in 1997. There were several apparent causes—stepped-up prosecutorial efforts, the sentencing guidelines themselves, the mandatory

33. Table 2-3 is derived from Richard Posner, *The Federal Courts: Challenge and Reform* 391–98 (1996) (Tables A-2 and A-3); Annual Report of the Director of the Administrative Office of the U.S. Courts (1997) (Tables B-1 and B-8); and Administrative Office of the U.S. Courts, *History of Federal Judgeships*, Table K.

34. See U.S. Sentencing Commission, *Guidelines Manual* 1997, Ch. 1.

Figure 2-D
 Appeals Filed and Appeals per Circuit Judgeship, 1960–1997



minimum sentences that became increasingly common in the 1980s,³⁵ and the availability of appellate review of sentences even after a guilty plea.³⁶ Along with the increase in direct criminal appeals came the growth in civil suits by incarcerated prisoners, including motions to vacate sentence and petitions for writs of habeas corpus (both technically considered civil actions), as well as suits alleging civil rights violations and unconstitutional conditions of confinement. Civil suits by prisoners made up about 8% of the docket in 1960, but more than 30% by 1997. All told, the “criminal-related” portion of the appellate docket grew from about 24% in 1960 to about 51% in 1997.

Table 2-4
 Appeal Types Filed in the Regional Courts of Appeals, 1960–1997

	1960	1970	1980	1990	1997
Criminal	623 (16%)	2,660 (23%)	4,405 (19%)	9,493 (23%)	10,521 (20%)
U.S. Prisoner	179 (5%)	818 (7%)	1,007 (4%)	2,263 (6%)	5,183 (10%)
Other U.S. Civil	609 (16%)	1,349 (12%)	3,647 (16%)	4,363 (11%)	3,803 (7%)
Private Prisoner	111 (3%)	1,622 (14%)	2,675 (12%)	7,678 (19%)	11,005 (21%)
Other Priv. Civil	1,423 (36%)	3,212 (28%)	7,525 (32%)	12,812 (31%)	15,423 (29%)
Bankruptcy	132 (3%)	205 (2%)	396 (2%)	1,087 (3%)	1,158 (2%)
Administrative	737 (19%)	1,522 (13%)	2,950 (13%)	2,578 (6%)	4,412 (8%)
Orig. pro/other	85 (2%)	274 (2%)	595 (3%)	624 (2%)	814 (2%)
TOTAL FILINGS	3,899	11,662	23,200	40,898	52,319

Note: Failure of percentages to total 100 is due to rounding.

35. See the discussion in Report of the Federal Courts Study Committee, April 2, 1990, 133–34.
 36. 18 U.S.C. § 3742 (1998).

During the same time, the courts of appeals began to see increasing numbers of appeals brought by unrepresented litigants, as Table 2-5 reveals. In 1997, fully half of the filings in the courts of appeals that were not direct criminal appeals were appeals by unrepresented parties. Although we cannot tell how much pro se litigation went on in the courts of appeals in earlier decades, it was probably relatively uncommon until the growth in prisoner litigation described above. Much of the pro se docket is still accounted for by prisoners, but it is not uncommon for other litigants to lack legal counsel—about one-quarter to one-third of nonprisoner civil appeals from the district courts in 1997 were filed by unrepresented litigants.

Table 2-5
Estimated Percentage of Appeals Filed by Unrepresented Litigants, 1950–1997

	1950	1960	1970	1980	1990	1997
Percentage of all filings	10%	7%	21%	16%	24%	42%
Percentage of non-criminal filings	11%	9%	27%	20%	32%	50%

Note: 1950–1990 figures are the number of civil appeals by prisoners as a percentage of the national appellate caseload. Reliable information about pro se status is available only for the last few years.

Like many prisoner cases, appeals filed by unrepresented parties who are not incarcerated pose special challenges for the courts, but they generally do not involve as much work for judges as fully counseled cases because they typically are controlled by well-settled precedent or require a highly deferential standard of review.³⁷ In most courts, central staff attorneys prepare these cases for decision by a three-judge panel. Many such appeals, even when meritorious, do not require extensive legal research or conference time, and often they do not yield published opinions that take a lot of judicial time to craft. Accordingly, the number of filings, while important, is not a sufficient measure of judicial workload, and should not be taken alone as a sign that the courts are overwhelmed. Rather, the nature of the work done by the courts of appeals must be considered; it is likely that the above described changes in the nature of appeals at least partially account for the ability of the courts of appeals to cope with much larger caseloads without a commensurate increase in judgeships.

37. The current formula used in the assessment of circuit judgeship needs discounts pro se cases by two-thirds to reflect the generally lower judicial time requirements associated with such cases.

2. Responses to growth in judgeships and workload

a. Creating new circuits and courts of appeals

Since 1891, Congress has faced “insistent pressure for further subdivision”³⁸ of the circuits. It has twice split circuits so as to create smaller courts of appeals that proponents of division said would be more effective. These actions reflected a view that the only way to deal with a court of appeals deemed to have grown too large was to reconfigure the circuit of which it was a part. Indeed, for the same reason, the current debate about the Ninth Circuit has centered on the question of whether the circuit should be split, even though in reality, it also has to do with a court of appeals deemed to be growing too large. We offer in Chapter 3 a new approach—restructuring the court of appeals, but retaining the circuit. In this chapter, however, we review briefly the two circuit reconfigurations in this century.

(1) 1929: Creation of the Tenth Circuit and its court of appeals

A 1925 American Bar Association resolution proposed re-examination of the nine-circuit configuration, citing both that year’s “Judges’ Bill,” which expanded the Supreme Court’s certiorari jurisdiction and regularized the jurisdiction of the circuit courts, and the “unequal distribution of the work” of the appellate courts.³⁹

In February 1928, the House of Representatives took up a bill to create an Eighth Circuit of Colorado, Kansas, Missouri, New Mexico, and Oklahoma and a new Ninth Circuit of Iowa, Minnesota, Nebraska, North and South Dakota, and Wyoming (renaming the current Ninth as the Tenth Circuit). Others favored a three-way split: a five-state Eighth Circuit of the upper midwest (the Dakotas, Iowa, Minnesota and Nebraska) and two four-state circuits: a new Tenth Circuit of the lower midwestern states of Arkansas, Kansas, Missouri and Oklahoma, and a new Eleventh Circuit of Colorado, New Mexico, Utah, and Wyoming. Another provision to make New York a single-state Second Circuit was soon dropped in the face of opposition from judges and lawyers in that circuit, as were other specific changes, such as placing Arkansas in the Fifth Circuit. Little Rock lawyer George Rose protested that “Arkansas does most business with St. Louis . . . and has almost no business with New Orleans;” furthermore, “[i]f Arkansas is put into the fifth circuit, the judges there will have to learn Arkansas law, and in the learning will no doubt make many mistakes.”⁴⁰

38. Frankfurter & Landis, *supra* note 19, at 107.

39. *To Change the Judicial Circuits of the United States and to Create a Tenth Judicial Circuit: Hearing on H.R. 5690 before the Committee on the Judiciary, House of Representatives, 70th Cong., 1st Sess., 38 (1928)* (resolution of the ABA was entered into the record) [hereinafter *Hearing*].

40. *Id.* at 21.

Debate over the Eighth Circuit, however, persisted into the next Congress, driven by the circuit's vast geographic expanse and its perceived effect on the court's work. Citing tables on caseloads and the distances between the principal cities of the Eighth Circuit, the ABA argued that an appellate court sitting over so large a jurisdiction "can not hope to transact as much business as a stationary court."⁴¹ Furthermore, complained Chief Justice Taft (in the days before appellate courts sat en banc), such a large circuit creates a need for a large court: "The six Circuit judges in the Circuit . . . make up two Supreme Courts . . . in the 8th circuit. And this prevents the uniformity of decision that is very necessary in one Circuit having theoretically only one Circuit Court of Appeals."⁴²

The judges of the Eighth Circuit conceded a need for some realignment but differed over the best way to do it. For example, Kimbrough Stone of Kansas City, then the senior (chief) circuit judge, objected to any characterization of the Eighth Circuit as backlogged, to which lawyers responded that the court avoided backlog only by heavy reliance on visiting judges ("I do not remember ever having been in that court for a long time and finding three circuit judges on the bench").⁴³

Hearings in 1929 ended with near unanimous support for a new Tenth Circuit cut from the westernmost states of the existing Eighth Circuit and with the addition of some new judgeships for those two appellate courts and others. President Coolidge signed the bill on February 28, 1929,⁴⁴ creating the boundaries shown in Figure 2-E.

(2) 1981: Creation of the Eleventh Circuit and its court of appeals

The statute that created the Eleventh Circuit in 1981⁴⁵ ended a long struggle, much more intense than that involving the Eighth, over sound judicial administration, the proper size of appellate courts, the best way to divide the circuit, and the direction of the civil rights litigation in the federal courts of the Deep South.⁴⁶

41. *Id.* at 40.

42. *Quoted in* Denise Bonn, *The Geographical Division of the Eighth Circuit Court of Appeals 19-20* (1974) (unpublished manuscript on file with the Federal Judicial Center).

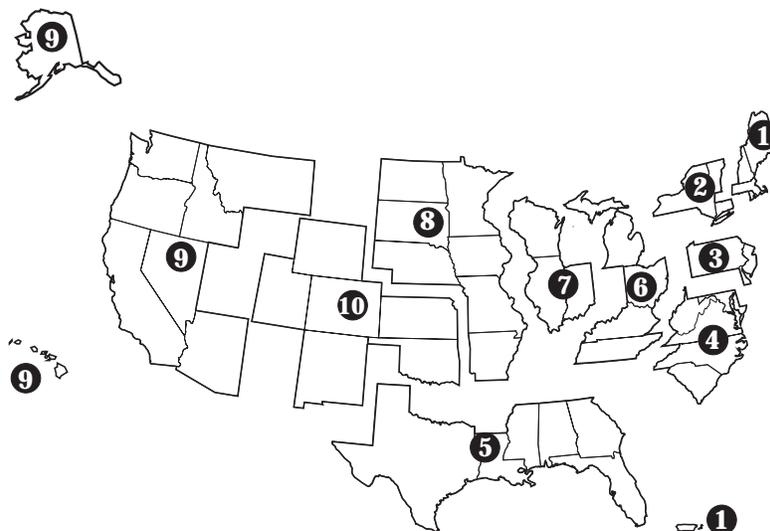
43. Hearing, *supra* note 39, at 32.

44. Act of Feb. 28, 1929, Pub. L. No. 71-840, 45 Stat. 1407.

45. Act of Oct. 14, 1980, Pub. L. No. 96-452, 94 Stat. 1994.

46. This account draws heavily on the standard source for the creation of the Eleventh Circuit, Deborah Barrow & Thomas Walker, *A Court Divided: The Fifth Circuit Court of Appeals and the Politics of Judicial Reform* (1988).

Figure 2-E
The Circuits in 1929



The Judicial Conference in March 1964 had recommended splitting the Fifth Circuit in order to provide its six states with additional federal appellate judgeships without creating a court of appeals of more than nine judgeships.⁴⁷ That September, however, the Conference approved a compromise solution, creating temporary judgeships to assist the Court, pending legislative action on the Conference’s circuit reconfiguration proposal.⁴⁸ Mississippi Senator James Eastland, chair of the Judiciary Committee, wanted to split the Fifth Circuit between Louisiana and Mississippi, but his House counterpart, Representative Emanuel Celler, feared that a circuit of Alabama, Florida, Georgia, and Mississippi “might not be so sanguine” in enforcing the Supreme Court’s civil rights decisions as would the judges from Texas and Louisiana.⁴⁹ He opposed any circuit division until the Conference undertook “a survey of the geographical organization of the entire federal judicial system in the light of population increases and economic changes.”⁵⁰

Disappointed with the inconclusiveness of seven years of appellate procedural innovation, and frustrated with the pervasive controversy over Fifth Circuit judge-

47. *Id.* at 83.

48. *Id.* at 3–4, 116–17. The Conference action is reported at Report of the Proceedings of the Judicial Conference of the United States 63 (Sept. 1964).

49. Barrow & Walker, *supra* note 46, at 116–17.

50. The language is the summary of the Celler proposal as reported in Report of the Proceedings of the Judicial Conference of the United States 21 (Mar. 1959).

ships and attendant circuit splitting recommendations, the Judicial Conference recommended in 1971 the creation of the Commission on Revision of the Federal Court Appellate System. Congress thus created the twelve-person Hruska Commission to study the circuit alignment and the appellate courts' internal operating procedures and to submit recommendations to the President, the Congress and the Chief Justice.⁵¹ After extensive hearings, the Hruska Commission filed its report on circuit restructuring in December 1973,⁵² recommending splitting both the Fifth and Ninth Circuits,⁵³ but Congress declined to implement either recommendation.

In 1978, as part of the Omnibus Judgeship Act, Congress authorized any court of appeals with more than fifteen active judges to use divisions for some court administration tasks and to perform its en banc functions with fewer than all of its judges. This was a compromise that secured passage of the Act, which increased the size of the Fifth Circuit's Court of Appeals from fifteen to twenty-six judgeships (and the Ninth Circuit's Court of Appeals from eighteen to twenty-three judgeships). However, after the newly enlarged court held its first en banc hearing—having declined to use the limited en banc function authorized by the Act—and as the judges attempted to stay current with the law of the circuit, all the judges agreed that a division was necessary. They petitioned Congress to create an Eleventh Circuit of Alabama, Florida and Georgia, and a reconfigured Fifth Circuit of Texas, Louisiana, and Mississippi. That proposal attracted wide support, and Congress enacted it after opposition from civil rights organizations ebbed. President Carter signed the bill to create the Eleventh Circuit on October 15, 1980.

(3) 1982: Creation of the Federal Circuit

A significant innovation in the organization of the courts of appeals system was introduced in 1982, when Congress created the United States Court of Appeals for the Federal Circuit. That court's appellate jurisdiction is not regionally de-

51. Act of Oct. 13, 1972, Pub. L. No. 92-489. The twelve commissioners were appointed (four each) by the Speaker of the House, the President Pro Tem of the Senate, the President, and the Chief Justice. The Commission was (a) "to study the present division of the United States into the several judicial circuits and to report . . . its recommendations for change in the geographical boundaries of the circuits as may be most appropriate for the expeditious and effective disposition of judicial business"; and (b) "to study the structure and internal procedures of the Federal courts of appeals system and to report . . . its recommendations for such additional changes in structure or internal procedure as may be appropriate for the expeditious and effective disposition of the caseload of the Federal courts of appeals, consistent with fundamental concepts of fairness and due process." *Id.* § 1(a) & (b).

52. Commission on Revision of the Federal Court Appellate System, *The Geographical Boundaries of the Several Judicial Circuits: Recommendations for Change* (Dec. 1973).

53. *Id.* at 3-4.

terminated; it has jurisdiction over certain types of appeals from all district courts and over all types of appeals from specified trial courts and administrative agencies. It is discussed later in Chapter 5.

b. New procedures and supporting personnel

The growth in the volume of appeals, in addition to necessitating more judges on each court, has wrought two other far-reaching, and related, innovations in the federal appellate courts in the last third of this century. One is the adoption of differentiated decisional processes, and the other is the employment of central staff attorneys. Both were inventions of necessity, pioneered by the courts to keep abreast of rising caseloads, but both have proven to be—for part of the docket—more efficient ways to deliver appellate justice regardless of docket pressures.

Differentiated decisional processes were adopted when courts recognized that not every appeal needs the same amount of judicial attention. Some appeals present difficult questions, or questions of great significance to the legal order, while other appeals present routine issues that are relatively easy to decide because the controlling law is well settled. For the latter, many courts began to find oral argument unnecessary or unhelpful, and the time spent in producing the traditional fully reasoned published opinion greater than judicial economy warranted. As cases of this type grew to represent a larger and larger proportion of appellate dockets, courts developed screening or tracking procedures to review appeals at an early stage and route them through the decisional process tailored to their difficulty and precedential significance. Under such tracking systems, some appeals continue to receive the traditional process—oral argument, conference by the panel, and fully reasoned opinion. Some are routed to a settlement procedure aimed at achieving an acceptable resolution of the dispute without expenditure of substantial judicial time. Still others are decided without oral argument and with a short, often per curiam, memorandum disposition or brief order, typically unpublished. The result, as Table 2-6 shows, is that in several of the courts fewer than a third of the cases decided on the merits are argued orally; in only three regional courts of appeals was the argument rate higher than 50% in 1997.

Table 2-6
Percentage of Cases Decided on the Merits in Which Oral Argument Was Heard in the Regional Courts of Appeals, FY 1997

	1st	2d	3d	4th	5th	6th	7th	8th	9th	10th	11th	D.C.	Nat'l
All cases	61%	65%	30%	30%	35%	50%	51%	46%	39%	30%	30%	47%	40%
Cases with counsel	74%	85%	42%	51%	47%	71%	78%	65%	54%	45%	38%	69%	56%

As the volume and nature of the appellate caseloads changed, so did the likelihood that an appellate court would publish an opinion explaining its decision, to the point where today, most courts issue published opinions in only a small percentage of the appeals they decide on the merits, as Table 2-7 reveals.

Table 2-7
Percentage of Cases Decided on the Merits that Resulted in a Published Opinion in the Regional Courts of Appeals, FY 1997

	1st	2d	3d	4th	5th	6th	7th	8th	9th	10th	11th	D.C.	Nat'l
All cases	51%	27%	16%	11%	22%	18%	48%	45%	18%	26%	14%	37%	23%
Cases with counsel	61%	39%	22%	19%	29%	25%	71%	62%	24%	36%	17%	55%	32%

For the most part, the decline in oral argument and publication is attributable to the influx of cases involving unrepresented litigants pursuing relatively simple appeals, many of which present the same issues. As the tables show, the percentage of cases with counsel that receive argument or published opinion is generally considerably higher. Because of changes in the nature of the caseload and in the significance of publication, lower rates of oral argument or opinion publication cannot automatically be interpreted as a sign of dysfunction in a court.⁵⁴

Concurrently with the adoption of these abbreviated internal processes came the employment of central staff attorneys to help implement the new processes. Although judges have long had personal (“elbow”) law clerks, the use of a central staff working for the court as a whole was genuinely new. Starting in the early 1970s with a handful of such attorneys, the courts of appeals have greatly increased their numbers.

Although central staff attorneys were originally employed primarily to help the courts process cases filed by unrepresented prisoners, in most courts their duties now extend to other types of cases. In most (but not all) courts, staff attorneys perform a screening function, reviewing appeals as they become ready for the court’s attention and routing them into either an oral argument track or a non-argument track. In all courts, any judge on the panel responsible for deciding the case may choose to schedule a case for argument, and the panel may unanimously determine that a case scheduled for argument does not need it. But in many courts, well-trained staff attorneys who accurately reflect the views of their

54. Opinion publication rates declined when the federal judiciary began a deliberate effort to reduce the cost of law practice and legal services by refraining from publishing opinions that do not add anything new to the law or help attorneys better predict appellate outcomes. Although court publication and citation practices vary, “unpublished” opinions are increasingly accessible by electronic means and in some courts may be cited if no better precedent exists.

courts' judges play a major role in determining what cases will be orally argued. In addition to preliminarily determining whether a case will be decided with or without argument, staff attorneys generally review the briefs and records and prepare memoranda to assist the judges; in some courts they also recommend dispositions and draft proposed opinions, usually in the non-argued cases.

As central staffs grew, the number of personal law clerks for circuit judges also grew, and their functions expanded. At mid-century, each circuit judge had a single law clerk. Today an active judge may employ three law clerks and two secretaries or four law clerks and one secretary.

Collectively, this transformation of process and personnel in the courts of appeals over the last three decades has given rise to concerns among judges, lawyers, and legal scholars that the quality of appellate decision-making may have been eroded and that there has been undue delegation of judicial work to non-judges. As to appeals decided without oral argument, the process has become less visible and, when combined with a less than fully reasoned opinion or cryptic judgment order, raises apprehensions as to the degree of attention those appeals actually receive from judges themselves. The apprehensions are intensified when the court uses staff attorneys to draft proposed dispositions, prompting claims by some critics of an "invisible judiciary," in addition to assertions of an invisible process, sometimes summarized in the claim that appellate courts have become "bureaucratized."

The Commission has been made aware of these concerns through published writings, testimony at its public hearings, and written submissions. We have received suggestions that, to meet these concerns, the appellate courts hear oral argument in larger percentages of cases, issue a greater number of reasoned opinions, limit the number of staff attorneys they employ, and be supplied with a sufficient number of judges to minimize the likelihood of over-reliance on staff attorneys and law clerks. At the same time, responses to our survey of practicing appellate lawyers nationwide do not reveal a widespread discontent with current practices within the federal appellate courts.

We do not minimize the seriousness of these concerns and suggestions. Indeed, assertions about the decline of the appellate process were among the reasons Justice White enlisted the cooperation of chief circuit judges in the preparation of profiles of each court of appeals' case management procedures. [At the date of issuance of this tentative draft report, the Commission has not completed its examination of this and other information concerning the appellate courts' internal processes and case management practices. Our conclusions about these matters will be set forth in the Commission's final report.]

E. The Emergence of the Circuit as an Entity of Federal Judicial Administration

A final piece in the evolution of “the present division of the United States into the several judicial circuits” is the emergence of the circuit itself as an important administrative entity of the federal judicial system.

During the nineteenth century, circuits were the mechanism for arranging the trial court obligations of itinerant Supreme Court justices and, after 1869, of separate circuit judges. Circuits exhibited rudimentary governance elements as circuit justices watched over the activities of district judges,⁵⁵ but the creation of a court of appeals for each circuit strengthened their administrative functions. Congress formalized that function in 1922, when it created the Conference of Senior Circuit Judges, now the Judicial Conference of the United States. Supervision of the courts’ budget and personnel resided in the Department of Justice, but during their annual gathering the circuits’ senior judges (in effect the chief judges) reported on the state of their circuits’ appellate and district dockets and developed suggestions for “uniformity and expedition of business.”⁵⁶ The 1922 Act also modified policies on temporary inter- and intra-circuit assignments by authorizing the senior circuit judge to assign district or appellate judges of the circuit to temporary duty on other courts within the circuit, or to petition the Chief Justice for an inter-circuit assignment.⁵⁷

In 1939, Congress formalized circuit governance by constituting each circuit’s appellate judges into a judicial council “[t]o the end that the work of the district courts shall be effectively and expeditiously transacted.” The councils reviewed district court workload statistics, and “district judges [were] promptly to carry out the directions of the council.”⁵⁸ The 1939 law also transferred responsibility for the national administration of the federal courts, including budget management, from the Justice Department to the newly created Administrative Office of the United States Courts, to function under the direction and supervision of the Conference of Senior Circuit Judges. To the judicial sponsors of the 1939 legislation, however, this was “a very small part of the bill.” Its major feature: “unifying the administration of justice in the hands of the chief judicial officers of the courts . . . [who] shall be furnished the facts with respect to the admin-

55. Russell Wheeler, *The Future of the Judicial Council of the Ninth Circuit—Until 1939*, in Long Range Planning for Circuit Councils 1, 11–13 (Federal Judicial Center 1992).

56. An Act for the Appointment of an Additional Circuit Judge for the Fourth Judicial Circuit, for the Appointment of Additional District Judges for Certain Districts, Providing for an Annual Conference of Certain Judges, and for Other Purposes, Pub. L. No. 67-298, § 2, 42 Stat. 837, 838 (1922).

57. *Id.* § 3 at 839.

58. An Act to Provide for the Administration of the United States Courts, and for Other Purposes, Pub. L. No. 76-299, § 306, 53 Stat. 1223, 1224 (1939).

istration of justice in their circuits . . . in quarterly reports by the [Director of the Administrative Office].”⁵⁹ Congress also mandated an annual conference in each circuit to include circuit and district judges and members of the bar under rules prescribed by each court of appeals, “for the purpose of consideration of the state of the business of the courts and advising ways and means of improving the administration of justice within the circuit.”⁶⁰

For several decades, however, the councils and circuit conferences were not major participants in federal judicial administration. Then-Circuit Judge Warren Burger in 1958 challenged the councils to “be managers, not just spectators, of how the courts are run,”⁶¹ and a leading student of the federal courts referred to them in 1970 as “rusty hinges of federal judicial administration.”⁶² But in the last third of the century, Congress and the courts have expanded their mission (“the effective and expeditious administration of justice within [the respective] circuit[s]”⁶³), broadened their membership (an equal number of circuit and district judges, plus the chief judge of the circuit as chair), and authorized them to appoint a circuit executive as council staff. Several circuits revamped the format and membership of their circuit conferences to create gatherings more in line with the statutory mission.

Congress has also regularized the tenure of both circuit and district chief judges, to avoid very brief or very long service. Under a 1982 statute,⁶⁴ a vacancy in a chief judgeship is filled by the senior active judge of the court under the age of 65 and chief judges may serve for no more than seven years, or until the age of 70. This change derived from a Hruska Commission call to “minimize the impact of a chief judge who lacks administrative abilities, while allowing the chief judges who are good administrators sufficient time to have a beneficent effect on the functioning of their circuits.”⁶⁵

Table 2-8 and Figure 2-F display current information about the boundaries, population, size, composition, and number of judgeships within each regional circuit.

59. *Hearings on H.R. 2973 Before the House Comm. on the Judiciary*, 76th Cong., 1st Sess. 20 (1939).

60. *Supra* note 58 at 1224-25.

61. Warren Burger, *The Courts on Trial*, 22 F.R.D. 71, 82 (1958).

62. Peter Fish, *The Circuit Councils: Rusty Hinges of Federal Judicial Administration*, 37 U. Chi. L. Rev. 203 (1970).

63. 28 U.S.C. § 332 (d)(1).

64. Act of Oct. 1, 1982, Pub. L. No. 97-164, 96 Stat. 37.

65. Commission on Revision of the Federal Court Appellate System, *Structure and Internal Procedures: Recommendations for Change 68* (1975). Chief judge selections are made pursuant to 28 U.S.C. §§ 45 (circuit judges) and 136 (district judges). Calculations in 1994 revealed that the average tenure of chief judges (district and circuit) who assumed the office pursuant to the 1982 statute has been four years. R. Wheeler & G. Bermant, *Federal Court Governance 19* (Federal Judicial Center 1994).

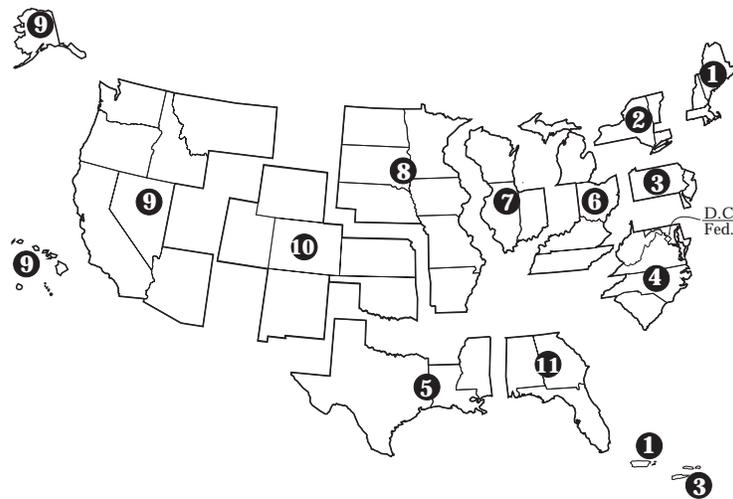
The Federal Appellate System: Past & Present

Table 2-8
Circuit Population, Size, Composition, Number of Judgeships

Circuit	Population (est. 7/1/98)	Area (sq. mi.)	States & Terrs.	Dists.	Authorized Judgeships			
					Circ.	Dist.	Magis.	Bankr.
First	13,337,709	52,144	4	5	6	29	16	13
Second	21,996,062	61,318	3	6	13	62	44	24
Third	20,901,091	54,328	3	6	14	62	33	21
Fourth	24,829,436	152,289	5	9	15	52	42	24
Fifth	26,521,607	352,394	3	9	17	78	64	28
Sixth	30,236,545	178,714	4	9	16	62	42	38
Seventh	22,929,634	145,777	3	7	11	46	32	28
Eighth	18,498,575	478,233	7	10	11	43	42	22
Ninth	51,453,880	1,347,498	11	15	28	99	96	68
Tenth	14,073,217	554,869	6	8	12	37	42	22
Eleventh	26,459,341	162,606	3	9	12	62	55	37
D.C.	528,964	61	(D.C.)	1	12	15	3	1
TOTAL	271,766,061	3,540,231	50 +	94	167	647	511	326

Note: Population estimates obtained from U.S. Census Bureau, Estimates of the Population of States: Annual Time Series (1997). Circuit, district, and bankruptcy judgeships are from 28 U.S.C. §§ 44, 133, and 152. Magistrate judge positions are from "List of Authorized Magistrate Judge Positions, FY 1999, Administrative Office of U.S. Courts" (includes both full-time and part-time positions).

Figure 2-F
The Circuits in 1998



Chapter 3

The Ninth Circuit and Its Court of Appeals

Our statute charges us to make recommendations about the structure of the federal appellate system and circuit boundaries, “with particular reference to the Ninth Circuit.” We focus on the Ninth Circuit first, for that reason and because our views about the future structure of the federal appellate system as a whole are informed by our study of the Ninth, the nation’s largest circuit and court of appeals. With respect to the Ninth Circuit, we conclude that *circuit* realignment is not indicated, but that restructuring of the *court of appeals* is.

Circuits do not decide cases; they are administrative, not adjudicative, entities with responsibilities for governance that are broader than—and have little to do with—the court of appeals itself. There is no persuasive evidence that the Ninth Circuit (or any other circuit, for that matter) is not working effectively, or that creating new circuits will improve the administration of justice in any circuit or overall. Furthermore, splitting the circuit would impose substantial costs of administrative disruption, not to mention the monetary costs of creating a new circuit. Accordingly, we do not recommend to Congress and the President that they consider legislation to split the circuit.

Nevertheless, there is consensus among appellate judges throughout the country (including about one-third of the appellate judges in the Ninth Circuit) that a court of appeals, being a court whose members must work collegially over time to develop a consistent and coherent body of law, functions more effectively with fewer judges than are presently authorized for the Ninth Circuit Court of Appeals. In our opinion, apparently shared by more than two-thirds of all federal appellate judges, the maximum number of judges for an effective appellate court functioning as a unitary decisional unit is somewhere between eleven and seventeen.⁶⁶

Decisional units of this size have a number of advantages. Judges can monitor the law more easily because they are responsible for monitoring fewer decisions. Smaller units may circulate for-publication opinions among all judges for whom the opinion speaks, thereby reducing inadvertent inconsistency and providing a way to address substantive conflicts or disagreements before they cause confusion or generate more litigation. Such units may also more readily take cases en banc that do create inconsistency, or that seem wrong to a majority of the judges, thereby leading to more coherent and predictable law that provides sound guidance to lawyers and judges who are governed by it. Further, because judges who

66. In our national survey (*see supra* p. 4), of the 201 circuit judges who expressed an opinion about how many judges a court of appeals can have and still function well, 72.3% reported that the maximum number is between ten and eighteen. Still, almost 22% believe that number is higher or that there is no natural limit on the size of an effective court.

serve on decisional units of this size can sit together more frequently than is possible on larger courts, they are better able to hold each other accountable and to be accountable as a court. The bar, in turn, can better keep abreast of current law declared by a small number of judges serving in fewer panel combinations. Knowing better the judges who will decide their cases, and being confident that aberrant decisions will be rectified, permits lawyers to assess the chances of success on appeal more realistically; ultimately, this should contribute to the more efficient and less expensive resolution of disputes.

Since the court of appeals is distinct from the circuit, the court of appeals can be restructured—by creating adjudicative divisions—without splitting the circuit. Accordingly, we recommend legislation to direct the Court of Appeals for the Ninth Circuit to organize itself into regionally based adjudicative divisions and a Circuit Division for conflict correction. In Chapter 4, we recommend legislation to authorize other circuits to create such divisions when their number of appellate judgeships exceeds thirteen and to direct them to do so when their number exceeds seventeen.

A. The Circuit and Its Court of Appeals

The Ninth Judicial Circuit covers the states of Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington, as well as Guam and the Commonwealth of the Northern Mariana Islands. Its district courts have ninety-nine district judgeships, sixty-eight bankruptcy judgeships, and ninety-six authorized magistrate judges (twenty-one of them part-time). Its court of appeals, the highest court in the circuit, has twenty-eight authorized judgeships—although, as explained below, many of these judgeships have long been vacant. Like all circuits, it is administered generally by a chief judge and circuit judicial council supported by a circuit executive. The administrative responsibilities performed by the council or the chief circuit judge, directly or through the circuit staff, include assigning judges temporarily within the circuit to other courts needing assistance; reviewing district courts' procedural rules and their plans for jury selection, Criminal Justice Act appointments, and court reporters; resolving controversies over the residence of district judges and allocation of work within the district courts; reviewing and approving construction and renovation plans; appointing bankruptcy appellate panels; resolving complaints of judicial disability or unfitness; and planning or coordinating such circuit-wide functions as the circuit judicial conference.

As of October 1, 1998, twenty-two of the twenty-eight authorized judgeships of the Ninth Circuit Court of Appeals were filled; but for most of the last four years the court has had only eighteen active judges, and from eleven to seventeen senior judges who participate in a substantial portion of the court's work. In 1992, the court requested an additional ten judgeships, which were never cre-

ated. In 1998, the court modified that request to three permanent and two temporary judgeships. The court's judges live throughout the circuit, not necessarily in the states where they resided at the time of their appointments.

Central staff attorneys at the court's headquarters review fully briefed appeals and "inventory" them, noting the issues raised and important features of the case, such as whether the issues are novel or particularly difficult. They also identify related pending cases in which the same issues are likely to be decided. This inventory system allows the staff to route similar cases to the same panel if they arise at the same time, or to alert panels to the fact that the same issue may shortly be decided by a panel before which it is already pending, thus helping to avoid inadvertent intracircuit conflict. Staff attorneys also assign the case a weight, based on features such as novelty and complexity of issues, which allows equitable distribution of cases among oral argument panels.

The court employs six to eight attorneys who serve as mediators; these attorneys review docketing statements filed with civil appeals to identify cases that could benefit from the court's appellate mediation program. The program settles up to 600 cases each year without requiring judicial attention. The court also employs an appellate commissioner who, among other duties, acts on vouchers for attorneys' compensation under the Criminal Justice Act and rules on a variety of motions matters, such as motions for appointment or withdrawal of counsel. The appellate commissioner also acts as a special master for the court, holding evidentiary hearings, when necessary, and making recommendations to a panel of judges on matters referred by the court, such as attorney disciplinary matters, requests by criminal defendants to represent themselves on appeal, National Labor Relations Board enforcement proceedings, and applications for fee awards in civil appeals.

The court, like all courts of appeals, does most of its work through panels of three judges. Panels sit regularly in San Francisco (the circuit headquarters), Seattle, Portland, and Pasadena, twice a year in Honolulu, and once a year in Anchorage. Each active judge serves on oral argument panels seven or eight weeks each year, hearing approximately thirty-two to thirty-six cases in each of those weeks. When there are not enough active and senior judges of the court to create argument panels, the court fills out its panels with judges drawn from district courts, primarily within the circuit, and circuit judges from outside the Ninth Circuit.⁶⁷ Among cases terminated after oral argument in the last year, approximately 43% had a visiting judge on the panel.

Circuit judges also serve for one or two months each year on "screening" panels that review cases preliminarily screened by court staff for decision without oral argument, generally because the outcome is clearly controlled by well-settled legal precedent. The three judges on each panel, supported by central staff attorneys, meet together in person and either decide the cases on the briefs or, if

67. Authorized by 28 U.S.C. §§ 291, 292.

they find that a case is more complex than it appeared on initial screening, refer it to a regularly constituted panel. Screening panels typically decide approximately 150 to 170 cases in a month, as well as any motions submitted for decision during their service.

In Fiscal Year 1997, 8,692 appeals were filed in the Ninth Circuit Court of Appeals, and 8,515 were terminated. Of those, 1,889 were terminated on the merits after oral argument and 2,952 without oral argument. Of the remaining appeals terminated, 261 were consolidated with other appeals and the rest were terminated “procedurally”—i.e., without a three-judge panel’s decision on the merits of the case.⁶⁸ The median time from notice of appeal to final disposition for appeals terminated on the merits was 14.4 months. The court issued opinions for publication in 849 cases.

Like all federal courts of appeals, the Ninth Circuit Court of Appeals sits en banc, but only the Ninth Circuit uses a statutorily authorized “limited en banc” court. Under rules adopted by the court, the limited en banc court consists of eleven judges (the chief judge and ten others, selected essentially by lot for each case).⁶⁹ The court’s rules also provide that a judge of the court dissatisfied with the decision of the limited en banc may call for a vote on whether the full court should convene to reconsider the case. Since it adopted its limited en banc procedure in 1980, such a vote has seldom been requested and the court has never voted to rehear a case as a full court.

The court of appeals currently has three “administrative units,”⁷⁰ each headed by an administrative judge who serves on the Court Executive Committee, rules on Criminal Justice Act fee requests higher than specified amounts, recommends action on court of appeals support services and facilities within the unit, and generally serves as a liaison between the chief judge of the court of appeals and other judges and the bar within the unit’s geographic area.

68. Procedural terminations may be for such reasons as settlement, default, or dismissal for jurisdictional defect. They generally account for 30–50% of a court’s total terminations, depending on the nature of its caseload and its procedures.

69. Authorized by Pub. L. No. 95-486, 92 Stat. 1633 (1978). *See also* Ninth Circuit Rule 35-3.

70. Authorized by Pub. L. No. 95-486, 92 Stat. 1633 (1978). The Southern Unit includes the Central and Southern Districts of California. The Middle Unit includes the Northern and Eastern Districts of California, and the Districts of Arizona, Guam, Hawaii, Nevada, and the Northern Mariana Islands. The Northern Unit includes the rest of the circuit’s districts.

B. The Debate Over Splitting the Circuit and Its Court of Appeals

1. Background

Calls to split the Ninth and other western circuits have been heard since 1891. In the 1930s, senators and House members from the Northwest complained of the unwieldiness of the then-seven judge court of appeals and disgruntlement among the bar and its clientele over the amount of travel required to litigate appeals. Several circuit-splitting bills appeared in the early 1940s, but support for them was undercut when the court expanded its sittings in Seattle and Portland and adopted an en banc rule in the wake of the Supreme Court's 1941 *Textile Mills* decision.⁷¹ The Ninth Circuit judicial council endorsed a circuit split in 1954, followed by a similar endorsement by the United States Judicial Conference the same year. However, the council shortly rescinded its endorsement of the split, and the Conference followed suit at its September 1954 session.⁷²

In 1973, the Commission on Revision of the Federal Court Appellate System recommended that Congress split both the Fifth Circuit and the Ninth Circuit. Its recommendation for the Ninth would have allocated the judicial districts in California between the two new circuits to equalize those new circuits' caseloads.⁷³ Congress did not enact the Hruska Commission proposals but in 1978, as part of a compromise to secure passage of an omnibus judgeship bill expanding the size of the Fifth Circuit to twenty-six and the Ninth to twenty-three circuit judgeships, it authorized appellate courts with more than fifteen active judges to use limited en banc procedures and organize themselves into administrative divisions, as described above.⁷⁴ Shortly thereafter, Congress split the Fifth Circuit,⁷⁵ but again declined to split the Ninth.

In 1989, eight senators introduced S. 948 to create a new Twelfth Circuit composed of Alaska, Hawaii, Idaho, Montana, Oregon, Washington, Guam, and the Northern Mariana Islands.⁷⁶ Similar proposals were made in subsequent Congresses. The 1990 *Report of the Federal Courts Study Committee* recom-

71. *See supra* note 32.

72. At its April 1954 "Special Session," the Conference endorsed an eight-judge Ninth Circuit and a four-judge Eleventh Circuit. Report of the Proceedings of the Judicial Conference of the United States 232 (April 1954). At its September meeting, noting that the Ninth Circuit judicial council had "rescinded its recommendation that the Ninth Circuit be divided," the Conference too rescinded its recommendation. Report of the Proceedings of the Judicial Conference of the United States 6 (September 1954).

73. Commission on Revision of the Federal Court Appellate System, *The Geographical Boundaries of the Several Judicial Circuits: Recommendations For Change* (Dec. 1973).

74. Act of Oct. 20, 1978, Pub. L. No. 95-486, § 6, 92 Stat. 1629, 1633.

75. *See supra* pp. 18-20.

76. S. 948, 101st Cong., 1st Sess. (1989).

mended against any circuit splitting without more experimentation with case management under current arrangements and the 1995 *Long Range Plan for the Federal Courts* likewise recommended against circuit realignment.⁷⁷

In 1995, senators introduced S. 956⁷⁸ to split the Ninth Circuit. The Judiciary Committee reported the bill out late in the year but the full Senate declined to approve it as a rider to a bill providing federal court appropriations. Congress adjourned without acting on a compromise measure to create a national study commission to evaluate circuit realignment. In the first session of the 105th Congress, the Senate approved legislation to split the circuit, while the House favored creating a study commission. A mid-November 1997 compromise established this Commission.⁷⁹

2. The arguments summarized

The debate over whether to split the Ninth Circuit involves numerous claims and counterclaims, almost all of which are about the court of appeals. They concern the effects of the size of the court of appeals, its geographic jurisdiction, and the court's place within the federal appellate system. We have given serious consideration to all of these arguments. We summarize the major issues below but do not dissect the arguments in detail because all of the claims and counterclaims are readily available in the literature we reviewed. Most can also be found in the publicly accessible transcripts of our hearings and statements submitted by witnesses.

a. The ability of the court of appeals to function effectively and timely

Proponents of a split assert that a court of twenty-eight judgeships, plus senior judges, cannot decide cases in a timely fashion; they point to workload data showing that the Ninth Circuit ranks at or near the bottom in time from the filing of a case in the district court to the final disposition in the court of appeals.

Split opponents respond that the court of appeals is among the fastest in the nation in disposition time once a case is argued or submitted to a panel, and attribute the court's overall slowness to its unfilled judgeships and resulting inability to assemble panels to hear cases ready for decision.

77. Report of the Federal Courts Study Committee Ch. 6 (1990); Judicial Conference of the United States, *Long Range Plan for the Federal Courts* 45 (1995).

78. Ninth Circuit Court of Appeals Reorganization Act of 1995, S. 956, 104th Cong., 1st Sess. (1995).

79. Pub. L. No. 105-119, § 305(a), 111 Stat. 2491 (1997).

b. The ability of the court to produce a coherent body of circuit law

Those who favor a split assert that the multiplicity of decision makers makes it less likely that circuit judges can stay informed of the law that other panels are making, and that district judges, litigants, and parties seeking to conform their conduct to circuit law encounter more serious obstacles to assessing what that law is. The judges, they say, cannot keep up with the large volume of court of appeals decisions. Pre-publication circulation of opinions among all judges of the court is impossible.

They claim an increased incidence of intracircuit conflicts because an appellate court as large as the Ninth's precludes close, regular, and frequent contact in joint decision making, and thus the collegiality that lets judges accommodate differences of opinion in order to produce a coherent body of law. They point to the over 3,000 possible combinations of three-judge panels on a twenty-eight-judge court.

Those opposing a split respond that the court has developed a sophisticated issue-tracking system that allows judges to know when other panels are deciding like issues and an electronic opinion delivery system that allows judges to know the current law of the circuit when they are deciding cases. They say that any court with more than fifteen or sixteen judges produces a large number of three-judge panel combinations.

They also assert that collegiality is an elusive concept and that counting panel combinations cannot measure the ability of judges in the late twentieth century to work together to fashion law. They note that the circuit's court of appeals judges have numerous opportunities to be with one another at meetings and symposia, and point to evidence of rancor and lack of collegiality on courts much smaller than the Ninth.

c. The ability of the court to perform its en banc function effectively

Proponents of a circuit split say that the court convenes en banc proceedings too infrequently, which helps explain the court of appeals' high reversal rate in the Supreme Court: a better en banc procedure would correct panel errors before they reach the Supreme Court. They also argue that the relative infrequency of en banc rehearings in the Ninth Circuit deprives judges and lawyers of sufficient guidance as to circuit law. Furthermore, split proponents argue that convening a different group of judges for each en banc proceeding frustrates the development of stable circuit law, and using a panel only slightly larger than a third of the court's full judgeship complement contravenes the very concept of an "en banc" court.

Supporters of the court as currently structured say that its en banc process is efficient and effective. They note that very few en banc decisions are closely

divided, so it is unlikely a full-court en banc would produce different results. They further assert that the Supreme Court takes cases from the Ninth Circuit in numbers roughly proportional to the circuit's share of the national appellate caseload, and that, over time, reversal has not been appreciably higher in Ninth Circuit cases than in others. They also say that to the extent the Supreme Court reverses the Ninth Circuit's Court of Appeals more than others, that is largely because novel issues arise in the diverse regions of the West that the court serves.

d. The implications of the size of the court's geographic jurisdiction for federalism, regionalism, and effective court operations

Those who would realign the circuit say that its size means that citizens of the West perceive the federal appellate judiciary as a remote institution, unfamiliar with the problems and points of view of those citizens' identifiable regions. Citizens in the Northwestern states claim that judges from other regions, especially California, decide cases involving their way of life with insufficient appreciation of the legal problems that way of life engenders. They also claim that the circuit's size allows a panel of three judges to determine the law for the vast region that makes up the circuit, without an effective en banc mechanism to act as a check on that power. Finally, they assert that the size of the circuit creates special travel problems for judges who live in more remote areas.

Opponents of a circuit split assert that the West is indeed one region and that the federal law under which it operates should be determined by a single federal appellate court. They say it is especially important that federal law governing the transactions and litigation of Asian-Pacific and maritime businesses operating along the western seaboard should be interpreted by a single appellate court; only historic accident allocates the eastern seaboard and Gulf Coast to six circuits. They note furthermore that decisions to which Northwestern interests object are not necessarily the product of judges from non-Northwestern states. They state also that the burdens and expense of judges' travel within the Ninth Circuit are exaggerated, and that the court's established and growing technological capacity, including electronic mail and videoconferencing, will substantially reduce the need for travel in coming years.

e. The relationship between circuit reconfiguration and intercircuit conflicts

Opponents of circuit splitting say that creating another court of appeals increases the likelihood of intercircuit conflicts and the corresponding burden on the Supreme Court to resolve them. Furthermore, they argue that the nation must find some way other than circuit splitting to deal with problems of large courts of appeals, inasmuch as other courts will soon be as large as the Ninth is now. Splitting circuits will balkanize federal law.

Proponents of circuit reconfiguration say that federal laws susceptible to conflicting interpretations will yield conflicts even among few appellate courts, and thirteen or fourteen regional circuits will not produce notably more intercircuit conflicts than twelve. Furthermore, they argue that intercircuit conflicts have been a less persistent and intolerable problem than asserted and note that the Supreme Court can resolve additional conflicts, if any arise.

f. The practicality of dividing the circuit

Opponents of a circuit split say that even if the Ninth Circuit were reconfigured, a large and growing circuit would remain, primarily because of the high volume of appeals generated by California. They argue that it is thus better to make the current structure work effectively than hope to solve any problems of this large circuit by splitting it and that reconfiguring it by dividing California between circuits would wreak the havoc of legal uncertainty within the state.

Split proponents say that a new Twelfth Circuit will be of a sufficient size to constitute a viable circuit, and that whatever problems a new Ninth Circuit that includes California would pose would be less troublesome than those posed by the current Ninth. Many proponents discount as well the claims that dividing California between two circuits is not feasible, and note that either an intercircuit conflict resolution mechanism or the Supreme Court could resolve any conflicts that might arise.

g. The administrative efficacy of the Ninth Circuit

Opponents of a circuit split point out that it would deprive all of the Ninth Circuit's courts of efficient administration and economies of scale. A large circuit, they say, can administer itself more innovatively than a smaller circuit, as evidenced by the Ninth's automation, training, and other programs. Furthermore, larger circuits have more flexibility in the intracircuit transfer of judges at all levels.

Proponents of reconfiguration argue that whatever administrative benefits the current arrangement provides could be replicated in new Ninth and Twelfth Circuits. Furthermore, they say that administration of the current Ninth Circuit consumes undue judge time because of the many oversight bodies needed to ensure judicial control of such a large entity.

Finally, proponents note that a circuit split would give judges now in the Ninth Circuit more representation on the Judicial Conference of the United States,⁸⁰ but opponents respond that Ninth Circuit judges are already well represented on the Conference's committees, which are integral elements of the federal judiciary's governance system.

80. 28 U.S.C. § 331 provides each regional circuit, regardless of size, two members on the Judicial Conference of the United States.

3. Views of the court's judges, its consumers, and knowledgeable observers

The position of the Ninth Circuit is that it is working well, and that a great majority of judges and lawyers in the circuit are opposed to a split.⁸¹ Of the judges in the Ninth Circuit who expressed an opinion on our survey, 69.7% of the circuit judges and 67.6% of the district judges do not favor realignment of the boundaries of their circuit. The judges who do favor circuit reconfiguration differ over what specific configuration would be best. Most of the Ninth Circuit judges who testified or submitted statements opposed a split. Five judges on the court of appeals, and a few from other courts, appeared or submitted statements supporting a split, either now or, because the court will inevitably grow, in the reasonably near future. Most of the other testimony at the public hearings and formal submissions to us favor keeping the circuit as presently configured. This testimony includes that of the governors of California, Nevada, Oregon, and Washington; the attorney general of Oregon; the U.S. Department of Justice; the American Bar Association; and most state and local bar associations. On the other hand, other representatives of some Ninth Circuit states communicated their preference for a split, including U.S. senators from Alaska, Montana, and Washington, and the attorneys general of Alaska, Idaho (who also spoke for that state's governor), and Washington.

In addition, five members of the United States Supreme Court have written our chair.⁸² Of the four who commented on the Ninth Circuit, all are of the opinion that it is time for a change.⁸³ In general, the Justices express concern about the ability of judges on the Ninth Circuit Court of Appeals to keep abreast of the court's jurisprudence and about the risk of intracircuit conflicts in a court with an output as large as that court's. Justice Kennedy is further concerned that

81. See Statement of Chief Judge Procter R. Hug, Jr., at the Commission's May 29, 1998, public hearing (San Francisco, Ca.), available on the Commission's website (<http://app.comm.uscourts.gov>), and Report to the Commission on Structural Alternatives for the Federal Courts of Appeals, Submitted by the United States Courts for the Ninth Circuit (May 1998) (unpublished manuscript, available on the Commission's website), provided by Chief Judge Hug in conjunction with his testimony.

82. The following members of the Court have written specifically about the Ninth Circuit Court of Appeals in response to the chairman's invitation to offer suggestions to the Commission in its work: Justice O'Connor, letter of June 23, 1998; Justice Kennedy, letter of Aug. 17, 1998; Justice Scalia, letters of Aug. 21 and Sept. 9, 1998; and Justice Stevens, letter of Aug. 24, 1998. Additionally, Justice Breyer, by letter of September 11, 1998, offered more systemic comments on the federal appellate system, but said that he had "not worked in the Ninth Circuit, and . . . shall not express a view about whether that Circuit has special problems that warrant its division."

83. Three of the four Justices who wrote about the Ninth Circuit (Justices Kennedy, Scalia, and Stevens) explicitly call for splitting the circuit, and one endorses circuit splitting as an option. Justice O'Connor writes that "some division or restructuring of the Ninth Circuit seems appropriate and desirable," but calls attention as well to "other proposals for setting up separate divisions within CA-9."

“the Ninth Circuit does not come close to the number of en banc hearings necessary to resolve intra-circuit conflicts, much less to address questions ‘of exceptional importance’” (quoting Fed. R. App. P. 35(a)). Justice Scalia is similarly concerned with the inadequacy of the Ninth Circuit Court of Appeals’ en banc process “not only to eliminate intra-circuit conflicts, but also to correct and deter panel opinions that are pretty clearly wrong (which occasionally occur, of course, in any Circuit)” (August 21, 1998 letter). He says the Supreme Court could without difficulty promptly resolve additional intercircuit conflicts that a circuit split might create, including a split that divided California. Justice Stevens says that California lawyers’ concerns about dividing California between two circuits “are seriously exaggerated.” Justice Kennedy also refers to the desirability of “our long tradition of appointing judges to serve a specific region. . . . The legal communities and other constituencies in the separate states ought to have a real interest in the judges of their respective circuits, and the judges, conversely, ought to have historic and professional ties to the region they serve.”

C. Criteria Informing the Debate

The arguments of those who favor change and of those who oppose change have both objective and subjective components. We have reviewed all of the available objective data routinely used in court administration to measure the performance and efficiency of the federal appellate courts,⁸⁴ but we cannot say that the statistical criteria tip decisively in one direction or the other.⁸⁵ While there are differences among the courts of appeals, differences in judicial vacancy rates, caseload mix, and operating procedures make it impossible to attribute them to any single factor such as size.

Subjective criteria, such as consistency and predictability of the law, are obviously more difficult to evaluate but are widely regarded as a high priority for the courts of appeals. In the time allotted, we could not possibly have undertaken a statistically meaningful analysis of opinions as well as unpublished dispositions, dissents, and petitions for rehearing en banc to make our own, objective

84. These include the number of appeals a court disposes of (“dispositions” or “terminations”) relative to the number of cases filed, how many cases are orally argued and how many are decided on the briefs, how many dispositions result in published opinions and how many in unpublished memoranda or summary orders, the time from filing to disposition, and how often the court relies on visiting judges from outside the circuit.

85. The statistical data that bear most directly on the arguments that have been made to us come from information regularly reported by the courts of appeals to the Administrative Office of the United States Courts. The Federal Judicial Center periodically converts the court-submitted AO information into an integrated database and makes it available through the Inter-University Consortium for Political and Social Research (ICPSR) at the University of Michigan. The FJC analyses on which we relied will be set out in an appendix to the final report, along with directions on how to obtain the underlying data from ICPSR to verify or extend the analyses.

determination of how the Ninth Circuit Court of Appeals measures up to others.⁸⁶ Our survey, however, did ask district judges and lawyers in the Ninth Circuit and nationwide for their views and experiences. They are the primary consumers of appellate decisions. District judges in the Ninth Circuit report finding the law insufficiently clear to give them confidence in their decisions on questions of law about as often as their counterparts in other circuits, but more frequently report that difficulties stem from inconsistencies between published and unpublished opinions. Lawyers in the Ninth Circuit report somewhat more difficulty discerning circuit law and predicting outcomes of appeals than lawyers elsewhere. Ninth Circuit lawyers, more often than others, reported as a “large” or “grave” problem the difficulty of discerning circuit law due to conflicting precedents, and the unpredictability of appellate results until the panel’s identity is known. More Ninth Circuit lawyers reported that they “frequently” have trouble predicting the outcome of an appeal. But when all is said and done, neither we nor, we believe, anyone else, can reduce consistency and predictability to statistical analysis. These concepts are too subtle, the decline in quality too incremental, and the effects of size too difficult to isolate, to allow evaluation in a freeze-framed moment.

In our common law system, consistency and predictability have to do with the coherence of the law declared over time. On an appellate court, unlike a trial court, groups of judges decide cases together. Initially this occurs through a panel of three; what the panel decides speaks for the court as a whole, unless the panel’s decision is reconsidered by the full court, sitting en banc. In this way, judges working together determine the law and, for this reason, the appellate process puts a premium on collegial deliberation, both on panels and en banc.

Collegiality in this sense does not connote friendship or agreement. Rather, it has to do with the “intimate, continuing, open, and noncompetitive relationship” among judges that “restrains one’s pride of self and authorship [and] makes a virtue of patience in understanding and of compromise on non-essentials.”⁸⁷ Of course, this cannot be quantified or measured, and we make no attempt to do so with respect to the Ninth Circuit Court of Appeals or any other. However, it is our judgment that the consistent, predictable, coherent development of the law over time is best fostered in a decisional unit that is small enough for the kind of close, continual, collaborative decision-making that “seeks the objective of as

86. We are aware of the literature on this subject, including a study that concluded that intracircuit conflict was not characteristic of the published opinions of the Ninth Circuit Court of Appeals in the mid-1980s, although it did find instances of multiple precedents, pointing in different directions, in areas of the law involving fact-specific legal rules that require case-by-case interpretation. See Arthur D. Hellman, *Maintaining Consistency in the Law of the Large Circuit*, in *Restructuring Justice: The Innovations of the Ninth Circuit and the Future of the Federal Courts* (Arthur D. Hellman, ed., 1990).

87. Frank Coffin, *On Appeal* 215 (1994).

much excellence in a group's decision as its combined talents, experience, and energy permit."⁸⁸

D. A Divisional Arrangement for the Ninth Circuit Court of Appeals

Having considered all of the arguments, evidence, the many helpful statements that were submitted to us, and our own experience, we recommend that Congress and the President by statute restructure the Court of Appeals for the Ninth Circuit into three regionally based adjudicative divisions and, in addition, create a Circuit Division for conflict correction to resolve any conflicts that arise from different decisions of the three regional divisions.⁸⁹ Our recommendation reflects not only our assessment of the needs of the Ninth Circuit Court of Appeals today, but our assessment of the needs of this and other growing federal appellate courts in the future.

1. The recommendation for a divisional arrangement

a. Regional divisions for the Ninth Circuit Court of Appeals: their composition and operation

We propose that the Ninth Circuit Court of Appeals be organized into the three regionally based adjudicative divisions shown below, which would hear and decide all appeals from the district courts in the respective divisions:

Northern Division — Districts of Alaska, Idaho, Montana, Oregon,
and Eastern and Western Washington

Middle Division — Districts of Northern and Eastern California, Hawaii,
Nevada, and the Pacific islands

Southern Division — Districts of Arizona and Central and
Southern California⁹⁰

The court of appeals would provide by rule for appeals from federal administrative agencies.

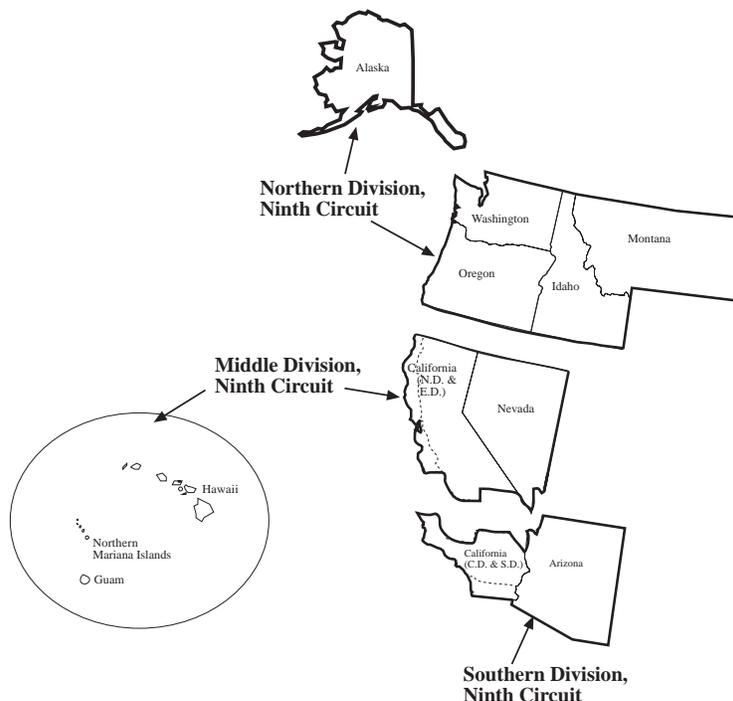
88. *Id.*

89. In Chapter 4, we recommend that Congress authorize any other court of appeals of more than thirteen judgeships to arrange itself in divisions, and that it direct any court of appeals of more than seventeen judgeships to do so.

90. The concentration of appeals in the southern part of the circuit makes it impossible to divide the court's workload equally among the three divisions, but we note that a near-equal distribution could be achieved with this divisional arrangement if Arizona were moved from the Ninth Circuit to the Tenth Circuit, or if Arizona were placed in the Northern Division instead of the Southern. However, both possibilities are problematic for reasons unrelated to caseload; therefore we do not recommend either option.

We also recognize that California contributes disproportionately to the capital caseload of the

Figure 3-A
Boundaries of Proposed Ninth Circuit Divisions



If Congress imposes a specific divisional structure on the Ninth Circuit’s Court of Appeals, the judges and lawyers of the circuit should of course be heard in the crafting of the statutory provisions. Nevertheless, we provide a draft bill to implement our recommendations, set out in Appendix C-1. Our draft bill includes a “sunset” provision, under which the Act would terminate seven years after its effective date. That period will allow time for initial reorganization and sufficient experience under the plan to allow the Federal Judicial Center to conduct a study of the effectiveness of this divisional structure and to report its findings to the Judicial Conference, which can in turn advise Congress of the views of the judicial branch on this important subject. The Ninth Circuit experience and the study of that experience will also provide valuable assistance to the other courts of appeals in designing their own divisional structures pursuant to our recommendation in Chapter 4.

circuit’s court of appeals, and so may burden the Middle and Southern Divisions more than the Northern. Yet, again, there is no rational way to equalize the burden, whether the circuit is split, or the court of appeals is restructured, as we recommend.

Under the proposed statute, each circuit judge would be assigned to a particular regional division; each division would consist of at least seven circuit judges in active status, with the actual number of judges to be determined according to caseload needs. A majority of judges serving on each division would be residents of the districts over which that division has jurisdiction, but each division would also include some judges not residing within the division, assigned randomly or by lot for specified terms of at least a year. Circuit judges in senior status would be assigned to divisions in accordance with policies adopted by the court of appeals.

Each division would function as a semi-autonomous decisional unit. Its judges would decide appeals through panels and would sit en banc to perform for the division the functions now assigned by statute to a regular court of appeals en banc. Decisions made in one division would not bind any other division, but they should be accorded substantial weight as the judges of the circuit endeavor to keep circuit law consistent. We recognize that putting parts of California in different divisions will prompt concerns about forum shopping and subjecting Californians to possibly diverging lines of federal authority. However, in the California state appellate court system, where the intermediate appellate system is organized into geographical districts, the decisions of one court of appeal have no binding precedential effect outside that court's jurisdiction. Thus, differences between the Middle and Southern Divisions under the system we propose would not create a situation that does not already exist and is apparently well accommodated in state practice. Division decisions on state law issues would not, of course, be binding on state courts. In any event, federal judges may certify important questions on which state law is not settled to the California Supreme Court. On federal law questions, conflicts can quickly be resolved by the Circuit Division and certiorari from "incorrect" decisions or decisions that conflict with other circuits can be sought in the United States Supreme Court. The spectre of inconsistent interpretations of federal law may be unattractive, but is one that exists throughout the federal system, and one that circuit splitting would not ameliorate.

Each division would have a presiding judge, determined from among the active judges of the division in the same manner that the chief judge of the circuit is determined. As now, the court of appeals (and thus the circuit) as a whole would have a chief circuit judge, but that chief circuit judge could not simultaneously serve as the presiding judge of a division.

b. Circuit Division for conflict correction, to resolve interdivisional conflicts

In addition to the regional divisions, our proposed statute would create a Circuit Division for conflict correction, whose sole mission would be to resolve

conflicting decisions between the regional divisions. It would be composed of the chief judge of the circuit, the presiding judge of each regional division, and one circuit judge from each of the regional divisions, selected under rules promulgated by the court of appeals as a whole. The Circuit Division's jurisdiction would be discretionary and could be invoked by a party to a case after a decision in a regional division. However, a panel decision in one division asserted to conflict with a decision in another division could be reviewed by the Circuit Division only after the panel decision had been reviewed by the division en banc or a divisional en banc had been sought and denied. The Circuit Division would not have jurisdiction to review a decision by a regional division on the ground that it is considered to be incorrect or unsound; its only authority would be to resolve square inter-divisional conflicts. A regional division's decision that is claimed to be in error but does not create a conflict between divisions would be subject to review only by the regional division sitting en banc or by the Supreme Court. The Circuit Division would replace the circuit-wide en banc process, which would be abolished. This change would not create a new tier in the judiciary, as it would merely substitute the Circuit Division for the existing en banc process.

c. Appellate procedure and administration

The regional divisions would operate under the Federal Rules of Appellate Procedure and under such local rules and internal operating procedures as the court of appeals as a whole might adopt. The Circuit Division would function under rules specified by the court of appeals. The regional divisions would not be authorized to adopt their own separate local rules or internal operating procedures. As now, the court of appeals would decide whether and how to establish any regional appellate clerks' offices, as well as how to arrange central staff attorneys, libraries, and other resources.

2. Reasons for the divisional arrangement

Our judgment that the law-declaring function of appellate courts requires groups of judges smaller than the present Ninth Circuit Court of Appeals leads us to recommend a divisional arrangement that we believe will capitalize on the benefits of smaller decisional units without sacrificing the benefits of a large circuit.

a. Smaller decisional units will promote consistency and predictability

Courts of appeals rely on their judges to monitor the decisions of all panels of the court, to identify and correct any misapplication or misstatements of the law, and to govern their own decision making. Over time, coherence and consistency suffer when judges are unable to monitor the law of their entire decisional unit

or correct misstatements of the court’s decisional law. The volume of opinions produced by the Ninth Circuit’s Court of Appeals and the judges’ overall workload combine to make it impossible for all the court’s judges to read all the court’s published opinions when they are issued.⁹¹ This fact, along with perceptions of greater inconsistency in the Ninth Circuit than most other circuits, confirms our own judgment, based on experience, that large appellate units have difficulty developing and maintaining consistent and coherent law.

We believe that judges operating in the smaller decisional units we propose—the regional divisions—will find it easier to monitor the law in their respective divisions and that those smaller decisional units will thus promote greater consistency.

Also, decisions should become more predictable because a divisional arrangement that creates smaller, more stable groups of reviewers will allow district judges to know better who will be reviewing their decisions, and lawyers to know better the judges who will be deciding their cases. The court, as seen by those who live under it and litigate before it, would become much more of a “known bench,” fostering judicial accountability and public confidence. Likewise, the circuit judges will know better the district judges and lawyers within their jurisdiction.

b. More effective en banc procedures and the Circuit Division will ensure clearer, more consistent circuit law

By several accounts, the Ninth Circuit’s limited en banc worked well in its early years, perhaps in part because the eleven-judge panels represented a larger proportion of the court’s judges. Dissatisfaction has arisen more recently with regard to both the infrequency of the Ninth Circuit en banc rehearings, relative to the perceived need for them, and the size and composition of the en banc court. Responses to our survey reflect this dissatisfaction. The proportion of circuit judges who characterize their court’s performance of several en banc functions as “good” is about the same in the Ninth Circuit as in other circuits, and for some functions higher, but the proportion describing it as “inadequate” is substantially higher in the Ninth Circuit.⁹² Similarly, more Ninth Circuit

91. On our survey, we asked judges whether they read all or most of the published opinions of the court of appeals as they are issued. A lower percentage of Ninth Circuit judges than judges in other circuits reported that they read all or most of the court’s published opinions—57% of the circuit judges and 64% of the district judges, compared to 86% of circuit judges and 78% of district judges in other circuits.

92. Between a quarter and a third of the Ninth Circuit judges described as “inadequate” the court’s use of the en banc process to provide guidance to trial judges and lawyers, correct “wrong” panel decisions, resolve conflicts in the circuit’s law, and prevent intercircuit conflicts. But the Ninth Circuit does not stand alone in this regard—similar or higher levels of dissatisfaction were reported by judges in several other circuits, not all of them “large.”

judges—both circuit and district—than judges in most other circuits report dissatisfaction with the frequency with which the court takes cases en banc.⁹³

The divisional arrangement we propose would create groups that can function effectively en banc, thus giving each division a way to ensure that the decisions it issues are correct and reasonably uniform. It would relieve each judge of having to cope with the decisional output of the entire Ninth Circuit Court of Appeals, and reduce the burden of en banc calls to a more manageable level. In time, we believe en banc rehearings may be needed within divisions less frequently because division judges will develop more collegial relationships and be better able to avoid issuing incorrect or inconsistent judgments.

We also believe the Circuit Division for conflict correction, its mission restricted solely to resolving inter-divisional, intra-circuit inconsistencies, can act more effectively than the present limited en banc mechanism. Although it may seem paradoxical to respond to concerns about the present limited en banc by creating a conflict resolving body that is even smaller, we believe that the bulk of the work now done by the limited en banc will be done by the divisional en bancs, for which all the division's active judges will convene. Indeed, we think the divisional en bancs, collectively, may do more work than the limited en banc does now. The Circuit Division will resolve conflicts that arise, and its composition will ensure that the views of the majority of the court's judges will predominate in that resolution.

c. The proposed divisional structure will rationalize the regionalizing and federalizing functions of appellate courts

By constituting divisions with both resident and nonresident judges, the divisional structure respects and heightens the regional character deemed a desirable feature of the federal intermediate appellate system, without losing the benefits of diversity inherent in a court drawn from a larger area.

The divisional structure draws on the circuit's full complement of judges while restoring a sense of connection between the court and the regions within the circuit by assuring that a majority of the judges in each division come from the geographic area each division serves. As a practical matter, it avoids the problem of presidential appointment that would be encountered if all judges were to be assigned strictly to the divisions in their geographic area. Instead, the president will continue to appoint judges to the court of appeals, not to a particular di-

93. For each en banc function we identified, Ninth Circuit judges were more likely than circuit judges nationwide to say their court went en banc less often than necessary, although for each function there was at least one other court in which a similar or higher percentage of judges felt likewise.

vision, subject however, to the informal norms that have developed to link geography to appellate court appointments.

Maintaining the court of appeals for the Ninth Circuit as presently aligned respects the character of the West as a distinct region. Having a single court interpret and apply federal law in the western United States, particularly the federal commercial and maritime laws that govern relations with the other nations on the Pacific Rim, is a strength of the circuit that should be maintained. The Atlantic seaboard and Gulf Coast are governed by law determined by courts of appeals in six separate circuits, which gives rise to complaints about inter-circuit conflicts from practitioners in the maritime bar, who regularly bemoan the differences in interpretation of federal law in circuits from Maine to Texas.

Moreover, federal appellate practice in the Western states will be less fragmented under a divisional arrangement than under two or more separate circuits because the divisional arrangement contemplates a single set of local circuit rules, continued administrative supervision of the entire circuit by the chief judge and judicial council, a single circuit judicial conference and a conflict correction mechanism within the same judicial circuit.

3. Differences between this proposal and the previous divisional experiment

Our proposal differs significantly from the regional calendaring divisions that the Ninth Circuit tried for five months starting in September 1978. In that experiment, the judicial council created three regional divisions, one with three active and one senior judge, the other two with five active and two senior judges.⁹⁴

Circuit records suggest that the judges thought that the regional calendaring system decreased circuit-wide collegiality and threatened the overall coherence of the circuit's substantive law, encouraging forum shopping. Some also doubted that the program substantially reduced judges' travel time, largely because northern and middle division judges had to travel to assist the more heavily burdened southern division. Perhaps most important, judges accustomed to sitting with a larger and more diverse group of judges experienced "panel fever" when they sat most of their time with a much smaller group.

Our proposal overcomes each of these problems. First, it ensures at least some mix of judges throughout the circuit to maintain circuit identity and collegiality. Second, the Circuit Division can maintain uniformity in the circuit's law. Finally, a court of twenty-eight circuit judgeships—or more—will allow divisions to be created that are large enough to avoid the too-close associations experienced when the much smaller court last tried a divisional approach.

94. Today, the Ninth Circuit has twenty-eight authorized judgeships, with twenty-two active judges and seventeen senior judges presently serving.

E. Realignment of the Ninth Circuit into Two or More Newly Constituted Circuits

As we have said, we do not believe that a realignment of the Ninth Circuit and the creation of more appellate courts in the West is necessary in light of the restructuring into divisions that we propose. Any realignment of circuits would deprive the west coast of a mechanism for obtaining a consistent body of federal appellate law, and of the practical advantages of the Ninth Circuit administrative structure. Moreover, it is impossible to create from the current Ninth Circuit two or more circuits that would result in both an acceptable and equitable number of appeals per judge and courts of appeals small enough to operate with the sort of collegiality we envision, unless the State of California were to be split between judicial circuits—an option we believe to be undesirable. If Congress rejects our recommendation, the challenges to finding a workable solution are daunting. We examined over a dozen proposals for splitting the circuit and found no merit to any of them. Of the proposals, we describe three because they are the only alternatives that have any geographical integrity, serve to any extent both the federalizing and regionalizing functions of federal courts, and are consistent with the principle of state contiguity in the “lower 48” states.⁹⁵

1. Option A—Variation on the “classical split”

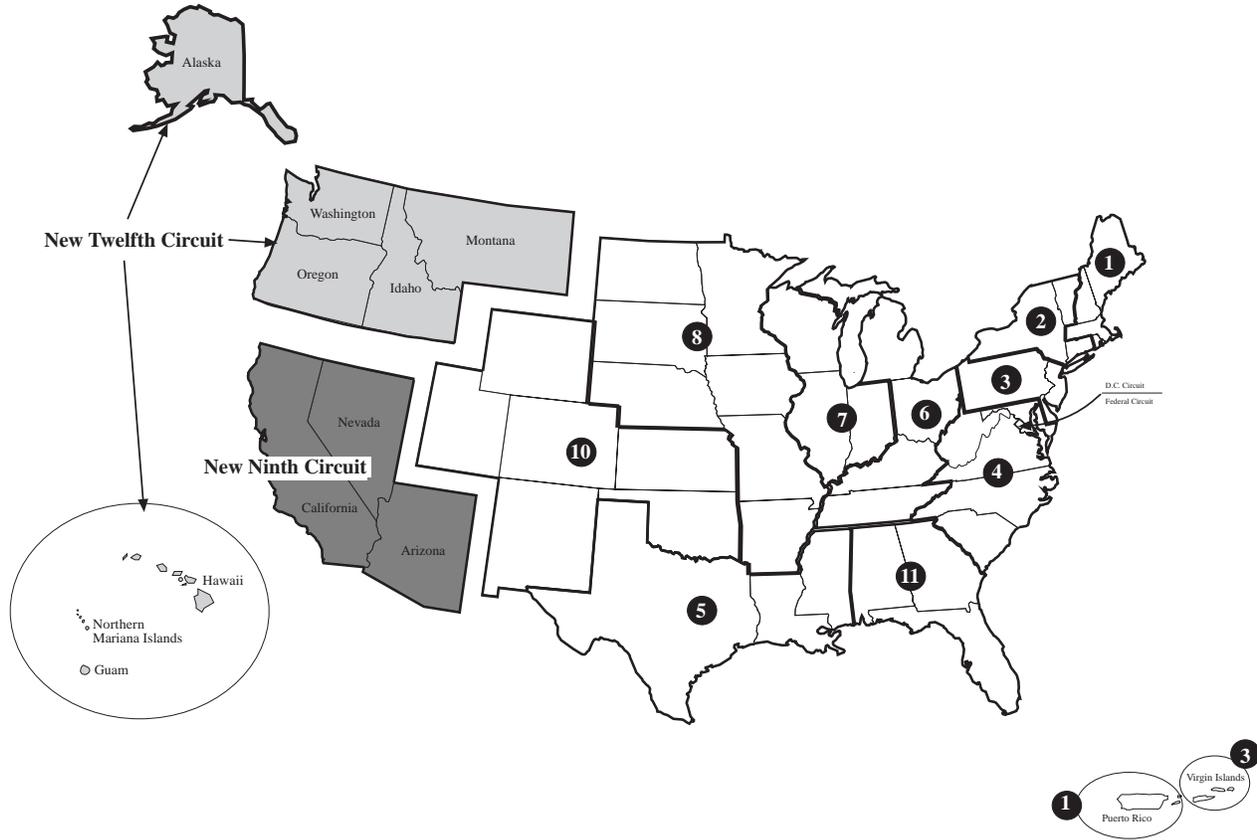
New Ninth Circuit — Arizona, California, and Nevada

New Twelfth Circuit— Alaska, Guam, Hawaii, Idaho, Montana, Northern Marianas, Oregon, and Washington

Option A is much like what some have called the “classical split,” except that it includes Hawaii (and the island territories) in the new Twelfth Circuit instead

95. To examine the caseload effects of different configurations, we estimated weighted filings by taking the three-year average of filings; cases filed by pro se litigants were discounted by two-thirds, in accordance with how the Judicial Conference of the United States treats them in its current formula for assessing circuit judgeship needs. These per-judgeship figures use the number of authorized judgeships and do not factor in either the court’s vacancies or its senior judges. The weighted filing estimate per judgeship for the current Ninth Circuit (226) is thus based on twenty-eight judgeships. The estimates for the differently configured circuits are based on the assumption that wherever an active judge now sits, a judgeship will continue to exist. We also used as the site of a judgeship the state of residence of any person whose nomination was pending as of October 1, 1998 (this frequently, but not always, corresponded with the residence of the judge whose departure from active status created the vacancy). The calculations also assume that the vacant judgeship for which a nomination was not pending would be moved from California to Hawaii, to implement the relatively new requirement in 28 U.S.C. § 44(c) that at least one active circuit judge be appointed from each state of a circuit. Obviously these assumptions are fraught with uncertainty and subject to change, particularly if Congress were to create the five new judgeships the Ninth Circuit Court of Appeals has requested.

Figure 3-B
Boundaries of Reconfigured Circuits—Option A



of in the Ninth. Placing the island jurisdictions with the Northwest states would move slightly more of the caseload to the circuit with the lighter caseload and might alleviate any sense in these small jurisdictions that they are dwarfed by the much more populous states of the new Ninth. But the caseload difference to either circuit would be small and there is no strong judicial administration reason for choosing one circuit over the other for the island jurisdictions. Either configuration would create workload disparity between the resulting circuits. Using the one we describe, and based on filing trends over the past three years, we estimate per-judgeship weighted filings would increase from 226 to 257 for the new Ninth Circuit, and drop to 169 per judgeship for the new Twelfth Circuit.⁹⁶

96. If this configuration were to become effective immediately, the disparity would be worse: active judges in the new Ninth Circuit would face 119 more weighted filings (at 331) than active judges in the new Twelfth Circuit (at 212).

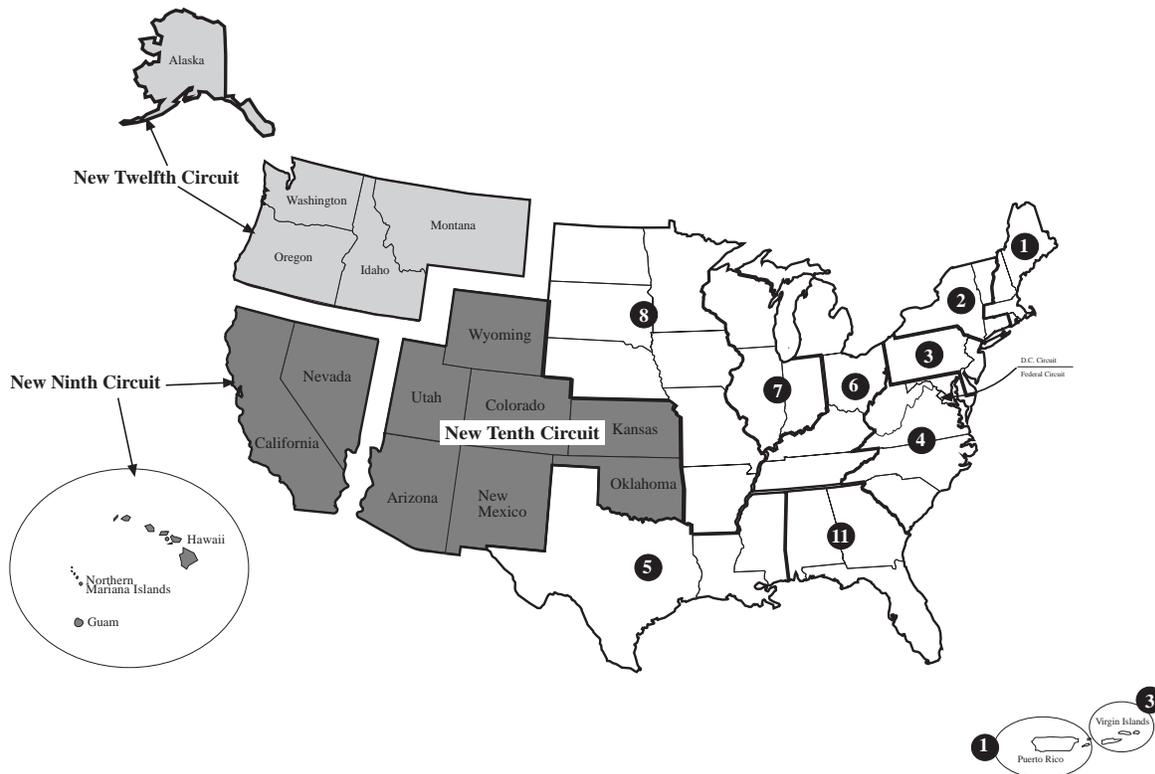
2. Option B—“Classical split” plus realignment of Tenth Circuit to reduce size of new Ninth

New Ninth Circuit — California, Guam, Hawaii, Nevada, Northern Marianas

New Tenth Circuit — Arizona, Colorado, Kansas, New Mexico, Oklahoma, Utah, Wyoming

New Twelfth Circuit— Alaska, Idaho, Montana, Oregon, Washington

Figure 3-C
Boundaries of Reconfigured Circuits—Option B



The distinctive feature of this option is the shift of Arizona to the Tenth Circuit. Next to California, Arizona generates more appeals than any other state in the present Ninth Circuit; thus moving it would significantly alleviate the caseload pressure exerted by California in the remaining Ninth Circuit. But it would do so by disconnecting California from Arizona. To the extent that Arizona follows California law in several areas, and has significant commercial ties with California, this would be an undesirable result. On the other hand, others think that Arizona has more in common with the Rocky Mountain states than the Pacific coast states. The Tenth Circuit Court of Appeals would be able to absorb the added caseload from Arizona while still remaining an appellate court of manageable size. Assuming the three circuit judgeships now in Arizona were

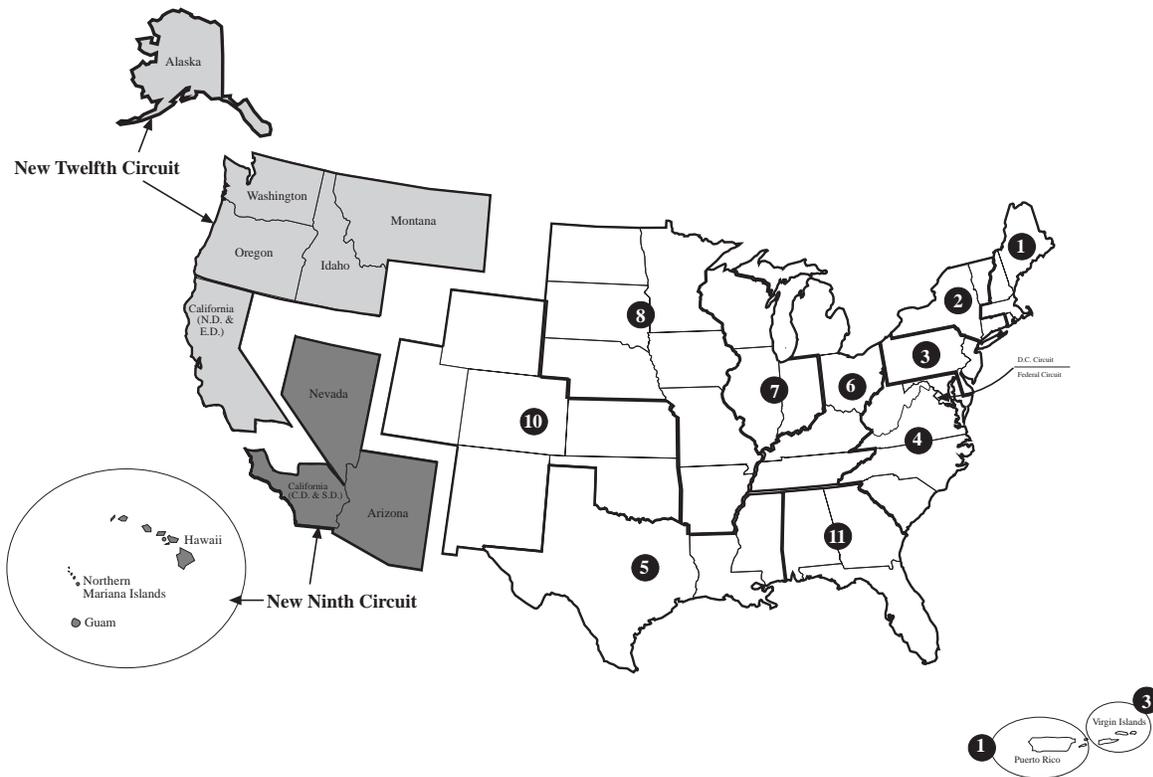
transferred to the Tenth Circuit, the weighted filings per judgeship in the new Tenth would change little—we estimate 177 weighted filings per judgeship, compared to 175. But the per-judgeship weighted filings in the new Ninth Circuit Court of Appeals would still rise by approximately 50 (from 226 to an estimated 270), while falling in the new Twelfth Circuit from 226 to 162.⁹⁷

3. Option C—Division of California between two circuits to reduce size of new Ninth

New Ninth Circuit— Districts of Arizona, Southern and Central California, Guam, Hawaii, Nevada, Northern Marianas

New Twelfth Circuit— Districts of Alaska, Eastern and Northern California, Idaho, Montana, Oregon, Eastern and Western Washington

Figure 3-D
Boundaries of Reconfigured Circuits—Option C



97. Immediate reconfiguration along these lines would cause even greater disparity than under Option A: each active judge in the new Ninth Circuit would face 210 more weighted filings (at 392 per judge) than an active judge in the new Twelfth (at 182).

This is the 1973 recommendation of the Commission on Revision of the Federal Court Appellate System. It divides California between two circuits as the only way to equalize caseloads, given California's dominance over any circuit into which it is allocated as a whole. (Weighted filings per judgeship would be about 232 in the new Ninth Circuit and about 219 in the new Twelfth Circuit.) This is the only option that distributes caseloads equitably, but it elicits strong objections—as it did when the Hruska Commission proposed it—because it would divide a state between two federal circuits. As noted above, Justice Scalia has said that the Supreme Court could deal promptly with intercircuit conflicts affecting California and Justice Stevens has characterized the bar's concern over such a split as “seriously exaggerated.” However, if the present Ninth Circuit is kept intact, the Circuit Division for conflict correction that we propose will be able to resolve inter-divisional conflicts—including those that the Supreme Court might be disinclined to resolve as intercircuit conflicts—faster and with less expense to litigants than Supreme Court resolution entails.

F. Conclusion

We believe that our recommendation addresses the adjudicative concerns that have animated calls to split the circuit while preserving the administrative structure that no one has seriously challenged. We also believe that our proposal accords with the overarching objectives of judges who have been responsible for administering the circuit, who with considerable force and support have pointed out how important it is to maintain a capacity, short of review by the Supreme Court, for a common body of federal law on issues that matter to the whole Pacific rim and the far western part of the United States.⁹⁸ The Circuit Division to resolve conflicts will do that.

The divisional structure for the court of appeals that we recommend, with a ready conflict correction mechanism, is a practical alternative that is workable, will achieve the legitimate ends of those who favor splitting the circuit and those who seek to preserve it, and affords the greatest promise for flexibility in the future. It is not, of course, a perfect structure. We can think of none that can be, with California—the single largest contributor to caseload—a part of the circuit. Yet we are persuaded that it is better to have the State of California subject to different divisions within the same circuit than to split it between circuits.

In sum, we have concluded and we therefore recommend to the Congress and the President that legislation retaining the circuit but restructuring the court of appeals is the most principled and effective way to resolve the debate about the Ninth Circuit and its court of appeals.

98. See August 29, 1998, letter from Procter Hug, Jr., Chief Judge of the Ninth Circuit; James R. Browning, Alfred T. Goodwin, and J. Clifford Wallace, former chief judges of the circuit; and Circuit Judge Mary M. Schroeder, scheduled to be the next chief judge of the circuit.

Chapter 4

Structural Options for the Courts of Appeals

In this and the next chapter, we turn from the Court of Appeals for the Ninth Circuit to the total appellate system. We offer no recommendations on the realignment of other circuits, and, more than that, propose no general realignment of the circuit structure. The Commission has been presented with suggestions that the circuit structure as a whole is antiquated and should be abolished, putting in its place a nationwide court of appeals organized internally to serve federal appellate needs as they may shift over the years. We have concluded, however, that the system of geographical circuits has not outlived its usefulness and that a decentralized administrative structure for the federal judiciary continues to be an effective means of administering this vast nationwide system of courts.

Current circuit boundaries are, to be sure, the product of history more than logic, and probably would not be the boundaries one would draw if starting afresh. By now, though, those boundaries are firmly established in the American legal order, and changing them would impose substantial disruptive costs.

Some commentators offer caseload inequality as a reason to split circuits; some argue that a circuit should be split when the number of opinions its court of appeals issues passes an unspecified threshold; others take longer appellate disposition times as a sign that a split is in order. As we noted in Chapter 3, all of these have been advanced by those who would split the Ninth Circuit. But the data we reviewed show that all can be found in substantial measure in one or more other circuits that cannot feasibly be split. If equalizing caseload among circuits, or among circuit judges, were the most important criterion for circuit alignment, a sweeping reconfiguration would be in order. If the number of published opinions or higher-than-average disposition times were the trigger, several circuits would now be candidates for reconfiguration. But caseloads change and shift over time, more or less unpredictably, and disparity in caseload has never been a driving principle in circuit configuration. Should caseloads ever become so disproportionate as to cause nationwide concern in the future, the structural alternative for courts of appeals that we recommend here will afford maximum flexibility for circuits to remedy disparities themselves—by requesting new judgeships and arranging them in optimally sized divisions, at minimum cost and disruption.

Accordingly, we believe that some changes to the structure of the courts of appeals will help them deal with the conundrum they will face as caseloads grow. On the one hand, if they do not obtain more judge power, they risk unacceptable backlogs of pending cases or an unacceptable decline in the quantity and quality of judicial attention paid to the cases they decide. On the other hand, adding too many judges to a court that must act collegially may heighten the likelihood of incoherence in the law. Although technology offers some promise

of a way out of this bind, we doubt that it will suffice to avert it altogether. We believe that the courts of appeals need additional flexibility to structure their operations to meet changing circumstances that cannot now be foreseen.

We therefore recommend here a flexible statutory framework to allow courts to experiment with three innovations: the divisional concept we propose for the Ninth Circuit Court of Appeals; the use of two-judge panels for deciding some kinds of cases; and district court appellate panels. While these innovations have been discussed by judges and students of the appellate process, few have been put to actual use, none in the federal courts. Rather than recommend a single legislative prescription or set of prescriptions for all of the courts of appeals, we urge Congress to authorize each circuit and its appellate court to test measures best suited to its particular circumstances—the nature and volume of appeals, the number of its judges, and other resources.

In addition, monitoring and evaluating the use of these procedures can provide Congress, the bench, and the bar with more systematic information about these procedures than would otherwise be available, and thus help determine if they can enable the federal appellate system to function better over the next decade or two without the full increase in judgeships that caseload growth would require under current methods of operation. It is possible that these innovations could provide each circuit with a system adequate to handle its appellate business in the years ahead, making a split of large circuits unnecessary. Regardless of what Congress decides with respect to the Ninth Circuit and its court of appeals, we recommend that these measures be enacted for the better administration of appellate justice.

Finally, we do not believe these options will obviate the need for additional judgeships. Indeed, even the innovations proposed here will fail if there are not enough judges for the proper administration of appellate justice.

A. Divisional Organization of Courts of Appeals

In Chapter 3, we describe a divisional plan that we believe Congress should direct the Ninth Circuit to implement as a seven-year demonstration to serve as a model for other courts of appeals. In this chapter, we recommend that Congress, on a permanent basis, give all appellate courts of a certain size discretion to adopt a divisional organization and require courts above a certain size to do so. When an appellate court reaches fourteen judges it is large enough to make feasible such an internal design, and it is reaching the point where performing its en banc function effectively is unreasonably difficult. Still, a divisional structure would be optional for a court of more than thirteen judgeships until it exceeds seventeen judgeships. In our view, when an appellate court operating as a single decisional unit reaches eighteen judgeships, the en banc process becomes too cumbersome to be feasible, and a limited en banc does not seem to us to be a long-term solution. Thus the statute we propose would require a

divisional structure once an eighteenth judgeship is created. If the court itself does not create divisions, the statute requires the circuit judicial council to so organize the court.

The proposed statute leaves considerable leeway to a court of appeals in designing a divisional structure. Although not specified in the statute, we contemplate that each division would have an odd number of judges, with a minimum of seven, and preferably no more than eleven judges. If a court needs to add a number of judges that would make the divisions too large, a new division can be created to maintain the general scheme. Whatever the design, the point is to have each judge of the court assigned to a specific division for a substantial period of time and for each division to exercise exclusive jurisdiction over the cases assigned to it. The statute would require that upon the adoption of a divisional plan the court also create a “Circuit Division” for conflict correction, modeled on that prescribed for the Ninth Circuit in the previous chapter, with the sole function of resolving conflicts between or among the divisions. It would replace the circuit-wide en banc procedure, which would be abolished once a divisional plan is in effect, although each division would continue to take cases en banc as necessary.

Different circuits might implement the divisional arrangement in different ways according to their needs, and we expect that creative judicial minds would tailor these alternatives to fit local circumstances. Some courts might opt for a regional organization in which not only the source of appeals (primarily the district courts) but the composition of the judicial division would be entirely tied to geography. Other courts might adopt an arrangement whereby judges are primarily assigned to the division in which they reside, but would sit regularly with one or more other divisions, not only to help out with caseloads as needed but to ensure cross-fertilization on both substantive circuit law and appellate procedures.

The proposed statute is set out in Appendix C-2 as subsection (d) of a revised section 46 of Title 28, United States Code.

If enacted, this statute will render unnecessary—and even confusing—the option for a court of more than fifteen judges to perform its en banc functions with fewer than all its judges. This “limited en banc” authorization provided in the 1978 Omnibus Judgeship Act has been used only in the Ninth Circuit and with mixed reactions. Accordingly, we recommend that this provision be repealed, but only if our proposal for adjudicative divisions is enacted (see Section 2 of proposed statute set out in Appendix C-2.)

B. Two-Judge Panels

Currently, the courts of appeals function primarily through three-judge panels pursuant to 28 U.S.C. § 46(b) (“the court may authorize the hearing and determination of cases and controversies by separate panels, each consisting of three

judges”). As caseloads grow, courts would benefit from the flexibility to provide by rule for two-judge disposition of some cases. We believe that two-judge panels may be able to help the courts conserve resources with no loss in fairness, and we thus recommend that Congress amend Section 46(b) to authorize federal appellate courts to use two-judge panels, and that it allow the courts to designate by rule those case types suitable for such disposition. Subsection (b) of the proposed revision to 28 U.S.C. Section 46 in Appendix C-2 is a statutory revision to this end.

Three-judge panels in federal appellate courts are a legacy of the three-judge appellate courts created by the 1891 Evarts Act. Three-judge panels are similarly pervasive in the states. As far as we are aware, only the Appellate Division of the New Jersey Superior Court, a statewide intermediate appellate court, uses two-judge panels; it has done so for twenty years⁹⁹ and in recent years two-judge panels have decided a majority of appeals in that court.

Some kinds of federal appeals may be suitable for disposition by two judges and others clearly are not. The New Jersey Rule of Court on this point is instructive. It says that three-judge panels should be convened to decide “a question of public importance, of special difficulty, of precedential value, or for such other special reason as the presiding judge shall determine.”¹⁰⁰ These are among the types of cases that most federal appellate courts schedule for oral argument and dispose of through published opinions, and they should remain the staple of the federal three-judge panel.

Still, in most courts of appeals today, judges supervise or participate in a staff-supported screening process that identifies those cases in which the outcome is clearly controlled by well-settled precedent. We expect that two-judge panels would decide cases primarily of this type, which are now decided by most courts without oral argument and with relatively brief opinions. If the two judges disagree or are in doubt, they can enlist a third judge to participate in the decision, or refer the case to a regular three-judge panel for hearing.

Two-judge panels could reduce overall judicial resource needs but not necessarily by one-third. Most cases that now need and receive oral argument will continue to need it, and these are the cases that consume the greatest share of judicial resources. Moreover, whenever there is a written opinion, the judge with primary responsibility for the opinion will spend more time on the case than will the other member or members of the panel. Thus, the judicial time that a two-judge panel will save will likely be the time a third judge now spends reading the briefs and conferring with the other panel judges; generally that will be less than one-third of the total judicial time that would ordinarily be spent on the case.

Given effective screening and recognizing that a large proportion of cases can only be decided one way, one might argue that a single appellate judge might

99. N.J. Ct. R. 2:13-2. Two-judge panels were authorized in September 1978.

100. *Id.*

suffice to decide some appeals. However, at least until more information is available on the operation of two-judge panels, we believe a minimum of two judicial minds should be brought to bear on alleged prejudicial errors made by a trial judge.

Because of the strong tradition of using three-judge panels and the concerns that departing from it may engender, we recommend that the Federal Judicial Center monitor the types of cases disposed of by two-judge panels and the type of procedural treatment they receive, and assess the effects of this change on the productivity of courts of appeals that adopt it. The Center should report to the Judicial Conference yearly, for at least the first three years that a court uses two-judge panels, information to allow the Conference to consider whether to recommend modifying or eliminating the authority for two-judge panels.

C. District Court Appellate Panels (DCAP)

We also recommend that Congress authorize the courts to experiment with shifting a portion of the reviewing task to the trial court level, an idea discussed for at least half a century by students of the appellate process as a way to expand appellate capacity without incurring the costs associated with appellate court growth. Specifically, we propose that Congress add a new section 145 to Title 28 of the United States Code to authorize judicial councils to create district court appellate panels within the circuit and provide by rule for the assignment of certain categories of cases to those panels. Appendix C-3 contains the proposed section 145.

In circuits that elect to use the authority conferred by this statute, the judicial council would create a “district court appellate panel service” and assign to it district and circuit judges of the circuit, the number of such judges to be determined by the council. The council would provide by rule for convening three-judge panels comprising two district judges and one circuit judge designated by the chief circuit judge. The judicial council would specify the categories of cases over which the DCAPs would have appellate jurisdiction. The clerk of the court of appeals would serve as clerk for the district court appellate panel service. Further review of decisions by a district court appellate panel would be in the court of appeals, but only by leave of that court.

A likely prospect for DCAP jurisdiction is diversity of citizenship cases, because they typically present only state law questions on which a federal decision can have no precedential effect. Another good prospect would be sentence appeals, as they present issues with which trial judges have wide experience. Other good candidates for DCAP review are cases that generally require the reviewer to apply well settled legal rules to varying fact patterns.

Trial judges already perform important reviewing functions in the federal appellate system. Federal district judges often sit temporarily with the courts of appeals, and in their own work regularly review trial proceedings when they rule

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on post-trial motions. In recent times, bankruptcy appellate panels, which use trial-level judges, have proven successful. In all of these contexts, trial judges are often more familiar than circuit judges with the trial process; that perspective allows them to be particularly adept at performing the error correction function. Litigants might therefore find in the district court appellate panel more assurance that their cases are getting the personal attention of Article III judges concerned primarily with correcting prejudicial errors in the trial proceeding. Because these panels could convene in cities throughout the circuit, not simply where the court of appeals hears arguments, they could provide litigants and lawyers with a more readily accessible reviewing forum.

To avoid concerns about district judges reviewing the work of their colleagues, district judges would not review judgments from the courts to which they had been appointed. In some circuits, it may be necessary to import district judges to staff these panels, and the proposed statute authorizes intercircuit assignments for this purpose.

Although extensive use of district court appellate panels could reduce the need for additional circuit judgeships, it would also, at least in some circuits, require additional district judgeships. The proper number could be determined only through experience, and we have not tried to project the additional need. In any case, additional district judgeships would add flexibility to the judicial system, as they could be deployed for trial or appellate work as the demands of the docket require.

We do not express an ultimate judgment as to the value of district court appellate panels. Much remains to be learned through use and experimentation. We assert only that these panels hold sufficient promise of strengthening the administration of appellate justice as dockets grow that the circuit judicial councils should be given the authority to experiment with them.¹⁰¹ The statute in Appendix C-3 leaves wide room for each circuit to select the cases to be routed to these panels and to determine other procedural details. As with the other proposals offered here, we recommend a program of monitoring and reporting by the Federal Judicial Center so that the Judicial Conference may determine whether to recommend that the authority be continued, modified, or eliminated.

101. We are aware of some district and circuit judge opposition to the concept of district court appellate review, as reported in comments directly to us and in a 1992 survey of federal judges (see *Planning for the Future: Results of a 1992 Federal Judicial Center Survey of United States Judges* at 5 and 27, reporting that about 65% of both circuit and district judges were strongly or moderately opposed to “a district court ‘appellate division’ for error correction, with discretionary review in the court of appeals”). We stress, however, that we see our specific proposal, which was not available to earlier commentators, as an experiment to be developed at the discretion of the judges involved, who will surely assess, among other things, whether enough district judges are available to make any such experiment feasible.

Chapter 5

Appellate Jurisdiction

As explained in Chapter 1, a majority of the Commission makes no recommendations on *what* matters should come into the federal courts. However, in this section we offer our recommendations on *where* and *how* appellate review of some of those matters might be best structured.

A. Bankruptcy Appeals

We reviewed legislation pending during our study period, and the recommendation of the National Bankruptcy Review Commission (NBRC) that would provide for appeal of decisions by bankruptcy judges in core matters (and in those noncore matters where the parties had consented to entry of the final order by a bankruptcy judge) directly to the regional courts of appeals, rather than to the district courts or bankruptcy appellate panels. We strongly recommend that Congress not implement this recommendation without modification, because it would exacerbate problems in the courts of appeals and destroy the apparently successful innovation of bankruptcy appellate panels. Nevertheless, the underlying problems that have prompted the proposals for change may need resolution. We have not made a full study of the bankruptcy appellate system, nor did the NBRC because of the broad scope of its mission and many demands on its time and attention. Accordingly, we urge that before Congress mandates any revision of the bankruptcy appellate system, it carefully consider alternatives to the NBRC recommendation.

For the present, we offer our assessment of the situation and proposals for alternative arrangements that will avoid the severe impact on some courts of appeals that inhere in the direct review proposal.

1. Current bankruptcy appellate structure and asserted problems

District courts are the primary appellate forum for many bankruptcy cases and proceedings. Several circuits, and with particular success the Ninth Circuit, have used their statutory authority to conduct some appellate review by a bankruptcy appellate panel (or BAP). A bankruptcy appellate panel comprises several bankruptcy judges, most of whom continue to serve as active bankruptcy judges at the trial level but also spend some of their time deciding appeals arising from bankruptcy courts in districts other than their own.

The structure of the bankruptcy appellate system is asserted to cause two general classes of problems. First, by its nature the system produces relatively little binding precedent, and this is said to result in uncertainty, unpredictability,

and nonuniformity. Second, the multiple appellate levels of the system take too long and cost too much for many litigants.

Although the true extent of uncertainty and unpredictability attributable to the dearth of binding precedent is unknown, commentators have documented specific issues that remain unresolved because they have not been authoritatively decided.¹⁰² Even more than in other areas of the law, many parties in bankruptcy are not in a position to litigate an issue through what may be as many as four levels before final resolution. Although cost is a significant problem to the parties, apparently one of its main detrimental effects on the system is that cases drop out before the appellate issues can be definitively resolved.¹⁰³

The NBRC recommended the elimination of the first layer of appeal to a district court or BAP.¹⁰⁴ In 1998, comprehensive bankruptcy reform legislation was introduced in the House of Representatives that would, among other things, implement some aspects of the NBRC recommendation on bankruptcy appeals. Such legislation would eliminate appellate review in bankruptcy matters by the BAPs and district courts.

We agree with the NBRC's assessment that the current bankruptcy appellate structure is less than ideal and understand that it may be causing substantial problems for litigants and their lawyers, but we disagree with the NBRC's proposed solution. We recommend that Congress consider several alternatives, but first we explain why we urge a route different from the NBRC recommendation.

2. Effect of direct bankruptcy appeals on the courts of appeals

Notwithstanding the obvious advantages to routing bankruptcy appeals directly to the courts of appeals (e.g., simplification, more binding precedent, and relief for district courts), direct review also has serious drawbacks. The most significant is the increased workload it would bring to the courts of appeals. If recent bankruptcy appeal trends were to continue, direct review might increase appellate caseloads more than 6% (i.e., more than 3,200 new appeals per year). In six

102. See Paul M. Baisier & David G. Epstein, *Resolving Still Unresolved Issues of Bankruptcy Law: A Fence or an Ambulance?*, 69 Am. Bankr. L.J. 525, 526-27 n.9 (1995), for examples of issues that are litigated repeatedly.

103. However, bankruptcy appeals that actually get filed in the courts of appeals do not appear to drop out by settlement or other procedural termination at any higher rates than other civil appeals. See Judith McKenna, Elizabeth C. Wiggins & Patricia Lombard, *Statistical Information Regarding Bankruptcy Appeals*, in Educational Program for the Seventy-first Annual Meeting of the National Conference of Bankruptcy Judges (Oct. 16-19, 1997), 6-17, 6-23 (on file with the Commission).

104. Recognizing that many orders in bankruptcy cases are determinative of substantive rights but are not technically "final," the NBRC also recommended an interlocutory appeal provision (Recommendation 3.1.4). The NBRC was created by the Bankruptcy Reform Act of 1994.

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courts, this would add more than 50 appeals per panel each year. In three courts, including the Ninth Circuit Court of Appeals, the increase would be approximately 100 new appeals per panel.

Direct review has other disadvantages as well. A speedy resolution is often essential in bankruptcy appeals, but in some overburdened courts of appeals, bankruptcy appeals may not be decided soon enough to realize the proponents' efficiency hopes. And cost savings for litigants are not assured. Most appeals will be heard outside the district in which they arose because most courts of appeals hold court in only one or two places. Thus, parties who would have stopped at one appeal in any event will incur more expense and inconvenience than they would in the current system.

Finally, direct review would sacrifice bankruptcy judge expertise that has proven valuable in circuits with BAPs. Circuit judges, on average, have less specialized knowledge about bankruptcy than do bankruptcy judges, particularly those selected to serve on BAPs.

Given these concerns, the Commission recommends that Congress seriously consider three options. All are based on the generally high level of performance demonstrated by the Ninth Circuit BAP and anticipated in the circuits that have more recently instituted BAPs. A 1989 Federal Judicial Center study¹⁰⁵ found that a large majority of attorneys had high regard for the BAP and supported its continuation. Ninth Circuit data show that parties consent to BAP review in about 60% of bankruptcy appeals, and that the rate of further appeal from BAP decisions in bankruptcy appeals is about half the rate of appeal from district court decisions.¹⁰⁶

3. Possible alternatives for handling bankruptcy appeals

One approach would provide direct appeal as of right to the court of appeals but allow the court to use a BAP to provide it with a report and recommendation in each appeal from a judgment, order, or decree entered by a bankruptcy judge. Unless a party objected or the court disagreed with the BAP's recommended disposition, the report and recommendation would be adopted as the court of appeals' decision. Given the low frequency of appeals from BAP decisions, at least in the Ninth Circuit, this option could help the courts of appeals handle their workload if the NBRC's recommendation regarding direct appeals were adopted.

105. Gordon Bermant & Judy B. Sloan, *Bankruptcy Appellate Panels: The Ninth Circuit's Experience*, 21 *Ariz. St. L.J.* 181 (1989).

106. Letter from Chief Judge Procter Hug, Jr., to the Hon. Wm. Terrell Hodges, Chair of the Executive Committee of the Judicial Conference of the U.S. (March 27, 1998); *see also* memorandum to the Ninth Circuit Judicial Council from its Committee on Bankruptcy Appeals (Feb. 27, 1998).

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A second approach would allow litigants to choose either the court of appeals or the BAP, with further review of BAP decisions only in the discretion of the court of appeals. This could avoid a very large increase in the workload of some courts of appeals and provide faster resolution of issues by judges especially knowledgeable about bankruptcy. In many circuits it could save parties time and money because the BAP would decide appeals more quickly than the courts of appeals. It would also meet the NBRC's major objectives of eliminating the cost and delay inherent in two levels of appeal as of right and ensuring bankruptcy appeals are heard by tribunals having typical attributes of an appellate court. Experience indicates that the greatest workload relief for the courts of appeals would be achieved if parties were required to "opt out" of the BAP system rather than "opt in."¹⁰⁷ Accordingly, we recommend that, should Congress choose this option, it include such a requirement.

Appendix C-4a contains statutory language that would direct appeals from all final judgments, orders, and decrees in bankruptcy cases and proceedings to the regional courts of appeals. It further provides that each circuit judicial council may establish a BAP to do one or both of the following: (1) with the implied consent of the parties, issue binding appellate decisions subject to further review at the discretion of the court of appeals; or (2) issue a report and recommendation subject to *de novo* review by the court of appeals. (The statutory language also deals with interlocutory appeals.)

Third, Congress could substitute BAP review for district court appellate review of bankruptcy judge decisions in core bankruptcy proceedings and in noncore bankruptcy proceedings where the parties had consented to final judgment by a bankruptcy judge. (District courts would still provide *de novo* review of bankruptcy court findings of fact and conclusions of law in noncore matters where parties had not consented to final judgment by the bankruptcy judge.) The BAPs' decisions would bind bankruptcy judges but not district judges. The regional courts of appeals would have jurisdiction of appeals from BAP decisions and from decisions by the district courts exercising their original bankruptcy jurisdiction. Although this approach might establish circuit precedent more quickly than under the current system, and would add (or retain) three-judge panel deliberation, it would also require litigants to clear another non-Article III hurdle before obtaining review by an Article III court. That could create constitutional challenges to the bankruptcy appellate system; we offer no opinion on whether such challenges would succeed but note that uncertainty would prevail until the matter was settled. This alternative could also defeat the goals of increased con-

107. That is, consent to BAP jurisdiction would be implied by a party's failure to request direct review by the court of appeals. In its initial incarnation, the Ninth Circuit BAP process required affirmative, express consent from the litigants. The BAP received few appeals. When the circuit amended the procedure to route bankruptcy appeals to the BAP unless parties opted out of BAP review, the BAP caseload increased tenfold. Bermant & Sloan, *supra* note 105, at 198.

venience and decreased expense of bankruptcy appeals. Moreover, small circuits, particularly those dominated by a single judicial district, may not have sufficient judge power outside that district to carry the BAP workload. Appendix C-4b contains statutory language that could implement this approach.

B. General Discretionary Review in the Courts of Appeals

The traditional view of 28 U.S.C. § 1291, which confers jurisdiction on the courts of appeals to review final decisions of the district courts, is that it accords litigants a right to an appeal and, correspondingly, imposes an obligation on the court to consider a properly presented case and decide it on its merits. This obligatory review was sharply distinguished from the concept of discretionary review, under which an appellate court has a choice as to whether it would consider the case on its merits. Up until three decades ago this right to appeal was assumed to include an opportunity to file briefs, to present oral argument to the court, and to receive from the court a written opinion explaining the decision. That conception of an appeal, however, has undergone modification as the appellate courts have adopted screening and tracking procedures through which a large proportion of appeals are decided by the court without oral argument and by judgment orders or unelaborated opinions.

This development has blurred the distinction between obligatory and discretionary review. Under either type of jurisdiction, litigants file papers with the court containing arguments, facts, and legal authority, and the court considers those papers. If the case comes as an appeal, theoretically as a matter of right, and the court has adopted screening procedures, the case will receive threshold scrutiny and be routed either through a summary procedure for decision without oral argument (usually resulting in a brief, unpublished disposition or order), or it will be scheduled for argument (usually resulting in a full opinion that explains the facts and applicable law). If the case comes as a petition for discretionary review, the court will likewise examine the papers and either deny review or grant review, in which case it will accord the appeal a more elaborate process, usually including oral argument and a reasoned opinion. In other words, whether the court's jurisdiction is labeled obligatory or discretionary, litigants obtain a judicial examination of their contentions either through an abbreviated process or what is considered the traditional appellate process.

There are, however, two types of discretionary review, and the foregoing description of a blurring of the distinction is accurate as to only one of the two types. One type is exemplified by the certiorari jurisdiction in the U.S. Supreme Court, found also in many state supreme courts. Under that arrangement, the court is given an unrestrained choice to refuse to entertain the case or to take it up on its merits. The choice to deny review can be made without regard to

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the merits, and a denial of review does not imply any view as to whether the lower court judgment is correct or incorrect. A denial can be made on a variety of grounds having nothing to do with the merits of the case—e.g., that the question is presented on a record that is too murky, that the court wishes to let the issue percolate further in the lower courts, or that as a matter of timing the court prefers to defer facing the issue. In that type of discretionary review, there is a sharp distinction with appeals of right, as the latter require the court to deal with the merits, however truncated its process may be.

It is in the other type of discretionary review that the distinction with appeals of right virtually disappears. That type is found in the appellate courts of Virginia and West Virginia and in the U.S. Court of Appeals for the Armed Forces. It can also be seen in the English Court of Appeal, Criminal Division. Under that arrangement, a party files with the appellate court a petition or application for leave to appeal. The court's authority to grant or deny leave is said to be discretionary. However, a decision to deny leave involves an examination of the merits in a way that a certiorari jurisdiction does not. While the formulation of the standard for denying leave varies, it is essentially that the case presents no issue of arguable merit or no showing of probable error in the trial court proceedings. In those courts, a denial of leave is in functional effect like a decision in a federal court of appeals to send a case through to decision without oral argument and dispose of it without a full opinion. The similarity is especially marked if the court issues only a one-line affirmance.

A recognition of this reality has prompted some judges to suggest that the jurisdiction of the federal courts of appeals be made expressly discretionary. They argue, among other considerations, that this would be more honest, that it would reflect what is actually going on.

The force of this argument for a discretionary review system in the federal courts varies with the type of discretion that is envisioned. If what is being advocated is the certiorari type discretion found in the Supreme Court, its adoption would mean that a court of appeals could deny review for any reason and without a serious look at the merits. For example, denials could be made on the ground that the court's docket is overloaded or that the issues presented are of little importance to the law. We believe that this type of appellate jurisdiction runs too counter to the now prevalent view that a losing litigant in the trial court should have one opportunity for an appellate court to examine assertions that the trial court has committed prejudicial error, and therefore we do not recommend it.

If, however, what is intended by the suggested change is the other type of discretionary review, what might be called for short the Virginia type, the case is closer. If that is what is intended, the statute authorizing it should include express wording requiring the court to grant leave to appeal "if the case presents any issue of arguable merit." Under this approach, review might be made dis-

cretionary with respect to types of cases that are generally fact intensive and controlled by existing precedent, but occasionally present a question of statutory interpretation that has not been definitively resolved. We are not persuaded, however, that a shift to an express discretionary jurisdiction for all appeals generally is a good idea.

C. The Federal Circuit and Its Potential

Although this report is focused on the regional courts of appeals and regional circuit alignment, we note that the most significant and innovative structural alteration in the federal intermediate appellate tier since its establishment was the creation by Congress in 1982 of the U.S. Court of Appeals for the Federal Circuit. The Federal Circuit has no geographical boundaries, except that of the United States as a whole. Its jurisdiction is defined in two distinctive ways: (1) It has exclusive appellate jurisdiction over the decisions of certain lower courts and administrative bodies, including the Court of Federal Claims, the Court of International Trade, the Court of Veterans Appeals, and the Merit Systems Protection Board. (2) It has exclusive appellate jurisdiction over the decisions of all the district courts in cases of particular subject matters. The major category consists of suits for patent infringement; in any action of that type brought in a district court anywhere in the country, the appeal will go to the Federal Circuit instead of to the court of appeals in whose regional circuit the district court is located. Otherwise, the Federal Circuit Court of Appeals is organized like all of the other federal appellate courts. It has a legislatively authorized number of circuit judgeships (twelve), a clerk of court, and supporting personnel. However, in addition to a relatively small group of central staff attorneys, it alone among the appellate courts employs, pursuant to statutory authorization, a small staff of technical advisors, mainly to assist the judges with the complex questions often involved in patent cases.

In creating this new court, Congress recognized that it was not only acting to meet existing conditions and needs but that it was also providing the federal appellate system with a resource it had not previously had—a court that could be vested with exclusive appellate jurisdiction over other categories of cases litigated in the district courts as to which in the years to come there would be a perceived need for centralized, nationwide review. Before the establishment of this court, Congress, when faced with such a need, had been forced to enact special arrangements, as it did, for example, in creating the Court of Customs and Patent Appeals and the Temporary Emergency Court of Appeals (TECA). Such measures are no longer necessary. Indeed, twice since 1982 Congress has taken advantage of this appellate resource: by abolishing TECA and transferring its authority to the Federal Circuit, and by giving the Federal Circuit exclusive jurisdiction to review decisions of the Court of Veterans Appeals. In its 1995

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Long Range Plan, the Judicial Conference recommended that the appellate function should be performed “primarily in a generalist court of appeals established in each regional circuit; and a Court of Appeals for the Federal Circuit with nationwide jurisdiction in certain subject-matter areas.”¹⁰⁸

We make no specific recommendations as to additional categories of cases that might usefully be placed within the Federal Circuit’s jurisdiction. However, we list below three types of cases that have been frequently discussed as potential candidates for the Federal Circuit’s jurisdiction, including the key reasons advanced for centralized review. We transmit these to Congress, without recommendation, for its use as it examines the needs of the federal appellate system in the future.

1. Tax appeals

For more than half a century, lawyers, judges, and legal scholars have urged that appeals in civil cases arising under the Internal Revenue Code be concentrated in one court of nationwide scope. Presently, appeals in those cases are taken to the regional courts of appeals from the 94 district courts, as well as from the single Tax Court (a review structure referred to as the “inverted pyramid”). The concern voiced is that having appeals in such cases spread across twelve appellate courts works inequities, in that citizens in different parts of the country are sometimes subject to different tax liabilities, and that planning is made difficult because the meaning of the tax law is often left unsettled for years, as the Supreme Court decides very few tax cases. In 1979, the Senate Judiciary Committee held extensive hearings on a bill to create a Court of Tax Appeals and received substantial support for the proposal. In 1990, the Federal Courts Study Committee recommended the centralizing of civil tax appeals and proposed that such review be placed in an Article III division of the Tax Court. As said above, the existence of the Federal Circuit, as part of the federal intermediate appellate system, makes unnecessary the creation of special courts of that sort. If Congress decides to centralize tax appeals, the Federal Circuit provides a readily available forum for that purpose, one that already adjudicates appeals in tax cases coming to it from the Court of Federal Claims, and whose docket would be capable of absorbing appeals from the Tax Court or the district courts or both.

2. Copyright cases

Patents and copyrights are linked in Art. I, Sec. 8 of the Constitution, which gives Congress authority “to promote the progress of science and the useful arts by securing to inventors and authors for limited times the exclusive right to their

108. Long Range Plan for the Federal Courts 43 (1995).

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respective writings and inventions.” Pursuant to that authority, Congress has enacted statutes governing both patents and copyrights, and the desirability of national uniformity in the law governing both has often been stressed. A specially felt need to introduce a higher degree of uniformity in the patent field was a major motivation for the creation of the Federal Circuit, at the time that legislation was enacted in 1981. Since then, technological developments have wrought far-reaching changes in both patents and copyrights. Computers, electronic data processing, storage, and communication in the information age have brought them together in ways that were unknown seventeen years ago. Today patents are issued for computer software programs that often are also the subject of copyrights. For this reason, some have suggested that it would be sensible to have patent and copyright claims ultimately adjudicated in the same court.

3. Social Security appeals

The suggestion has often been made that judicial review of Social Security cases, after final administrative action in the agency, be placed in an Article I court, thereby relieving the district courts of this administrative review task. Although the Commission has reviewed proposals to that effect, we make no recommendation in that regard, other than to say that they deserve the serious consideration of Congress. If Congress should at some point create an Article I court for this purpose, Congress may want to consider placing exclusive appellate jurisdiction over that court in the Federal Circuit. The Federal Circuit is already vested with such jurisdiction over decisions of the Court of Veterans Appeals, an Article I court to which all appeals are taken from adverse administrative action by the Veterans Administration. Social Security claims and veterans claims have much in common, and it would be sensible and efficient to place appellate review over all of them in one forum. If this were done, the standard of review for the veterans appeals would seem appropriate for Social Security cases, namely, a limitation of appellate review to questions of statutory and constitutional interpretation.

Chapter 6

Recapitulation and Concluding Observations

After examining the structure and circuit alignment of the entire federal appellate system, with particular reference to the Ninth Circuit, the Commission has developed, and here recommends to the Congress and the President, a set of statutory proposals that we believe will provide the structure and flexibility that the federal appellate system needs to administer justice in the future. We urge as well that the Judicial Conference of the United States and all federal judges consider the merits of the proposals.

These proposals, if enacted, would:

- organize the Ninth Circuit Court of Appeals into regional adjudicative divisions, with a Circuit Division to maintain uniform circuit law (Chap. 3, sec. D; Appendix C-1);
- authorize any court of appeals with more than thirteen judgeships, at its option, to organize itself into divisions, and require any court of appeals with more than seventeen judgeships to do so (Chap. 4, sec. A; Appendix C-2);
- authorize the courts of appeals to decide selected cases with two-judge panels (Chap. 4, sec. B; Appendix C-2);
- authorize the judicial council of any circuit to establish district court appellate panels to provide first level review for designated categories of cases that involve error correction, with discretionary review in the court of appeals (Chap. 4, sec. C; Appendix C-3).

In developing these proposals, the Commission has drawn upon the contributions of many judges, lawyers, and legal scholars who have devoted much thought over the years to the problems of the federal judiciary. We believe these proposals are constructive, forward-looking innovations; yet they do not work radical change. They build on the existing circuit structure and alignment. They are evolutionary, not revolutionary. Regardless of what Congress decides to do with respect to the Ninth Circuit, the importance of the other recommendations would not be diminished; they should be enacted in any event for the better administration of appellate justice.

In addition to these specific statutory recommendations, we commend to the consideration of Congress suggestions regarding bankruptcy appeals, discretionary appellate jurisdiction in general, and other potential uses of the Court of Appeals for the Federal Circuit.

To assist Congress further, the Commission has prepared, and included in the Appendices to this report, drafts of bills to implement its recommendations. By

Recapitulation & Concluding Observations

providing the actual text of the recommended statutory measures, we hope to facilitate the introduction of bills to carry out these proposals.

Although our recommendations go well beyond the Ninth Circuit, that circuit and its court of appeals are obviously at the heart of this report, both by the terms of the statute and because of the history that brought this Commission into existence. Our recommendation for a divisional organization of the Ninth Circuit's Court of Appeals is a major recommendation, not only because of the change it would work in that court but also because, if successful there, the experience would benefit every other court of appeals that grows large enough to call into question its ability to function as a single decisional unit. If the divisional arrangement we offer proves successful, it will preserve not only the Ninth Circuit for the foreseeable future, but the entire structure of the regional federal appellate system composed of a relatively small number of geographical circuits and the non-regional Federal Circuit. We therefore urge Congress to enact our divisional proposal and thus enable the Ninth Circuit and its court of appeals to continue to serve as a laboratory for innovation.

No set of measures can, of course, be good for all time, but we believe that the proposals recommended in this report will, if enacted, provide the nation with a federal appellate structure that, with adequate funding, should operate well into the indefinite future. The recommendations in this report reflect our best effort to adapt the appellate system to current realities with the least cost and the greatest benefit to litigants, the bar, the judiciary, and of course the citizens of the country. The benefits of these proposals are not without some costs, at least to established ways of doing business, but we believe the benefits outweigh the costs.

With the submission of this final report to the Congress and the President, the Commission considers that it has discharged its ultimate statutory responsibility to recommend "such changes in circuit boundaries or structure as may be appropriate for the expeditious and effective disposition of the caseload of the Federal Courts of Appeals, consistent with fundamental concepts of fairness and due process."

**Statement of Judge Merritt, Joined by Justice White,
Dissenting in Part from Chapter 1’s Section Entitled
“Jurisdiction and Structure” (p. 5)**

A few weeks ago I suggested to the Commission that we present to Congress a plan that would reduce the caseload presented by the diversity cases. The plan was laid over to be passed upon on September 15, which was the date set for making as much progress as possible in order to get a proposed report to be presented to the public. The September vote on the diversity jurisdiction plan was three to two against the plan. The controlling reason given by the majority, as I understand it, was that a plan suggesting changes in federal jurisdiction exceeds our statutory power plain and simple.

The relevant language of the statute creating this Commission is this: We are to make “recommendations for such changes in circuit boundaries or structure as may be appropriate for the expeditious and effective disposition of the caseload of the Federal Courts of Appeals.” My plan easily passes muster under this statutory language. It recommends restructuring diversity jurisdiction by Congress and is aimed at reducing circuit court caseload substantially. The majority interprets its mandate to cover federal jurisdiction only if the issue is joined with “structure.” But diversity jurisdiction is plainly structural. Furthermore, the Report also indicates that it is not acceptable to address district court jurisdiction because the Commissioners did not choose to review the caseloads of both circuit courts and district courts. Yet, the Commission proposes to have district court panels act as appellate panels—a proposal affecting both structure and caseload. In light of this proposal, I press my plan.

The growing caseload of the federal courts is our most significant problem. It drives the needs to create judgeships, which in turn drives the need to create courts. No substantial progress can be made in curtailing the growth in the size of the federal judiciary and its large staff unless Congress makes changes in jurisdiction. Thus, caseload and jurisdiction directly relate to and impact the structure of the appellate courts. The debate which gave rise to the creation of this Commission was fueled in part by caseload problems facing the Ninth Circuit Court of Appeals. Congress seeks our recommendations for changes in structure that may be appropriate for the effective disposition of the caseload of the federal courts of appeals. We devote an entire chapter in our report to the history of caseload and judgeships in the circuits and courts of appeals. Yet, the majority of our Commission construes our mandate from Congress so narrowly that they preclude consideration of factors that impact caseload most—i.e., the jurisdiction of the federal courts—and thereby deprive Congress and the President of the benefit of recommendations that not only will treat the symptoms of the caseload problem but would also provide a cure to the problem.

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For these reasons, we respectfully dissent from the Commission majority's decision not to make recommendations about overall federal jurisdiction, and we present a plan to modify substantially diversity jurisdiction. If such a change were made, it would give breathing room to courts of appeals now being overwhelmed with cases and it might well obviate the need to make substantial changes in the federal courts of appeals for several decades. Following our discussion of this plan, we conclude with some additional observations on the jurisdiction of the federal courts.

I. Proposal to Reduce Diversity Jurisdiction

Although diversity jurisdiction has been under attack since the Founding of the nation, it has survived because there has always been an understanding that federal courts are needed to counteract the local influence that sometimes prejudices the state courts in cases involving out-of-state parties. Consequently, past proposals to abolish or severely restrict diversity jurisdiction have consistently failed.

Senator Kenneth McKellar proposed a new solution in 1945 that would have eliminated original diversity jurisdiction and allowed defendants to remove cases to federal court when they could show proof of local influence or prejudice. This would have made diversity jurisdiction consistent with its original purpose while providing enormous relief to the federal dockets by removing those run-of-the-mill state-law cases that have no legitimate claim to a federal forum. Judge William Denman of the Ninth Circuit Court of Appeals testified on behalf of federal judges in favor of Senator McKellar's proposal to replace general original diversity jurisdiction with special removal jurisdiction in cases involving local prejudice. In his testimony to the Senate Judiciary Committee, Judge Denman noted the vast changes that have unified the country since the Founding and pointed out the fallacy in assuming that state courts are always inferior. Judge Denman asked, "Are the States of the union sufficiently civilized to provide courts in which even justice is done, in controversies involving nothing but State laws, between citizens of one State and those of the other State?" After observing how two world wars had unified the country and how judges from around the world had begun visiting the United States to study our judicial system, he answered with an unqualified "yes."¹⁰⁹

Recently, Judge Jon Newman of the Second Circuit Court of Appeals revived interest in Senator McKellar's idea with his suggestion to make certain classes of federal jurisdiction discretionary: "Permitting federal judges to exercise discretion as to whether particular cases . . . may proceed in federal court would re-allocate substantial numbers of federal court cases to state courts while preserv-

109. Hearing Before the Senate Judiciary Committee on S. 466, 79th Cong., 1st Sess. (Oct. 8, 1945).

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ing the opportunity for federal judges to decide those cases that especially merit federal court consideration.” Judge Newman’s plan would eliminate original jurisdiction based on diversity of citizenship but would allow removal to federal court in certain cases, depending on “such factors as the multi-state nature of the dispute or a reasonably perceived risk of local prejudice.”¹¹⁰

As the Federal Courts Study Committee recently observed, “no other class of cases has a weaker claim on federal judicial resources” and “no other step will do anywhere nearly as much to reduce federal caseload pressures and contain the growth of the federal judiciary.”¹¹¹ Some statistics will illustrate this point. Last year, the district courts heard 55,278 state law cases that came into federal court simply because the parties were from different states.¹¹² In the same year, 1,767, or almost 40%, of the 4,557 civil jury trials were diversity cases.¹¹³ Moreover, the courts of appeals heard 3,776 diversity appeals last year.¹¹⁴ Between 1995 and 1997, diversity cases in the courts of appeals constituted 21% of all orally argued civil cases and 17% of all published opinions in civil cases.¹¹⁵ Diversity cases are of “above-average difficulty” in terms of the workload of the federal courts.¹¹⁶ Oftentimes, these cases present complex questions of federal procedure and state law, they involve difficult and complicated facts, and they consume a disproportionate share of federal judicial time.¹¹⁷

We therefore encourage Congress to adopt a system of diversity jurisdiction with special removal in cases involving local prejudice or complex multistate subject matter, similar to that suggested by Senator McKellar and Judge Newman. This proposal would eliminate federal jurisdiction over diversity cases where state-court adjudication would be equally fair and effective, but it would preserve jurisdiction when the parties can show a concrete need for a federal forum. Such a concrete need may arise because of (1) the existence of local influence that threatens prejudice to an out-of-state litigant, or (2) the complex nature of interstate litigation, such as mass tort cases arising from airline crashes or the nationwide consumer litigation prompted by asbestos.

110. Jon O. Newman, *Restructuring Federal Jurisdiction: Proposals to Preserve the Federal Judicial System*, 56 U. Chi. L. Rev. 761, 771–72 (1989).

111. Report of the Federal Courts Study Committee 39 (April 2, 1990). See also Richard A. Posner, *The Federal Courts: Challenge and Reform* 210–12 (compiling statistics showing that abolishing diversity jurisdiction would substantially decrease the workload of the federal courts).

112. *Judicial Business of the United States Courts: 1997 Report of the Director of the Administrative Office of the U.S. Courts*, Table C-2. This figure represents 20% of the 269,132 civil cases on the district court dockets last year.

113. *Id.* at Table C-4.

114. *Id.* at Table B-7. This figure represents 10% of the 35,414 civil appeals last year.

115. Compiled by Judith McKenna of the Federal Judicial Center from caseload statistics reported by the courts of appeals.

116. Posner, *supra* note 111, at 210–12.

117. See generally Thomas D. Rowe, Jr., *Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms*, 92 Harv. L. Rev. 963 (1979).

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In practical terms, our proposal would operate similarly to the current removal procedure and the existing procedures for multidistrict litigation. Initially, all cases between citizens of different states arising under state law would have to be filed in state court. To avail themselves of the new discretionary diversity jurisdiction, the parties would have to petition for permission to remove their case to federal court. Removal would be permitted in two types of cases. First, an out-of-state plaintiff or defendant could remove a case in which local influence or prejudice would prevent a fair and impartial adjudication in the state courts by petitioning the district court for the federal district encompassing the state forum. In-state plaintiffs and in-state defendants would not be allowed to petition for this type of removal. There simply is no basis—nor has there ever been—for these types of cases being tried in federal courts. Second, those parties in litigation involving numerous parties or multiple claims could remove a case whose interstate complexity requires resolution by a federal court by petitioning the existing multidistrict litigation panel. Federal jurisdiction in these complex multistate cases is warranted because there is no current compact among the states to allow coordinated or consolidated proceedings in cases pending in several states.¹¹⁸ Orders allowing or denying removal on either basis would be subject to limited mandamus review in the courts of appeals.

Specifically, this proposal would require several changes to the U.S. Code, which we have included in the attachment. First, 28 U.S.C. § 1332, the statute creating original jurisdiction in the federal courts according to the domicile of the parties, would be amended to eliminate jurisdiction over cases between citizens of different states.

Second, the removal statute, 28 U.S.C. § 1441, would include two new subsections corresponding to the two types of diversity cases which can be removed to federal court. The new section 1441(c) would allow removal when an out-of-state party in a diversity case involving more than \$75,000 could show “with reasonable certainty that local influence would prejudice that party, making a federal forum decidedly preferable to the State court or any other State courts to which that party may transfer the case under State law.”¹¹⁹ The new

118. The American Law Institute’s complex litigation project proposed just such a compact to promote the efficient resolution of these cases. *See* American Law Institute, Complex Litigation Project 165–216 (Final Draft, May 5, 1993; published 1994).

119. We do not include any more specific factors to constitute local influence because it is our opinion that the common law will best define the parameters of this removal provision. It is worth noting that in 1888, Congress adopted a removal statute using language on local prejudice similar to the standard proposed here. Until 1948, that statute supplemented the diversity statute by allowing an out-of-state defendant to remove “at any time before trial” in the state court “when it shall be made to appear to said circuit court that from local prejudice or local influence he will not be able to obtain justice in such state court, or in any other court to which the said defendant may, under the laws of the state have the right, on account of such prejudice or local influence to remove said cause.” Review by mandamus was allowed, and the statute was fleshed out in

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section 1441(d) would allow removal of complex interstate diversity cases involving more than \$75,000 if the multidistrict litigation panel created by 28 U.S.C. § 1407 grants permission to the parties.

Third, 28 U.S.C. § 1446, the statute governing the procedures for removal, would include a new subsection describing the special removal procedures for cases involving local prejudice. This new section 1446(c) would require an out-of-state party to file a petition with the relevant district court “signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and stating with particularity how it is reasonably certain that local influence would prejudice that party” in the state courts. This section also sets a sixty-day limit for the district court to “determine whether removal is appropriate under the particular circumstances presented in the petition” and specifies that the decision “permitting or denying removal” is reviewable only through an extraordinary writ (mandamus) pursuant to 28 U.S.C. § 1651.

Finally, the multidistrict litigation statute, 28 U.S.C. § 1407, would be amended to allow the removal and transfer of “civil actions involving one or more common questions of fact” currently “pending in state courts between parties who qualify for jurisdiction” under the revised section 1441(d). The new section 1407(b) would require parties in these cases to petition the multidistrict litigation panel for removal by showing that “removal to federal court is necessary for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.” If the multidistrict litigation panel decides removal is not appropriate, this subsection requires the panel to remand the case “to the State court in which it was pending”; if the panel determines removal is appropriate, “the case will be removed to the appropriate district court and may be transferred to any district for coordinated or consolidated pretrial proceedings.” Once the pretrial proceedings conclude, the panel would remand the case “to the federal district court to which the case was originally removed.” The current statute already provides for mandamus review of the panel’s decisions.

To make our proposal politically feasible, we have focused our advice on the one area of federal jurisdiction that is sure to prove the maximum caseload relief for the federal courts with minimum impact on those citizens who have a legitimate claim to a federal forum. The legislation described here should be more successful than the numerous proposals to reform diversity jurisdiction in the past because this proposal eliminates the run-of-the-mill state-law cases unnecessarily burdening the federal courts, without sacrificing federal adjudication for those who truly need it. We therefore encourage the Congress and the President to provide the federal courts needed relief by adopting this proposal and seeing that it becomes law.

several early mandamus appeals. *See, e.g., In re Pennsylvania Co.*, 137 U.S. 451 (1890); *City of Detroit v. Detroit City Ry.*, 54 F. 1 (C.C.E.D. Mich. 1893) (opinion by William Howard Taft); *Schwenk & Co. v. Strange*, 59 F. 209 (C.C.A. 8 1893).

II. Appropriate Federal–State Allocation of Judicial Business

Federal courts are courts of limited jurisdiction whose mission is primarily to adjudicate cases and controversies having to do with matters of national interest that state courts—which are courts of general jurisdiction that handle over 90% of all litigation in this country—are unable or unsuited to handle effectively. Congress should periodically look at federal jurisdiction to see if there are cases, such as diversity cases, that can be returned to the state courts for adjudication. Moreover, the nature and extent of federal jurisdiction is for Congress to decide, but we believe that no legislation extending federal jurisdiction into areas that traditionally fall within the scope of state regulation or prosecution should be enacted without full and informed consideration of the appropriate balance of jurisdiction between state and federal courts, as well as the effect that proposed legislation will have on the ability of the federal courts, including the courts of appeals, to carry out their core functions.

The core functions of the federal courts are:

- enforcing individual rights and liberties provided by the federal constitution, including habeas corpus petitions of state prisoners;
- enforcing the institutional separation of powers provided by the federal constitution;
- adjudicating disputes involving the interests of the federal government;
- determining claims involving foreign governments;
- resolving disputes between states;
- interpreting and applying federal treaties and statutes, especially in areas where it appears essential to have a federal forum available (for example, in civil rights, bankruptcy, and patent matters);
- developing federal common law where indicated (for example, in connection with the antitrust laws and statutes such as ERISA); and
- deciding appeals from rulings by federal administrative agencies.

By the same token, as most crimes are prosecuted under state law in state courts, the core function of the federal courts lies in providing a forum for prosecution of

- offenses against the United States itself;
- multistate or international criminal activity that is difficult or impossible for a single state or its courts to handle effectively;
- crimes that involve a matter of overriding federal interest, such as a violation of civil rights by state actors;
- widespread corruption at the state or local level; and
- crimes of such magnitude or complexity that federal resources are required.

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Laws such as the current diversity statutes that extend federal jurisdiction beyond these core functions have two significant adverse effects: First, they adversely affect the allocation of responsibility between the state and federal systems that is fundamental to the structure of the overall system of justice in our country. Second, they imperil fulfillment of the federal system's core function by increasing the demand on the limited resources of the federal courts and diluting their ability to focus on matters that are paramount to the national interest.

For these reasons we recommend that the Congress carefully weigh the risks of structural imbalance and adverse impact on the capacity of the federal courts of appeals to perform their core functions before creating new rights or remedies that lie within the scope of state regulation or prosecution and beyond the traditional scope of federal jurisdiction. Decisions about whether to confer new responsibilities on the federal system that have traditionally been handled by the states should be informed by data about the capacity of the state and federal systems, their respective areas of historic expertise, the primary mission of each, and the cost and benefit of reallocating resources. Legislation assigning new responsibilities to the federal courts should not be enacted unless the states do not and will not take responsibility for the area of perceived need, state programs are inadequate, no alternatives are available, and a federal interest is substantially implicated. Factors that should be considered include:

- whether the proposed legislation would assign work to the federal system that is within its core functions;
- whether states are inadequately addressing the perceived need;
- whether federal financial or other assistance to state justice systems would cure any current inadequacy in the states' ability to address these needs;¹²⁰
- the capacity of the federal courts to take on new business without additional resources or restructuring;
- the extent to which proposed legislation is likely to affect the caseload, and in turn, the capacity of the federal courts to perform their core functions and to fulfill their mandate for the "just, speedy and inexpensive determination" of actions;
- the cost of delay to litigants; and
- whether the perceived needs are or could be served as well or better (more efficiently and economically) by alternatives to federal jurisdiction (such as alternative dispute resolution, or administrative proceedings).

120. The congressionally established State Justice Institute is a conduit through which federal funding could be directed to state courts to enable them to handle matters that might otherwise be routed to the federal courts.

Attachment to Statement of Judge Merritt

Proposed Statute to Reduce Diversity Jurisdiction in the Federal Courts

Sec. 1. (a) Section 1332 of Title 28, United States Code, is amended by striking part of the title as follows:

“Diversity of Citizenship”

and substituting in its place the word

“Alienage”

(b) Section 1332 of Title 28, United States Code, is further amended by striking subsection (a)(1), which provides:

“(1) citizens of different states”

and renumbering subparts (a)(2), (a)(3) and (a)(4) as follows:

Subparts “(2)”, “(3)” and “(4)” will become “(1)”, “(2)” and “(3)” respectively.

(c) Section 1332 of Title 28, United States Code, is further amended by inserting into subsection (d), after the term “section” and before the comma, the following words:

“and in section 1441 of this title”

Sec. 2. (a) Section 1441 of Title 28, United States Code, is amended by striking the beginning of the phrase in sentence two of subsection (b) as follows:

“Any other such action”

and substituting in its place the following:

“Any civil action of which the district courts have original jurisdiction pursuant to section 1332 of this title”

(b) Section 1441 of Title 28, United States Code, is further amended by redesignating subsections (c), (d) and (e) and adding new subsections (c) and (d) as follows:

Previous subsections “(c)”, “(d)” and “(e)” will become “(e)”, “(f)” and “(g)” respectively

And new subsections (c) and (d) will be added as follows:

“(c) Any suit of a civil nature brought in any State court between a citizen of the forum state and a citizen of a different State may be removed by the out-of-state party to the district court of the United States for the district and division embracing the place where the state action is pending, at any time before the trial or final judgment, if the matter in controversy exceeds the sum or value of \$75,000, exclusive of interests or costs, and if the out-of-state party shows with reasonable certainty that local influence would prejudice that party, making a federal forum decidedly preferable to the State court or any other State courts to which that party may transfer the case under State law.”

“(d) Any party in a suit of a civil nature brought in any State court between citizens of different states in which the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest or costs, may petition the multidistrict litigation panel for removal and transfer of an action pursuant to section 1407(b)

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of this title. If the panel accepts the action for multidistrict litigation, the panel shall order the case removed to the district court for the district embracing the place where the state action is pending and the case shall then proceed as provided in section 1407 of this title."

Sec. 3. (a) Section 1446 of Title 28, United States Code, is amended by adding the following phrase at the beginning of subsections (a) and (b):

"Except as provided in subsection (c),"

(b) Section 1446 of Title 28, United States Code, is further amended by relettering subsections (c), (d), (e) and (f) and adding new subsection (c) as follows:

Previous subsections "(c)", "(d)", "(e)" and "(f)" will become "(d)", "(e)", "(f)" and "(g)" respectively.

And new subsection (c) will be added as follows:

"(c) An out-of-state party desiring to remove any civil action from a State court pursuant to section 1441(c) of this title shall, before the trial or final judgment in the State court, file in the district court for the district and division embracing the place where such action is pending a petition for removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and stating with particularity how it is reasonably certain that local influence would prejudice that party, making a federal forum decidedly preferable to the State court or any other State courts to which that party may transfer the case under State law. The district court shall, within 60 days after the petition is filed, determine whether removal is appropriate under the particular circumstances presented in the petition. An order permitting or denying removal under section 1441(c) of this title is not reviewable except by extraordinary writ pursuant to section 1651 of this title."

(c) Section 1446 of Title 28, United States Code, is further amended by inserting into the newly designated subsection (e), previously designated as subsection (d), after the term "removal" and before the term "of," the following phrase:

"or petition for removal"

(d) Section 1446 of Title 28, United States Code, is further amended by striking a portion of the phrase in newly designated subsection (e), previously designated as subsection (d), as follows:

"defendant or defendants"

and substituting in its place the phrase

"removing party"

Sec. 4. Section 1407 of Title 28, United States Code, is amended by relettering subsections (b), (c), (d), (e), (f), (g) and (h) and adding new subsections (b), (e) and (f) as follows:

Previous subsections "(b)", "(c)", "(d)", "(e)", "(f)", "(g)" and "(h)" will become "(c)", "(d)", "(g)", "(h)", "(i)", "(j)", and "(k)" respectively

And new subsections (b) and (e) will be added as follows:

"(b) When civil actions involving one or more common questions of fact are pending in state courts between parties who qualify for federal jurisdiction pur-

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suant to section 1441(d) of this title, such actions may be removed to the district court of the United States for the district and division embracing the place where such action is pending. Such removal shall be ordered by the judicial panel on multidistrict litigation authorized by this section upon its determination that removal to federal court is necessary for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. If the panel concludes removal is not appropriate under this subsection, the panel shall deny the petition. If the panel concludes removal is appropriate under this subsection, the panel shall order the case removed to the appropriate district court, and the case may be transferred to any district for coordinated or consolidated pretrial proceedings. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the federal district court to which the case was originally removed unless it shall have been previously terminated: *Provided, however,* That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded."

"(e) Proceedings for the removal of an action under subsection (b) may be initiated by petition filed with the panel by a party in any action in which removal under this section may be appropriate. A copy of such petition shall be filed in the State court in which the moving party's action is pending, and the State court shall proceed no further unless and until the panel denies the petition for removal. Proceedings for the transfer of an action under subsection (b) may be initiated by motion filed with the panel by a party in any action in which transfer for coordinated or consolidated pretrial proceedings under this section may be appropriate. A copy of such motion shall be filed in the federal district court to which the case was originally removed."

And the letter "(f)", designating a new subsection, will be inserted at the beginning of the text, before the term "The", in the second full paragraph contained in previously designated subsection (c).

APPENDICES TO COMMISSION REPORT

APPENDIX A

THE COMMISSION STATUTE

Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998

(Pub. L. No. 105-119. approved Nov. 26, 1997)

Section 305

- (a) COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS-
- (1) ESTABLISHMENT AND FUNCTIONS OF COMMISSION-
- (A) ESTABLISHMENT- There is established a Commission on Structural Alternatives for the Federal Courts of Appeals (hereinafter referred to as the 'Commission').
- (B) FUNCTIONS- The functions of the Commission shall be to—
- (i) study the present division of the United States into the several judicial circuits;
- (ii) study the structure and alignment of the Federal Court of Appeals system, with particular reference to the Ninth Circuit; and
- (iii) report to the President and the Congress its recommendations for such changes in circuit boundaries or structure as may be appropriate for the expeditious and effective disposition of the caseload of the Federal Courts of Appeals, consistent with fundamental concepts of fairness and due process.
- (2) MEMBERSHIP-
- (A) COMPOSITION- The Commission shall be composed of five members who shall be appointed by the Chief Justice of the United States.
- (B) APPOINTMENT- The members of the Commission shall be appointed within 30 days after the date of enactment of this Act.
- (C) VACANCY- Any vacancy in the Commission shall be filled in the same manner as the original appointment.
- (D) CHAIR- The Commission shall elect a chair and vice chair from among its members.
- (E) QUORUM- Three members of the Commission shall constitute a quorum, but two may conduct hearings.
- (3) COMPENSATION-
- (A) IN GENERAL- Members of the Commission who are officers, or

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full-time employees, of the United States shall receive no additional compensation for their services, but shall be reimbursed for travel, subsistence, and other necessary expenses incurred in the performance of duties vested in the Commission, but not in excess of the maximum amounts authorized under section 456 of title 28, United States Code.

(B) Members of the Commission from private life shall receive \$200 for each day (including travel time) during which the member is engaged in the actual performance of studies, but not in excess of the maximum amounts authorized under section 456 of title 28, United States Code.

(4) PERSONNEL-

(A) EXECUTIVE DIRECTOR- The Commission may appoint an Executive Director who shall receive compensation at a rate not exceeding the rate prescribed for level V of the Executive Schedule under section 5316 of title 5, United States Code.

(B) STAFF- The Executive Director, with the approval of the Commission, may appoint and fix the compensation of such additional personnel as the Executive Director determines necessary, without regard to the provisions of title 5, United States Code, governing appointments in the competitive service or the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates. Compensation under this paragraph shall not exceed the annual maximum rate of basic pay for a position above GS-15 of the General Schedule under section 5108 of title 5, United States Code.

(C) EXPERTS AND CONSULTANTS- The Executive Director may procure personal services of experts and consultants as authorized by section 3109 of title 5, United States Code, at rates not to exceed the highest level payable under the General Schedule pay rates under section 5332 of title 5, United States Code.

(D) SERVICES- The Administrative Office of the United States Courts shall provide administrative services, including financial and budgeting services, to the Commission on a reimbursable basis. The Federal Judicial Center shall provide necessary research services to the Commission on a reimbursable basis.

(5) INFORMATION- The Commission is authorized to request from any department, agency, or independent instrumentality of the Government any information and assistance the Commission determines necessary to carry out its functions under this section. Each such department, agency, and independent instrumentality is authorized to provide such informa-

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tion and assistance to the extent permitted by law when requested by the chair of the Commission.

- (6) REPORT- The Commission shall conduct the studies required in this section during the 10-month period beginning on the date on which a quorum of the Commission has been appointed. Not later than 2 months following the completion of such 10-month period, the Commission shall submit its report to the President and the Congress. The Commission shall terminate 90 days after the date of the submission of its report.
- (b) AUTHORIZATION OF APPROPRIATIONS- There are authorized to be appropriated to the Commission such sums, not to exceed \$900,000, as may be necessary to carry out the purposes of this section. Such sums as are appropriated shall remain available until expended.

APPENDIX B MEMBERS OF THE COMMISSION

Byron R. White (chair) is Associate Justice of the Supreme Court, Retired. Justice White was appointed to the Supreme Court by President Kennedy in 1962. He retired on June 28, 1993. Prior to his appointment to the Court, he was Deputy Attorney General of the United States (1961–1962) and in private practice in Denver, Colorado. Justice White served as a law clerk to Chief Justice Vinson from 1946 to 1947.

N. Lee Cooper (vice-chair) has practiced law in Birmingham, Alabama, since 1966. He served from 1996 to 1997 as the President of the American Bar Association and held numerous other positions in the Association, including chair of the Section of Litigation. He is a director of the American Bar Endowment and a Fellow of the American Bar Foundation.

Gilbert S. Merritt is a judge of the U.S. Court of Appeals for the Sixth Circuit. He was appointed to the court in 1977 and served as chief judge, and thus as a member of the Judicial Conference of the United States, from 1989 until 1997. He chaired the Executive Committee of the Conference from 1994 until 1997. Before his appointment to the court, he was in private practice in Nashville, Tennessee, and was U.S. Attorney for the Middle District of Tennessee from 1966 to 1969.

Pamela Ann Rymer is a judge of the U.S. Court of Appeals for the Ninth Circuit. She was appointed to the court in 1989, having served as a U.S. district judge for the Central District of California since 1983. She has served on several committees of the Judicial Conference of the United States and of the Ninth Circuit, and is a member of Stanford University's Board of Trustees.

William D. Browning is a senior U.S. district judge for the District of Arizona. He was appointed in 1984 and took senior status in 1998. Judge Browning was chief judge of the District of Arizona from 1990 to 1994 and was a member of the Judicial Conference of the United States and the Judicial Council of the Ninth Circuit. Before his appointment to the court, he was in private practice in Tucson, Arizona, and served as president of the State Bar of Arizona.

APPENDIX C
PROPOSED STATUTES TO IMPLEMENT COMMISSION
RECOMMENDATIONS

This appendix contains:

1. Statute for Divisional Organization of the Court of Appeals for the Ninth Circuit (as proposed in Chapter 3)
2. Statute to enact a new 28 U.S.C. § 46 to provide for divisional organization of large courts of appeals and for two-judge panels; to provide for repeal of authorization for limited en banc proceedings, and other purposes (as proposed in Chapter 4)
3. Statute Authorizing District Court Appellate Panels (as proposed in Chapter 4)
- 4a. Statute for Direct Appeal of Bankruptcy Decisions to the Courts of Appeals with Assistance from Bankruptcy Appellate Panels (as described in Chapter 5)
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1. Statute for Divisional Organization of the Court of Appeals for the Ninth Circuit (as proposed in Chapter 3)

Sec. 1. Six months after the date of enactment of this Act, the United States Court of Appeals for the Ninth Circuit shall be organized into three regional divisions designated as the Northern Division, the Middle Division, and the Southern Division, and a non-regional division designated as the Circuit Division.

Sec. 2. The provisions of section 1294 of title 28, United States Code, shall not apply to the Ninth Circuit Court of Appeals during the effective period of this Act. Instead, review of district court decisions shall be governed as provided herein.

- a. Except as provided in sections 1292(c), 1292(d), and 1295 of title 28, United States Code, appeals from reviewable decisions of the district and territorial courts located within the Ninth Circuit shall be taken to the regional divisions of the Ninth Circuit Court of Appeals as follows:
 - (1) appeals from the districts of Alaska, Idaho, Montana, Oregon, Eastern Washington and Western Washington shall be taken to the Northern Division;
 - (2) appeals from the districts of Eastern California, Northern California, Guam, Hawaii, Nevada, and Northern Mariana Islands shall be taken to the Middle Division;

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- (3) appeals from the districts of Arizona, Central California, and Southern California shall be taken to the Southern Division; and
- (4) appeals from decisions of federal administrative agencies shall be taken to the regional division specified in the rules of the court of appeals.
- b. Each regional division shall include from seven to eleven judges of the court of appeals in active status. A majority of the judges assigned to each division shall reside within the judicial districts that are within the division's jurisdiction as specified above; provided, however, that judges may be assigned to serve, for specified terms of one year or more, in a division in which they do not reside. Such judges shall be assigned at random, by means determined by the court, in such numbers as necessary to enable the divisions to function effectively. The decisions of one regional division shall not be regarded as binding precedents in the other regional divisions.
- c. The provisions of section 45 of title 28, United States Code, shall govern the designation of the presiding judge of each regional division as though the division were a court of appeals; provided, however, that the judge serving as chief judge of the circuit may not at the same time serve as presiding judge of a division.
- d. Panels of a division may sit to hear and decide cases at any place within the judicial districts of the division, as specified by a majority of the judges of the division. A judge assigned to one division may be assigned by the chief judge of the circuit for temporary duty in another division. The divisions shall be governed by the Federal Rules of Appellate Procedure and by local rules and internal operating procedures adopted by the court of appeals. The divisions may not adopt their own local rules or internal operating procedures.

Sec. 3. In addition to the three regional divisions specified above, the Ninth Circuit Court of Appeals shall organize, within six months after the date of enactment of this Act, a Circuit Division composed of the chief judge of the circuit, the presiding judge of each regional division, and one other circuit judge in active status from each of the regional divisions, selected in accordance with rules prescribed by the court of appeals for nonrenewable terms of three years each.

- a. The Circuit Division shall have jurisdiction to review, and to affirm, reverse, or modify, final decisions rendered in any of the court's divisions. The exercise of such jurisdiction shall be within the discretion of the Circuit Division and may be invoked by application for review by a party to the case, only on the ground that there is a conflict on a question of law between a decision of one division and a decision of another. The Circuit Division may review the decision of a panel within a division only if en banc review of the decision has been sought and denied by the division.

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- b. The provisions of section 46 of title 28, United States Code, shall apply to each regional division of the Ninth Circuit Court of Appeals as though the division were the court of appeals. The provisions of subsection 46(c), authorizing hearings or rehearings en banc, shall be applicable only to the regional divisions of the court and not to the court of appeals as a whole. The Circuit Division shall consider and decide cases en banc.

Sec. 4. The provisions of section 332 of title 28, United States Code, governing circuit judicial councils, shall apply to the Ninth Circuit during the effective period of this Act; provided, however, that the Judicial Council of the Ninth Circuit shall include, but is not limited to, the chief judge of the circuit, the presiding judge of each regional division of the court of appeals, and at least one district judge from each regional division.

Sec. 5. The provisions of section 711 of title 28, United States Code, shall apply to the Ninth Circuit Court of Appeals during the effective period of this Act; provided, however, that the clerk of the Ninth Circuit Court of Appeals may maintain an office or offices in each regional division of the court to provide services of the clerk's office for that division.

Sec. 6. The Federal Judicial Center shall conduct a study of the effectiveness and efficiency of the divisions in the Ninth Circuit Court of Appeals, and, within eight years after the effective date of this Act, submit to the Judicial Conference of the United States a report summarizing the activities of the divisions, including the Circuit Division, and evaluating the effectiveness and efficiency of the divisional structure.

Sec. 7. This Act shall terminate seven years after the date of enactment of this Act.

2. Statute to enact a new 28 U.S.C. § 46 to provide for divisional organization of large courts of appeals and for two-judge panels; to provide for repeal of authorization for limited en banc proceedings, and other purposes (as proposed in Chapter 4)

Sec. 1. Section 46 of Title 28, United States Code, is hereby repealed and replaced by the following:

Sec. 46. Assignment of judges; panels; en banc proceedings; divisions; quorum

(a) Circuit judges shall sit on the court of appeals and its panels in such order and at such times as the court directs.

(b) Unless otherwise provided by rule of court, a court of appeals or any

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regional division thereof shall consider and decide cases and controversies through panels of three judges, at least two of whom shall be judges of the court, unless such judges cannot sit because recused or disqualified, or unless the chief judge of that court certifies that there is an emergency including, but not limited to, the unavailability of a judge of the court because of illness. A court may provide by rule for the disposition of appeals through panels consisting of two judges, both of whom shall be judges of the court. Panels of the court shall sit at the times and places and hear the cases and controversies assigned as the court directs. The United States Court of Appeals for the Federal Circuit shall determine by rule a procedure for the rotation of judges from panel to panel to ensure that all of the judges sit on a representative cross section of the cases heard and, notwithstanding the first sentence of this subsection, may determine by rule the number of judges, not less than two, who constitute a panel.

(c) Notwithstanding the provisions of subsection (b), a majority of the judges of a court of appeals not organized into divisions as provided in subsection (d) who are in regular active service may order a hearing or rehearing before the court en banc. A court en banc shall consist of all circuit judges in regular active service, except that any senior circuit judge of the circuit shall be eligible to participate, at that judge's election and upon designation and assignment pursuant to section 294(c) of this title and the rules of the circuit, as a member of an en banc court reviewing a decision of a panel of which such judge was a member.

(d) A court of appeals having more than thirteen authorized judgeships may organize itself into two or more divisions, with each judge of the court assigned to a specific division, either for a specified term of years or indefinitely. The court's docket shall be allocated among the divisions in accordance with a plan adopted by the court, and each division shall have exclusive appellate jurisdiction over the appeals assigned to it. A court of appeals having more than seventeen authorized judgeships shall organize itself into divisions, in accordance with the provisions of this subsection. If such court does not so organize itself within two years after the eighteenth judgeship is created, the judicial council of the circuit shall enter an order organizing the court into divisions, consistent with the provisions of this subsection. The presiding judge of each division shall be selected from among the judges of the division in active status as though the division were the court of appeals; provided, however, that the chief judge of the circuit shall not serve at the same time as the presiding judge of a division.

When organizing itself into divisions, a court of appeals shall establish a Circuit Division, consisting of the chief judge, the presiding judge of each division, and additional circuit judges in active status, selected in accordance with rules adopted by the court, so as to make an odd number of judges but not more than nine. The Circuit Division shall have jurisdiction in its discretion solely to resolve conflicting holdings between the court's divisions; it shall function under rules

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adopted by the court. After the establishment of a divisional plan of organization, a court of appeals shall not consider and decide cases en banc, but each division shall employ the en banc procedure as though it were the court of appeals.

(e) A majority of the number of judges authorized to constitute a court or panel thereof shall constitute a quorum.

Sec. 2. The provision of section 6 of Pub. L. 95-486, 92 Stat. 1633 (Oct. 20, 1978), authorizing courts of appeals with more than 15 active judges to perform its en banc function by such number of members of its en banc court as may be prescribed by rule of the court of appeals, is hereby repealed.

Sec. 3. After the divisional plan is in operation, the court of appeals shall grant no new petitions for hearing or rehearing en banc. However, petitions already granted may be heard in accordance with Federal Rule of Appellate Procedure 35.

Sec. 4. The Federal Judicial Center shall monitor the implementation of section 46 for eight years following the date of enactment of this Act and report to the Judicial Conference such information as it believes relevant or that the Conference requests to enable the Conference to assess the effectiveness and efficiency of this section.

3. Statute Authorizing District Court Appellate Panels (as proposed in Chapter 4)

Sec. 1. Title 28 of the United States Code is hereby amended by inserting the following new section:

145. District Court Appellate Panels

(a) The judicial council of each circuit may establish a district court appellate panel service composed of district judges and circuit judges of the circuit, in either active or senior status, who are assigned by the judicial council to hear and determine appeals in accordance with subsection (b). Judges assigned to the district court appellate panel service may continue to perform other judicial duties.

(b) An appeal heard under this section shall be heard by a panel composed of two district judges and one circuit judge assigned to the district court appellate panel service, as designated by the chief judge of the circuit. The circuit judge shall preside. A district judge serving on an appellate panel shall not participate in the review of decisions of the district court to which the judge has been appointed. The clerk of the court of appeals shall serve as the clerk of the district

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court appellate panels. A district court appellate panel may sit at any place within the circuit, pursuant to rules promulgated by the judicial council, to hear and decide cases, for the convenience of parties and counsel.

(c) In establishing a district court appellate panel service, the judicial council shall specify the categories or types of cases over which district court appellate panels shall have appellate jurisdiction. In such cases specified by the judicial council as appropriate for assignment to district court appellate panels, and notwithstanding the provisions of sections 1291 and 1292 of this title, the appellate panel shall have exclusive jurisdiction over district court decisions and may exercise all of the authority otherwise vested in the court of appeals under sections 1291, 1292, 1651, and 2106 of this title. A district court appellate panel may transfer a case within its jurisdiction to the court of appeals if the panel determines that disposition of the case involves a question of law that should be determined by the court of appeals; the court of appeals shall thereupon assume jurisdiction over the case for all purposes.

(d) Final decisions of district court appellate panels may be reviewed by the court of appeals, in its discretion. A party seeking review shall file a petition for leave to appeal in the court of appeals, which that court may grant or deny in its discretion. The jurisdiction of the court of appeals shall be exercised to maintain consistency and uniformity in the law throughout the circuit and to settle important questions of law.

(e) Procedures governing review in district court appellate panels and the discretionary review of such panels in the court of appeals shall be in accordance with rules promulgated by the court of appeals.

(f) After a judicial council of a circuit makes an order establishing a district court appellate panel service, the chief judge of the circuit may request the Chief Justice of the United States to assign one or more district judges from another circuit to serve on a District Court Appellate Panel, if the chief judge determines there is a need for such judges; the Chief Justice may thereupon designate and assign such judges for this purpose.

Sec. 2. The Federal Judicial Center shall monitor the implementation of section 145 for eight years following the date of enactment of this Act and report to the Judicial Conference such information as it believes relevant or that the Conference requests to enable the Conference to assess the effectiveness and efficiency of this section.

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4a. Statute for Direct Appeal of Bankruptcy Decisions to the Courts of Appeals with Assistance from Bankruptcy Appellate Panels (as described in Chapter 5)

Note: Existing 28 U.S.C. § 158, which provides for appeal of bankruptcy court decisions to the district court or BAP, would be repealed, and a new 28 U.S.C. § 1293 would be added.

Title 28, United States Code, is hereby amended by inserting the following new section:

§ 1293. Bankruptcy Appeals

(a) The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction over appeals from the following:

- (1) Final judgments, orders, and decrees entered by bankruptcy judges and district courts in cases under title 11, in proceedings arising under title 11, and in proceedings arising in or related to a case under title 11.
- (2) Interlocutory orders and decrees entered by bankruptcy judges and district courts granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve injunctions in cases under title 11, in proceedings arising under title 11, and in proceedings arising in or related to a case under title 11, other than proceedings regarding the automatic stay of section 362 of title 11.
- (3) Interlocutory orders and decrees of bankruptcy judges and district courts entered under section 1104(a) or 1121(d) of title 11, or the refusal to enter an order under such section.
- (4) An interlocutory order or decree of a bankruptcy judge or district court entered in a case under title 11, in a proceeding arising under title 11, or in a proceeding arising in or related to a case under title 11, if the court of appeals that would have jurisdiction over an appeal of a final order entered in such case or such proceeding permits, in its discretion, appeal to be taken from such interlocutory order or decree.

(b) (1) The judicial council of a circuit may establish a bankruptcy appellate panel composed of bankruptcy judges in the circuit who are appointed by the judicial council to exercise the powers described in paragraphs (2)(A) and/or (3) of this subsection.

- (2)(A) If the judicial council so orders, a bankruptcy appellate panel shall exercise the jurisdiction to review judgments, orders, and decrees of bankruptcy judges described in subsection (a) of this section, unless
 - (i) the appellant elects at the time of the filing of appeal; or

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- (ii) any other party elects, not later than 30 days after service of the notice of the appeal;

to have such jurisdiction exercised by the court of appeals.

- (B) The court of appeals may in its discretion review a decision of a bankruptcy appellate panel made under this paragraph (2) upon the motion of any party, upon the recommendation of the bankruptcy appellate panel, or on its own initiative.
- (3) If the court of appeals so orders, a bankruptcy appellate panel shall hear and make a report and recommendation in cases within the jurisdiction to review judgments, orders, and decrees of bankruptcy judges described in subsection (a) of this section. A panel of the court of appeals shall review the report and recommendation de novo and determine the appeal.
- (4) An appeal to be heard by a bankruptcy appellate panel under this subsection (b) shall be heard by three members of the bankruptcy appellate panel, provided that a member of such panel may not hear an appeal originating in the district for which such member is appointed or designated under section 152 of this title.
- (5) If authorized by the Judicial Conference of the United States, the judicial councils of two or more circuits may establish a joint bankruptcy appellate panel.

4b. Statute for Appeal to BAP with Subsequent Appeal to Regional Court of Appeals (as described in Chapter 5)

Note: Existing 28 U.S.C. § 158, which provides for appeal of bankruptcy judge decisions to the district court or BAP, would be repealed, and a new 28 U.S.C. § 1293 would be added.

Title 28, United States Code, is hereby amended by inserting the following new section:

§ 1293. Bankruptcy Appeals

- (a) The judicial council of each circuit shall establish a bankruptcy appellate panel composed of bankruptcy judges in the circuit who are appointed by the judicial council to exercise the powers described in subsection (b). If authorized

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by the Judicial Conference of the United States, the judicial councils of two or more circuits may establish a joint bankruptcy appellate panel. An appeal to be heard by a bankruptcy appellate panel shall be heard by three members of the bankruptcy appellate panel, provided that a member of such panel may not hear an appeal originating in the district for which such member is appointed or designated under section 152 of this title.

(b) The bankruptcy appellate panel shall have jurisdiction of appeals from the following:

- (1) Final judgments, orders, and decrees entered by bankruptcy judges in cases under title 11, in proceedings arising under title 11, and in proceedings arising in or related to a case under title 11.
- (2) Interlocutory orders and decrees entered by bankruptcy judges granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve injunctions in cases under title 11, in proceedings arising under title 11, and in proceedings arising in or related to a case under title 11, other than proceedings regarding the automatic stay of section 362 of title 11.
- (3) Interlocutory orders and decrees of bankruptcy judges entered under section 1104(a) or 1121(d) of title 11, or the refusal to enter an order under such section.
- (4) An interlocutory order or decree of a bankruptcy judge entered in a case under title 11, in a proceeding arising under title 11, or in a proceeding arising in or related to a case under title 11, if the bankruptcy appellate panel that would have jurisdiction of an appeal of a final order entered in such case or such proceeding permits, in its discretion, appeal to be taken from such interlocutory order or decree.

(c) The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from the following:

- (1) Final judgments, orders, and decrees entered by district courts or BAPs in cases under title 11, in proceedings arising under title 11, and in proceedings arising in or related to a case under title 11.
- (2) Interlocutory orders and decrees entered by district courts or BAPs granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve injunctions in cases under title 11, in proceedings arising under title 11, and in proceedings arising in or related to a case under title 11, other than proceedings regarding the automatic stay of section 362 of title 11.
- (3) Interlocutory orders and decrees of district courts or BAPs entered under section 1104(a) or 1121(d) of title 11, or the refusal to enter an order under such section.
- (4) An interlocutory order or decree of a district court or BAP entered in

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a case under title 11, in a proceeding arising under title 11, or in a proceeding arising in or related to a case under title 11, if the court of appeals that would have jurisdiction over an appeal of a final order entered in such case or such proceeding permits, in its discretion, an appeal to be taken from such interlocutory order or decree.