
COMMENTARY

**THE UNKINDEST CUT:
THE WHITE COMMISSION PROPOSAL
TO RESTRUCTURE THE
NINTH CIRCUIT***

ARTHUR D. HELLMAN**

Once again the battle has been joined. Senators from the Western states have introduced a bill to divide the largest of the federal judicial circuits, the Ninth. The judges of the circuit have responded by insisting that no restructuring is necessary. Bar associations, editorial writers, and the other usual suspects have joined in the fray.

Déjà vu? Not quite. This time the legislation is not the brainchild of the politicians themselves; rather, it embodies the recommendation of a study commission chaired by retired Supreme Court Justice Byron White. Further, the legislation would not divide the Ninth Circuit into three new circuits; instead, it would keep the circuit intact but divide the court of appeals into three “semi-autonomous” adjudicative units. And in another break with the past, the circuit judges are not united in their opposition to the proposed restructuring. In fact, one of the most zealous champions of the plan is a Ninth Circuit judge who was a member of the Commission.

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** Professor of Law, University of Pittsburgh School of Law.

In the spring of 1999, Chief Judge Hug appointed me to a 10-member Evaluation Committee whose mission is “to examine the existing policies, practices and administrative structure of the Ninth Circuit Court of Appeals, in order to make recommendations to its judges to improve the delivery of justice in the region it serves.” It is an honor to serve on the Evaluation Committee. However, I do not speak for the court or any other institution; the views expressed here are my own. Portions of the Article are based on my testimony at a hearing of the Subcommittee on Courts and Intellectual Property of the House Judiciary Committee on July 22, 1999.

Supporters insist that after decades of controversy the Commission has finally come up with a proposal that “will achieve the legitimate ends of those who favor splitting the circuit and those who seek to preserve it.”¹ The plan does give the appearance of compromise and moderation. But appearances are deceiving. The Commission plan is not a compromise; it gives one side almost everything it wants. And far from being moderate, it embodies a novel approach to federal appellate structure that is flawed both in conception and in execution.

This leap into the unknown might be justified if the Commission had demonstrated the existence of a problem of serious dimensions that could not be dealt with in any other way. On the contrary, in explaining its key conclusion—that “the law-declaring function of appellate courts requires groups of judges smaller than the present Ninth Circuit Court of Appeals”²—the Commission offers remarkably little in the way of proof. The Commission simply does not make the case for the radical restructuring that it proposes.

Part I of this Article sketches the developments that led to the establishment of the Commission. Part II examines how the proposed divisional structure would actually work. Part III analyzes the rationale for the recommendation.

I. BACKGROUND

The White Commission, formally known as the Commission on Structural Alternatives for the Federal Courts of Appeals, was created by an Act of Congress signed by President Clinton on November 26, 1997. The process that led to the Commission’s creation was a tortuous one. For present purposes, a brief summary will suffice.³

The origins of the Commission can be traced to congressional debates over the future of the Ninth Circuit. The Ninth is by far the largest of the federal judicial circuits. It encompasses nine states, including California, and two territories. The Ninth Circuit Court of Appeals has twenty-eight authorized judgeships, nearly twice as many as the next largest circuit, the Fifth. Efforts to divide the Ninth Circuit began in the 1940s, when the

1. COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, FINAL REPORT 57 (1998) [hereinafter WHITE COMM’N REP.].

2. *Id.* at 47.

3. For a detailed account, see Carl Tobias, *A Federal Appellate System for the Twenty-First Century*, 74 WASH. L. REV. 275, 282-94 (1999).

court of appeals had only seven judges.⁴ None of these efforts progressed very far.⁵

In 1995, eight Senators introduced Senate Bill 956, which would have divided the Ninth Circuit immediately into two new circuits.⁶ They argued that “the massive size of [the] circuit” produced inconsistent decisions;⁷ they also insisted that the eight states other than California were “dominated by California judges and California judicial philosophy.”⁸ The Senate Judiciary Committee held hearings on the legislation,⁹ and on December 7, 1995, the committee considered the legislation at a markup session.¹⁰

It was at that markup session that the idea of establishing a commission to study the federal appellate courts first emerged into public view. California Senator Dianne Feinstein spoke out strongly against the circuit division bill. She proposed instead that Congress create a “Commission on Structural Alternatives for the Federal Courts of Appeals.”¹¹ Her proposal failed by one vote.¹² The Committee then approved a substitute proposal to divide the Ninth Circuit.¹³

The full Senate took no action on the Judiciary Committee report, but in March 1996 it approved a modified version of the Feinstein proposal for a study commission.¹⁴ That proposal died when the House failed to take action before the 104th Congress adjourned in October 1996.

4. See John R. Schmidhauser, *Judge Browning and the Remaking of the Ninth Circuit's Institutions*, in RESTRUCTURING JUSTICE: THE INNOVATIONS OF THE NINTH CIRCUIT AND THE FUTURE OF THE FEDERAL COURTS 351 (Arthur D. Hellman ed., 1990) [hereinafter RESTRUCTURING JUSTICE].

5. For a brief account of legislative proposals in the 1980s and early 1990s, see SENATE JUDICIARY COMM., NINTH CIRCUIT COURT OF APPEALS REORGANIZATION ACT OF 1994, S. REP. NO. 104-197, at 4-5 (1995).

6. See S. 956, 104th Cong. (1995). For discussion of the legislation, see Symposium, *The Proposal to Split the Ninth Circuit Court of Appeals*, 57 MONT. L. REV. 241 (1996).

7. 141 CONG. REC. S7504 (daily ed. May 25, 1995) (statement of Sen. Gorton).

8. *Id.*

9. See *The Ninth Circuit Split: Hearing on S. 853 and S. 956 Before the Senate Comm. on the Judiciary*, 104th Cong. (1995). I testified in opposition to the bill.

10. There is no official record of that markup session. An unofficial transcript was prepared by the Federal News Service. See *Hearing [sic] of the Senate Judiciary Committee* (Dec. 8 [sic], 1995), available in LEXIS, News Library [hereinafter Senate Judiciary Markup]. The date is given incorrectly in the Federal News Service transcript; the session took place on Dec. 7, 1995. See 141 CONG. REC. D1431-32 (daily ed. Dec. 7, 1995).

11. See Senate Judiciary Markup, *supra* note 10 (statement of Sen. Feinstein).

12. See *id.* (8 yeas and 9 nays on Feinstein amendment).

13. See *id.*

14. The issue of dividing the Ninth Circuit was initially raised on the Senate floor by a proposed amendment to the Balanced Budget Downpayment Act. See 142 CONG. REC. S2220 (daily ed. Mar. 18, 1996) (statement of Sen. Burns) (proposing second-degree amendment based on bill reported out of the Senate Judiciary Committee). The proposed amendment generated a lengthy debate, with Senator Feinstein again offering the study commission as an alternative to the circuit split. See *id.* at S2220-

Maneuvering resumed in the 105th Congress. In June 1997, the House passed House Bill 908, a modified version of the study commission legislation approved by the Senate in the 104th Congress.¹⁵ A few weeks later, the Senate rejected Senator Feinstein's proposal to create a study commission and instead adopted an appropriations bill that included a provision dividing the Ninth Circuit along the lines proposed by the Senate Judiciary Committee in March 1996.¹⁶

The stalemate between the Houses was resolved in the closing days of the session. The Senate agreed to abandon its effort to divide the circuit immediately; instead, both Houses approved a severely compromised version of the study commission legislation.¹⁷

The new legislation closely resembled House Bill 908.¹⁸ In particular, the language delineating the Commission's functions remained unchanged; the law instructed the Commission to "study the structure and alignment of the Federal Court of Appeals system, with particular reference to the Ninth Circuit."¹⁹ But the Commission was given only one year to do its work, and the membership was reduced from ten to five.²⁰ Chief Justice Rehnquist appointed the members of the Commission in December 1997, and the Commission issued its final report one year later.

In February 1999, Senators Frank Murkowski of Alaska and Slade Gorton of Washington introduced Senate Bill 253 to implement the Commission's recommendations.²¹ That legislation was the subject of a hearing by the Senate Judiciary Committee on July 16, 1999. No bill was introduced in the House, but on July 22, 1999, the Subcommittee on Courts

2242. Two days later, a compromise was reached. The Judiciary Committee's bill was called up, but not for the purpose of moving forward with circuit realignment. Rather, a modified version of Senator Feinstein's study commission amendment was substituted for the Judiciary Committee's proposed division of the Ninth Circuit. On March 20, 1996, the Senate unanimously passed the bill as amended. *See* 142 CONG. REC. S2544-45 (daily ed. Mar. 20, 1996).

15. *See* 143 CONG. REC. H3225 (daily ed. June 3, 1997).

16. *See* 143 CONG. REC. S8061 (daily ed. July 24, 1997).

17. The compromise was embodied in section 305 of the bill appropriating funds for the judiciary. *See* Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-119, § 305, 111 Stat. 2440, 2491-93 (1997).

18. For that reason, some of the most useful legislative history is found in the House report on House Bill 908. *See* HOUSE JUDICIARY COMM., COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, H.R. REP. NO. 105-26 (1997).

19. This language first appeared in the version of the Commission legislation passed by the Senate in March 1996. *See* 142 CONG. REC. S2544 (daily ed. Mar. 20, 1996). It was carried over into House Bill 908 and then into the appropriations bill adopted in late 1997.

20. Senator Feinstein initially proposed a 12-member Commission. *See* Senate Judiciary Markup, *supra* note 10. The number was reduced to 11 in the version approved by the Senate in March 1996, and to 10 in the version adopted by the House in June 1997. *See* 142 CONG. REC. S2544 (daily ed. Mar. 20, 1996); 143 CONG. REC. H3225 (daily ed. June 3, 1997).

21. *See* S. 253, 106th Cong. (1999).

and Intellectual Property of the House Judiciary Committee held an oversight hearing on the Final Report of the White Commission.²² At this writing, neither committee has reported out a bill, but Senate Bill 253 remains on the table for consideration in the second session of the 106th Congress.

Shortly before the session began, Chief Justice Rehnquist voiced support for the Commission plan. He observed that “structural adjustments are occasionally necessary” to “preserv[e] our federal Judiciary’s ability to perform its function.”²³ He noted that although “Congress’ immediate concern in creating the Commission was the size of the Court of Appeals for the Ninth Circuit,” the Commission had “proposed legislation that would accommodate the inevitable growth of other courts of appeals as well, while preserving the regional circuits.”²⁴ He urged Congress “to act on the Commission’s proposals.”²⁵

II. THE COMMISSION’S PLAN: CONTRADICTIONS AND CONUNDRUMS

The Commission plan, as embodied in Senate Bill 253, would retain the Ninth Circuit but divide its court of appeals into three “semi-autonomous” divisions.²⁶ The plan contains four elements:

1. *Regional jurisdiction over appeals.* The present Ninth Circuit Court of Appeals would be reorganized into three “regionally based adjudicative divisions.” Each division would hear the appeals filed from that geographical area.²⁷

2. *Regional assignment of judges.* Each division would include seven to eleven court of appeals judges in active status. “A majority of [the] judges serving on each division would be residents of the districts over which that division has jurisdiction, but each division would also include

22. The hearings have not yet been published. I testified at the House hearing.

23. William H. Rehnquist, 1999 Year-End Report on the Federal Judiciary (Jan. 1, 2000) <<http://www.uscourts.gov/chief99.html>>.

24. *Id.*

25. *Id.*

26. In addition to its proposal for restructuring the Ninth Circuit, the Commission made several recommendations that would apply to all of the courts of appeals. See WHITE COMM’N REP., *supra* note 1, at 75. These recommendations are also included in Senate Bill 253, but the proposed modifications would be permissive rather than mandatory. The ideas have little or no support within the judiciary, and it is highly unlikely that any of them will be adopted in the foreseeable future. I do not discuss them here.

27. WHITE COMM’N REP., *supra* note 1, at 41.

some judges not residing within the division, assigned randomly or by lot for specified terms of at least three years.”²⁸

3. *Regional performance of the law-declaring function.* “Each regional division would function as a semi-autonomous decisional unit.”²⁹ This entails two changes from the current arrangement. The circuit-wide en banc process would be abolished; the functions now performed by the Ninth Circuit’s en banc court would be performed by en banc courts for each division.³⁰ More important, divisional decisions—whether by panels or by the en banc court—would be binding only within the division.³¹

4. *Conflict resolution by a “Circuit Division.”* In addition to the three regional divisions, the Commission plan would establish a “Circuit Division . . . whose sole mission would be to resolve conflicting decisions between the regional divisions.”³² The Circuit Division would be composed of the chief judge of the circuit and twelve active judges—four from each of the regional divisions—who would be selected by lot and who would serve for staggered three-year terms.³³

The Commission argues that its plan “is the most principled and effective way to resolve the debate about the Ninth Circuit and its court of appeals.”³⁴ However, analysis of the various elements leads to a very different conclusion. The Commission may be correct in saying that its proposal “addresses the adjudicative concerns that have animated calls to split the circuit.”³⁵ But its confidence that the plan “will achieve the legitimate ends of . . . those who seek to preserve [the circuit]”³⁶ is sorely misplaced.

A. ABANDONMENT OF CIRCUIT-WIDE STARE DECISIS

The most radical aspect of the Commission’s proposal is the abandonment of circuit-wide stare decisis. Today, the Ninth Circuit, like all of the other federal courts of appeals, follows the precept that panel decisions are binding on all subsequent panels unless overruled by the

28. *Id.* at 43.

29. *Id.*

30. *See id.* at 43, 48-49.

31. *See id.* at 43.

32. *Id.* at 45.

33. *See id.*

34. WHITE COMM’N REP., *supra* note 1, at 57.

35. *Id.*

36. *Id.*

Supreme Court or by the court of appeals en banc.³⁷ Under the Commission's plan, decisions handed down in one division would be binding only within that division.

If there was any doubt about the Commission's commitment to this element of its plan, it is eliminated by the Commission's response to the comments by Chief Judge Hug on the preliminary draft of the Commission report. Judge Hug, speaking for a majority of the judges of his court, urged the Commission to modify its plan by making panel decisions binding throughout the circuit "unless . . . overruled by a circuit-wide en banc court."³⁸ The Commission emphatically rejected this suggestion, stating that this modification "would leave the court of appeals essentially unchanged as an adjudicative body, and would defeat the purpose of the divisional structure that we recommend."³⁹

Abandonment of circuit-wide stare decisis would be a logical step if the Commission were recommending that the Ninth Circuit be kept intact solely for administrative purposes and that three separate courts be created within the circuit for adjudication. But that is not the Commission's plan, nor does the Commission reject the premise that the law within the Ninth Circuit should be uniform. On the contrary, the Commission states at the outset that the Ninth Circuit Court of Appeals "should continue to provide the West a single body of federal decisional law."⁴⁰

How, then, can the Commission propose a regime under which "[d]ecisions made in one division would not bind any other division"? The Commission gives two answers, perhaps three (with the third buried in a footnote).

1. *Inter-division Treatment of Precedent*

First, the report contemplates that decisions of other divisions would "be accorded substantial weight as the judges endeavor to keep circuit law consistent."⁴¹ As a prediction of judicial behavior, this is well grounded in experience. Circuit judges today generally respect the decisions of other

37. See *Catholic Soc. Servs. v. INS*, 182 F.3d 1053, 1057-58 (9th Cir. 1999); *United States v. Zarate-Martinez*, 133 F.3d 1194, 1200 (9th Cir. 1998); Arthur D. Hellman, *Precedent, Predictability, and Federal Appellate Structure*, 60 U. PITT. L. REV. 1029, 1038 (1999) [hereinafter *Predictability*].

38. WHITE COMM'N REP., *supra* note 1, at 51.

39. *Id.*

40. *Id.* at iii (emphasis added).

41. *Id.* at 43.

circuits,⁴² and there is no reason to think that judges in a restructured Ninth Circuit would not accord similar weight to decisions of other divisions.

On the other hand, there is a difference between respecting precedent and being obligated to follow it. I have no doubt that judges today often follow precedents they do not like, simply because it is their obligation to do so.⁴³ If stare decisis did not operate circuit-wide, judges would be free simply to reject precedent from another division. The Commission plan would thus authorize, if not encourage, the creation of intracircuit conflicts.

This brings us to the Commission's second and more important response: the creation of a "Circuit Division." The Commission insists that the Circuit Division—"a small, stable, but still representative subset of the court's judges . . . focused on conflict resolution"—can insure the maintenance of "desirable circuit-wide uniformity."⁴⁴ This response raises two questions. First, what does the Commission mean by "desirable circuit-wide uniformity"? Second, how much uniformity would the Circuit Division bring? To these questions I now turn.

2. *Jurisdiction and Authority of the Circuit Division*

The keystone of the Commission plan is the Circuit Division. Without the Circuit Division, there could be no pretense that the Ninth Circuit Court of Appeals remained intact in anything but name. Each of the regional divisions would be totally autonomous except for the cumbersome process

42. See, e.g., *In re Kennedy*, 108 F.3d 1015, 1017 (9th Cir. 1997) ("As there is no Ninth Circuit precedent on point, we look to how our sister circuits have addressed the jurisdictional question."); *Cone v. Longmont United Hosp. Ass'n*, 14 F.3d 526, 531 n.3 (10th Cir. 1994) ("Although there is no Tenth Circuit case directly on point, we are comfortable adopting the approach taken by other circuits in disparate treatment cases."); *United States v. Morton*, 999 F.2d 435, 439 (9th Cir. 1993) (stating that out-of-circuit precedent "dispels the district court's ruling here").

43. A striking example is *United States v. Magallon*, 113 F.3d 150 (9th Cir. 1997), *vacated*, 115 F.3d 695 (9th Cir. 1997). In its initial opinion, the panel unanimously set aside the sentences of four defendants convicted for drug crimes involving methamphetamine. See *Magallon*, 113 F.3d at 153. The panel found that the district court had committed plain error, that the error "affected the defendants' substantial rights," and that failure to correct the error "would seriously affect the fairness and integrity of judicial proceedings." *Id.* at 153-54. However, the panel soon discovered that the same sentencing issue was pending before another panel which, under the court's rules, had priority. The other panel rejected the "plain error" argument. See *United States v. Scrivner*, 114 F.3d 964 (9th Cir. 1997). The *Magallon* panel then affirmed the sentences, finding that the intervening decision "controls this case." *United States v. Magallon*, No. 95-10438, 1997 WL 572171, at *1 (9th Cir. Sept. 15, 1997) (unpublished opinion). For other examples, see *In re Robert L. Helms Const. & Dev. Co.*, 110 F.3d 1470, 1475 (9th Cir. 1997) (rejecting "clear logic and persuasive reasoning" because "binding Ninth Circuit authority" required contrary position), *on reh'g*, 139 F.3d 702 (9th Cir. 1998) (en banc); *United States v. Castillo*, 866 F.2d 1071, 1083 (9th Cir. 1988) ("While we have concluded that the authorities cited above require us to hold that the Government's argument did not violate the constitution, we do so under compulsion of the law of this circuit and with strong misgivings.").

44. WHITE COMM'N REP., *supra* note 1, at 51.

of rotating judges among the regions. Thus, it is essential to understand how the Circuit Division would operate.

The first thing that stands out is the extraordinary constraints the Commission's plan places on the authority of the Circuit Division. The jurisdiction of the Division would be limited to resolving "square" conflicts between the regionally organized divisions.⁴⁵ Further, the Circuit Division could not take any case on its own motion; it could act only in response to an application for review filed by a party.⁴⁶ Neither of these limitations constrains the en banc process today.

a. *Only "square" conflicts*

What does the Commission mean by "square" conflicts? One plausible interpretation is that the Commission refers to situations in which one division explicitly refuses to follow a decision handed down in another division. Explicit rejection is the only treatment of circuit precedent now forbidden to court of appeals panels. It would be logical to say that when a panel does take advantage of the freedom conferred by the divisional arrangement, the decision would be subject to review by the Circuit Division to eliminate the disagreement.

Suppose, though, that the panel (or the regional en banc court) distinguishes a decision from another division that reached a contrary result in a similar case. The losing litigant argues that, notwithstanding the purported grounds of distinction, the panel's resolution conflicts with the other division's ruling. Could the Circuit Division find that a square conflict exists and accept the application for review?

If the answer is yes, that is an invitation to tiresome wrangling over whether two decisions really are in conflict. In this regard, it is instructive to consider the experience of the Florida Supreme Court. That court is vested with jurisdiction to review "any decision of a district court of appeal . . . that expressly and directly conflicts with a decision of another district court of appeal . . . on the same question of law."⁴⁷ Commentators describe the jurisdiction as "disputatious"⁴⁸ and note that "the existence of conflict often is not so certain, meaning that a brief [seeking review] must

45. *See id.* at 45.

46. The statute drafted by the Commission to implement its recommendations provides that the jurisdiction of the Circuit Division "may be invoked by *application for review* by a party to the case." *Id.* at 95 (emphasis added). *See also id.* at 46 (outlining procedures to be followed by Circuit Division).

47. FLA. CONST. art. V, § 3(b)(3).

48. Gerald Kogan & Robert Craig Waters, *The Operation and Jurisdiction of the Florida Supreme Court*, 18 NOVA L. REV. 1151, 1225 (1994).

engage in a lengthier and more convoluted argument to establish the Court's discretion over the case."⁴⁹ That is hardly a model to be emulated.

What makes the arrangement even more problematic in the Ninth Circuit context is that the judges of the Circuit Division would be questioning the good faith or competence of their own colleagues. If the Circuit Division agrees to review a decision that has distinguished an opinion handed down by another regional division, that would be tantamount to saying that the later panel has failed to recognize that the earlier opinion involved the same issue and required the same result. I suspect that the Circuit Division judges, taking into account the effect of such a declaration on collegiality within the circuit and on the legitimacy of the system, would be reluctant to take that step.

One other possibility comes to mind. Under the Commission's plan, a litigant must request en banc rehearing by the regional division before seeking review by the Circuit Division.⁵⁰ I suspect that, not infrequently, litigants will assert that the panel decision creates a conflict with an opinion that the panel did not cite or distinguish. The division may deny rehearing without comment. In that situation, the grant of review by the Circuit Division would not impugn the competence or integrity of the three-judge panel, but the task of determining whether a conflict exists becomes considerably more difficult. I can testify from my experience in studying intercircuit conflict that when the later of two decisions makes no mention of the earlier one, assessing a purported inconsistency is a time-consuming and frustrating enterprise.⁵¹

These considerations suggest that the jurisdiction of the Circuit Division would be limited to acknowledged conflicts—conflicts created by the explicit refusal of one regional division to follow the precedent established by another division. That limitation, however, would substantially undercut the effectiveness of the mechanism. Indeed, the Circuit Division would be far less able than the existing limited en banc court to maintain uniformity within the circuit—a mechanism that the White Commission finds wanting.

Under the existing arrangement, Ninth Circuit judges can and do grant rehearing en banc to resolve tensions in circuit law caused by inconsistencies in doctrines or outcomes less blatant than explicit rejection.

49. *Id.* at 1238.

50. See WHITE COMM'N REP., *supra* note 1, at 45.

51. The problem is similar to that of determining whether an uncited out-of-circuit precedent is squarely on point. See *Predictability*, *supra* note 37, at 1077-85.

For example, in *Townsend v. Holman Consulting Corp.*,⁵² the en banc court overruled a panel decision so as to obviate the need to maintain the “unstable and awkward” distinction drawn by a later case.⁵³ There was no need for the court to consider whether the conflict was “square.” So, too, in *Hale v. Arizona*,⁵⁴ in which the court said it “consider[ed] these questions en banc to resolve the tension between [two panel decisions].”⁵⁵ In other cases the en banc court has quietly overruled a circuit precedent that the three-judge panel found to be distinguishable.⁵⁶

When the Commission issued its draft report in October 1998, it was unclear whether the narrower or broader interpretation of the Circuit Division’s jurisdiction was intended. The Final Report appears to endorse the narrower reading. In explaining how the arrangement it proposes “will ensure clearer, more consistent circuit law,” the Commission states that “conflicts . . . between divisions will be more sharply highlighted,” and that the Circuit Division will “choose between *articulated conflicting points of view*.”⁵⁷ This language implies that the Circuit Division would be limited to cases in which a panel explicitly rejected the “point of view” adopted by one of the other divisions. As long as the panel found grounds of distinction—even “unstable and awkward” grounds—the Circuit Division would stay its hand.

This interpretation is confirmed by the testimony of Judge Pamela Ann Rymer, a member of the Commission, at a hearing of a Senate Judiciary subcommittee on July 16, 1999. Speaking on behalf of the Commission, Judge Rymer said that “it will be the rare case that qualifies” for review by the Circuit Division. She added: “*Inconsistency alone is not sufficient* for Circuit Division review. There must be square and significant conflict.”⁵⁸

b. *Only upon litigant request*

The authority of the Circuit Division would be further constrained by the Commission’s insistence that the jurisdiction of the Division could be invoked only by a party to a case—and “only after the panel decision had

52. 929 F.2d 1358 (9th Cir. 1990) (en banc).

53. *Id.* at 1365.

54. 993 F.2d 1387 (9th Cir. 1993) (en banc).

55. *Id.* at 1389.

56. Compare *In re Taffi*, 96 F.3d 1190, 1193 (9th Cir. 1996) (en banc) (overruling *In re Mitchell*, 954 F.2d 557 (9th Cir. 1992)), with *In re Taffi*, 68 F.3d 306, 308-09 (9th Cir. 1995) (declining to “extend *Mitchell* to the facts of this case”).

57. WHITE COMM’N REP., *supra* note 1, at 48-49 (emphasis added).

58. Commission on Structural Alternatives for the Federal Courts of Appeal: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the Senate Judiciary Comm., 109th Cong. 14 (1999) (statement of Hon. Pamela Ann Rymer) [hereinafter Rymer Statement].

been reviewed by the division en banc or a divisional en banc had been sought and denied.”⁵⁹ Here, too, the Commission plan casts aside one of the mechanisms used by the Ninth Circuit today to maintain uniformity: the sua sponte, panel-initiated en banc call.

Recent decisions illustrate the utility of this procedure. In 1998, the court took a group of cases en banc sua sponte “to rethink our previous decisions” on the preemption of state tort claims by the Airline Deregulation Act.⁶⁰ The en banc opinion explained, “Because of the need to clarify the law in this area, these cases were taken en banc after they were assigned to a three-judge panel, but prior to the panel’s rendering a decision.” The en banc court issued a unanimous opinion overruling two panel decisions and establishing the law for the entire circuit. This process would not have been possible under the Commission’s plan. More recently, the court accepted a panel’s sua sponte en banc call to resolve “an irreconcilable conflict in this circuit’s case law regarding the standard of review for rulings on the prosecution’s use of peremptory challenges.”⁶¹ The court eliminated the inconsistency without waiting for a litigant’s request and without waiting for the panel to issue an opinion.

3. *The Commission’s Narrow Vision of Uniformity*

Supporters of the Commission plan are caught on the horns of a dilemma. If the Circuit Division can review decisions even when the regional panel insists that the other division’s ruling is distinguishable, it opens the door to time-consuming and uncollegial disputation over whether the new case creates a “square” conflict. But if the Circuit Division is limited to hearing cases in which one division has explicitly rejected another division’s precedent, it will be powerless to eliminate less blatant inconsistencies of the kind that arouse concern today.

Is there any escape from this quandary? The White Commission gives what it may regard as a partial answer. In a little-noticed footnote—not included in the October 1998 draft report—the Commission reveals that its vision of “uniformity” is a narrow one. The Commission’s text refers to “conflicts on *issues for which circuit-wide (or state-wide) uniformity is important.*”⁶² The footnote explains:

59. WHITE COMM’N REP., *supra* note 1, at 45.

60. *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1261 (9th Cir. 1998).

61. *Tolbert v. Page*, 182 F.3d 677, 679 (9th Cir. 1999). For another recent example, see *United States v. Sanchez-Rodriguez*, 161 F.3d 556, 558 (9th Cir. 1998) (en banc) (“We granted en banc review sua sponte to consider whether two of our previous decisions . . . are consistent and, if so, what law should govern this appeal.”).

62. WHITE COMM’N REP., *supra* note 1, at 44 (emphasis added).

[W]e envision that [the function of the Circuit Division] will be focused on maintaining uniformity on issues of law that matter to the entire circuit or to a state (such as California) that is in more than one division. For example, it would be highly undesirable if the Northern and Southern Divisions established different rules on an admiralty issue. On the other hand, it would not appear to matter whether all divisions had the same rule of law with respect to the factors to be considered in granting an adjustment for abuse of trust under the Sentencing Guidelines.⁶³

Although the Commission does not generalize from its two examples, this passage implicitly draws a distinction emphasized by the Federal Courts Study Committee in its analysis of conflicts between circuits.⁶⁴ The Study Committee recognized that not all intercircuit conflicts are “intolerable,” and it posited that one criterion for identifying “intolerable” conflicts is that they “impose economic costs or other harm to multi-circuit actors.”⁶⁵ The White Commission’s examples suggest that it draws the line in the same way.

In the aftermath of the Study Committee report (and at the request of Congress), I conducted a study of unresolved conflicts between federal judicial circuits.⁶⁶ The study concluded that, more often than not, unresolved conflicts do not pose a serious threat to the activities of multi-circuit actors.⁶⁷ Indeed, on many issues the subject matter alone virtually forecloses any effect on multi-circuit actors. This is true of sentencing issues, as suggested by the White Commission; it is also true of most civil rights issues and most issues involving the elements of federal crimes. In disclaiming the importance of circuit-wide uniformity on these issues, the Commission is implicitly telling us that the Circuit Division need not resolve even “square” conflicts in large and important areas of federal law.⁶⁸

Two other aspects of the distinction also warrant mention. First, “square” conflicts on issues affecting multi-circuit actors are probably less common than “square” conflicts on issues such as the interpretation of

63. *Id.* at 115 n.99.

64. *See* FEDERAL COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 124-25 (1990).

65. *Id.*

66. *See* Arthur D. Hellman, *By Precedent Unbound: The Nature and Extent of Unresolved Intercircuit Conflicts*, 56 U. PITT. L. REV. 693 (1995) [hereinafter *Unresolved Conflicts*].

67. *See id.* at 795.

68. In her testimony at the Senate and House hearings, Judge Rymer emphasized that the Circuit Division’s jurisdiction would be limited to “issues on which uniformity throughout the circuit is important.” Rymer Statement, *supra* note 58, at 15.

federal criminal statutes or sentencing guidelines. Second, the concerns that underlie the desire for uniformity between divisions on matters of admiralty law and other issues affecting multi-circuit actors apply equally to uniformity between circuits.⁶⁹ For that reason, these concerns often guide the Supreme Court in the exercise of its certiorari jurisdiction. If the Circuit Division is confined to resolving “square” conflicts on issues affecting multi-circuit actors, it will have little to do, and that little may well be overtaken in short order by Supreme Court decisions.

B. ANOTHER CASUALTY: THE INFORMAL EN BANC PROCESS

The discussion thus far makes plain that the proposed Circuit Division would have far less authority to resolve intracircuit inconsistency than the en banc court in the Ninth Circuit today. But the effect on circuit law of adopting the Commission plan is likely to be even greater than a structural analysis suggests.

In addition to eliminating the circuit-wide en banc court, the Commission plan would jettison the informal processes through which off-panel judges anywhere in the circuit may call a panel’s attention to apparent departures from circuit precedent. As will be discussed in Part III, these informal processes often result in modification of panel opinions, preserving harmony in circuit law without the need for an en banc hearing. Under the Commission’s plan, judges would monitor only the opinions in their own divisions. The nonstructural mechanism that today helps “to provide the West a single body of federal decisional law”⁷⁰ would be lost, and the availability of the Circuit Division would be totally irrelevant.

C. THE SHRIVELED “LAW OF THE CIRCUIT”

In sum, there is less to the Circuit Division than meets the eye. The Circuit Division would resolve only “square” conflicts—a category apparently limited to cases in which one division has explicitly rejected another’s precedent. It would act only upon the request of a party, and it would probably limit itself to issues that affect the operations of multi-circuit actors—a circumstance that is the exception rather than the rule. In all other respects, the law in each division would be left to develop separately.

69. See *Unresolved Conflicts*, *supra* note 66, at 756-57.

70. WHITE COMM’N REP., *supra* note 1, at iii.

One other element of the Commission plan comes into play here. The Commission contemplates that after granting review, “the Circuit Division will simply resolve *the issue in conflict*, and return the case to the regional division for such other proceedings as are necessary.”⁷¹ This too suggests a narrow view of the Circuit Division’s field of operation, and it reinforces the supposition that the Circuit Division would confine itself to discrete issues on which there is an explicit disagreement.

What would the consequences of this arrangement be? I believe that, before very long, the three divisions would be carrying out their law-declaring functions almost as separate courts. Decisions of the Circuit Division would be so infrequent, and their effect on the law of the division so limited, that “the law of the circuit” would shrink to near-insignificance.

D. ISOLATION OF THE DIVISIONS

The scenario I have described is made even more likely by the probable fate of another element of the Commission’s plan, the long-term random rotation of judges among the divisions. Here is what the Commission has to say about the rotation feature in its report:

A majority of judges serving on each division would be residents of the districts over which that division has jurisdiction, but each division would also include some judges not residing within the division, assigned randomly or by lot for specified terms of at least three years.⁷²

The draft statute is somewhat more open-ended:

A majority of the judges assigned to each division shall reside within the judicial districts that are within the division’s jurisdiction . . . ; provided, however, that judges may be assigned to serve for specified, staggered terms of three years or more, in a division in which they do not reside. Such judges shall be assigned at random, by means determined by the court, in such numbers as necessary to enable the divisions to function effectively.⁷³

Even here, there is some ambivalence about long-term cross-division assignment of judges (compare “would” in the report text with “may” in the draft statute). And when Senator Murkowski (joined by Senator Gorton) introduced the legislation implementing the Commission proposal,

71. *Id.* at 46 (emphasis added).

72. *Id.* at 43.

73. *Id.* at 94.

he offered the “strong suggestion” that the Senate Judiciary Committee eliminate the rotation requirement altogether.⁷⁴

I believe that if the Commission plan were to be enacted into law, the Murkowski view would prevail. I say this because there is simply no constituency for the long-term random rotation of judges among divisions. The northwestern senators—who until now have been the most ardent advocates of splitting the circuit—have already made clear their opposition to this feature. And the circuit judges, most of whom do not want any division of the circuit or the court, would be equally opposed to long-term cross-division assignment. Judges living in Alaska would hardly relish the prospect of flying to Pasadena or Phoenix for every argument calendar for three long years. Judges from Los Angeles would not want to hear all of their cases in the northwest.

I am not suggesting that judges would hear cases only in their own region. On the contrary, short-term cross-division assignment of judges would certainly be a feature of the arrangement, if only because caseloads will seldom be proportional to the number of judges residing in each of the regions.⁷⁵ But that is little different from current use of, for example, district judges and senior judges from other circuits. The judges regularly sitting in each division would be the judges who reside there.

E. CONCLUSION: THE COMPROMISE THAT ISN'T

What happens when you put all of this together? In all likelihood, the result would be something like this. In each division, cases would be adjudicated largely by a self-contained group of judges bound only by the precedents they themselves have handed down. The Circuit Division would intervene to provide circuit-wide law only on the rare occasions when a panel or en banc court in one division has explicitly rejected another division's precedent on an issue that affects multi-circuit actors. In many—perhaps most—areas of the law, each division would develop its own line of precedent. The “law of the circuit” would become almost an irrelevance.

This analysis explains why the Commission plan is not a compromise. Those who want to divide the Ninth Circuit have never cared about the circuit as such. It is a matter of indifference to them whether the circuit council, the Bankruptcy Appellate Panel, the circuit conference, and other

74. See 145 CONG. REC. S743 (daily ed. Jan. 20, 1999).

75. Indeed, the probability of imbalance in the allocation of judicial resources is one of the arguments against dividing the circuit or the court of appeals.

circuit institutions remain as they are. What they have sought is a division of the Court of Appeals.⁷⁶ And that, for all but a handful of cases, is what the Commission plan would give them.

III. THE COMMISSION'S FAULTY DIAGNOSIS

Notwithstanding its flaws and limitations,⁷⁷ the divisional structure plan might be worth pursuing if the Commission had identified a serious problem in the Ninth Circuit Court of Appeals that could be solved only through reliance on smaller adjudicative units. But on the evidence of the Commission report, no such problem exists.

The rationale for the Commission plan is that “the law-declaring function of appellate courts requires groups of judges smaller than the present Ninth Circuit Court of Appeals.”⁷⁸ This rationale rests in turn on two overlapping arguments. First, judges in a large appellate court are unable “to monitor all the decisions the entire court of appeals renders.”⁷⁹ Second, “large appellate units have difficulty developing and maintaining consistent and coherent law.”⁸⁰ Neither argument stands up under scrutiny.⁸¹

76. This focus can be seen clearly in the 1997 Senate debate on Senator Feinstein's unsuccessful effort to kill the appropriations rider that would have effected an immediate division of the Ninth Circuit. See *supra* text accompanying note 16. Although supporters of the appropriations measure often spoke of “splitting the circuit,” their arguments invariably centered on the need to divide the Court of Appeals. See, e.g., 143 CONG. REC. S8046 (daily ed. July 24, 1997) (statement of Sen. Hatch) (“Because the circuit is so large its judges cannot sit together to hear cases en banc as do other circuits . . .”); *id.* at S8047-48 (remarks of Sen. Burns) (citing reversals of Ninth Circuit Court of Appeals by the United States Supreme Court); *id.* at S8050 (remarks of Sen. Craig) (noting that Ninth Circuit “currently employs 28 judges—11 more than any other circuit”); *id.* at S8054 (statement of Sen. Murkowski) (stating that “continual increases in the reversal rate . . . by the U.S. Supreme Court” are the result of inconsistency in circuit decisions).

77. For further discussion of the flaws in the divisional structure proposal, see Procter Hug, Jr., *The Commission on Structural Alternatives for the Federal Court of Appeals' Final Report: An Analysis of the Commission's Recommendations for the Ninth Circuit*, 32 U.C. DAVIS L. REV. 887, 909-15 (1999).

78. WHITE COMM'N REP., *supra* note 1, at 47.

79. *Id.*

80. *Id.*

81. I do not discuss the argument that the Ninth Circuit Court of Appeals should be restructured because it has been reversed so often by the United States Supreme Court. Commission member Pamela Rymer, “representing and speaking on behalf of” the Commission, told the Senate Judiciary Committee that the reversal rate “is not a problem that the Commission identified or that the Commission believes should weigh into the consideration of structural alternatives one way or the other.” Testimony of Hon. Pamela Rymer (July 16, 1999) (unofficial transcript on file with the author). I take Judge Rymer at her word. For a detailed examination of the reversals, see Marybeth Herald, *Reversed, Vacated, and Split: The Supreme Court, the Ninth Circuit, and the Congress*, 77 OR. L. REV. 405 (1998). Professor Herald concludes that high reversal rate is “hard to explain away” but is not “a problem that needs to be solved by a circuit split.” *Id.* at 488-89.

A. MONITORING OF PANEL OPINIONS

Central to the Commission's vision of effective appellate adjudication is the "monitoring" of panel opinions by other judges of the court. The Commission puts it this way:

Courts of appeals rely on their judges to monitor the decisions of all panels of the court so that their own decisions are consistent with earlier decisions of the court and so that the court can identify and correct any misapplication or misstatements of the law The volume of opinions produced by the Ninth Circuit's Court of Appeals and the judges' overall workload combine to make it impossible for all the court's judges to read all the court's published opinions when they are issued.⁸²

For several reasons, the Commission's reliance on this theory is misplaced. First, as Chief Judge Hug and his colleagues have aptly stated, the assumption that judges cannot keep sufficiently abreast of circuit law without reviewing opinions as they come out "is a relic of the pre-computer era."⁸³ Before computers, opinions would not appear in the advance sheets for weeks or months; digests, citators, and other research tools lagged even further behind. On a large court, the only way a judge could avoid an inadvertent conflict with another panel's decision was to read opinions as they came out, sort them into piles by subject matter, and perhaps keep a personal index of important rulings.

Today, conditions are very different. If a judge is considering a case involving NEPA or FOIA or *Miranda* or *Noerr* or any other issue, all of the court's decisions on point, no matter how recent, can be accessed in seconds through online research services. In addition, the Ninth Circuit has its own computerized case inventory tools. A judge may scan newly filed opinions simply to get a sense of what is going on in the court, but to collect cases in an effort to replicate the computerized databases would be a waste of time.

Second, the Commission lumps together two very different activities: keeping up with circuit law and monitoring panel opinions. Keeping up with circuit law is something done by individual judges; it is an activity that looks to the future. With all circuit law now easily retrievable by computer when it is needed, there is no particular reason for individual

82. WHITE COMM'N REP., *supra* note 1, at 47.

83. Letter from Chief Judge Procter Hug Jr. to Justice White (Aug. 29, 1998) (visited Jan. 1, 2000) <<http://app.comm.uscourts.gov/hearings/submitted/hug.htm>>. The letter was also signed by three former chief judges of the circuit and by Judge Mary M. Schroeder, who is next in line to be chief judge.

judges to acquire familiarity with decisions that have no relevance for any of their current cases. And reading an opinion today will not help in avoiding a conflict when, months or years from now, the judge does confront a case presenting a similar issue.

Monitoring panel opinions, in contrast, is something that the court does as an institution. The purpose of monitoring, as the Commission suggests, is to identify panel decisions that conflict with earlier decisions of the court or that misstate the law. But effective monitoring does not require that all judges keep up with all opinions. As long as each opinion receives some scrutiny by off-panel judges, the objectives can be met.

Third, the Commission goes off track by referring to “[t]he *volume* of opinions produced by the Ninth Circuit’s Court of Appeals.”⁸⁴ What the Commission fails to mention is that the volume of published opinions does not correlate with circuit size.⁸⁵ In 1998, three other circuits produced a larger number of published opinions than did the Ninth Circuit.⁸⁶

One would think that, other things being equal, an annual output of 800 opinions could be monitored more easily by twenty-eight judges than by fourteen. Opinions are not fungible, and neither are judges. The larger the number of judges engaged in the monitoring process, the greater the likelihood that a particular error or inconsistency will catch the eye of at least one member of the court.⁸⁷

Finally, the evidence leaves no doubt that the judges of the Ninth Circuit Court of Appeals engage in a substantial amount of opinion monitoring.⁸⁸ Under the court’s General Orders, off-panel judges (whether in active or senior status) can use the court’s en banc process to raise

84. WHITE COMM’N REP., *supra* note 1, at 47 (emphasis added).

85. The analysis here is limited to published opinions because only published opinions contribute to the law of the circuit.

86. See ADMINISTRATIVE OFFICE OF U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 1998, at 54 tbl.S-3 (visited Jan. 1, 2000) <<http://www.uscourts.gov/dirprt98/index.html>>. The three circuits with a higher volume of published opinions than the Ninth were the Fifth, the Seventh, and the Eighth. I recognize that 1998 may have been aberrational for the Ninth Circuit, in that the court’s output of published opinions was probably reduced by its high vacancy rate. However, it is not uncommon for other circuits to approach or exceed the output of the Ninth Circuit.

87. In testimony before a House Judiciary subcommittee, Congressman Tom Campbell expressed a different view. He posited that all judges would generally apply the same criteria in reviewing panel opinions, so that increasing the number of judges would not improve performance. However, drawing on my experience in studying the intracourt memoranda in the Ninth Circuit, I believe that Congressman Campbell errs in his premise. For example, some judges flag possible errors in business-related cases; others never do so. Some judges will look more carefully at a “liberal” outcome; others will be concerned by “conservative” rulings. The larger the number of judges, the more combinations of interests and predilections we can expect.

88. The data in this and the following paragraphs are based on my own study of internal court documents.

questions about a panel opinion.⁸⁹ Nothing elaborate is required; often a short electronic message will suffice to alert the panel—and all members of the court—that some aspect of the disposition has aroused concern. In the four-year period 1993 through 1997, there were more than 300 cases in which an off-panel judge initiated en banc activity.⁹⁰ In more than 200 of those cases, one or more memoranda were circulated to the members of the court. In about half of these cases the court voted on whether to take the case en banc. Even when the court did not vote on an en banc call, the off-panel judge's comments often resulted in modification of the panel opinion and sometimes in a modification of the disposition.⁹¹

This record might be less impressive if off-panel judges were initiating en banc activity primarily in cases in which a dissenting or concurring opinion by a member of the three-judge panel had already signaled the possibility of “misapplication or misstatement[] of the law.”⁹² However, a substantial majority of the decisions that generated en banc traffic were unanimous, with no separate opinion by any of the participating judges to lift the case out of the mine run.

No less telling is the nature of the monitoring that the record reveals. The off-panel judges did not always focus on case outcomes; sometimes the memoranda expressed concern only about language, reasoning, or the treatment of precedent in a panel opinion. The issues in the cases spanned the entire range of federal law; while many involved ideologically charged areas like immigration and federal habeas corpus, others did not.⁹³

89. Technically, a judge would use one of several procedures, depending on whether a petition for rehearing en banc has been filed and, if so, how the panel has ruled on it. But nothing turns on whether the proper label is attached to a communication. For a description of the process (albeit in the context of an extraordinary case), see Stephen Reinhardt, *The Anatomy of an Execution: Fairness vs. "Process"*, 74 N.Y.U. L. REV. 313, 328-33 (1999).

90. This figure includes only cases in which the off-panel judge invoked the en banc procedures of the General Orders. It does not include cases—perhaps quite numerous—in which the off-panel judge communicated only with the panel members.

91. In at least one instance, the panel publicly acknowledged the influence of off-panel judges. See *Marshall v. Gates*, 44 F.3d 722, 725 (9th Cir. 1995):

We are the more inclined to [construe a local rule to avoid inconsistency with the federal rules] because it has been brought to our attention by a colleague on this court that all of the district courts in this circuit have rules similar to [the one held invalid in the initial panel opinion].

Id.

92. See WHITE COMM'N REP., *supra* note 1, at 47.

93. I do not suggest that the process is perfect. Dubious panel decisions sometimes fail to attract the attention of any off-panel judge for reasons that are not apparent. In some instances, judges initiate en banc activity but fail to follow up. The Evaluation Committee appointed by Chief Judge Hug is now investigating ways of improving the process, and I am confident that fine-tuning can reduce lapses to a minimum.

In this light, the Commission's concerns about the supposed difficulties of opinion monitoring in the "large appellate unit" ring hollow. Judges today need not read opinions as they come out in order to make use of them when they are relevant. As for monitoring, the evidence indicates that the judges of the Ninth Circuit can and do monitor the opinions rendered by their colleagues.

B. MAINTAINING COHERENT AND CONSISTENT LAW

Monitoring, of course, is not an end in itself, but a means to an end. The Commission's principal argument is that "large appellate units have difficulty developing and maintaining consistent and coherent law."⁹⁴ The Commission thus aligns itself with those who believe that inconsistencies in panel decisions are more common in the Ninth Circuit than in other circuits.⁹⁵

What is the basis for this conclusion, so critical to the Commission's recommendation? The Commission refers to "perceptions" of inconsistency and to its own "judgment, based on experience."⁹⁶ The "experience" is not specified or described. This is a remarkably weak foundation on which to build so substantial a structure.

The Commission acknowledges "the literature on [the] subject," including my own empirical studies of inconsistency in the Ninth Circuit.⁹⁷ The Commission's only response is to say that consistency and predictability cannot be "reduce[d] . . . to statistical analysis" because the "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."⁹⁸

94. WHITE COMM'N REP., *supra* note 1, at 47. The Commission also suggests that a large appellate unit is handicapped in "ensur[ing] that the decisions it issues are *correct*." *Id.* at 48 (emphasis added). The Commission does not explain how one measures the correctness of an appellate decision. Justice Antonin Scalia, who asserted in his letter to the Commission that the Ninth Circuit was not effectively performing its "error-reduction function," cited as evidence "[t]he disproportionate segment of [the Supreme] Court's discretionary docket that is consistently devoted to reviewing Ninth Circuit judgments, and to reversing them by lop-sided margins." Letter from Justice Antonin Scalia to Justice Byron R. White, Chair of the Commission (Aug. 21, 1998) (visited Jan. 1, 2000) <<http://app.com.uscourts.gov/hearings/submitted/pdf/Scalia1.pdf>>. However, as already noted, Judge Pamela Rymer, speaking on behalf of the Commission, has disavowed reliance on the record of reversals in the Supreme Court. *See* Testimony of Hon. Pamela Rymer, *supra* note 81. In any event, the Commission places its primary emphasis on "consistency" rather than "correctness."

95. For example, the chairman of the Senate Judiciary Committee has said that "there are as many contradictory rules of law within the Ninth Circuit as there are within all the other circuits combined." 143 CONG. REC. S8046 (daily ed. July 24, 1997) (remarks of Sen. Hatch).

96. WHITE COMM'N REP., *supra* note 1, at 47.

97. *Id.* at 39 n.93.

98. *Id.* at 40.

It is the Commission's prerogative to reject the methods or conclusions of empirical research, but it is regrettable that the Commission simply gives up and declares that the concepts are too subtle to warrant analysis. For example, what does the Commission mean by "evaluation in a freeze-framed moment"? The research I conducted, and which the Commission cites, embraced two distinct years of the Ninth Circuit's work, and the evaluation involved decisions rendered over a much longer period of time.⁹⁹

Although the Commission is not willing to credit systematic empirical research, it is willing to rely on "perceptions." The reference to "perceptions" apparently incorporates the brief account earlier in the report of the Commission's survey of district judges and lawyers in the Ninth Circuit and nationwide.¹⁰⁰ The survey is a valuable—indeed unique—source of information, and happily the Commission has made available a complete account of the findings in its Working Papers.¹⁰¹ Those findings raise some doubts about the conclusions drawn by the Commission.

Consider one of the specific points cited by the Commission in its report, the proposition that "Ninth Circuit lawyers, more often than others, reported as a 'large' or 'grave' problem the difficulty of discerning circuit law due to conflicting precedents, and the unpredictability of appellate results until the panel's identity is known."¹⁰² When we look at the corresponding table in the Working Papers, we find that, indeed, Ninth Circuit lawyers were more likely than lawyers in other regional circuits to have experienced problems in "discerning circuit law due to conflicting precedents."¹⁰³ But two other points also stand out:

- The Ninth Circuit lawyers who viewed the problem as "large" or "grave" constituted only one-quarter of the respondents.¹⁰⁴
- The highest proportion of lawyers giving this response came not from the Ninth Circuit, but from the Federal Circuit—a court of 12 judges, all of whom have their chambers in the same building.¹⁰⁵

99. The Commission cites a chapter in *RESTRUCTURING JUSTICE*, *supra* note 4 (drawing upon research described in detail in Arthur D. Hellman, *Breaking the Banc: The Common Law Process in the Large Appellate Court*, 23 ARIZ. ST. L.J. 915 (1991) [hereinafter *Breaking the Banc*] and Arthur D. Hellman, *Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court*, 56 U. CHI. L. REV. 541 (1989) [hereinafter *Jumboism*]).

100. See WHITE COMM'N REP., *supra* note 1, at 39-40.

101. See COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, WORKING PAPERS 3-91 (1999) [hereinafter WORKING PAPERS].

102. WHITE COMM'N REP., *supra* note 1, at 40.

103. WORKING PAPERS, *supra* note 101, at 86, Item 20g.

104. See *id.*

A similar pattern can be seen in the responses to the question “how big a problem is the unpredictability of results until the panel’s identity is known?”¹⁰⁶ Ninth Circuit lawyers were more likely to have experienced problems than lawyers in other regional circuits, but so were lawyers practicing before the Federal Circuit.¹⁰⁷ Interestingly, one out of seven lawyers experienced a “large” or “grave” problem of unpredictability in the First Circuit, which has only six judgeships and enjoys a reputation for collegiality.¹⁰⁸

These findings point to the need for caution in interpreting the survey results. The question is not whether particular phenomena are associated with the Ninth Circuit Court of Appeals, but whether those phenomena are causally linked to circuit size. On this score, a recent news story about the Court of Appeals for the Federal Circuit provides a useful perspective.¹⁰⁹ The story notes that some members of the intellectual property bar “accuse the specialized court of unpredictability, claiming that judges are deeply divided on basic patent doctrine, [and] that results are often panel-dependent.”¹¹⁰ The story elaborates:

This factionalism leads to a crap-shoot mentality among lawyers who say the outcome of their cases depends too heavily on who sits on a particular panel. Because the U.S. Supreme Court rarely reviews patent cases, the panels’ inconsistent rulings remain unresolved Some say the court should take more cases en banc.¹¹¹

To anyone who has followed the debate over dividing the Ninth Circuit, these comments will sound uncannily familiar. They are precisely the kinds of comments that give rise to the “perceptions” that the Commission relies on.¹¹² Yet no one would argue that the Court of Appeals for the Federal Circuit is too large and should be divided into smaller adjudicative units.

I do not know whether the criticisms of the Federal Circuit are justified. Nor would I want the Ninth Circuit to view the survey findings with complacency. I do suggest that the “perception” evidence drawn from

105. *See id.*

106. *Id.* at 87, Item 20j.

107. *See id.*

108. *See id.* The Commission, in explaining what it means by “collegiality,” quotes at length from a book by the former chief judge of the First Circuit. *See* WHITE COMM’N REP., *supra* note 1, at 40 (citing FRANK M. COFFIN, *ON APPEAL* (1994)).

109. Victoria Slind-Flor, *Federal Circuit Judged Flawed*, NAT’L L.J., Aug. 3, 1998, at A-1.

110. *Id.*

111. *Id.*

112. *See, e.g.*, Paul D. Carrington, *An Unknown Court*, in *RESTRUCTURING JUSTICE*, *supra* note 4, at 210 (quoting lawyer’s comment that “Las Vegas is the capital of the Ninth Circuit”).

the survey offers little support for the Commission's conclusion that large appellate units have difficulty developing and maintaining consistent and coherent law.

Finally, there is (to borrow a favorite allusion of Chief Justice Rehnquist) the evidence of the dog that did not bark in the night-time. If inconsistency is as much of a problem as the Commission believes it is, examples should be easy to find. The Commission compiled a voluminous record of testimony and statements dealing with the Ninth Circuit, yet not a single witness came forward with examples—systematic or even anecdotal—of conflicts between Ninth Circuit panel decisions.¹¹³

Ironically, the one witness who did cite specific examples did so in the course of arguing that “the Ninth Circuit has greater (not lesser) intra-circuit uniformity than in other circuits.”¹¹⁴ This was James M. Wagstaffe, the author of a treatise on federal pretrial practice, who testified at the Commission's hearing in San Francisco. Wagstaffe explained that in the course of preparing annual updates for his work, he reviews “all major decisions [on jurisdiction and procedure] rendered in the last year by the various circuit and district courts.”¹¹⁵ He found that “many circuits, including even the smallest ones, have had strong disagreements among ‘competing’ panels in areas of federal practice.”¹¹⁶ He asserted that, in contrast, “the Ninth Circuit has been remarkably free from intra-circuit conflict in the broad areas of my study. Rather, [there is] a healthy and intellectually honest commitment to intra-circuit stare decisis.”¹¹⁷

113. At the Senate hearing on Senate Bill 253, Judge Andrew J. Kleinfeld offered one example. He said, “We have decisions in death penalty cases out of California that I cannot reconcile.” Testimony of Hon. Andrew Kleinfeld (July 16, 1999) (unofficial transcript on file with the author). Although Judge Kleinfeld did not name any cases, he probably was referring to *Caro v. Calderon*, 165 F.3d 1223 (9th Cir.), *cert. denied*, 119 S. Ct. 2414 (1999). Judge Kleinfeld dissented from the panel decision in that case, saying that the decision “cannot be reconciled with the earlier decision in *Babbitt v. Calderon*, 151 F.3d 1170 (9th Cir. 1998).” *Id.* at 1229 n.1 (Kleinfeld, J., dissenting). The majority summarized the facts of *Babbitt* and said, “All that is entirely different from *Caro*'s case.” The majority then explained at length why the cases were distinguishable. *See id.* at 1227-28 (majority opinion). Of course, similar disagreements can be found in other circuits. *See, e.g., Shorter v. ICG Holdings, Inc.*, 188 F.3d 1204, 1214 (10th Cir. 1999) (Lucero, J., dissenting) (“the result reached by the majority conflicts squarely with our precedent in [a prior case]”); *Doe v. Santa Fe Indep. Sch. Dist.*, 171 F.3d 1013, 1015 (5th Cir. 1999) (Jolly, J., joined by seven other judges, dissenting from denial of rehearing en banc) (stating that “majority opinions in *Santa Fe* and [an earlier Fifth Circuit case] are . . . clearly in conflict with each other”).

114. Statement of James M. Wagstaffe, Hearing of the Commission on Structural Alternatives for the Federal Courts of Appeals, San Francisco, Calif. (May 29, 1998) (visited Jan. 1, 2000) <<http://app.comm.uscourts.gov/hearings/sanfran/0529WAGS.htm>> [hereinafter Wagstaffe Statement].

115. *Id.*

116. *Id.*

117. *Id.*

A reading of the transcript suggests that Commission members reacted with some incredulity to Wagstaffe's statements.¹¹⁸ But the Commission need not have taken these conclusions on faith. Wagstaffe cited several specific cases as examples of the procedural and jurisdictional issues on which Ninth Circuit law is, in his view, at least as coherent as that of other circuits.¹¹⁹ Using those cases (and the treatise) as starting-points, the Commission could have tested the accuracy of Wagstaffe's assessments. But it did not do so.

It is not even clear what kinds of conflicts the Commission believes are so prevalent in the Ninth Circuit. The paradigm of the intracircuit conflict is the panel opinion that distinguishes a circuit precedent on grounds that others find to be unpersuasive or even disingenuous.¹²⁰ But conflicts can also be created by a panel's failure to cite or distinguish a relevant contrary precedent.¹²¹ As the discussion in Part II suggests, the two kinds of conflicts raise somewhat different issues in the context of structural reform. But the Commission refers to "perceptions of . . . inconsistency" without explaining whether the problem lies in one, the other, or some combination of the two.

The absence of examples and the lack of specificity are emblematic of the flimsy evidentiary support that underlies the Commission's plan. At most, the Commission has shown that there is some dissatisfaction with the Ninth Circuit Court of Appeals' performance of its law-declaring function. The Commission has not demonstrated the existence of problems that would be cured by dividing the court into three largely autonomous decisional units.

IV. CONCLUSION

The Commission's proposal for regionally based adjudicative divisions reflects a conscientious attempt to respond to criticisms of the

118. See Commission on Structural Alternatives for the Federal Courts of Appeals, Public Hearing, San Francisco, California 363-64 (May 29, 1998) (also available at <<http://app.com.uscourts.gov/hearings/sftrans.pdf>>). For example, one Commission member asked Wagstaffe, "[A]re you saying that you read annually the courts of appeals' opinions on procedural questions in every circuit?"

119. See Wagstaffe Statement, *supra* note 114. Wagstaffe's examples included issues of diversity jurisdiction and complete preemption.

120. See *supra* note 113. If conflicts of this kind are more numerous in the Ninth Circuit than in other circuits, we would expect to find that dissenting judges in the Ninth Circuit argue more often than their colleagues in other circuits that panel decisions have flouted circuit precedent. Recently I conducted an empirical study to test this hypothesis. The data show no meaningful difference between the Ninth and other circuits in this respect. See *Predictability*, *supra* note 37, at 1092-1100.

121. For a discussion of "omitted precedents," see *Breaking the Banc*, *supra* note 99, at 940-41; *Jumboism*, *supra* note 99, at 570-72.

Ninth Circuit Court of Appeals “while preserving [an] administrative structure that no one has seriously challenged.”¹²² Unfortunately, the plan is flawed both in conception and in execution. It is unlikely to accomplish its goals, and it has the capacity to produce much mischief. Congress should reject the proposal and allow the Ninth Circuit Court of Appeals to continue the course of productive experimentation that it has pursued with great vigor and much success over the last two decades.

122. WHITE COMM’N REP., *supra* note 1, at 57.