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THE NINTH CIRCUIT SHOULD NOT BE SPLIT

Procter Hug, Jr.*

I. INTRODUCTION

This article has been prepared in the context of recent legislative efforts to divide the Ninth Circuit. Although the principal focus of the legislative proposal has been on the Ninth Circuit Court of Appeals, it is important to recognize the implications of any division on the circuit as a whole, including the district and bankruptcy courts. A division of the Ninth Circuit would be a serious disruption of all of these courts and their support units, and not solely the court of appeals. It would also disrupt the effective service our circuit executive's office affords to these other court units. The vast majority of the judges and the attorneys who would be affected is convinced that the Ninth Circuit is functioning well. The law professors who have looked into the matter agree. If this is the case, the question becomes whether the purported advantages of dividing the circuit outweigh the loss of the advantages of the circuit as it presently operates and the additional problems created by the division. In this article, I intend to examine these issues. However, in order to put this matter properly in focus, I believe we must make a broader examination of the federal judicial system as a whole.

There is a fundamental problem facing the federal court system. The number of cases filed in federal courts has increased dramatically in the last twenty years. This is due to the increase in population and also to the increased number of issues that now fall within federal jurisdiction.

This increase has generally been met in the district courts by an increase in the number of district judges appointed to handle these cases. A weighted caseload formula of 430 cases per judgeship has been applied, and the judgeships have, for the most part, been authorized by Congress to meet the increased number of cases filed. There has been no particular concern raised about the number of judges in a particular district, and rightly so, because each district judge operates relatively independently in handling the cases assigned. The administrative structure of districts, whether large or small, has not been perceived to present a problem. Thus, the number of judgeships authorized has generally been increased proportionately as the

* Chief Judge, United States Court of Appeals for the Ninth Circuit. Special thanks to Mark Mendenhall, Esquire, in assisting with the preparation of this article.
filings have increased. There are, of course, districts that have been affected because of the delays in filling vacancies and also by what has proved to be a pattern of six-year intervals between new judgeship bills. This could easily be rectified if the President and Congress more promptly filled vacancies and acted on judgeship bills every two years when they are requested by the United States Judicial Conference.

The same pattern is generally true for bankruptcy judges. Judgeships have generally been authorized to correlate with the increased number of cases filed. Again, here, certain districts have been affected by delay in filling vacancies and the interval between bills authorizing new bankruptcy judgeships. However, as a general rule, the number of judgeships has increased proportionately to the number of cases filed.

At the highest level of our federal court structure, the Supreme Court has experienced a significant increase in petitions for certiorari. However, with a few exceptions, the Supreme Court has the discretion to limit cases it intends to review. In the past five years, the number of cases the Supreme Court has chosen to review has decreased from 141 in 1990 to 93 in 1994. The necessity of sifting through 8,100 petitions for certiorari no doubt places an increased burden on the Court and its staff. The Court has obviously chosen to limit the number of cases it takes in order to provide adequate time for the Justices to give full and careful consideration to the serious issues before them. This decision seems quite appropriate to me.

The circuit courts of appeals present an entirely different picture with regard to the increased caseload. Unlike the Supreme Court, the circuit courts of appeals do not have discretion to select the cases they hear; they are courts of mandatory appellate jurisdiction. Unlike the district courts and bankruptcy courts, where the number of judges in a district does not present a problem, the circuit courts are legitimately concerned with the number of judges on the circuit court. This is because circuit judges do not act as individual entities deciding cases, but as members of a court whose coordinated efforts establish binding precedent in the circuit.

A study by the Federal Judicial Center in 1989 pointed out that the caseload per circuit judge increased 347% from 1960 to 1989, whereas the caseload per district judge increased 35.6%.

2. The Federal Appellate Judiciary in the Twenty-First Century 255
From 1989 to 1995, the appeals filed increased from 37,734 to 50,072 (a 26% increase), while the number of judges remained the same at 167. Recent statistics in the Ninth Circuit are illustrative of the increased caseload. The number of cases appealed in 1978 was 3,099, and the number of authorized judgeships was 23. In 1995, the number of cases appealed was 8,637, and the number of authorized judgeships was 28. Thus, during this period, the number of cases appealed in the Ninth Circuit increased 179% while the number of authorized judgeships increased only 22%.

This disproportionate increase in cases in comparison to the number of judges has placed great pressure on the courts of appeals. During this period, each of the circuits sought ways not only to dispose of more cases and maintain the fairness and the quality of the courts' work, but to limit the necessity of adding additional judges.

There are at least four ways in which the pressure of additional caseload on circuit courts can be approached:

1. Reducing federal jurisdiction so that the caseload or its increase is lessened. From all current appearances, Congress has no appetite for reducing federal jurisdiction, and is more likely to increase the amount placed on the plate of the federal judiciary.

2. Providing that the circuit courts have discretionary jurisdiction in all or some areas. In my view, this is feasible only where there is at least one mandatory appeal to an independent court body.

3. Continuing the practice of increasing the caseload per judge. All circuit courts have made a great effort to devise methods of handling more cases without increasing judgeships within the limits of giving appropriate judge time to cases. It must be recognized that increasing the caseload per judge involves either greater delegation or, if not delegation, a more truncated review by each judge.

(Federal Judicial Center 1989).


4. Increase the number of appellate judges proportionately to the cases appealed. If this is done, it necessarily means either more circuits or larger circuits.

It is my view that there is not necessarily one uniform answer that must be imposed on all sections of the country. Different sections of the country have differing cultures, histories, patterns of appellate practice, and configurations of states. Simply because the Ninth Circuit is working well as a large circuit is no reason to disrupt other smaller circuits that are working well by requiring them to combine.

Similarly, because a smaller circuit is working well in some areas of the country, that is no reason to require a larger circuit to divide into smaller circuits. We have an excellent example with our United States, where small and large states with widely varying geography and sizes of population work well within our federal system.

Uniformity of size is not important; what is important is whether the circuit is operating well. I submit that this is a question that each circuit is best able to decide, considering the particularities of that circuit.

Who are those best able to evaluate circuit performance and determine whether it is functioning well? I believe judges on the circuit court, the judges on the district and bankruptcy courts, and the attorneys practicing in those circuits provide the primary opinions to be considered. In addition, the academic scholars, institutions, and committees that have made special studies of circuit performance can add valuable perspective. These include law professors, the Federal Judicial Center, the Federal Courts Study Committee, the Committee on Long Range Planning, and others.

It is more important to have an adequate number of circuit judges do the job well than it is to maintain a particular circuit configuration. With that in mind, this article examines how the Ninth Circuit is currently operating—what the judges, the bar, and the academic scholars think of the current operation of the circuit. As this article demonstrates, those evaluations are highly favorable to the current operation of the Ninth Circuit.

If and when the ten requested circuit judgeships are added, the enlarged Ninth Circuit should itself be allowed to make appropriate adjustments and then evaluate its performance. We currently have the physical facilities and the administrative structure to handle the increased number of judgeships request-
ed. We are confident that a larger court will work well, just as we were with prior increased judgeships. If the larger circuit proves later to be unwieldy or ineffective, that would be the time to consider whether and how circuit division should occur.

This article demonstrates that the Ninth Circuit is functioning well and that it serves as a model for how large circuits may handle large and growing caseloads. It points out the failings of the circuit division "solution" that does not include the provision of additional resources, and concludes by inviting Congress to undertake a thorough and impartial study of the entire federal appellate system to devise appropriate remedies for the problems posed by caseload growth.

II. THE NINTH CIRCUIT IS WORKING WELL AND IS A MODEL FOR OPERATING A LARGE CIRCUIT

A. The Burden of Persuasion

Any discussion about a policy decision as serious as breaking up a 100-year-old institution ought to begin by determining who has the burden of proof. One of my newer colleagues, Judge Michael Daly Hawkins of Arizona, has stated the answer succinctly: "The burden should be on those who propose to split the circuit to show that a particular proposal will advance the cause of justice in this region and will do so with greater efficiency than the Ninth Circuit has been able to do for the last century."5

In order to meet that burden, proponents would need to show that the Ninth Circuit is not functioning well and that dividing the Ninth Circuit would significantly enhance the operation of the federal court system in the nine western states and the Pacific Islands. I submit that any advantages that might be gained by dividing the circuit are greatly outweighed by advantages lost and the disruption and expense of the division.

Before detailing the successful performance of the Ninth Circuit, it is useful to note that even some of those who in the past have supported circuit division do not support it today in light of the circuit's current operations. For example, my colleague, Judge Diarmuid O'Scanlanl, from Portland, whose paper is included in this symposium,6 stated that, while he be-

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lieves that a split of the Ninth Circuit is inevitable, he also acknowledges, "I entirely agree with Chief Judge Wallace that the Ninth Circuit is handling its caseload reasonably well, and there is not currently a crisis. I also concur in his opposition to Senate Bill 956, the proposed legislation currently before Congress."

Similarly, Professor Arthur D. Hellman of the University of Pittsburgh School of Law, whose paper is also part of this symposium, and Circuit Judge Charles E. Wiggins, have changed their views based upon greater knowledge of the workings of the court. Both served on the Commission on Revision of the Federal Court Appellate System (the Hruska Commission) and both supported the Commission's 1973 recommendation to split the Ninth Circuit. In his written statement submitted to the Senate Judiciary Committee during the September 13, 1995 hearing on S. 956, Professor Hellman stated: "In my judgment, the proponents of this legislation have not pointed to any problems in the administration of justice that would be cured or mitigated by dividing the Ninth Circuit. The proposal should therefore be rejected." Circuit Judge Wiggins expressed a similar change of view in his letter to Senator Feinstein just after the hearings.

B. Evaluating Performance

Improving the administration and delivery of justice must be the paramount motivation for any effort to change the configuration of circuit boundaries that have existed for over 100 years. Common sense, stability, and certainty of law all require the preservation and maintenance of a time-tested legal institution so long as it is performing at a level comparable to or better than that of its counterparts.

When compared to the other circuit courts, the Ninth Circuit

7. See O'Scannlain, A Ninth Circuit Split, supra note 6, at 948.
PROPOSED NINTH CIRCUIT SPLIT

Court of Appeals is functioning well by almost every measure. The following thumbnail assessment evaluates the performance of the Ninth Circuit Court of Appeals in five areas—terminations in comparison to filings; median times and efficiency; written, reasoned decisions; consistency of decisions among panels; and collegiality.

The Ninth Circuit Court of Appeals is functioning well in terminating over 8,300 cases a year, almost 40% more than it terminated seven years ago with the same number of judges. Moreover, the number of pending (i.e., undecided) cases in the Ninth Circuit has declined dramatically in the last few years, reflecting a court-wide focus on enhancing judicial and staff productivity. The Ninth Circuit Court of Appeals is the only circuit in the nation to have terminated more cases than were filed in four out of the last five years.\(^{11}\)

1. **Median Times**

The Ninth Circuit Court of Appeals is also highly efficient. The judges in the Ninth Circuit are among the leaders in the nation in terms of the amount of time it takes to decide cases once the cases are in their hands, i.e., the period from hearing or submission to final disposition. The Ninth Circuit's performance during this period—the time period over which the judges themselves have the most control—is equal to that of the three fastest courts in the country. In the Ninth Circuit, the median time from oral argument submission to disposition is 1.8 months, or .4 months less than the national median.\(^{12}\)

The only statistic in which the Ninth Circuit Court of Appeals falls short of the national average is time from filing the notice of appeal to final disposition, which was an average of 14.3 months in fiscal year 1995. Although this is not the longest time among the circuits, it is about four months longer than the national median time. This is largely due to the backlog that built up following the San Francisco earthquake that seriously damaged the Circuit Court of Appeals Courthouse, requiring us to relocate into leased space and hampering the development of our case management systems. As we have reduced the backlog, this disposition time has steadily improved.

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12. Senate Report, supra note 11, at 20 n.8.

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2. Written Decisions

An indication of the productivity and effectiveness of an appellate court is in its ability to issue written, reasoned decisions for the parties in the cases that come before it. The higher the percentage of cases disposed of by written, reasoned decisions, the more effective a court is in providing guidance to the litigants about that court's interpretation and application of the law. The Ninth Circuit furnished written, reasoned decisions in 97% of its cases in 1995, compared to a national average of 89% (with a range of 42% to 100%).

3. Consistency

Consistency of court of appeals decisions among panels is important to provide coherent guidance to lower courts and litigants. The Ninth Circuit has instituted case management devices that have effectively reduced conflicts between panels and maintained a high level of consistency in its decisions. Lawyers have expressed particular concern that dividing the extended coastline in the West would create inconsistent and conflicting application of maritime, commercial, and utility law in the two circuits, making commerce more difficult and costly, and requiring litigants and judges to research the law of two circuits for every potential cross-circuit transaction. Potential inconsistencies would be especially troubling in the application of utility rates along the entire Pacific seaboard by the Bonneville Power Administration.

To help resolve the occasional conflict between decisions of different three-judge panels within the circuit, Congress enacted legislation in 1978, allowing a circuit to hear cases en banc without the direct participation of all of its judges. Since 1980, the Ninth Circuit's use of a limited en banc court to resolve intracircuit conflicts has proven highly effective. All 28 active judges participate in determining whether a case will be heard en banc. Each call for an en banc vote leads to careful evaluation of the development of the law of the circuit in that area. If a majority of the judges votes to hear a case en banc, ten members of the court chosen at random, together with the Chief Judge, serve as the limited en banc court. Judges and lawyers have expressed a high degree of satisfaction with the limited en banc

process.

An objective, highly-praised scholarly study of consistency of the law in the Ninth Circuit concluded “the pattern [of multiple relevant precedents] exemplified by high visibility issues . . . is not characteristic of Ninth Circuit jurisprudence generally. Nor is intracircuit conflict.”

A recent study by the Federal Judicial Center reached a similar conclusion. That study held that despite concerns about the proliferation of precedent as the courts of appeals grow, there is currently little evidence that intracircuit inconsistency is a significant problem. Also, there is little evidence that whatever intracircuit conflict exists is strongly correlated with circuit size.

4. Collegiality

Finally, on a more subjective note, the issue of collegiality has been raised on numerous occasions as a quality essential for effective appellate decisionmaking. The argument is often made that an appellate court of twenty-eight judges could not possibly sustain a sufficiently high degree of collegiality among its diverse members to maintain a coherent and consistent body of case law.

My own experience contradicts the conventional wisdom. During my eighteen years on the Ninth Circuit Court of Appeals—when it grew from thirteen to twenty-eight judges—I have enjoyed some of the finest professional and collegial relationships in my entire life. As our court family has grown, our working relationships have accommodated and adapted to preserve an extremely high level of cordiality and collegiality that has often impressed visiting judges from outside the circuit.

From what I have observed and heard, I believe the experiences of my colleagues are very similar to mine. Judge Michael Hawkins—a relative newcomer on the court, having joined us in 1994—has written: “Collegiality is alive and well in the Ninth Circuit. With the possible exception of former U.S. Marines, I have never encountered a group of people who, regardless of
background or point of view, treat one another with such civility and decency." Furthermore, the results of the empirical studies conducted by Professor Hellman on intracircuit consistency confirm that the court is functioning smoothly and is achieving the goal of a consistent and coherent body of law for the circuit.

C. Advantages of Size and Innovations

The size of the Ninth Circuit is an asset that has improved decisionmaking and judicial administration, both within the circuit and throughout the federal judiciary. As a single court of appeals serving a large geographic region, the Ninth Circuit has promoted uniformity and consistency in the law and has facilitated trade and commerce by contributing to stability and orderly progress. Severing the circuit could create the potential for increased inter-circuit conflicts, imposing an additional burden on the Supreme Court.

The court of appeals is strengthened and enriched, and the inevitable tendency toward regional parochialism is weakened, by the variety and diversity of backgrounds of its judges drawn from the nine states comprising the circuit. The size of the circuit also has allowed it to draw upon a large pool of district and bankruptcy judges for temporary assignment to neighboring districts with temporary needs for judicial assistance.

The Ninth Circuit Bankruptcy Appellate Panel (BAP) is another advantage attributable to size. Devised as a specialized appellate tribunal to review appeals from single-judge bankruptcy decisions, the BAP has been well accepted by the bar, works efficiently throughout the circuit, and has helped reduce the number of cases appealed for review to the district court and to the court of appeals. It has been so successful that Congress has repeatedly urged other circuits to establish such panels.

Due to its singular position in the federal appellate court structure, the Ninth Circuit has drawn the attention and assistance of the academic community. A variety of scholars has reviewed and analyzed the circuit's structure, workload, and internal operations. In one of the most in-depth examinations of a circuit court ever attempted, a team of fourteen scholars spent

three years in the late 1980s investigating dozens of aspects of circuit adjudication and administration. The result—Restructuring Justice: The Innovations of the Ninth Circuit and the Future of the Federal Courts—was a scholarly and thoughtful look at the pressures on appellate courts today and the lessons to be learned from the steps that a large circuit had taken to respond to them. The Ninth Circuit has benefited immensely from its collaborative work with the academic community, and all circuits, large and small, have gained from the insights and recommendations provided by these students of the administration of justice.

The Ninth Circuit is a leader in developing innovative solutions to caseload and management challenges. The ABA Appellate Practice Committee’s Report applauded three specific operational efficiencies: “—issue classification, aggressive use of staff attorneys, and a limited en banc—were developed by the Ninth Circuit precisely to address the issues of caseload and judgeship growth... and hold promise for other circuits as they continue to grow.”

Studies such as these have examined and analyzed the dozens of innovative procedures that the Ninth Circuit has devised to manage its large caseload effectively. These have included the use of oral screening and motions panels to minimize paperwork, an Appeals Control Program to assure timely briefing by attorneys, a sophisticated issue-coding and case-weighting system to avoid conflicts and equalize workload, a circuit-wide e-mail system for instant electronic communications and opinion-sharing among chambers, a special unit to assist in the management of pro se cases, an expanded settlement program with experienced attorneys who resolve over 500 cases each year without judicial involvement, fully-computerized docketing and case tracking systems, convenient satellite divisional clerk’s offices, an electronic bulletin board for the posting of opinions, and the use of an appellate commissioner for the review of requests for attorneys’ fees and for expediting the handling of motions.

Other innovations have improved the administration of justice throughout the courts in the circuit. These innovations include: decentralized budgeting, improved tribal court relations, flexible judicial reassignments, active education committees,
improved state-federal judicial relations, and wide use of alternative dispute resolution devices, among others. The results have inured to the benefit of the entire judiciary. As the congressional-ly-mandated Federal Courts Study Committee noted in 1990, "Perhaps the Ninth Circuit presents a workable alternative to the traditional model."23

D. Evaluation by the Academic Community

A widely diverse group of academics and scholars of judicial administration from across the country has expressed concern about circuit division in the absence of a greater body of facts and information about the operations of all the appellate courts. Most federal courts teachers and scholars of judicial administration from across the nation are familiar with the challenges facing the federal appellate courts, and many of them have observed or written about the issue, some in the context of the efforts to divide the Ninth Circuit. Dozens of them wrote letters to United States Senators in connection with the recent proposal to divide the circuit. Almost without exception, this knowledgeable group expressed serious reservations about precipitous and irrevocable congressional action, the necessity for which had not been documented with any credible accuracy. A few excerpts from some of those letters may be illustrative:

I do not think a case can be made that splitting the circuit is required to improve judicial administration . . . . It may well be that the day will come that I will support a division of the Ninth Circuit. I would do that, however, only if it is part of a comprehensive solution to the problems the courts of appeals have throughout the country rather than a result-oriented move directed at one circuit only—Charles A. Wright, University of Texas School of Law.24

The current proposal is almost surely the worst that could be devised . . . . There is no advantage to the public, to litigants, or to the national law that would be secured by the present proposal. It is unqualifiedly a bad idea—Paul D. Carrington, Duke University School of Law.25

24. Letter from Charles A. Wright, Professor of Law, University of Texas, to Sen. Kay Bailey Hutchison (R-Tx.) (Feb. 12, 1996) (on file with author).
25. Letter from Paul D. Carrington, Professor of Law, Duke University, to the Senate Comm. on the Judiciary (Mar. 21, 1996) (on file with author).
The adage 'if it isn't broke, don't fix it,' applies here . . . . By every measure of efficiency, the Ninth Circuit processes cases as well as other circuits. There is no reason to believe that two smaller circuits would be more efficient in any way—Erwin Chemerinsky, University of Southern California Law Center.26

This is a situation of: if it ain't broke, don't fix it. The Ninth Circuit is one aspect of government that clearly is not broke. And the fix proposed will create, not solve, problems—Sherman L. Cohn, Georgetown University Law Center.27

I have yet to be convinced that the Ninth Circuit needs to be divided . . . . In some significant measure the size and diversity of the Ninth Circuit has given it a unique position in our federal courts. Not only does the Circuit work well, it remains a model for shaping diverse jurisdictions into a viable whole. Any division of the Circuit would dilute this important pluralistic attribute—Charles H. Sheldon, Washington State University, Department of Political Science.28

First, it is unclear that the proposal, which necessarily entails substantial costs of reorganization and the establishment of an additional supporting bureaucracy for the new 12th Circuit, addresses a real problem. Certainly all the federal courts of appeals face a serious set of pressures from burgeoning caseloads that threaten to undermine the quantity and quality of federal court justice. But creating a new circuit is not responsive to those pressures—Jonathan D. Varat, University of California, Los Angeles, School of Law.29

III. THE JUDGES AND LAWYERS WHO WORK IN THE NINTH CIRCUIT OPPOSE DIVISION

While statistics and studies of court operations are one convincing indicator of a court's successful performance, the views

27. Letter from Sherman L. Cohn, Professor of Law, Georgetown University, to Sen. Dianne Feinstein (D-Cal.) (Feb. 20, 1996) (on file with author).
and resolutions of those who use the court on a daily basis are another important consideration. The Ninth Circuit has consistently sought to involve the judges, lawyers, and litigants in efforts to enhance its services and operations. The corollary has been that the judges and lawyers within the circuit have consistently and overwhelmingly voted against attempts to divide the Ninth Circuit.

A. Responsiveness to Users

For many years, the Ninth Circuit has used surveying techniques as part of its continuing efforts to improve performance. In 1987, our circuit executive's office, as part of the self-assessment and self-evaluation aspect of the annual judicial conference process, conducted a circuit-wide study of court of appeals practitioners' and district court judges' attitudes toward case management and administration by the Ninth Circuit Court of Appeals. The findings and recommendations were discussed at the 1987 judicial conference and the court implemented many of the principal suggestions.

Since that time, the court of appeals, through its Advisory Committee on Rules of Practice and Procedure, has conducted periodic meetings and informal hearings with judges and appellate practitioners in various locations throughout the circuit to obtain their views for the improvement of court operations. One outgrowth of this process has been the court of appeals' expansion of its rules to incorporate more description of the court's internal operating procedures, thus providing more guidance to counsel in the management of their cases. Another outcome has been the development of a series of high-quality videotapes produced by the court to assist counsel in preparing and presenting their cases to the court of appeals.

Conducting outreach and listening to the bar and litigants have resulted in two additional new programs at the court of appeals to respond to specific concerns. The first was the creation of a separate, professionally-staffed Pro Se Unit in our staff.

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32. "PERFECTING YOUR APPEAL—CIVIL" (United States Court of Appeals for the Ninth Circuit 1995); "PERFECTING YOUR APPEAL—CRIMINAL" (United States Court of Appeals for the Ninth Circuit 1995).
attorneys' office to review, manage, and support the court's handling of cases brought by unrepresented litigants. This has included the establishment of an extensive pro bono panel system for the assignment of meritorious cases to volunteer counsel. Such efforts have streamlined and expedited the resolution of these often difficult and protracted cases.

The second program was the institution of a new position of Appellate Commissioner to oversee, organize, and provide uniformity to the attorney voucher review and payment process. As the first such position in the federal appellate courts, the program has provided substantial relief to appellate judges while at the same time providing speed, certainty, and consistency to appellate practitioners. Through these and similar programs, the Ninth Circuit has striven to be responsive to the diverse bar that practices before it.

B. Resolutions by Judges and Lawyers

The judges of the Ninth Circuit take positions and action as a circuit through their statutorily-created governing body, the Judicial Council of the Ninth Circuit. The Judicial Council of the Ninth Circuit has repeatedly voted its opposition to division of the circuit, most recently in December 1995 in response to the specific configuration of states set forth in S. 956. On four occasions in the past fifteen years, the federal judges in the Ninth Circuit and the elected representatives of practicing lawyers who participate in the Ninth Circuit Judicial Conference have voted overwhelmingly in opposition to splitting the circuit. The official bar organizations of Arizona, California, Hawaii, Idaho, Montana, and Nevada have taken positions against circuit division. No state bar organization in the circuit has taken a position in favor of the split. In addition, the national Federal Bar Association, composed predominantly of lawyers who practice in the federal courts, also has passed a strong resolution in opposi-

33. Senate Report, supra note 11, at 18-19.
34. Id. at 18-19.
35. Id. at 18-19; see also Letter from James E. Towery, California State Bar President, to Sen. Dianne Feinstein (D-Cal.) (Feb. 7, 1996) (on file with author); Letter from Sidney K Ayabe, Hawaii State Bar Association President, to Sherman V. Lohn, attorney in Missoula, Montana (Feb. 1, 1995) (on file with author); Letter from William A. McCurdy, Idaho State Bar President, to the Hon. James R. Browning, Judge, U.S. Court of Appeals for the Ninth Circuit (Feb. 7, 1990) (on file with author).
tion to division of the Ninth Circuit.\textsuperscript{36}

While it is well within the authority of Congress to determine the structure of the federal courts, never before has Congress acted to divide a circuit in the face of almost overwhelming opposition from the judges and lawyers within that circuit. The situation surrounding the division of the former Fifth Circuit is instructive:

Legislation to divide the Fifth Circuit was first considered as early as 1975. But it was not enacted at that time because there was strong opposition from judges and lawyers in the affected states. By 1980, however, professional opinion had coalesced. Division of the Fifth Circuit had the unanimous support of the judges of the court of appeals. It was also endorsed by the bar associations of each of the six states in the circuit, as well as by other judges and lawyers.

The contrast with the present legislation could not be sharper. As described above, the Ninth Circuit Judicial Council and the Judicial Conference oppose splitting the circuit. State bar associations in the circuit have spoken out against the proposal.

In dividing the Fifth Circuit in 1980, Congress acted in accordance with the overwhelming weight of professional opinion within the circuit. That same respect for professional opinion leads to the conclusion that the Ninth Circuit should not be divided.\textsuperscript{37}

IV. CIRCUIT DIVISION IS NO SOLUTION TO CASELOAD GROWTH

In matters affecting the administration of justice, proponents of significant change must be cognizant, according to Professor Hellman, that "judicial institutions operate and interrelate in subtle ways, and improvident reforms may have consequences that cannot be predicted even by the most knowledgeable."\textsuperscript{38} Thus, to justify change, serious problems must exist that the proposed changes will cure without creating undesirable consequences.

Realignment of circuit boundaries is undeniably a significant change with substantial short- and long-term costs and many unknown and unforeseeable consequences. It should not be un-

\begin{itemize}
\item \textsuperscript{36} Senate Report, supra note 11, at 18-19.
\item \textsuperscript{37} Id. at 19.
\item \textsuperscript{38} Hearings, supra note 9, at 2.
\end{itemize}
dertaken lightly, and not be undertaken at all absent a sufficient showing of need and appropriateness. The judiciary's own *Long Range Plan for the Federal Courts* acknowledged the severely restricted circumstances under which circuit division might be appropriate:

Each court of appeals should comprise a number of judges sufficient to maintain access to and excellence of federal appellate justice. Circuit restructuring should occur only if compelling empirical evidence demonstrates adjudicative or administrative dysfunction in a court so that it cannot continue to deliver quality justice and coherent, consistent circuit law in the face of increasing workload.  

**A. Flaws in Proposed Division**

The most recent bill that proposed to divide the Ninth Circuit which was passed by the Senate Judiciary Committee was significantly different from, and more troubling than, each of its predecessors. Even some of those who favor a clean Northwest/South split have balked at the irregular configuration of a Twelfth Circuit that included all the states *except* California and Hawaii.

While the Ninth Circuit opposes any division, it has tried to call to the attention of policy makers several serious flaws in the S. 956 proposal. First, the proposed division would create a disproportionate division of the workload between the judges of the new Twelfth Circuit and the judges of the restructured Ninth Circuit. Based upon internal court statistics for calendar year 1995, a division of the 1995 case filings of 8,367, in accordance with the proposed circuit split, would result in 3,313 filings for the 13-judge Twelfth Circuit and 5,324 filings for the restructured 15-judge Ninth Circuit. The Twelfth Circuit would have 765 filings per three-judge panel, whereas the Ninth Circuit would have 1,065 filings per three-judge panel. The Ninth Circuit would have a 39% greater caseload per panel than the Twelfth Circuit.

Second, the unwieldy, gerrymandered reconfiguration of the Twelfth Circuit would serve no one well. As Professor Paul Carrington has noted:

[E]veryone . . . has assumed that any split of the Ninth Circuit

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would follow geographic boundaries . . . . There is no administrative convenience, or convenience of litigants to be served by a court extending from Tucson to Fairbanks. The 12th Circuit as envisioned would still be a jumbo circuit, far too large to assure any of the advantages one might hope to secure by having a smaller court of appeals.  

Third, the proposed division would undermine a principal purpose of federal appellate courts—to reduce the impact of local and regional parochialism by providing a federalizing function over a substantial geographic area. As Professor Daniel J. Meador has stated:

The proposed division also violates the principle that a circuit should consist of at least three states. Leaving one circuit with only two states under this bill is particularly egregious because one of the two states enormously overshadows the other in terms of litigation and number of judges. Hawaii would be a tiny appendage to California in such a circuit.

Fourth, the new configuration of states in the proposed Twelfth Circuit would sever the long and close legal, economic, cultural, and geographic ties among Arizona, California, and Nevada, an historical nexus that has existed since the days of the Spanish explorers.

Fifth, isolating California and Hawaii destroys the current balance within the Ninth Circuit among large and small states. This creates virtually a one-state circuit completely dominating a smaller state.

Sixth, the potential cost of creating a new Twelfth Circuit is too high. In an era of budget constraints, creating a new circuit that would require duplication of functions that have been perfected and are being well-performed would be unwise. Administratively, the creation of a new circuit would not only create serious disruption, but also would require duplicate offices for the clerk of court, circuit executive, staff attorneys, settlement attorneys, and library—estimated annually at $1-2 million, plus $2-3 million in start-up costs. The estimated cost of a new circuit headquarters would range from $23 to $59.5 million.

In addition, taxpayer dollars already spent would be wasted.

40. See supra note 25 and accompanying text. See generally Paul D. Carrington et al., Justice on Appeal (1976).
because the Congress has authorized, and the GSA has virtually completed, an extensive post-earthquake rehabilitation of the historic Ninth Circuit headquarters building in San Francisco at a cost of over $100 million. The building is designed to accommodate the judicial and administrative personnel of the Ninth Circuit as it presently exists and to meet its needs for the foreseeable future in accordance with its Long Range Plan.42

V. THE NINTH CIRCUIT WELCOMES A THOROUGH AND IMPARTIAL STUDY

As Professor Hellman has so ably pointed out, Congress should not act precipitously in the area of judicial administration because of the delicate and subtle balances that may be disrupted, and the unintended consequences that may result. That is not to say that changes should never take place. On the contrary, the Ninth Circuit was the first circuit to create a Long Range Plan, setting forth its goals and objectives and methods of implementation. This plan is carefully reviewed each year to evaluate the year's performance and revise goals and objectives in light of current conditions.

The purpose of the Ninth Circuit Conference structure, with elected lawyer representatives, an annual circuit-wide conference, and annual district conferences, is to consider the advice and suggestions of the bar as to how the Ninth Circuit can best meet its responsibilities to the public. The elected lawyer representatives are also responsible to be the link between the bar and the courts throughout the year to relate problems, to suggest improvements, and to help revise rules and procedures as needed. The circuit's use of surveys and conferences, and its voluntary submission to rigorous scholarly examination, amply demonstrate its efforts to be a responsive and dynamic judicial organization.

Based upon its prior experience with the academic community and the benefits obtained from their insightful recommendations, the Ninth Circuit strongly supported Senator Dianne Feinstein's proposed legislation to establish a study commission, similar to the former Hruska Commission, to take a full and fair look at the entire federal appellate system and to make recommendations to the Congress for how and where to make reforms.

As several members of the Senate Judiciary Committee

42. UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, LONG RANGE PLAN (1992).
stated in their views:

Rather than targeting one circuit and dividing it haphazardly, Congress should create a Commission that would proceed systematically, examine problems on a nationwide basis, and make recommendations that will serve the country for the long term. Before we implement Draconian structural reforms, we should be absolutely certain that innovations in case processing and other management solutions would not suffice. Any "solution" carries tradeoffs. Only a careful, holistic examination can provide a sound foundation for choosing among various options for reform or realignment of the circuit courts of appeal. Senator Heflin's remarks at September's Judiciary Committee hearing are instructive:

In my judgment, the overall structure of the circuit courts of appeals needs careful study.... The federalizing of various crimes is going to vastly increase the workload of the district courts and circuit courts of appeals. Proposals that are out in the field of tort reform and others will also increase the work of the Federal courts relative to civil actions in the future. Congress continues to add to the workload of the judiciary and all of the circuit courts will be impacted by this. We also continue to develop conflicts between the various circuits, and there have been proposals over a period of time to do something about it. I really think that in the long run, there needs to be a careful evaluation of the entire circuit court structure and the administration of justice, how decisions are decided.43

To those who would argue that there have been enough studies, I would respond that this specific issue—the effect of growth on the entire federal appellate system—has not been studied in over two decades. The last similar effort was conducted by the Hruska Commission, and its own Deputy Executive Director, Professor Hellman, has publicly written: "Circumstances have changed considerably over the past twenty years, and today the Hruska Commission's recommendation should be given little weight."44

Legislatively, the outcome of the effort to divide the Ninth Circuit in the Senate in 1996 ended in a floor compromise. The Senate passed a modified version of S. 956, which no longer called for a split and which established a Commission on Structural Alternatives for the Federal Court of Appeals, a modified

43. Senate Report, supra note 11, at 19-20.
44. Hearings, supra note 9, at 4.
form of the study bill originally proposed by Senator Feinstein. It is most important that the commission have adequate time to conduct a meaningful study that will make a real contribution to future development of the federal judicial system. The commission should have at least 18 months after its appointment to conduct its study and render its report to Congress. Hopefully, the current bill, which requires a report by February 1997, will be modified to provide adequate time for the commission to be organized and carefully perform its work. A time limit that is too constricted will seriously lessen the thoroughness and reliability of the report of the commission.

VI. CONCLUSION

We are at the crossroads in determining the kind of federal appellate structure that will best serve this nation going into the 21st century. The growing caseload that is occurring in the circuit courts of appeals must be addressed, but it need not be addressed with a single uniform solution. There are differing concerns in each circuit. The Ninth Circuit is operating effectively, as this article demonstrates. There are significant advantages to keeping the circuit intact. There are many disadvantages to dividing it. The vast majority of the judges, the bar, and the academic community believes that the Ninth Circuit is functioning well and opposes a division. As circumstances change, with increased caseloads and the addition of circuit judges, this evaluation may change as it did in the Fifth Circuit. Until that occurs, however, the Ninth Circuit should be left intact. At this time, the disadvantages and disruption that the division of the Ninth Circuit would cause greatly outweigh its benefits.