Three Divisions in One Circuit? A Critique of the Recommendations from the Commission on Structural Alternatives for the Federal Courts of Appeals

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THREE DIVISIONS IN ONE CIRCUIT? A CRITIQUE OF THE RECOMMENDATIONS FROM THE COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS

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Though some of my comments are informed by my own experience as a clerk for the Ninth Circuit, this article is not intended to reveal any confidential communication to which I had access while clerking for the Ninth Circuit. Such a revelation would be improper and unnecessary. If I have unwittingly revealed something that should be confidential, I ask the parties involved and the court to accept my sincerest apologies.
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I. INTRODUCTION

On November 26, 1997, President Bill Clinton signed a bill to create the Commission on Structural Alternatives for the Federal Courts of Appeals to study the structure and alignment of the federal courts of appeals with particular reference to the Ninth Circuit. The Commission was a Congressional compromise on what to do with the huge and ever more unpopular Ninth Circuit Court of Appeals. The Senate, led by Alaska Republican and Appropriations Committee Chairman Ted Stevens, passed a rider to the judiciary appropriations bill in the summer of 1997 which would have split the Ninth Circuit in two, but members of the House of Representatives balked at such


   (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.

Id. at § 305(a)(1)(B).

a step under the influence of powerful California Republican members and their Democratic Senate colleagues.\textsuperscript{3} The Senate's proposed Twelfth Circuit Court of Appeals of Alaska, Arizona, Hawaii, Idaho, Montana, Oregon, and Washington, had few merits except that the proposal would have amputated the northwestern states' "tail" from California's "dog" without allowing California to overwhelm Arizona and Hawaii in the process. At another time, the Senate's proposed split might have seemed somewhat bizarre even from the perspective of split supporters. After all, it included non-continuous states\textsuperscript{6} and would have had an Arizona Democratic appointee as its Chief Judge, though Republicans championed the proposal.\textsuperscript{6} It's passage in the Senate demonstrates the determination of many northwestern lawmakers to do almost anything to split the Ninth Circuit.

The five-member Commission on Structural Alternatives issued a tentative draft report to Congress on October 7, 1998,\textsuperscript{7} and a final report on December 18, 1998.\textsuperscript{8} The Commission recommended that the Ninth Circuit be reorganized into "three regionally based adjudicative divisions."\textsuperscript{9} These adjudicative divisions would be semiautonomous — their judges would hear cases only from the division to which they were assigned; they would not be bound by case law from the
court ultimately permitted Alaska to build the highway. See Armbrister, 131 F.3d at 1287.


4. \textit{As United States Senator Slade Gorton from Washington put it, Washington's role compared to California's in the Ninth Circuit is that of "the tail on a huge dog." William Carlsen, Frontier Justice, S.F. CHRON., Oct. 6, 1996, at 127.}

5. Obviously, Hawaii and Alaska are going to be noncontiguous regions of any circuit of which they are members, but the Senate plan would have included Arizona, which does not border any other state in the proposed circuit. See Ostrom, \textit{supra note 2.}


7. Of the judges who would have been members of the Twelfth Circuit under the 1997 Senate plan, Phoenix-based Judge Mary Schroeder fulfills the qualifications of the chief judge statute — she would be the most senior active judge under the age of sixty-five who has not previously served as a chief judge. See 28 U.S.C. § 45(a)(1) (1994) (setting forth the selection criteria for chief circuit judges).


10. \textit{Id. at 41.}
other divisions; and each division would have its own en banc process.\textsuperscript{10} Most, though not all, of the judges in each division would maintain chambers within the corresponding geographic region.\textsuperscript{11} Finally, the Commission would consign the Ninth Circuit's "limited en banc" process to the ashheap of history.\textsuperscript{12} Each division would have its own full division en banc process, and where a case created a genuine inter-divisional split, a new "Circuit Division," a thirteen-judge panel of circuit leaders, would decide what law would govern.\textsuperscript{13}

On January 19, 1999, Alaska Senator Frank Murkowski and Washington Senator Slade Gorton introduced a bill to enact the Commission's recommendations for the Ninth Circuit into law.\textsuperscript{14} In response, the Ninth Circuit's Chief Judge Proctor Hug, Jr. appointed an "Evaluation Committee" to address some of the key criticisms of the current Ninth Circuit administration that had inspired the Commission's recommendations, including the court's limited en banc process, monitoring of panel decisions, regional considerations and disposition times.\textsuperscript{15} Chief Judge Hug has also responded to the Commission's work in a detailed analysis that minimized the support and significant justifications for the Commission's recommendations,\textsuperscript{16} but

\textsuperscript{10} See id. at 43.
\textsuperscript{11} See id.
\textsuperscript{12} See id. at 45.
\textsuperscript{13} Id.
\textsuperscript{15} See generally Media Release, Ninth Circuit Appoints Evaluation Committee to Respond to Court Restructuring Proposal (Mar. 10, 1999) <http://www.cc9.uscourts.gov/web/OCELibrary.nsf/504ca249c786e20f85256284006da7ab/a56e24f2c74c4f2588256730005bb67ab7OpenDocument>. The Committee is chaired by Senior Circuit Judge David R. Thompson, and includes Senior Circuit Judge Edward Leavy, Circuit Judges Mary M. Schroeder, Thomas G. Nelson, Michael Daly Hawkins, M. Margaret McKeown, and Kim Wardlaw, Chief District Judge David A. Ezra of Hawaii, Miriam Krinsky, Esq., Chair of the Advisory Rules Committee, and Professor Arthur Hellman, a leading court administration expert and circuit split opponent. See id. at ¶ 3.
\textsuperscript{16} For example, Chief Judge Hug wrote:

The Commission acknowledges that the conclusion of a need for a major structural change in the Ninth Circuit Court of Appeals is not based upon any objective findings. The subjective findings are based upon rather minor differences expressed by the Ninth Circuit judges and lawyers, and the belief of the Commission that a smaller decisional unit just works best.

Proctor Hug, Jr., Analysis of the Final Commission Report 2-3 (Jan. 11, 1999) (available at <http://www.cc9.uscourts.gov/web/OCELibrary.nsf/504ca249c786e20f85256284006da7ab/ca3ced348fe1a5b8825673000652b8b8FILE/hugfinal.PDF>). The "differences" of Ninth Circuit judges and Supreme Court justices, at least, would probably be better characterized as "substantial," or even "vociferous." See infra notes 62-108, 118-34 and accompanying text. To be sure, the Commission made some philosophical decisions about how justice should be delivered and the structures needed for that purpose, but the Commission
did pinpoint several key weaknesses in the divisional proposal.\textsuperscript{17} The evaluation committee's report is expected in the fall of 1999,\textsuperscript{18} and it is by no means clear when Congress will act, if at all.

The Commission's recommendations have considerable merit,\textsuperscript{19} and Congress would be well advised to take it seriously. Nevertheless, Congress would also be well advised to go a step farther and create at least one new circuit, the "icebox circuit," from the states assigned to the commission's "Northern Division": Alaska, Idaho, Montana, Oregon, and Washington. Part II of this article provides a brief background on the contours of the split debate.\textsuperscript{20} Part III describes the specifics of the Commission's proposed divisional realignment of the Ninth Circuit.\textsuperscript{21} Part IV explains that the Commission's proposal, while a good start, is not the best way to solve the Ninth Circuit's problems and bring the highest quality of justice to the northwestern states.\textsuperscript{22} This article concludes that Congress should create a Twelfth Circuit of the northwestern "icebox" states, and then create two divisions from the remaining Ninth Circuit states following the model recommended by the Commission.

This article focuses on the arguments of those who support a Ninth Circuit split for several reasons. First, so far, their arguments are winning. The Commission did not propose a split, but favorably cited many pro-split arguments to support their own recommendation to divide the Ninth Circuit.\textsuperscript{23} Second, the Ninth Circuit has a number of identifiable problems related to its size, which could be alleviated by creating a new Twelfth "icebox" Circuit of the five Northwestern

\begin{itemize}
  \item[17.] Several of Chief Judge Hug's criticisms go beyond the question of whether big or small circuits are better. A number challenge recommended structures, such as the "Circuit Division" and assignment of judges to divisions in which they are not resident, as creating inequalities of status between judges. See Hug, supra note 16, at 4-5; infra notes 219-34, 247-52 and accompanying text. As discussed more fully later in this article, the current Ninth Circuit administrative processes are designed to minimize status inequalities between judges. See infra notes 232-36 and accompanying text. Chief Judge Hug's criticisms in this regard are worthy of serious attention.
  \item[18.] See Media Release, supra note 15, at ¶ 3.
  \item[19.] In fact, the Ninth Circuit leadership thought the proposal had so much merit that, despite its distaste for structural changes in the court, it moved quickly in the wake of the Commission's draft report to develop reforms to answer the Commission's implicit criticism of its operations in the Tentative Report. See generally Procter Hug, Jr., Analysis of the Commission Report (visited Feb. 8, 1999) <http://app.comm.uscourts.gov/report/comments/ANALYSIS.htm>. The Commission rejected the circuit leadership's reforms in the Final Report. See COMMISSION REPORT, supra note 8, at 51-52.
  \item[20.] See discussion infra Part II.
  \item[21.] See discussion infra Part III.
  \item[22.] See discussion infra Part IV.
  \item[23.] See COMMISSION REPORT, supra note 8, at 34-37.
\end{itemize}
states. The Commission's work highlighted these problems, some for the first time. Finally, many arguments in favor of splitting the circuit are unexplored in academic literature. Since the 1970s, most published academicians who have addressed the issue have favored the status quo. Most circuit and district judges backing a split did not speak up until the Commission hearings, perhaps because they were unconvinced or because they were hesitant to buck the majority view of their colleagues. The Commission's division plan indicates that at least the Commission has found favor with most of the split-backers' contentions, if not their ultimate conclusions. Therefore, a new attention to the merits of these otherwise unexplored arguments, as opposed to the familiar carping against them, seems appropriate.

The Commission's division proposal would address many of the current Ninth Circuit's size-related problems. Nevertheless, while the division approach makes sense for the states in the southern part of the circuit, the icebox states deserve different treatment. They are a group of five states, not too large, that want their own circuit now. They are bound together by common regional interests, yet maintain a healthy internal diversity. Unlike the two southern divisions, the northern "icebox" division would be the type of circuit one might design if "designing it from scratch." Congress should build on the Commission's report by creating the icebox circuit and dividing the remaining Ninth Circuit into the divisions the Commission recommends.

II. SETTING THE STAGE: BACKGROUND OF THE CURRENT SPLIT DEBATE

Congress has faced persistent pressure to split the Ninth Circuit since 1891. Some arguments have long been what they are now: the

25. In the mid-1970s, the Hruska Commission proposed that Congress split the Ninth Circuit. See Hruska Report I, supra note 5, at 235. Congress essentially left the split decision up to the judges, and the judges decided to reorganize until then. See COMMISSION REPORT, supra note 8, at 33.
27. See COMMISSION REPORT, supra note 8, at 75.
28. Spreng, supra note 24, at 890.
29. See COMMISSION REPORT, supra note 8, at 17.
circuit has too many judges and the travel time to panel-sittings is too great. More recent concerns have been that the circuit's judges are overworked, and that a full court en banc process is too unwieldy for such a large court. In the mid-1970s, the well-respected Commission on Revision of the Federal Court Appellate System (the "Hruska Commission"), recommended splitting both the Fifth and the Ninth Circuits. Congress balked at circuit splitting at first, but eventually created what are now the Fifth and Eleventh Circuits after the Fifth Circuit's judges specifically requested it in 1981.

Instead of splitting in response to the Hruska Commission's recommendations, the Ninth Circuit embarked on an internal reform program to make its rapidly growing circuit more efficient. Students of court administration consider the Ninth Circuit to be a model for innovation, but problems soon set in. The court grew to twenty-eight authorized judgeships, eleven more than the next largest circuit. The circuit's reversal rate at the Supreme Court level ballooned. The reinstitution of capital punishment in California pitted many Ninth Circuit judges' opposition to the procedure against the citizens of their jurisdiction, and the high profile cases that those battles spawned left the court looking out of control. Northwesterners began to complain that their environment-friendly and Indian rights-oriented federal appellate court was out of touch with the problems that affected their daily lives. Through the late 1980s and 1990s, Northwestern Senators and Representatives pushed to split the Ninth Circuit, but could not convince a majority of either house of Congress.

31. *See id.*
40. *See Ostrom, supra* note 2; *Whitney, supra* note 2.
41. *See COMMISSION REPORT, supra* note 8, at 33-34.
Senate actually passed a split plan in 1997,\textsuperscript{42} dividing the Ninth Circuit seemed politically realistic for the first time, but the split never occurred because the House of Representatives would not agree with the Senate's plan.\textsuperscript{43}

Enter the Commission on Structural Alternatives. Congress mandated that this appellate court study commission would be composed of five members appointed by Chief Justice William Rehnquist and would study circuit court structures generally, with a specific focus on the Ninth Circuit.\textsuperscript{44} Chief Justice Rehnquist, a Ninth Circuit critic,\textsuperscript{45} appointed a commission that was not clearly pro- or anti-split, but which could be expected to take the task of potentially reorganizing the Ninth Circuit seriously. The Commission included retired Supreme Court Justice Byron R. White;\textsuperscript{46} Judge Gilbert S. Merritt, former chief judge of the relatively large Sixth Circuit Court of Appeals;\textsuperscript{47} Judge Pamela Rymer, a Bush appointee to the Ninth Circuit residing in Los Angeles who was not participating publicly in the split debate;\textsuperscript{48} Judge William D. Browning, former chief judge of the United States District Court for Arizona, the district with perhaps as much or more at stake in the split debate than any other;\textsuperscript{49} and N. Lee Cooper, the immediate past president of the American Bar Association who practices in the Eleventh Circuit, something of a success story of prior circuit splitting efforts.\textsuperscript{50} The Commission elected Justice White to be its chair.\textsuperscript{51}

\begin{enumerate}
\item[42.] See Tobias, supra note 2.
\item[43.] See COMMISSION REPORT, supra note 8, at 34.
\item[44.] See id. at ix, 1.
\item[46.] See generally Office of Public Information, Supreme Court of the United States, For Immediate Release (Dec. 19, 1997) <http://www.comm.uscourts.gov/Press_Releases/1named.htm> (press release identifying Commission members and their backgrounds) [hereinafter For Immediate Release].
\item[47.] See generally id.
\item[48.] See generally id.
\item[49.] See generally id. Arizona has bounced around from proposed circuit to proposed circuit like a ping-pong ball. Support of Arizona's senators for a split is probably a primary reason why the 1997 Senate split assigned Arizona to the proposed Twelfth Circuit, even though it would not border any other state in the circuit. See Tobias, supra note 2.
\item[50.] See generally For Immediate Release, supra note 46. One's personal experience does not necessarily control one's views on circuit splitting, but Justice Rehnquist did choose Commission members likely to be on the cutting edge of the split debate issues. The only members of the Ninth Circuit to speak in favor of splitting the Ninth Circuit publicly are Judges Andrew J. Kleinfeld, Diarmuid F. O'Scannlain, Thomas G. Nelson, Joseph T. Sneed, Stephen Trott, and Eugene A. Wright. See generally Letter from Eugene A. Wright, Joseph T. Sneed, Robert R. Beezer, Senior Judges, and Diarmuid F. O'Scannlain, Stephen Trott, Thomas G. Nelson, and Andrew J. Kleinfeld, Judges, Ninth Circuit Court of Appeals, to Byron R. White, Chair, Commission on Structural Alterna-
\end{enumerate}
The Commission made it clear early on that it was open to a significant reorganization of the Ninth Circuit when it appointed University of Virginia School of Law Professor Emeritus Daniel J. Meador as its executive director in January 1998.\textsuperscript{62} In the wake of the Hruska reports in the mid-1970s, Professor Meador had co-authored a book that endorsed splitting the Ninth Circuit by creating a Twelfth Circuit composed of the icebox states.\textsuperscript{63} He has also criticized some of the most important empirical research suggesting that Ninth Circuit law is not as inconsistent as anecdotal evidence has claimed.\textsuperscript{64} Given the political context in which the Commission was authorized and the members and staff chosen, recommendations of some surgery on the Ninth Circuit were perhaps inevitable.

The authorizing statute had the Commission on a tight timetable. Congress fixed a ten-month period for the Commission to complete any investigation or studies, with a report to Congress and the President due two months later.\textsuperscript{65} This did not give the Commission time to do independent empirical research, particularly on complex issues such as whether the circuit's size produced inconsistency and unpredictability in the law, or had a negative impact on collegiality. In any event, the Commission seemed skeptical that new or existing empirical research could help determine whether it was appropriate to split the circuit due to those problems.\textsuperscript{66} The Commission did listen

tives for the Federal Courts of Appeals (Nov. 6, 1998) (available at <http://app.comm.uscourts.gov/report/comments/DOScanmlain.htm>). All are Republican appointees and all but Judge Sneed sit in the northwest, which would almost certainly be part of a new circuit if one were created. Judge Rymer, also a Republican appointee at about the same time as most of the northwestern judges named above, sits in California and had not previously participated in the debate publicly. Judge Merritt, who was the Chief Judge of the third largest circuit based on the number of judges, was likely to have insights into the problems and possibilities of administering a large circuit other than the Ninth Circuit.


52. See id. Membership of court study committees tends to tell much about the outcome of its work. By contrast, Chief Judge Hug appointed Arthur Hellman, a Ninth Circuit cheerleader and split opponent to his Evaluation Committee. See Media Release, supra note 15, at ¶ 3; see generally Hellman, supra note 35; Arthur D. Hellman, Dividing the Ninth Circuit: An Idea Whose Time Has Not Yet Come, 57 Mont. L. Rev. 261 (1996).


56. See COMMISSION REPORT, supra note 8, at 39-40. In fact, the Commission's executive director has criticized that research elsewhere. See generally Meador, supra
to many hours of testimony spread over six days and six key cities: Atlanta, Dallas, Chicago, New York, Seattle, and San Francisco. Seattle and San Francisco are headquarters for the Ninth Circuit. Atlanta and Dallas are centers for the Eleventh and Fifth Circuits, which were created from the split of the old Fifth Circuit in 1981. Twelve Ninth Circuit judges and sixteen district, bankruptcy and magistrate judges from the Ninth Circuit states gave live testimony to the Commission. Many others submitted written views, including five United States Supreme Court Justices, four of whom addressed the Ninth Circuit split issue and recommended some sort of change. Most of the testimony opposed any change in the current configuration of the Ninth Circuit. Therefore, the Commission’s recommendations were based on existing opinion, and existing research to the extent the Commission found it persuasive.

The Commission’s report carefully summarized the arguments on both sides of the split debate. The report sorted the myriad arguments made in academic and professional literature, and by judges and lawmakers, into seven groups, but did not explicitly pass judgment on the merit of any of them. Most of those issues, however, do militate in favor of some sort of split or reorganization.

A. Timely Decisions?

The first issue was whether Ninth Circuit cases are correctly decided in a timely manner. The Ninth Circuit ranks near the bottom

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note 54. The Commission did survey district judges and lawyers in the Ninth Circuit and nationwide about their views on circuit boundaries and their impact on the quality of justice, and uncovered significant criticism of consistency and predictability in Ninth Circuit law. See COMMISSION REPORT, supra note 8, at 39-40. Nevertheless, the Commission concluded that “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.” Id. at 40.


58. See id.


60. See COMMISSION REPORT, supra note 8, at 37.

61. See id. at 34-37.

62. See id. at 34.
of the list in terms of the time between filing a case and a decision, and the delay is at least partly due to the size of the circuit. For example, additional staff time is devoted prior to argument to issue coding and case sorting tasks designed to make sure that the decision in the case will be consistent with the law in the circuit — a function necessary because the court hears so many cases. While split opponents claim that the real source of the delay is that the Ninth Circuit has been significantly judicially understaffed for a long time, which slows down decision making in individual cases because the workload per judge is so overwhelming, other courts have done better managing enormous workloads with an equivalent number of vacancies. Vacancies alone, therefore, are not the only problem. Further, time spent on certain types of work — en bancs, death penalty cases, and reading the circuit’s published opinions — would be significantly reduced if the circuit were split. Therefore, at least some of the court’s workload and delay problems are attributable to the circuit’s size.

B. Consistent Circuit Law?

The second issue was whether Ninth Circuit judges are able to maintain a coherent body of circuit law in such a large circuit, and it is fair to summarize the discussion as indicating at least some doubt on that subject. Judges on both sides of the split issue have freely admitted that they are no longer able to read all the court’s opinions; their only disagreement is whether reading those decisions is necessary to maintaining consistent circuit law. Judges in other circuits

63. See id.


65. Ninth Circuit Chief Judge Procter Hug, Jr. cites with pride the Ninth Circuit's "aggressive use of staff attorneys" in managing the court's large workload, but whether that is a good thing is a matter for debate. Procter Hug, Jr., The Ninth Circuit Should Not Be Split, 57 MONT. L. REV. 291, 301 (1996) (quoting SUBCOMMITTEE TO STUDY CIRCUIT SIZE, ABA APPELLATE PRACTICE COMMITTEE, REPORT 10 (1992)); see also Meador, supra note 54, at 196-97.

66. See COMMISSION REPORT, supra note 8, at 34.

67. See Joint Statement, supra note 64, at 3-4.

68. See Spreng, supra note 24, at 893-905.

69. See COMMISSION REPORT, supra note 8, at 34-35.

70. See Kleinfield, supra note 2, at ¶ 6-14 (backing a split and noting "[i]t is odd word usage to call a public body a 'court,' in the singular, if its judges do not even sit together as one body, and do not even read each others' opinions"); Alfred T. Goodwin,
tend to think it is.\textsuperscript{71} There are also so many different panel combinations of active, senior and visiting judges on the Ninth Circuit,\textsuperscript{72} that it is difficult for judges to develop the collegial relationships needed to accommodate differences of opinion.\textsuperscript{73} Whether appellate judging should be done by "small, collegial, judicial bodies"\textsuperscript{74} or a larger, possibly more bureaucratic unit, probably depends on the type of judicial product one prefers,\textsuperscript{75} but the public displays of distemper on the Ninth Circuit that seem to go beyond assertive disagreement must impair jurisprudential quality in the long run. Former Eleventh Circuit Chief Judge Gerald Bard Tjoflat theorizes that the larger the court, the more unstable its law, because there are so many points of view on the court not represented on any given panel\textsuperscript{76} and while it is true that staff do issue coding and special scheduling in order to avoid as many intra-circuit conflicts as possible,\textsuperscript{77} as discussed above, the price is delayed justice and increased bureaucracy.

C. Effective En Banc?

The next category of arguments focused on whether the Ninth Circuit can perform its en banc function effectively, given its size.\textsuperscript{78}

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Senior Judge, Ninth Circuit Court of Appeals, Written Statement to the Commission on Structural Alternatives for the Federal Courts of Appeals ¶ 22 (May 1, 1998) (available at <http://app.comm.uscourts.gov/hearings/seattle/0527GOOO.htm>) (opposing a split and stating that "[i]n today's world, appellate judges generally do not routinely read every case written by every judge on their own court"); see also Joint Statement, supra note 64, at 6-7.


\textsuperscript{72} The Commission reported that last year approximately 43 percent of Ninth Circuit cases terminated after oral argument in 1997 were decided by a panel containing a visiting judge, and this statistic does not include the number of panels that contained a Ninth Circuit senior judge. See COMMISSION REPORT, supra note 8, at 31.

\textsuperscript{73} There are 3,276 possible panel combinations for the twenty-eight authorized judges for the Ninth Circuit, and in practice there are more, because so many senior and visiting judges are used to fill out the panels on the understaffed Ninth Circuit. See Gerald Bard Tjoflat, More Judges, Less Justice, A.B.A. J., July 1993, at 70, 72. By comparison, the eleven-judge Eleventh Circuit has only 165 potential combinations, and the six-judge First Circuit has a mere 20 different panel combinations. See id.


\textsuperscript{75} As Fourth Circuit Chief Judge J. Harvie Wilkinson, III, has stated, "I believe nonetheless that at heart the appellate process is a deliberative process, and that one engages in more fruitful interchanges with colleagues whom one deals with day after day than with judges who are simply faces in the crowd." Wilkinson, supra note 71, at 1173. Of course, judging need not be the deliberative process Judge Wilkinson describes, though that has been the model the American appellate courts have followed until recently.

\textsuperscript{76} See BAKER, supra note 34, at 66-67 (interview with Judge Tjoflat).

\textsuperscript{77} See Hellman, supra note 35, at 57-62; Hug, supra note 65, at 301.

\textsuperscript{78} See COMMISSION REPORT, supra note 8, at 35-36.
\end{flushleft}
The Ninth Circuit never actually sits "en banc," that is, with all the judges together. Instead, it uses a "limited en banc" court of eleven judges,\(^79\) somewhat of a contradiction in terms. On the current court of twenty-one judges, it is not even a majority of the total. Judges Thomas Nelson and Stephen Trott told the committee that "[t]here is a certain disassociation from en banc opinions which one cannot participate in,"\(^80\) and "there is a natural feeling of detachment from the [en banc] process."\(^81\) On three occasions, the court considered using a full court en banc to decide a particularly gripping case, but never actually did so.\(^82\) Because the Ninth Circuit lacks a true en banc process, the court never speaks with a truly institutional voice, and loses the opportunity to help district judges and lawyers know the collective court better.\(^83\)

On the other hand, the en banc process is probably neither the cause of, nor the solution to, most of the Ninth Circuit's ills. The Ninth Circuit's rate of reversal by the Supreme Court is uncomfortably high,\(^84\) and the Supreme Court reverses Ninth Circuit en banc opinions with impunity.\(^85\) Therefore, it would not necessarily help for the Ninth Circuit to rehear more panel opinions in the limited en banc format. On the other hand, the limited en banc structure itself does not cause the reversals. Rather, the opinions of Ninth Circuit judges that the Supreme Court thinks are incorrect produce reversals. Therefore, the court's reversal problem arises from the judges who write and vote for those opinions. Absent some certainty that those judges

\(^{79}\) See 9th Cir. R. 35-3. The limited en banc process is authorized in 28 U.S.C. § 46(c) (1994).

\(^{80}\) Joint Statement, supra note 64, at 5 (italics replacing underscoring).

\(^{81}\) Id. at 6.

\(^{82}\) See, e.g., Compassion in Dying v. Washington, 85 F.3d 1440 (9th Cir. 1996); Campbell v. Wood, 20 F.3d 1050 (9th Cir. 1994); United States v. Penn, 647 F.2d 876 (9th Cir. 1980).

\(^{83}\) Paul D. Carrington, An Unknown Court: Appellate Caseload and the "Reckonability" of the Law of the Circuit, in RESTRUCTURING JUSTICE: THE INNOVATIONS OF THE NINTH CIRCUIT AND THE FUTURE OF THE FEDERAL COURTS 206, 208-09 (Arthur D. Hellman ed., 1990). Professor Carrington, noting Karl Llewellyn's observation that predicting appellate outcomes depends on the predictor's knowledge of the judges deciding the cases, has argued that the Ninth Circuit's accommodations to size and workload, such as the limited en banc procedure, are impairing lawyers' knowledge of the court and therefore their ability to advise their clients and to decide whether to appeal at all. See id.

\(^{84}\) The Supreme Court reversed 28 out of 29 of the Ninth Circuit cases it heard in the 1996-1997 term. See Bob Egelko, Senate Short-Circuits 9th with Vote to Split Court, Seattle Post-Intelligencer, Aug. 18, 1997, at B1. The Court reversed only two-thirds of the cases that it heard in the same period from all the courts. See id.

would not make up a majority of the court, structural changes allowing full court en banc rehearing would not decrease the number of reversals, though they might, however, improve the internal consistency of the circuit's law.

D. Is Bigger Better?

Next the Commission described the perceived benefits and disadvantages that the court's large geographic jurisdiction has for federalism, regionalism, and effective court operations. A large Ninth Circuit has the potential to maintain a relatively consistent body of law governing transactions and litigation of Asian-Pacific and maritime business, and the Commission found this worth preserving. The Commission reported complaints from those on the eastern seaboard that the inconsistency of law from circuit to circuit impairs commercial activity there.

The disadvantages of such a geographically large circuit might well outweigh that advantage, however. "The West" is not one region; it is several. The Ninth Circuit's size was not a product of some special plan to harness the power of regional interests. It was an accident of history and geography, which melded together a number of different groups with sometimes competing interests, and has not clearly turned out well. Whether Ninth Circuit judges from California decide issues concerning the Northwest without a sufficient appreciation of the region's "way of life" is a legitimately debatable point, as is the question of whether such "appreciation" is really part of an appellate judge's job where the relevant information is not clear from the record. In any event, the problem remains that many Northwesterners perceive that California and other southwestern judges are "ganging up" on them, and do not care about their communities. Their view

86. See COMMISSION REPORT, supra note 8, at 36.
87. See id. at 49-50.
88. See id. at 50. On the other hand, Montana Senator Conrad Burns has pointed out that the law on the east coast has remained "acceptably consistent" even though there are six circuits rather than the two he backs. Burns, supra note 26, at 254.
89. See BAKER, supra note 34, at 76.
91. For a development of the argument that understanding the regional milieu from which a case arises is only an appellate judge's job when evidence about the milieu appears in the record, see Hellman, supra note 52, at 284.
92. See, e.g., Editorial, Twelfth Court Warranted, FAIRBANKS DAILY NEWS-MINER, July 15, 1997, at A4 (complaining that most Ninth Circuit judges do not understand the two federal statutes that apply only to Alaska, the Alaska Native Claims Set-
seems justified when Ninth Circuit Judge Ferdinand Fernandez criticizes his colleagues for doing just that in his concurrence in *Alaska ex rel. Yukon Flats School District v. Native Village of Venetie Tribal Government*, a Ninth Circuit decision ultimately overruled by the Supreme Court. That view can threaten the legitimacy of a court and its role as a local representative of the federal government. Whether circuit courts should be close to the rhythms of daily life in their regions or whether they should read a cold record secluded in an ivory tower is a policy judgment. Nevertheless, it needs to be addressed if the conclusion is the former, because as the Idaho Attorney General warned the Commission, "[t]he Ninth Circuit is not close to the people of Idaho." Even if this large court gives a boost to federalization with one hand, it may take away legitimacy and goodwill from federal institutions with the other.

E. More Inter-circuit Conflict?

The Commission next questioned whether splitting the Ninth Circuit would create inter-circuit conflicts and therefore increase the Supreme Court's caseload. Several Supreme Court justices who

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3rd and the Alaska National Interest Land Conservation Act, nor are they familiar with its legislative history] [hereinafter *Twelfth Court Warranted*]; Editorial, *Gorton Bill to Split 9th Circuit Is Timely*, TACOMA NEWS TRIBUNE, Dec. 15, 1995, at A14 (arguing that California judges delay for any reason the imposition of the death penalty so that in the case of a particular Washington murderer, the Supreme Court had to rebuke the Ninth Circuit before the punishment could proceed).

93. 101 F.3d 1286 (9th Cir. 1996), rev'd, 118 S. Ct. 948 (1998).

94. Judge Fernandez wrote:

We have been asked to blow up a blizzard of litigation throughout the State of Alaska as each and every tribe seeks to test the limits of its power over what it deems to be its Indian country. There are hundreds of tribes, and the litigation permutations are as vast as the capacity of fine human minds can make them.


96. See COMMISSION REPORT, supra note 8, at 36. The untested assumption is that judges in a Twelfth Circuit of the icebox states would decide cases radically different than would judges in what would be the new Ninth Circuit. As I discuss elsewhere, that is unlikely. See Spreng, supra note 24, at 909-11. In fairness, it may well be the case on a few hot-button issues such as the environment (environmentalists certainly think so), and for that reason they oppose a split vociferously. See, e.g., Carl Tobias, *The Proposal to Split the Ninth Circuit*, 20 HARV. ENVTL. L. REV. 547 (1996); Todd True, Managing Attorney, Earthjustice Defense Fund, Oral Testimony before the Commission on Structural Alternatives for the Federal Courts of Appeals 207, 212 (May 27, 1998) (transcript available at <http://app.comm.uscourts.gov/hearings/seatrans.pdf>). As a former clerk and, I hope, a careful observer of the court, I sense that there are fewer disagreements on the court
wrote to the Commission insisted that they would be pleased to have debates before the court sharpened and informed by inter-circuit conflict, and that they do not find the potential parade of new cases from two far western circuits daunting. Further, if the only way to maintain consistent law in the far west is to put one group of judges' views in a circuit where those views will always be a minority, perhaps the Supreme Court needs to be made aware of these disagreements through inter-circuit conflicts so it may iron out the jurisprudential differences once and for all. Otherwise the configuration of the circuits has merely mashed them. As for whether a split would "balkanize federal law," as some split critics have suggested, it is worth bearing in mind that some of the smallest circuits in the East are among the most well-respected, and neither their jurisprudential work nor their internal administration has ever been compared to the geopolitical jostling and strife in the states of the former Yugoslavia.

F. Practicalities of Circuit Splitting

The Commission next described the contours of the debate over whether dividing the Ninth Circuit was even practical. The problem is that California alone produces more than half of the circuit's appeals; therefore, there is no way to divide the circuit in half without dividing California, which is a very controversial suggestion. The problem is made worse by the fact that the most obvious state to assign to any circuit with California is Arizona, which produces the sec-

than one might expect, and on most issues, a pair of randomly chosen judges would probably agree on what the law requires.


98. An empirical study from New York University argued that inter-circuit conflict is actually useful to the Supreme Court in that it frames issues in these important cases. See Samuel Estreicher & John Sexton, Redefining the Supreme Court's Role: The Federal Judicial Process 4-5 (1986).

99. Commission Report, supra note 8, at 36. There is a "the sky is falling" quality to an argument that splitting one circuit into two new circuits could "balkanize" federal law. This balkanization argument is made more credibly in the context of reconfiguring all the circuit courts into a number of smaller units with only a few judges each. See Tobias, supra note 26, at 1387.

100. See Kleinfield, supra note 2, at ¶ 33.


ond largest number of appeals! It would be impossible to divide the circuit into two equal halves, or even to come close, without dividing a state or creating a geographically bizarre circuit.

Many have discussed splits that leave California alone or with states so small that they would be overwhelmed by their huge circuit colleague and have concluded that such splits are simply unacceptable for reasons of federalism. Unless California itself is to be split between two circuits, the only feasible split would be to fashion a new Twelfth Circuit out of the icebox states of Alaska, Idaho, Montana, Oregon and Washington, possibly with Hawaii and the Pacific Islands thrown into the mix. Admittedly, this would leave the big appeal producers, California and Arizona, together in the new Ninth, so it would remain a very large circuit. On the other hand, a circuit of the icebox states would be a sensible judicial and administrative unit, and the much-lauded administrative and efficiency reforms of the old Ninth could be put to work to improve justice in the new.

G. Is Small Beautiful?

Finally, the Commission reviewed the concern that two circuits made from the Ninth Circuit would lose the benefit of the circuit's administrative efficiency. Big is not always better, however. Management theory teaches that as organizations increase in size, their administrative burden increases geometrically, which eventually creates diseconomies of scale. Therefore, the question is not just whether splitting the circuit would rob the two new circuits of economies of scale. The real question is whether additional staff and "efficiency" mechanisms of the Ninth Circuit are actually producing zero or even negative marginal returns right now. Further, the Fifth and Eleventh Circuits are proving with their caseloads that smaller circuits can often manage larger dockets than larger courts, perhaps because the collegiality to be gained from a smaller court increases efficiency as much if not more than more staff or innovation.

103. See COMMISSION REPORT, supra note 8, at 55.
104. See, e.g., Hruska Report I, supra note 5, at 237; O'Scannlain, supra note 101, at 318.
105. See generally Spreng, supra note 24, at 890-91; see also COMMISSION REPORT, supra note 8, at 52-56 (discussing icebox split proposal).
106. To appreciate the magnitude of any circuit containing California, one must realize that if it were its own circuit, it would be the third largest circuit in the nation. See Diarmuid O'Scannlain, A Ninth Circuit Split Is Inevitable, But Not Imminent, 56 OHIO ST. L.J. 947, 949 (1995).
108. See Tjoflat, supra note 73, at 70-71.
This was the stage from which the Commission began its own consideration of the problem. The Commission did discover some useful new perspectives in its limited investigation, which significantly enlightened the well-traveled byways of the split debate and illuminated new ones. These basic concerns, however, are what primarily shaped and informed the Commission's ultimate recommendations.

III. THE COMMISSION RECOMMENDATIONS

The Commission started its Ninth Circuit recommendations with two important conclusions. First, "[t]here is no persuasive evidence that the Ninth Circuit . . . is not working effectively, or that creating new circuits will improve the administration of justice in any circuit or overall." Therefore, there would be no circuit splitting in the Commission's recommendation. On the other hand, the Commission also found a consensus among appellate judges that the maximum number of judges in an effective appellate "decisional unit" was between eleven and seventeen, a view the Commission shared. The Ninth Circuit, by contrast, has twenty-one active judges now; twenty-eight active judges are authorized by statute; and the Ninth Circuit judges have requested thirty-eight. These numbers are much larger than the maximum the Commission believes to be effective. Others agree. As John Godbold, the former chief judge of the old and new Fifth Circuit, stated, "I've been on a court of nine, a court of 12, a court of 13, a court of 15, and there's not a heck of a lot of difference. And, I was on a court with 26 actives and ten seniors, 36 judges, and that makes a big difference." Therefore, some sort of internal reorganization would be necessary to act on both conclusions in the Commission's report.

A. What's New? The Commission's Original Research

Probably because the Commission's timetable was so tight and the split debate road so well worn, the Commission essentially relied

109. COMMISSION REPORT, supra note 8, at 29.
110. Id.
111. See id. at 29-30.
112. See 28 U.S.C. § 44(a) (1994); see also COMMISSION REPORT, supra note 8, at 30.
113. The court modified that request to three permanent and two temporary judgeships in 1998. See COMMISSION REPORT, supra note 8, at 30; see also O'Scannlaim, supra note 101, at 315.
on available literature and opinion, with two important exceptions. First, the Commission's hearings uncovered significant pockets of support from northwestern judges and elected officials on behalf of a split. Second, a top appellate attorney advanced the suggestion of a formal appellate structure commission chair with a new structural reform proposal — two divisions in one circuit tied together by special rules for choosing panels and en banc courts. This suggestion is a compromise with merit between the status quo and an all-out split.

B. Northwestern Support for a Split Comes Out of the Woodwork

The Commission surveyed Ninth Circuit district and appellate judges for their opinions on a split and more than two-thirds of both groups indicated that they oppose it. An oft-repeated argument against the circuit split had been that the Ninth Circuit's legal community, particularly judges, do not want a split. One of the most notable developments from the Commission's work is that under its umbrella, a significant number of Ninth Circuit appellate judges went public with their support for a split for the first time. Four of the five Supreme Court justices who contributed to the Commission's collection of testimony and submissions indicated support for the split, including Justice Anthony Kennedy, a former member of the court, and Justice John Paul Stevens, not a member of the ideological group often stereotyped as supporting a split.

115. See infra notes 154-56 and accompanying text.
116. See COMMISSION REPORT, supra note 8, at 56-57.
117. See Burns, supra note 26, at 256.
118. See Joint Statement, supra note 64, at 1; Kleinfeld, supra note 2, at ¶ 1; Joseph Sneed, Judge, Ninth Circuit Court of Appeals, Oral Testimony before the Commission on Structural Alternatives for the Federal Courts of Appeals 53, 53 (May 29, 1998) (transcript available at <http://app.comm.uscourts.gov/hearings/sftrans.pdf>) (noting his support for a split) [hereinafter Sneed Testimony]. Both Judge O'Scannlain and Judge Kleinfeld had spoken in vague support of a theoretical split before 1998. See O'Scannlain, supra note 106, at 948 (supporting an effort to "continue to restructure circuits into more manageable regional entities"); see also Ann Donnelly, Fairness Demands Split of Ninth Circuit Appeals Court, COLUMBIAN, Aug. 3, 1997 (quoting Judge Kleinfeld's statement that "we have become a laughing stock. It's not because we have bad judges; it's because the circuit is too large and has too many cases."). In his statement to the Commission, Judge Sneed, not a Northwesterner, specifically endorsed the icebox split. See Joseph T. Sneed, III, Senior Judge, Ninth Circuit Court of Appeals, Written Statement to the Commission on Structural Alternatives for the Federal Courts of Appeals ¶ 13 (May 29, 1998) (available at <http://app.comm.uscourts.gov/hearings/sanfran/0529SNEE.htm>) [hereinafter Sneed Statement].
119. See COMMISSION REPORT, supra note 8, at 38 & n.90.
120. See Kennedy, supra note 90, at 1.
121. See generally Letter from John Paul Stevens, Justice, United States Supreme Court, to Byron R. White, Chair, Commission on Structural Alternatives for the
Not so obvious from a first glance at the report was how many elected officials and district judges from the icebox states testified and submitted statements in favor of the split, some adamantly stating their views. It is probably now safe to say that "anyone who's anyone" in Idaho supports a split, including both Circuit Judges,122 the Attorney General,123 and the Chief Judge of the District Court for Idaho.124 By contrast, Montana judges are apparently almost universally opposed, according to retired Montana Supreme Court Justice John C. Sheehy, in large part because California is a primary source for Montana state law.125 Virtually all of the district judges in Oregon, the "circuit breakers," advised the Commission to split the circuit by dividing California, because they believed the current Ninth Circuit was too inconsistent and too many appeals were now the equivalent of legal "crap shoots."126 Washington judges and elected representatives are divided, and there are prominent spokespersons for both sides. The Governor127 and some district judges128 oppose a split, while the

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122. See Joint Statement, supra note 64, at 2.

123. See generally Lance, supra note 95.

124. See Edward J. Lodge, Chief Judge, United States District Court for the District of Idaho, Written Statement to the Commission on Structural Alternatives for the Federal Courts of Appeals 1 (available at <http://app.comm.uscourts.gov/hearings/submitted/pdf/Lodge.pdf>). However, not all the editorial boards of the Idaho newspapers agree. See, e.g., Editorial, California's 9th Circuit Should Be Split, IDAHO STATESMAN, July 28, 1997, at 7A (reprinted from MOSCOW-PULLMAN DAILY NEWS) (arguing, despite the title, that the Ninth Circuit works well and there should be no split except for a national reorganization of circuit borders).

125. See John C. Sheehy, Written Statement to the Commission on Structural Alternatives for the Federal Courts of Appeals ¶ 3, 5 (May 18, 1998) (available at <http://app.comm.uscourts.gov/hearings/seaattle/0527SHEE.htm>). Montana's senators, however, are a little less sure. Junior Senator Conrad Burns has been one of the prime movers behind the split movement. See Ostrom, supra note 2. Senior Senator Max Baucus has backed split proposals in the past. See BAKER, supra note 34, at 84 n.43.


128. See, e.g., Barbara Jacobs Rothstein, Judge, United States District Court for the Western District of Washington, Written Statement to the Commission on Structural Alternatives for the Federal Courts of Appeals ¶ 1 (May 27, 1998) (available at <http://app.comm.uscourts.gov/hearings/seaattle/0527ROTH.htm>) (strongly opposing any split). However, the Washington district courts are not lockstep on the issue. See generally Letter from Fred Van Sickle, Judge, United States District Court for the Eastern District of Washington, to the Commission on Structural Alternatives for the Federal Courts of Ap-
state's senior U.S. Senator\(^{129}\) and Attorney General\(^{130}\) favor a split. Alaska District Judge H. Russel Holland spoke in favor of maintaining the current borders, but his suggestions for improvement addressed several key problems with the current Ninth: adding additional judges, liberalizing the en banc procedures to provide for "expanded panels" to decide hot-button issues, and changing panel composition so that at least one judge who resided in the state where a case originated would sit on the panel to decide the case\(^{131}\) — Alaskans being very sensitive to the latter issue.\(^{132}\) Nevertheless, Judge

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\(^{131}\) H. Russel Holland, Judge, *United States District Court for the District of Alaska*, Written Statement to the Commission on Structural Alternatives for the Federal Courts of Appeals ¶ 20-22 (May 27, 1998) (available at <http://app.comm.uscourts.gov/hearings/seattle/0527HOLL.htm>). Judge Holland expressed the view that northwestern states are adversely affected because too many Ninth Circuit panels deciding cases originating in the northwest fail to understand its regions. See *id*. This sentiment was also expressed by the Washington Attorney General's testimony. See generally Gregoire, supra note 130.

\(^{132}\) The Alaska Native Claims Settlement Act (ANCSA) and the Alaska National Interest Lands Conservation Act (ANILCA) are comprehensive federal statutes that have immense impact on Alaskan daily life. See 43 U.S.C. §§ 1601-1629f (1994 & Supp. II 1996) and 16 U.S.C. §§ 3101-3233 (1994 & Supp. III 1997). Alaskans played key roles in drafting those statutes. Attorney General Bruce Botelho cited to the Commission specific examples of instances where, based on the communal understandings of those acts and the Alaskan understandings of the meanings of words, Ninth Circuit judges and the Alaskan attorneys arguing ANCSA and ANILCA cases apparently thought each other's positions about the construction of those acts were bizarre and unthinkable. See Bruce M Botelho, Attorney General, *State of Alaska*, Written Statement to the Commission on Structural Alternatives for the Federal Courts of Appeals ¶ 8 (May 27, 1998) (available at <http://app.comm.uscourts.gov/hearings/seattle/0527BOTE.htm>). One of Attorney General Botelho's examples was the construction of the word "rural" in ANILCA. Alaskans think "[r]ural Alaska' means bush Alaska: self-dependent, isolated communities generally unconnected to Alaska's roads or railways." *Id.* In one case, Ninth Circuit judges apparently thought that definition was incredible, and explained to the Alaska lawyers that "the term rural is not difficult to understand; it is not a term of art." *Kenaitze Indian Tribe v. Alaska*, 860 F.2d 312, 316 (9th Cir. 1988). Yet it is also not so hard to understand that in the *sui generis* conditions of Alaska, a word such as "rural" might take on a different meaning than it does in California, if you know anything about Alaska. Of course, the most famous example of this sort of misunderstanding is *Alaska ex rel. Yukon Flats School District v. Native Village of Venetie Tribal Government*, in which the Ninth Circuit held, contrary to Alaskan understanding and, according to the Supreme Court, contrary to a correct reading of the law, that Indian Country still existed in Alaska after ANCSA.
Holland noted that a majority of the Alaska district judges favored splitting the circuit.\textsuperscript{133} Several judges favoring the split noted that not just circuit judges, but also district judges, lack the time to read the court's new opinions on a timely basis, which is arguably a more important problem to district judges than to their appellate brethren, because district judges must make split second rulings on motions and need the benefit of the most current law at their fingertips.\textsuperscript{134}

The four northwestern Attorneys General who testified before the Commission gave a rude wake-up call to anyone who might have thought that the Commission's work would be a lot of platitudinal back-patting. Three of the four northwestern Attorneys General who offered their opinions to the Commission backed a split and used the opportunity to vent concretely about indignities they had experienced at the hands of Ninth Circuit judges.\textsuperscript{135} All three mentioned problems related to size such as seemingly interminable delay, inconsistency, and the inability of circuit judges to keep up with the circuit's law, but even those more generalized complaints focused on regional and geographic frustrations with court operations.\textsuperscript{136} Alaska Attorney General Bruce Botelho listed numerous examples of situations in which he found out about Ninth Circuit orders binding the state of Alaska from newspaper reporters and friends in the "lower forty-eight," because slow mail service to Alaska had delayed the written order from the Court.\textsuperscript{137} Splitting the circuit would not solve that problem — although faxing the orders would\textsuperscript{138} — but the circuit's failure to show sensitivity to its far-flung litigants added support to the argument that the circuit is so large it is out of touch\textsuperscript{139} with its constituent members.

Idaho Attorney General Alan Lance found similar insensitivity in the Ninth Circuit's two-year treatment of a Native American tribe's claim to Lake Coeur d'Alene in northern Idaho, a cultural icon for the state, only to be reversed by the Supreme Court later.\textsuperscript{140} "I understand the burdens under which the Ninth Circuit operates," Lance com-

\textsuperscript{133} See Holland, supra note 131, at ¶ 2.

\textsuperscript{134} See generally Van Sickle, supra note 128; Joint Statement, supra note 64.

\textsuperscript{135} See Botelho, supra note 132, at ¶¶ 8, 12, 14; Gregoire, supra note 130, at ¶¶ 2-3; Lance, supra note 95, at ¶ 8.

\textsuperscript{136} See Botelho, supra note 132, at ¶ 11; Gregoire, supra note 130, at ¶ 5; Lance, supra note 95, at ¶¶ 11-12.

\textsuperscript{137} See Botelho, supra note 132, at ¶¶ 12-15.

\textsuperscript{138} See id. at ¶ 14.

\textsuperscript{139} See id.

\textsuperscript{140} See Lance, supra note 95, at ¶ 7.
mented.\(^{141}\) “However, the people of Idaho deserve to have their cases resolved in a more timely manner . . . .”\(^{142}\) Lance verbally banged his head against the wall over death penalty cases delayed for years by Ninth Circuit judges and then vacated when “the Ninth Circuit Court of Appeals appeared to engage in its own factual findings to arrive at a different result from the district court.”\(^{143}\) “[T]his type of overreaching is frustrating for the state — delays alone erode public confidence in our system of justice,” he wrote.\(^{144}\)

All three of those Attorneys General complained that their states’ legal interests are simply overshadowed in a circuit where distant judges seem to operate with the philosophy that “out of sight means out of mind.” “Our states are directly affected by the resulting infrequency of en banc consideration,” wrote Washington Attorney General Christine O. Gregoire.\(^{145}\) “Judges serving a Northwest circuit would be more aware of issues pending before other panels, and more willing to hear matters important to our states en banc.”\(^{146}\) Attorney General Lance of Idaho noted the other side of the problem, when he told the Commission that Idahoans are “left disconnected from the federal judiciary that establishes the federal case law under which Idahoans are bound and must live.”\(^{147}\) Attorney General Botelho also complained of a cultural disconnect between Ninth Circuit judges and people from his state.\(^{148}\) He described numerous Ninth Circuit rulings on the federal statutes that are particular to Alaska, the Alaska Native Claims Settlement Act (ANCSA) and the Alaska National Interest Lands Conservation Act (ANILCA), that left average Alaskans scratching their heads in disbelief.\(^{149}\) But the problem Botelho saw runs deeper than that:

Even laws that are not exclusive to Alaska cannot be interpreted without a contextual basis. Some aspects of life in Alaska are remarkably different than life in other western states, but this may not be readily apparent to a judge from California or Arizona reading a brief. For example, in Alaska an easement or a river might have the significance given to a major highway in another state. Water rights are of relatively little importance in Alaska as compared with other western

\(^{141}\) Id.
\(^{142}\) Id.
\(^{143}\) Id. at ¶ 8.
\(^{144}\) Id.
\(^{145}\) Gregoire, supra note 130, at ¶ 5.
\(^{146}\) Id.
\(^{147}\) Lance, supra note 95, at ¶ 11.
\(^{148}\) See Botelho, supra note 132, at ¶ 7.
\(^{149}\) See id. at ¶¶ 5, 6, 8-9.
states. Independent thinking, living off the land, and overcoming the challenges presented by isolation and vast distances between communities are central elements of the collective identity and experience of Alaskans. Regardless of how well intentioned the judges might be, if their opinions reveal a lack of depth of understanding about a place or people, the result can seem patronizing or even offensive to the people affected. Generally any misperceptions are subtle, but occasionally they can be glaring.\textsuperscript{150}

The Commission heard enough testimony to conclude that a significant group of Northwesterners were chafing under the Ninth Circuit’s yoke, and that the court’s legitimacy and federalizing function were suffering as a result.

Several conclusions are reasonable from the testimony the Commission heard from Ninth Circuit judges, district judges from the circuit, and elected officials. First, support for a split had grown in the past several years.\textsuperscript{151} Second, that support was almost exclusively isolated in the northwest.\textsuperscript{152} Third, support for a split was becoming, if it had not done so already, the view of a majority or, at minimum, a substantial minority of circuit judges,\textsuperscript{153} district judges, attorneys general, and perhaps other elected officials in the northwest. Finally, the Commission was bombarded with real venom from northwestern elected officials struggling to enforce both federal and state laws in their jurisdictions who believed they had suffered slights and gross injustices at the Ninth Circuit’s hands. Significant representatives from the group of states forming the most likely candidate for a new circuit were starting to chomp at the bit.

\textsuperscript{150} Id. at ¶ 7; see also Twelfth Court Warranted, supra note 92.


\textsuperscript{152} The only Ninth Circuit judge outside the icebox states who testified on behalf of a split was Senior Judge Joseph Sneed of San Francisco. See Sneed Testimony, supra note 118, at 53 (testifying in favor of the icebox split).

\textsuperscript{153} Of the active judges in the northwest on the day the Commission began its work, two-thirds told the Commission that they favored a split. The Senate has since confirmed two new judges for the northwest; neither they nor Judge Betty Fletcher of Seattle, who was still active while the Commission was at work, testified to the Commission, but those who did testify or submit written views on behalf of a split still constitute one-half the membership of what would be the icebox circuit (Judges O’Scannlain, Trott, Nelson, and Kleinfeld). See Joint Statement, supra note 64, at 1; Kleinfeld, supra note 2, at ¶ 1.
C. Breakthrough: Two Divisions in One Circuit?

The moment of prescience before the Commission announced its recommendation came from Sanford Svetcov, the President of the American Academy of Appellate Lawyers. Svetcov proposed splitting the Ninth Circuit not into two circuits, but into two divisions, one consisting of Alaska, Washington, Oregon, Idaho, Montana, and Northern and Eastern California, and the other consisting of Arizona, Nevada, Hawaii, Guam, Marianas Islands, and Southern and Central California.\(^{154}\) Panels would consist of two judges from the division where the case arose and one judge from the other division.\(^{155}\) A special en banc court divided between the two divisions would resolve intra-circuit conflicts, and the majority of other en banc courts would be drawn from the pool of those voting in favor of en banc rehearing.\(^{156}\)

This divisional notion is not new. Prior to the 1981 split, the old Fifth Circuit had operated with two divisions.\(^{157}\) The Ninth Circuit briefly experimented with two decisional divisions\(^{158}\) and currently has three administrative divisions.\(^{159}\) In fact, Svetcov’s proposal was really just a “Ninth Circuit specific” version of an idea Senior Third Circuit Judge Joseph F. Weis, Jr. has been promoting for years in his quest to eliminate geographical circuit boundaries and create a unified court of appeals.\(^{160}\) Weis’ unified, nationwide appellate court would operate in nine-judge “divisions,” whose members might well be related by geography, but would remain part of one national court of appeals, creating one body of law.\(^{161}\) Weis suggested to the Commission that the Ninth Circuit might serve as a guinea pig of sorts to see


\(^{155}\) See id. at ¶ 13.

\(^{156}\) See id. at ¶ 15.

\(^{157}\) See BAKER, supra note 34, at 64-65.


\(^{159}\) See BAKER, supra note 34, at 79.

\(^{160}\) See generally Joseph F. Weis, Jr., Disconnecting the Overloaded Circuits—A Plug for a Unified Court of Appeals, 39 St. Louis U. L.J. 455 (1995). These were ideas Weis and others developed with the Federal Courts Study Committee, a predecessor of the Commission on Structural Alternatives in the late 1980s. See BAKER, supra note 34, at 40-43.

\(^{161}\) Weis, supra note 160, at 465-67.
if his scheme of operating a very large, but unified, court with several divisions could work. 162

Ninth Circuit Judges Thomas G. Nelson and Stephen S. Trott support structural reforms such as circuit splitting, but they responded to Svetcov’s divisional split-but-no-split unfavorably. Among the problems they foresaw were: (1) the unrealistic assumption that there would be equal numbers of judges in both divisions; (2) the increased nonrepresentational aspects of the limited en banc process because, under Svetcov’s proposal, the majority of judges would be chosen from those favoring en banc rehearing; and (3) that the proposal would still impose a considerable travel burden for the out-of-division judge on each panel. 163

The Weis and Svetcov proposals 164 have the merit of splitting some of the difference between the polar extremes of creating two new circuits — possibly by dividing California in half, as the Hruska Commission had proposed and as the Oregon circuit breakers still backed, and the status quo. Nevertheless, even the specifics of the Svetcov proposal failed to address many of the problems facing the circuit. The most obvious weakness, as Judges Nelson and Trott realized, is the proposal’s en banc structure. Like a full-court en banc, the Svetcov proposal ensures that a majority of en banc court judges would support rehearing en banc, and the structure would therefore be representative of the judges on the court at least to one extent. Nevertheless, the Svetcov en banc court would still not be a full court en banc, and therefore would have all of the limited en banc court’s disadvantages. For example, it would not represent the views of all the judges. 165 The court’s reasoning (if not the result) might still be very difficult to predict. 166 Judges not on the en banc court might still


164. Academic advisors to the Commission helped flesh out these proposals as well. See generally Hug, supra note 19.

165. Despite what appears to be ideological cleavage on the Ninth Circuit, many of the judges do not see it that way. “Regardless of who did the appointing, no other judge on this court truly represents our respective points of view on any case.” Joint Statement, supra note 64, at 5.

166. See, e.g., United States v. Perez, 116 F.3d 840 (9th Cir. 1997) (en banc).
feel removed from the process. Finally, the court would still lack an institutional voice.

Moreover, Svetcov's proposal assumes that if a majority voted for en banc rehearing, then it is probably to change the panel's opinion — and that "desire for change" is the only important interest to represent on the en banc panel. That is certainly a conclusion subject to debate. For example, the current Ninth Circuit has made a policy decision that the chief judge of the circuit should sit on every en banc panel, providing, at minimum, continuity of leadership. There may be many other judges who "should" be on en banc panels, but do not get chosen in the random drawings, at considerable cost to the circuit in terms of the legitimacy of its most important work. Ninth Circuit Judge Michael Daly Hawkins has argued that perhaps the author of the panel opinion and the judge who called for en banc rehearing should automatically become members of the Ninth Circuit's limited en banc panel. A case can be made in some situations that judges from the state where the case originates should be represented on the en banc panel. The Ninth Circuit's large size allows it to benefit from having judges with numerous legal specialties; arguably those with the most knowledge of the legal subject in the en banc case at bar should serve on the panel. Obviously, it would be virtually impossible to draft rules for choosing limited en banc panels that could accommodate all such groups of judges. One great benefit of a full-court en banc process is that it accommodates them all.

A good example of an en banc panel that might have benefited from more members was that chosen for Compassion in Dying v. Washington. The en banc court overturned a panel decision upholding a state law banning assisted suicide. The opinion seemed to be groundbreaking until the Supreme Court held that the three-judge panel was right all along. Even if the Supreme Court had not stepped in, the Compassion in Dying en banc panel might not have received the respect it deserved as an en banc court, because it was missing appropriate personnel. None of the members from the three-judge panel which had almost certainly devoted immense time and energy to the case, including the court's leading "life issues" scholar,
were chosen for the en banc panel. ¹７２ Only two of the four judges from the state where the case originated were chosen.¹７３ Judges on the losing side mobilized a failed movement to rehear the case in a full-court en banc.¹７４ The outcome at the Ninth Circuit might not have been different had different judges or more judges served on the en banc panel. However, it is questionable whether the court's en banc opinion would have received as much respect from both Ninth Circuit and other courts' judges as the en banc opinion of the nation's largest federal appellate court should receive had the Supreme Court allowed it to stand.¹７５

Some of the other characteristics of Svetcov's proposal also split differences, but not in the right places. Putting two judges from the division where a case originates on the three-judge panel deciding the case is a nod to regional concerns, but Svetcov does not explain why a judge from California, for example, is needed to decide a case originating in Idaho. Why not a judge from Washington instead? The California judge will simply end up with a long trip. Moreover, since the division judges would sit with each other regularly, and the individual extra-division judges would probably sit with them even less than they do now, interesting but disconcerting panel dynamics might de-

¹７２ Compare the composition of the three-judge panel, Judges Eugene Wright, John Noonan, and Diarmuid O'Scanlairn in Compassion in Dying, 49 F.3d at 588, with the en banc panel, Judges James Browning, Procter Hug, Jr., Mary Schroeder, Betty Fletcher, Harry Pregerson, Stephen Reinhardt, Robert Beezer, Charles Wiggins, David Thompson, Ferdinand Fernandez, and Andrew J. Kleinfeld in Compassion in Dying, 79 F.3d at 783. Of course, a fair criticism of the three-judge panel is that it included probably the court's most outspoken "pro-life" judges, and therefore was no more "representative" of the court than the en banc panel. A necessary evil of three-judge panels is that they will almost never be representative. En banc courts should provide a check on that problem; however, a limited en banc court could never provide such a check.

¹７３ Those were Judges Betty Fletcher and Robert Beezer. Missing were Judges Eugene Wright and Jerome Farris. This author has no reason to believe that either of these judges would have changed the outcome had they been members of the en banc panel. Judge Wright was a member of the original three-judge panel and dissented from the opinion upholding the law.

¹７４ See Compassion in Dying v. Washington, 85 F.3d 1440 (9th Cir. 1996) (rejecting request to rehear case in full-court en banc).

¹７５ It is not precedent that constrains judges; it is respect for precedent. As Judge Sneed reminded the Commission: "All precedents can be squeezed or stretched. Every judge sometimes resorts to both. These practices, unchecked by frequent personal encounters with each of one's colleagues, tend to generate en banc calls which can lead to intemperate remarks that further strain the obligations of courtesy." Sneed Statement, supra note 118, at ¶ 7.
velop. Where two judges from the same division sit together often enough to know each other well, the extra-division judge might become something of an outsider, similar to a visiting judge. Further, while the Svetcov proposal at least keeps California intact in one circuit, though split across two divisions, there are reasonable circuit split proposals, such as the icobox split, which do not require splitting California at all. The Svetcov proposal was definitely something of a breakthrough in the split debate, but it is not the answer to the Ninth Circuit’s problems.

D. The Commission’s Recommendation: Three Divisions in One Circuit

The principles in the Svetcov proposal, as well as previous experiments with the division concept, evidently inspired the Commission’s recommendation, but the Commission went even farther. To reorganize the Ninth Circuit, the Commission recommended three decisional divisions: the Northern Division consisting of the icobox states (Alaska, Idaho, Montana, Oregon and Washington); the Middle Division containing the districts of Northern and Eastern California, Hawaii, Nevada, and the Pacific Islands; and the Southern Division containing Arizona and the Central and Southern districts of California. For the rest of the country, the Commission recommended that Congress authorize all courts of appeals with more than fifteen judges to reorganize into divisions.

Other divisional arrangements for the Ninth Circuit had been tried in the past and found wanting. Therefore, the Commission made specific recommendations for these internal reorganizations. Depending on caseload, each division would have at least seven cir-

176. See infra notes 228-39 and accompanying text. Extra-division judges would know the basic circuit procedures, which frequently visiting judges from other circuits do not, but they would not know the other judges as well, nor would they know the division’s informal procedures. For example, in the Ninth Circuit there are informal practices such as the one which gives the judge writing an opinion the opportunity to vote first on whether to rehear a case. See Spreng, supra note 24, at 906 n.146. These types of practices would develop in each division and extra-division judges would lack familiarity. Another informal practice is that active Ninth Circuit judges usually write opinions in which the law of the circuit changes or there is a breakthrough of some type. See id. at 907 n.146. This practice is based on the theory that a local judge should announce changes in the law, even if a visiting judge might otherwise have been assigned the opinion. See id. The same practices would probably develop in a divisional approach. The point is that the judges would not all be equal.

177. See COMMISSION REPORT, supra note 8, at 41.
178. See id. at 61.
179. See id. at 50; see also Goodwin, supra note 158, at 120.
cuit judges. Each circuit judge would "belong" to a division, but only a majority would be required to reside in the division. Those not residing in the division would be assigned randomly or by lot for specified terms of at least three years.

The Commission carefully explained the role of precedent in each division. The divisions would each "function as a semi-autonomous decisional unit." Each would have its own presiding judge and its own internal, full-division en banc process. Decisions from one division would not bind any other, but the Commission urged that out-of-division authority from the circuit be given "substantial weight." The full circuit would retain its chief judge, but that person could not serve as the presiding judge of a division as well. The President would not appoint judges to the individual divisions; instead, assignment would occur according to internal circuit rules or the Federal Rules of Appellate Procedure.

To this point, the Commission's report sounded very much like a three-way circuit split in reality, and a divisional reorganization in name only. At least one commentator made that very point. The Commission's proposal for a "Circuit Division," however, assured that the old Ninth Circuit structure would be more than a mere skeleton around three otherwise autonomous units. This new structure's "sole mission" would be to resolve decisional conflicts between the divisions.

Initially, the Commission proposed a seven-judge Circuit Division consisting of the chief judge of the circuit, the presiding judge of each division, and one other judge from each division. However, the proposed make up sustained severe criticism during the Tentative Draft Report's comments. Some argued that seven judges were insufficient to "break a tie" between divisions. Another concern was whether the composition of the Circuit Division was inappropriately weighted in favor of the court leadership, which would in turn likely be weighted in favor of one or another party. In light of that criti-
cism, the Final Report suggested a different composition — a thirteen-judge Circuit Division including the Chief Judge and twelve other judges selected by lot, with an equal number from each division.\footnote{192} Each Circuit Division member would serve three years.\footnote{183}

The Circuit Division would hear cases that had already been through the divisional en banc process and were claimed to be in conflict with a decision from another division.\footnote{194} It would not be permitted to exercise its discretionary review to hear cases claimed to be in error but not in direct conflict with another division’s decision.\footnote{195} Circuit-wide en banc would be abolished.\footnote{196}

The Commission indicated that its division proposal balanced genuine problems it perceived in the status quo “without sacrificing the benefits of a large circuit.”\footnote{197} It listed three broad justifications for its recommendation. First, the Commission accepted the arguments that smaller decisional units would promote consistency and predictability, because each division would produce less law for the judges to review, and because a smaller court would be easier for its bar to “know.”\footnote{198} These were central arguments of most prominent split backers. Second, the Commission agreed that the limited en banc procedure on the current Ninth Circuit was unsatisfactory, so smaller units that could hold full-court en banc proceedings would be a useful development for the West.\footnote{199} Again, the Commission rejected the contention that the “Ninth Circuit functions well and should not be divided,”\footnote{200} at least as far as en banc proceedings are concerned. Finally, the Commission accepted that there are benefits to making sure that panels contain judges who understand a region, and to making sure that panels are sufficiently geographically diverse to perform their federalizing function.\footnote{201} The Commission specifically mentioned the benefit of having a single court announcing the law for an entire seaboard region as a motivating factor in its decision not to recommend creating two or more completely separate entities from the Ninth Cir-
cuit. In fact, the only factors the Commission mentioned as justifying its decision not to recommend a split were all bound up with its respect for "the character of the West as a distinct region," and its inability to comprehend a more beneficial split.

The Commission's explanation for rejecting various proposed circuit split proposals was perhaps the weakest aspect of its work. The Commission failed to discuss the relative merits or disadvantages of the "icebox split," despite Justice Kennedy's admonition that the icebox states should not be held hostage to Congress' inability to devise a better split. That failure was even more surprising given that Ninth Circuit Judge Sneed had specifically proposed the icebox split, and the Commission itself acknowledged that the icebox states would form a sensible administrative and regional unit. The Commission's only apparent reason for rejecting a modified icebox split, which would add Hawaii and the island jurisdictions to an icebox circuit, was that the caseload per judge would drop precipitously in the new circuit while it would rise in the new Ninth. As the Commission recognized, however, the same problem exists in the divisional approach. Further, workload per judge is currently artificially high in the northwest, only because of its historical role as a "bloodbank" of judges for California and Arizona and the large number of California death penalty cases. The Commission also discussed the icebox split in the context of moving Arizona to the Tenth Circuit, but its reason for rejecting this split had nothing to do with the icebox formation. However, the Commission focused on the disadvantages of moving Arizona, which follows California law in a number of areas, out of the Ninth Circuit.

The only other split configuration the Commission seriously considered was the Hruska split, which would have created a new

202. See id.
203. Id. at 49.
204. See Kennedy, supra note 90, at 5.
205. See Sneed Statement, supra note 118, at ¶ 13.
206. See COMMISSION REPORT, supra note 8, at 54.
207. See id.
208. See id. at 41 n.96.
210. See COMMISSION REPORT, supra note 8, at 41 n.96. Northwesterners would no doubt be infuriated to learn that their own death penalty cases are delayed while Northwestern judges are deciding California's death penalty cases. See Lance, supra note 95, at ¶¶ 7-8.
211. See COMMISSION REPORT, supra note 8, at 41 n.96, 55-56.
212. See id.
213. See id. at 56-57; Hruska Report I, supra note 5, at 235. Oregon Representative Michael Kopetski introduced a bill in Congress to split the circuit according to the Report's suggestion in 1993. See Burns, supra note 26, at 247-48. The Oregon "circuit
Twelfth Circuit of the northern and eastern districts of California and the icebox states. Again, this proposal has serious drawbacks, including the fact that such a configuration would produce even greater workload disparity than the modified icebox split the Commission initially rejected, and the procedural uncertainty that would arise from completely splitting California. Again, these concerns have nothing to do with the icebox states themselves. For example, no matter how you slice up the Ninth Circuit, the Commission’s work demonstrates that the Central and Southern districts need more appellate judges. Therefore, the Commission’s reasoning in opposition to the icebox split was superficial at best.

To the extent that the Commission’s reasons for rejecting the icebox split were superficial, it may be because the Commission was not rejecting the icebox split at all. The Commission’s mandate, put crudely, was to propose reorganizing the Ninth Circuit in a way that would please the northwestern Senators while preserving a sensible organization for the circuit. The Commission recognized that any useful response to that mandate was going to have to take into account the very strong opposition to any split in the large and politically powerful southern part of the circuit. Moreover, the Commission had not uncovered a ringing endorsement for a split in the north — instead it found only growing support for a change.

The Commission provided split backers in Congress with a powerful tool to produce a split if it chooses to use it. The Commission’s recommendations are the necessary political cover for Congress to “almost” create three circuits from the current Ninth, by enacting the Commission’s draft legislation. When the split legislation sunsets in seven years, Congress may continue the divisional arrangement, with many of the benefits of an actual split, or test the waters in the icebox states for majority support for the next step toward creating a new Twelfth Circuit. On the other hand, the report’s critique of the Ninth


214. See COMMISSION REPORT, supra note 8, at 56; Hruska Report I, supra note 5, at 235.

215. See COMMISSION REPORT, supra note 8, at 57; see also Hruska Report I, supra note 5, at 238-40 (concluding that the difficulties of splitting a state between two circuits could be managed).

216. As the Commission noted in the section discussing the merits of its own proposal, “[t]he concentration of appeals in the southern part of the circuit makes it impossible to divide the court’s workload equally among the three divisions,” unless Arizona were moved to the Tenth Circuit, a proposal the Commission specifically did not endorse. COMMISSION REPORT, supra note 8, at 41 n.96.
Circuit and its description of an ideal circuit would justify creating
the icebox or a similar Twelfth Circuit, as seven Ninth Circuit judges
pointed out in their letter urging the Commission to recommend split-
ting the circuit in its final report. 217 The recommendations do not for-
stall something bolder, such as Judge Weis' national court of appeals;
rather, they would arguably facilitate bold restructuring in the future.
The Commission's recommendations therefore provided Congress
with reasoned basis for reorganizing the Ninth Circuit in a number of
different ways, depending on the politics of the 106th Congress.

IV. A THIRD WAY: THE ICEBOX AND TWO DIVISIONS IN ONE
CIRCUIT

The Commission concluded that

it is impossible to create from the current Ninth Circuit two or
more circuits that would result in both an acceptable and equ-
tuitable number of appeals per judge and courts of appeals
small enough to operate with the sort of collegiality we envi-
sion, unless the State of California were to be split between
judicial circuits—an option we believe to be undesirable. 218

Academic commentators agree that California should not be split. 219
Yet, the Commission seems to have ignored a fresh approach to the
Ninth Circuit's ever-louder critics in the northwest that would not
substantially disadvantage the southern parts of the circuit. An even
better recommendation than the three divisions in one circuit pro-
posal would be to create from the Northern Division — the icebox
states — their own circuit, and then reorganize the new Ninth Circuit
into two divisions, according to the lines the Commission has already
drawn.

A. Problems with Three Divisions in One Circuit

The Commission's divisional proposal has a number of merits. It
would create smaller units in which collegiality could flourish more
easily. Judges could keep up with their division's law. Workload

217. See generally Wright et al., supra note 50; see also Paul Elias, North-South
Split Backed by Seven Ninth Circuit Judges, RECORDER, Nov. 9, 1998, at 3. If Congress
were looking for a way to split the circuit, it could easily justify going beyond the Com-
mission's recommendations by pointing out that there was very little reason not to do so.
218. COMMISSION REPORT, supra note 8, at 52.
219. See generally Carl Tobias, Why Congress Should Not Split the Ninth Circuit,
would probably decline as the number of truly unwieldy en bancs, \textsuperscript{220} burdensome slip opinions to read, death penalties, and excessively long trips also declined.\textsuperscript{221} The division structure would permit meaningful, full-division en banc procedures everyone could respect, because the division would be bound by only its case law. The Circuit Division might also maintain at least a minimal consistency of the law throughout the far West.

What the proposal reflects, primarily, is the Commission's choice between two competing philosophies of how courts should do their work, and inexorably bound up with that, what constitutes an appropriate judicial product. On one hand, the Commission described a "decisional unit that is small enough for the kind of close, continual, collaborative decision making that 'seeks the objective of as much excellence in a group's decision as its combined talents, experience, and energy permit,'"\textsuperscript{222} and that is rooted in the local region it serves. The other approach envisions larger groups of judges working more like a bureaucratic organization with considerable support from staff, and focusing on the primary task of getting the cases resolved.\textsuperscript{223} The Commission essentially chose "small is beautiful" over "big is better." As Judge Godbold put it, "I've been little, I've been moderate, and I've been big . . . . Little is best."\textsuperscript{224}

From this perspective, many criticisms of the Commission's recommendations are their greatest strengths. For example, the Commission specifically recommended that decisions of the individual divisions not bind the other divisions, and it provided for divisional en banc process at the expense of a circuit-wide en banc process.\textsuperscript{225} While these characteristics of the report might be viewed as failings if maintaining the integrity of a large institution is the goal,\textsuperscript{226} they are es-

\textsuperscript{220} Whether the actual number of en banc cases would decline is not certain. There is an argument that because smaller decisional units would be able to monitor the division's case law better, en bancs would be less necessary to correct bad decisions. Correcting bad decisions, incidentally, is not an accepted reason for rehearing a case en banc according to circuit rules, though it certainly happens. See FED. R. APP. P. 35; 9TH CIR. R. 35-1; Hellman, supra note 35, at 74-75.

\textsuperscript{221} See Spreng, supra note 24, at 903, 913-20.

\textsuperscript{222} COMMISSION REPORT, supra note 8, at 40.

\textsuperscript{223} For a discussion of this view, perhaps not as an ideal but as a necessity, see Reinhardt, supra note 74, at 53-54.

\textsuperscript{224} Godbold, supra note 114, at 153.

\textsuperscript{225} Chief Judge Hug argued, for example, that the divisional en banc process simply created additional costs and delay to litigants, and that in any event, a court-wide en banc process should be maintained. See Hug, supra note 19, at ¶¶ 17-18. That proposal would simply defeat the regional autonomy that is the hallmark of the division structure. The divisional en bancs do not create cost or delay; keeping a circuit-wide en banc along with a full-division en banc creates cost and delay.

\textsuperscript{226} See id. at ¶¶ 12-17.
sential to resurrecting the small decisional units with the collegiality and full unit en banc processes the Commission treasured. Federal law targeted at one state or region, for example, would be decided for the most part by judges from that region under the Commission’s division structure. Of course, the wisdom of that recommendation depends solely on the philosophy of the beholder.

Even to those who prefer smaller circuits, however, the Commission’s proposal is not perfect.\(^\text{227}\) It has two significant flaws that must be addressed before Congress converts it to law. First, since the proposal relies on regional divisions, but assigns judges to those divisions only partly based on the regions where they maintain chambers,\(^\text{228}\) the Commission’s proposal creates two unequal classes of judges in each division: regional insiders and regional outsiders. Second, the Circuit Division proposal will not be as strong a stick to keep circuit law consistent as the Commission seems to hope. The Commission also proposed that the Federal Judicial Center study the effectiveness of the divisional experiment,\(^\text{229}\) since the approach leaves many intangible questions unaddressed.

1. Problems with Collegiality

According to the Commission proposal, most of the judges in each geographical division would reside in that division, but some would reside elsewhere.\(^\text{230}\) Periodically, those who reside elsewhere would return to their home divisions, and some of the resident judges would be assigned to a different division. At all times, a majority of the judges assigned to the division would also reside there. The judges residing in the division would have the benefit of being “of the division,” and depending on how the rules were written, would also benefit from either permanently or usually being assigned to their home, regional division.\(^\text{231}\) A minority of the judges in each division, however, would clearly be outsiders geographically.

The distinctions between judges certainly go against the grain of current court culture. The Ninth Circuit judges go to some pains to ensure that all judges on the court are “equal” and have the same opportunity to decide cases and make an impact on the law. This partly

\(^{227}\) This article does not address arguments based simply on a preference for larger circuits, or the technical problems of dividing California or assigning Arizona to a division.

\(^{228}\) The Commission’s proposal would have outsider judges assigned randomly to a division for three-year terms. See COMMISSION REPORT, supra note 8, at 43.

\(^{229}\) See id. at 42-43.

\(^{230}\) See id. at 43.

\(^{231}\) The report indicates that the term of such an assignment should be at least three years. See id.
explains why the court conducts random drawings for three-judge and en banc panels, though other values, such as regionalism, predictability, and efficiency, are sacrificed in the process. Junior judges have opportunities to participate in managing the circuit and writing important en banc opinions, though some organizations might preserve these responsibilities — and honors — for the most senior members. The mere fact that a judge was not assigned to a panel deciding a case does not mean that judge cannot contribute to the outcome by making informal suggestions and using mechanisms such as “stop-clocks” to politely coerce the panel into considering changes in its draft opinion. Ninth Circuit judges are dissatisfied when they feel they do not have an equal chance to participate in all the court’s processes. They balk at institutional structures that tend to create “tiers of judges.”

These efforts at equality have several virtues. First, they promote the sort of collegiality the Commission valued in its recommendations. Second, they ensure that nothing inherent in the institution will take away precedential force from any individual judge’s work. Assigning judges to divisions in which they do not maintain chambers would be a significant blow to this painstakingly maintained equality. Through no fault of any individual judge, this arrangement would tend to create two classes of judges, with the “outsider” judges likely playing an inferior role.

An outsider judge would be like a visiting professor or non-tenure track faculty member at a law school. Visiting and non-tenure

233. “Stop-clock” memos are the way an off-panel judge asks the panel to give him or her more time to consider calling for an en banc rehearing. See id. at 71.
234. See 9th Cir. G.O. 5.3, 5.4; see also Spreng, supra note 24, at 898-99; Hellman, supra note 35, at 61.
235. See Joint Statement, supra note 64, at 5-6. The Ninth Circuit recently recalled a mandate in a death penalty case because two judges, who would have called for an en banc rehearing in the case, mistakenly missed the deadline under the court’s rules to make that call. See Thompson v. Calderon, 120 F.3d 1045, 1060-61 (9th Cir. 1997) (Reinhardt, J., concurring), rev’d in part, 118 S. Ct. 1489 (1998). For example, it has not escaped notice that in ten years, Judge Betty Fletcher has served on almost twice as many en banc panels as Judge Diarmuid O’Scannlain. See Kleinfeld, supra note 2, at ¶ 21.
236. Sneed Testimony, supra note 118, at 57. This was Judge Sneed’s explanation to the Commission for why the Ninth Circuit would probably never adopt a permanent limited en banc court. See id.
237. Chief Judge Hug hinted at this problem in his analysis of the Commission’s report when he pointed out that out-of-division judges would miss out on participating in en bancs in their home divisions. See Hug, supra note 19, at ¶ 28. His example to illustrate the disadvantages of assigning judges out of division demonstrates what I suspect would be the reaction of many judges — it is better, more fun, and more rewarding to be assigned to your home division. Out-of-division judges would be, in a sense, “unfortunates.”
track faculty are by definition temporary employees. They are not on a career path to move into management of the schools where they are teaching. They may not know their tenured colleagues very well. Long-term planning often does not include them. In some cases, they may be intellectually superior to permanent, tenure-track faculty; they may be celebrated professors. Nevertheless, their status is different.

The Commission left the door open for Congress or the Ninth Circuit to establish specific rules for out-of-division judges that could minimize some collegiality and other status-related problems resulting from the divisional structure. Some ills, however, seem impossible to cure. Could an outsider judge ever succeed to the presiding judge position? If not, then all the division's judges are not equal, and the outsider judge is like a visiting faculty member — stimulating to have around, but not really part of the team. If an outsider judge could serve as presiding judge, then it is reasonable to ask whether regionalism or any value other than blind equality is furthered when the southern division's presiding judge might live in Alaska or Montana.238 Outsider judges would not even be "insiders" in the divisions where they maintain chambers, because they could not serve on en banc panels and would lose inter-personal ties with their neighboring colleagues.239

Outsider judges would be not just institutional but also social outsiders. How would a small handful of northern judges fit into the social milieu of the Southern Division, where the overwhelming majority of judges sit in the Los Angeles area,240 and may get together in small groups for lunch on a regular basis to maintain collegial ties?241 Outsiders from the north would obviously be at a distinct disadvantage in simply getting to know their colleagues.242 Would that make a

238. Justice Kennedy has argued that judges ought to reside in the regions where they sit. See Kennedy, supra note 90, at 4-5.
240. The Southern Division would have two pockets of active judges, the Los Angeles metro area (Judges Pregerson, Reinhardt, Kozinski, Fernandez, Rymer, Tashima, and Wardlaw) and Phoenix (Judges Schroeder, Hawkins, Silverman), along with a generous sampling of senior judges in both places. There is only one other active judge in the Southern Division (Judge Thompson). It is law clerk lore that there is a significant social scene that has built up among the clerks, and to a certain extent, the judges, in each place.
241. See Patricia M. Wald, Calendars, Collegiality, and Other Intangibles on the Courts of Appeals, in FEDERAL APPELLATE JUDICATURE IN THE TWENTY-FIRST CENTURY 171, 181 (Cynthia Harrison & Russell R. Wheeler eds., 1989). D.C. Circuit Judge Patricia Wald noted that "[p]urposeful efforts by judges to spend more time together in non-confrontational situations may be . . . worthwhile." Id.
242. This problem is less pronounced where the Middle and Northern divisions are concerned, because the judges resident there are already less clustered. Only two ac-
difference when panels are conferencing on cases? It might, and if so, then the divisional arrangement is extremely unsatisfactory. Chief Judge J. Harvie Wilkinson has argued that "one engages in more fruitful interchanges with colleagues whom one deals with day after day than with judges who are simply faces in the crowd." An outsider judge would lack the benefit of dealing with other judges regularly, and panels might lose the full input of those judges as a result.

Moreover, unlike the current arrangement, the outsider judges would be condemned to lives as itinerants — always traveling, usually great distances, to their panel sittings. It is no accident that the northwestern judges complained loudest to the Commission about the imposition of travel time on the court's work. Travel to San Francisco and Los Angeles, the cities where the court sits most often, is in-terminable for them. At least under present circumstances they sometimes go to Seattle, which is much more like home chambers by comparison. The respite of Seattle sittings would be lost, of course, to a Northern Division judge assigned to the Southern Division for any length of time. Consider also the possibility of the Northern Division instituting regular Billings and Boise sittings, along with those the current Ninth Circuit holds in Seattle, Portland and Anchorage. What would its southern outsider judges think of travel burdens then? There seems to be no good way to balance this problem by limiting the amount of time an outsider judge would remain assigned away from her home division, because limiting the assignment to the three-year minimum that the Commission recommends would simply exacerbate the collegiality problems. Moreover, northern judges made travel time complaints to the Commission because traveling for a week at a time almost every month has a negative impact on workload and work quality. It would not be a positive development if out-

tive judges currently reside in San Francisco (Judges Browning and Fletcher), and two in Reno (Chief Judge Hug and Judge Brunetti). See generally United States Courts for the Ninth Circuit, Circuit Judges for the Ninth Circuit Court of Appeals (visited Mar. 7, 1999) <http://www.ce9.uscourts.gov/web/ocelbrn.sf/504ca249c786e20f8525628406da7ab/21ccf621748761fa8825672b006507c0?OpenDocument> [hereinafter Circuit Judges]. There is no active judge residing in Hawaii, though one would anticipate such an appointment so that the mandate that each state in a circuit have an active judge is complied with. 28 U.S.C. § 44(c) (Supp. III 1997). Portland (Judges O'Scannlain and Graber) and Boise (Judges Trott and Nelson) have two active judges each, and Billings (Judge Thomas), Seattle (Judge McKeown), and Fairbanks (Judge Kleinfeld) each have one. See generally Circuit Judges, supra note 242.

243. Wilkinson, supra note 71, at 1173.
244. See Joint Statement, supra note 64, at 7.
245. The current Ninth Circuit also sits in San Francisco, Pasadena and twice a year in Honolulu. See COMMISSION REPORT, supra note 8, at 31.
246. See id. at 43.
247. See id. at 36.
of-division judges became particularly notable for their large backlogs or shoddy writing.

It is important not to miss the forest for the trees. Justice Kennedy has argued, with good reason, that judges should reside in the regions they serve.\textsuperscript{248} Even if that is not such an important value, no one seriously suggests that the Fifth Circuit's Chief Judge Henry Politz ought to head up to New England from time to time to sit with the First Circuit so that the eastern seaboard's law will be more consistent or the First Circuit more diverse. Why does the Commission believe southern judges need to be making law in the northern part of the Ninth Circuit, or vice versa? The flippant, but perhaps honest, answer is that without outsider judges, the Commission's proposal would simply be a three-way split-in-fact.

2. Problems with the Circuit Division

The Commission's one substantive reason for not splitting the circuit outright is the hope that a unified Ninth Circuit may be able to maintain consistent federal law to promote maritime commerce and to facilitate activity in other areas of shared regional concern.\textsuperscript{249} The Commission's recommendations do not hold for much hope for achieving that goal, and Commission proposed only two means of maintaining consistency.\textsuperscript{250} First, it exhorted judges to give other divisions' decisions "substantial weight" in their own decision making, which is, at best, a fairly intangible guideline.\textsuperscript{251} Second, it proposed a thirteen judge "Circuit Division" to adjudicate conflicts between the decisional law of the divisions.\textsuperscript{252}

The Circuit Division has several interesting features that would change judges' and litigants' behavior, perhaps in unpredictable ways. First, litigants would always know the members of the Circuit Division before making a petition for circuit division rehearing. The Circuit Division would be composed of "the chief judge of the circuit and twelve active circuit judges selected by lot in equal numbers from each of the regional divisions."\textsuperscript{253} Each judge on the Circuit Division

\begin{thebibliography}{99}
\bibitem{248} See Kennedy, supra note 90, at 4-5.
\bibitem{249} This is one of the better arguments in opposition to the split. See Hug, supra note 65, at 300; Locke, supra note 127, at ¶¶ 7-10, 20-22.
\bibitem{250} See COMMISSION REPORT, supra note 8, at 36. In a way, the Commission proposed three ways of maintaining consistency. The third is the influence of outsider judges, but that influence may be limited, given the rules of stare decisis. The Commission also prescribed outsider judges' inferior status away from their home divisions. See supra notes 228-39 and accompanying text.
\bibitem{251} COMMISSION REPORT, supra note 8, at 43.
\bibitem{252} Id. at 45.
\bibitem{253} Id.
\end{thebibliography}
would serve a three year term, which would be staggered to maintain continuity of membership.\textsuperscript{254} The Circuit Division's jurisdiction would be discretionary, and it could be invoked by a litigant if a panel decision in a regional division was in conflict with that of another division.\textsuperscript{255}

Public knowledge of the Circuit Division members' identities is not necessarily bad. It would make Circuit Division adjudication more predictable than the current limited en banc panel approach, which might encourage settlement of certain cases.\textsuperscript{256} Knowing the composition of the Circuit Division, with the increased predictability it would create, might also have some constraining impact on the rest of the circuit's judges, who generally do not enjoy being overruled. On the other hand, the Ninth Circuit tilled the soil of permanent limited en banc courts twenty years ago, but rejected such an institution because it might distort the process of choosing which cases to rehear en banc.\textsuperscript{257} Whether distortion would infect the Circuit Division would depend on whether the Circuit Division or the court as a whole chose the cases it would hear.

The more disconcerting aspect of the Circuit Division as the Commission originally proposed it — seven judges, the majority of which would be the Chief Judge and presiding judges\textsuperscript{258} — was that it would have been heavily weighted toward very senior active judges, since this is the basis on which the Chief Judge and the presiding judges would be chosen.\textsuperscript{259} This was a serious disadvantage of the original proposal, and Congress should not resurrect it. This weighting toward seniority could possibly be counterbalanced by fixing the rules so that more junior judges were chosen for the remaining three slots envisioned in the original proposal, but again, that would mean "all the judges are not equal," and would probably have a negative impact on inter-personal dynamics and respect for precedent on the

\textsuperscript{254} See id.

\textsuperscript{255} See id. However, the Circuit Division's jurisdiction could not be invoked until the conflicting decision had been reviewed by the division en banc, or after en banc review had been sought and denied — thus allowing the regional divisions an opportunity to correct their own errors. See id.

\textsuperscript{256} See Carrington, supra note 83, at 208 (discussing KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 30-51 (1960)).

\textsuperscript{257} See Hellman, supra note 35, at 66-67.

\textsuperscript{258} See TENTATIVE DRAFT REPORT, supra note 7, at 42.

court.\textsuperscript{260} Of course, more senior judges often carry more administrative responsibility in the Ninth Circuit. Seniority plays at least some role in how en banc and death penalty coordinators are chosen, for example.\textsuperscript{261} However, the en banc or death penalty coordinator has only the most minimal ability to use that position to affect the law of the circuit. The opposite would be true for the Circuit Division as originally proposed.

Allowing the most senior judges to make up the majority or perhaps all of the Circuit Division, would make the Circuit Division the most politicized unit on the court.\textsuperscript{262} Consider the following example. President Reagan appointed five still-active judges to the Ninth Circuit, ranging over all three divisions. Added to the four Bush appointments still serving on active duty, the possibility of a Reagan-Bush hegemony on the original Circuit Division for many years would not be unrealistic.\textsuperscript{263} President Clinton’s six appointments and counting are next. Whether such hegemony would ever actually occur would remain to be seen, but the possibility that any particular president could influence the composition of the Circuit Division so completely is a sobering indictment of the Commission’s original scheme. One of the virtues of the current Ninth Circuit is that since President Reagan began appointing judges in large numbers (almost fifteen years ago), the court has been fairly evenly divided between Republicans and Democrats. Presidents Kennedy, Carter, Reagan, Bush and Clinton are all represented, some in large numbers among the active judging corps. Partly because President Carter appointed ten judges, the court was characterized as being “liberal,” but a more correct view is that the current court is polarized and individualistic.\textsuperscript{264} The seven-member Circuit Division, by contrast, could give the appearance of one particular legal or political ideology because of the way it is chosen. That would have a negative impact on its legitimacy inside and outside the courtroom.

\textsuperscript{260} See supra notes 228-39 and accompanying text.  
\textsuperscript{261} Such sensitive jobs would not go to the new recruits to the court, for all the obvious reasons. However, the current death penalty coordinator, Thomas G. Nelson, is not particularly senior. Willingness to take on those responsibilities may play a greater role in assigning them than seniority. By contrast, some positions, such as the law clerk orientation chairs, routinely go to very junior judges. They are an opportunity to contribute in positive ways to the administration of the court, but comparatively speaking, require less institutional knowledge.  
\textsuperscript{262} See Levi, supra note 191, at ¶ 3.  
\textsuperscript{263} President Reagan’s appointments could never hold all of the top leadership positions at one time, because Judge Melvin Brunetti, the senior Reagan judge in the Middle Division, is past the age when statutory law would permit him to hold either the Chief or Presiding Judge position.  
\textsuperscript{264} See Spreng, supra note 24, at 909-11.
The larger circuit division, chosen randomly, as Arizona Chief District Judge Robert Broomfield recommended to the Commission,\textsuperscript{265} and as the Commission ultimately did propose in its final report,\textsuperscript{266} will not necessarily be better. The more judges involved, the more judges will be affected by a significant workload increase from this additional decision making vehicle. One of the benefits of the divisional proposal, a decrease in workload due to smaller decisional units, would be significantly impaired. A permanent circuit division would also create inequality among the judges,\textsuperscript{267} and inspire the same “disassociation” and “detachment” as the current limited en banc procedure.\textsuperscript{268}

Despite these drawbacks, the Circuit Division would still have merit if it could maintain consistency among the divisions by addressing inter-division conflicts. Although Professor Arthur Hellman’s research has shown that there are very few direct conflicts between published Ninth Circuit opinions,\textsuperscript{269} anecdotal evidence suggests that the Ninth Circuit’s law does not seem very consistent to the lawyers and district judges who apply it on a daily basis.\textsuperscript{270} Professor Meador has argued elsewhere that the reason for the difference is that inconsistency manifests itself in more subtle ways than the criteria for inconsistency in Professor Hellman’s study could discern.\textsuperscript{271} Yet the Circuit Division’s mandate would be to hear only direct conflicts of the type Professor Hellman studied. Either it would degenerate into a limited en banc court of the type the Ninth Circuit currently has,\textsuperscript{272} with the massive impact on workload and legitimacy that would suggest, or it would have little impact on consistency at all. Therefore, it is questionable whether the Circuit Division could be sufficiently successful at rooting out inconsistency in circuit precedent to outweigh the risks of politicization or increased workload.

\textsuperscript{265}See Broomfield, \textit{supra} note 259, at 2.

\textsuperscript{266}See Commission Report, \textit{supra} note 8, at 45-46.

\textsuperscript{267}See Hug, \textit{supra} note 16, at 4-5.

\textsuperscript{268}See \textit{supra} notes 80-81 and accompanying text.

\textsuperscript{269}See Hellman, \textit{supra} note 35, at 83-86.

\textsuperscript{270}See, \textit{e.g.}, COMMISSION REPORT, \textit{supra} note 8, at 39-40; see also Carrington, \textit{supra} note 83, at 210 (quoting an attorney who grumbled that “Las Vegas is the capital of the Ninth Circuit”); Meador, \textit{supra} note 54, at 196 (reporting survey results that 59 percent of Ninth Circuit lawyers and 68 percent of district judges disagreed with the proposition that “[t]here is consistency between [Ninth Circuit] panels considering the same issue”).

\textsuperscript{271}See Meador, \textit{supra} note 54, at 200.

\textsuperscript{272}Chief Judge Hug points out an important difference between the Circuit Division and the current en banc: “There would be no participation of judges throughout the circuit in the decisions of the Circuit Division, as to whether it should take a case or not take a case or let a panel decision stand.” Hug, \textit{supra} note 16, at 5.
3. Merits of the Icebox Split Combined with Two Divisions in One Circuit

The country would be better served if the Commission proposed, and Congress adopted, a slightly different compromise: create a new Twelfth Circuit from the icebox states and then divide the remaining Ninth Circuit into two divisions operating approximately as the Commission suggested for its three-division plan. The states of the current Ninth Circuit would retain virtually all of the benefits of the Commission's proposal. In addition, the disadvantages of the divisional arrangement would be mitigated if the circuit were split and the larger portion reorganized into divisions.

A three-way split is unrealistic and perhaps unwise. The icebox circuit is sensible, but the best way to divide the remaining southern part of the circuit is unclear. Creating a circuit from the proposed Southern Division, for example, would violate many of the well-respected Hruska Commission criteria for proper circuit organization.\textsuperscript{273} Placing Arizona in the Middle Division rather than the Southern Division would permit the Middle Division to be split again someday, and it would equalize workload,\textsuperscript{274} but at the expense of creating a circuit from a mere part of a state.\textsuperscript{275} These are not attractive options.

On the other hand, if Congress created only the icebox circuit now, it would at least retain the option of dividing the new Ninth Circuit again later. Further, the umbrella of consistent western law might survive two circuits in the far West, though it would be less likely to survive three. In the near term, it is unlikely that western law would somehow become balkanized, simply because Congress replaced one circuit with two.

By contrast with the Middle and Southern Divisions of the Commission's proposal, the Northern Division is easy to imagine as a separate circuit. The icebox states are a true region, with common interests but sufficient diversity to stand alone. They form a potential circuit that one might design from scratch.\textsuperscript{276} Theirs would be a circuit

\textsuperscript{273} For example, the Southern Division would contain just one state and a quarter of a state, violating the criteria that a circuit should contain at least three states and there should never be a circuit of only one state. See Hruska Report 1, supra note 5, at 231-32. The criteria that the circuits should contain a diversity of population, business and interests might also be violated. See id. at 232.

\textsuperscript{274} See Broomfield, supra note 259, at 3.

\textsuperscript{275} See supra note 273 and accompanying text.

\textsuperscript{276} Judge Sidney Thomas argues that the icebox states are too small in population and filings to support their own circuit. See Sidney R. Thomas, Judge, Ninth Circuit Court of Appeals, Written Statement to the Commission on Structural Alternatives for the Federal Courts of Appeals ¶ 10 (May 27, 1998) (available at <http://app.comm.us...>
small enough for the collegiality the Commission craves, but without
the travel burdens and judicial inequality the Commission's division
proposal would create. Internally, the icebox circuit could maintain
consistency with a full court en banc process, just as the Commission
envisions. Its caseload would be sufficiently light to permit its judges
to read all its opinions, and perhaps to circulate them to the entire
court prior to issuing them. The circuit would start out fairly evenly
divided between Republicans and Democrats, much as the current
Ninth Circuit is divided, so the complaint that creating the icebox
circuit is merely a way to change the law governing the northwest
lacks merit.

The Commission's division proposal, modified to create only two
divisions from the new Ninth Circuit states, would have a great deal
of merit in a circuit that would still be extremely large, but not easily
split without dividing a state. Implementing the divisional structures
in the south would still permit experimentation. The Circuit Division
might add possible conflicts from multiple interpretations of Califor-
nia law, for example, to its docket. The "outsider" problem would re-
main, but since the outsiders would be coming from only one other di-
vision, they would probably feel less out of the loop, and all judges
would be more likely to maintain chambers in the same cities. Lopp-
ing off the northern states would also reduce the travel time for out-
sider judges, because none of the southern judges would ever have to
sit in Seattle or Anchorage.

V. CONCLUSION

The Commission on Structural Alternative has made a valuable
recommendation to the United States Congress, but not in the way it
intended. Its proposal to create three divisions out of the Ninth Cir-
cuit confirms that the northwest "icebox" states are a legitimate re-
"nional and judicial entity. Despite the Commission's unexplained

277. See COMMISSION REPORT, supra note 8, at 47-48.

278. The Democrat appointed judges on the new Twelfth Circuit would be Sidney
R. Thomas, Susan P. Graber, and Margaret M. McKeown. See generally Circuit Judges,
supra note 242. The Republican-appointed judges would be Diarmuid F. O'Scannlain,
Stephen Trott, Thomas G. Nelson, and Andrew J. Kleinfield. See generally id.

279. The Democrat appointed judges on the current Ninth Circuit are Procter
Hug, Jr., James R. Browning, Mary M. Schroeder, Harry Pregerson, Stephen Reinhardt,
Michael Daly Hawkins, A. Wallace Tashima, Sidney R. Thomas, Barry G. Silverman, Su-
san P. Graber, Margaret M. McKeown, Kim McLean Wardlaw, and William A. Fletcher.
See generally id. The Republican appointed Judges are Melvin Brunetti, Alex Kozinski,
Diarmuid F. O'Scannlain, Stephen Trott, Ferdinand F. Fernandez, Pamela Ann Rymer,
Thomas G. Nelson, and Andrew J. Kleinfield. See generally id.
hesitance to endorse circuit splitting, Congress should seriously consider fashioning the icebox states into their own circuit. Further, the division concept the Commission espouses would solve many of the problems that the new Ninth Circuit would encounter. Congress should build from the Commission's useful work, split the Ninth Circuit, and institute the divisional arrangement in the new Ninth Circuit post-haste.