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WHY CONGRESS SHOULD NOT SPLIT THE NINTH CIRCUIT

Carl Tobias*

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DURING the first session of the 104th Congress, the United States Senate Judiciary Committee approved Senate Bill 956, a proposal to split the United States Court of Appeals for the Ninth Circuit. The measure would have established a new Twelfth Circuit consisting of Alaska, Arizona, Idaho, Montana, Nevada, Oregon, and Washington and would have left California, Hawaii, Guam, and the Northern Mariana Islands in the Ninth Circuit. This vote may appear insignificant; however, it could actually have had enormous consequences.

Congress has divided appeals courts only twice since creating the modern appellate system in 1891. Neither House of Congress had ever held floor debate on a bill that would split the Ninth Circuit. The court divi-

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sion which Congress considered would have had substantial systemic impacts by, for example, eliminating the finest circuit in which to experiment with effective procedures for improving the quality of appellate justice.

The recommended bifurcation would have adversely affected the proposed Ninth Circuit. Most significant, the court would have had comparatively few judges to resolve a large, complicated docket and would have essentially become a one-state circuit. This is unprecedented. The division would also have had important implications for the new Twelfth Circuit. For instance, the court's creation could have entailed significant start-up costs and continuing expenses. Some of these difficulties apparently persuaded the Senate not to split the court, but to authorize a commission which would have assessed the appeals courts. The 104th Congress ultimately failed to approve that study; however, it did appropriate funds for this effort. Advocates of the Ninth Circuit's division and of a national study commission have suggested that they will introduce proposals which would implement their views in the 105th Congress.

The above ideas show that the circuit-splitting measure which the 104th Congress considered deserves evaluation. This Essay undertakes that effort. It first examines the history of Senate Bill 956. The Essay then analyzes the recent proposal, finding that the measure's disadvantages outnumber its benefits. In conclusion, the Essay recommends that Congress reject the proposal and establish a national commission to assess the appeals courts and their expanding caseloads. If Congress is not convinced that splitting the Ninth Circuit is unwise and finds that the division is imperative, the Essay affords suggestions for improving the bill.

I. THE BACKGROUND OF SENATE BILL 956

The bill's background requires limited treatment here, as its history has been fully assessed elsewhere.¹ Congress instituted the modern appellate system by passing the Evarts Act in 1891.² Congress formed a newly-numbered Ninth Circuit consisting of California, Nevada, and Oregon in 1866³ and later added Montana, Washington, Idaho, Hawaii, Alaska, Arizona, Guam, and the Northern Mariana Islands.⁴

1. See Carl Tobias, *The Impoverished Idea of Circuit-Splitting*, 44 EMORY L.J. 1357 (1995); see also Thomas E. Baker, *On Redrawing Circuit Boundaries—Why the Proposal to Divide the United States Court of Appeals for the Ninth Circuit Is Not Such a Good Idea*, 22 ARIZ. ST. L.J. 917 (1990) [hereinafter Baker, *Redrawing*]. I rely substantially in this Essay on these two articles and on THOMAS E. BAKER, *RATIONING JUSTICE ON APPEAL* (1994) [hereinafter BAKER, *RATIONING*].

2. Evarts Act, ch. 517, 26 Stat. 826 (1891) (codified as amended at 28 U.S.C. §§ 41-49 (1994)). See generally FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT, A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 103-28 (1927).

3. See Act of July 23, 1866, ch. 210, § 2, 14 Stat. 209 (codified as amended at 28 U.S.C. § 41 (1994)).

4. For the acts adding each state and territory, see Tobias, *supra* note 1, at 1359-60. With the exception of the Northern Mariana Islands version, which is at 28 U.S.C. § 1821 (1994), each act's current version is at 28 U.S.C. § 41 (1994).

Congress has redrawn circuit boundaries only once since 1930.⁵ Concerns about caseload congestion led Congress in 1980 to create the Eleventh Circuit by removing Alabama, Florida, and Georgia from the Fifth Circuit, leaving Louisiana, Mississippi, and Texas.⁶ Congress divided the Fifth Circuit partly at the suggestion of the Commission on Revision of the Federal Court Appellate System, popularly known as the Hruska Commission for its chair, Senator Roman Hruska (R-Neb.).⁷ After performing a thorough analysis, the Hruska Commission recommended that Congress bifurcate the two biggest courts, the Fifth and the Ninth Circuits, instead of championing a more comprehensive resolution, such as realigning the entire appellate system.⁸ Congress also split the Fifth Circuit because it was large and the court's active judges favored division;⁹ however, bifurcation failed to relieve overloaded dockets.¹⁰

Numerous observers had suggested the Ninth Circuit's division since the 1940s.¹¹ Therefore, the Hruska Commission's bifurcation recommendation was predictable, even if its suggestion that Congress split California and reassign its districts to different circuits was surprising.¹² The proposal respecting California was quite controversial and delayed serious congressional examination of the court's division in 1973. Moreover, Congress showed little interest in a circuit-splitting measure that was introduced a decade later.¹³

5. In 1929, crowded dockets led Congress to create the Tenth Circuit by detaching Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming from the Eighth Circuit and retaining Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota in the Eighth Circuit. See Act of Feb. 28, 1929, ch. 363, 45 Stat. 1346, 1347 (current version at 28 U.S.C. § 41 (1994)).

6. Act of Oct. 14, 1980, Pub. L. No. 96-452, 94 Stat. 1994 (current version at 28 U.S.C. § 41 (1994)); see also Charles A. Wright, *The Overloaded Fifth Circuit: A Crisis in Judicial Administration*, 42 TEX. L. REV. 949 (1964) (discussing caseload congestion). See generally H.R. REP. NO. 1390, 96th Cong., 2d Sess. (1980), reprinted in 1980 U.S.C.A.N. 4236; Baker, *Redrawing*, supra note 1, at 924-28.

7. Commission on Revision of the Federal Court Appellate System, *The Geographical Boundaries of the Several Judicial Circuits: Recommendations for Change*, 62 F.R.D. 223 (1973) [hereinafter *Hruska Commission*].

8. See *Hruska Commission*, supra note 7, at 228.

9. See Baker, *Redrawing*, supra note 1, at 927; see also Letter from Charles E. Wiggins, U.S. Circuit Judge for the Ninth Circuit, to Sen. Dianne Feinstein (Dec. 18, 1995) (on file with author) [hereinafter Wiggins Letter].

10. See OFFICE OF THE CIRCUIT EXECUTIVE OF THE U.S. COURTS FOR THE NINTH CIRCUIT, POSITION PAPER IN OPPOSITION TO S. 956—NINTH CIRCUIT COURT OF APPEALS REORGANIZATION ACT OF 1995 (June 22, 1995), reprinted in 141 CONG. REC. S10,436, S10,436-38 (daily ed. July 20, 1995) (statement of Sen. Murray) [hereinafter S. 956 POSITION PAPER].

11. See Baker, *Redrawing*, supra note 1, at 928; S. 956 POSITION PAPER, supra note 10, at 2; see also OFFICE OF THE CIRCUIT EXECUTIVE OF THE U.S. COURTS FOR THE NINTH CIRCUIT, POSITION PAPER IN OPPOSITION TO S. 1686 NINTH CIRCUIT COURT OF APPEALS REORGANIZATION ACT (Aug. 2, 1991) [hereinafter S. 1686 POSITION PAPER].

12. See *Hruska Commission*, supra note 7, at 234-35. See generally Arthur D. Hellman, *Legal Problems of Dividing a State Between Federal Judicial Circuits*, 122 U. PA. L. REV. 1188 (1974).

13. See S. 1156, 98th Cong., 1st Sess. (1983); Foye A. Silas, *Circuit Breaker—Move on to Split the Ninth*, 70 A.B.A. J. 34, 34 (1984); see also Baker, *Redrawing*, supra note 1, at 928; Wiggins Letter, supra note 9.

During 1978, Congress empowered circuits of greater than fifteen active members to reorganize with administrative units and adopt streamlined measures for en banc hearings.¹⁴ The Ninth Circuit responded to this invitation creatively, reorganizing into three units to achieve more efficient administration.¹⁵ The court also instituted a limited en banc procedure whereby the chief judge and ten active judges selected by lot rehear en banc appeals on a majority vote of all active judges.¹⁶ The court has implemented many intramural reforms, such as pre-briefing conferences,¹⁷ and has relied heavily on technological advances.¹⁸ In 1989, the Ninth Circuit reported to Congress that this experimentation had allowed the court to resolve a large, complex docket and that there was no reason to split the court. The circuit also reported that the mechanisms used permitted the court's continued growth.¹⁹

Senate Bill 948 deserves brief analysis because the measure and most arguments espousing it resemble Senate Bill 956 and the contentions favoring it. During March 1990, a Senate Judiciary subcommittee held a hearing in which many of the bill's champions and opponents offered much helpful information.²⁰ Numerous proponents claimed that the Ninth Circuit's size fostered complications.²¹ The "increasing likelihood of intracircuit conflicts"²² also bothered advocates of Senate Bill 948, who

14. Act of Oct. 20, 1978, Pub. L. No. 95-486, § 6, 92 Stat. 1629, 1633 (*supplemented by* Judicial Council's Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, 94 Stat. 2035 (1981)).

15. *See* Baker, *Redrawing*, *supra* note 1, at 929. *See generally* JOSEPH S. CECIL, FEDERAL JUDICIAL CENTER, ADMINISTRATION OF JUSTICE IN A LARGE APPELLATE COURT: THE NINTH CIRCUIT INNOVATIONS PROJECT (1985); OFFICE OF THE CIRCUIT EXECUTIVE OF THE U.S. COURTS FOR THE NINTH CIRCUIT, S. 948 POSITION PAPER NINTH CIRCUIT COURT OF APPEALS REORGANIZATION ACT 6-7 (1989) [hereinafter S. 948 POSITION PAPER].

16. *See* 9TH CIR. R. 35-3 (formerly 9TH CIR. R. 25). *See generally* PAUL D. CARINGTON ET AL., JUSTICE ON APPEAL 161-63, 200-03 (1976); Steven Bennett & Christine Pembroke, "Mini" In Banc Proceedings: A Survey of Circuit Practices, 34 CLEV. ST. L. REV. 531 (1986).

17. *See* Baker, *Redrawing*, *supra* note 1, at 932; John B. Oakley, *The Screening of Appeals: The Ninth Circuit's Experience in the Eighties and Innovations for the Nineties*, 1991 B.Y.U. L. REV. 859.

18. *See* Baker, *Redrawing*, *supra* note 1, at 932; Arthur D. Hellman, *Central Staff in Appellate Courts: The Experience of the Ninth Circuit*, 68 CAL. L. REV. 937, 961 (1980); S. 956 POSITION PAPER, *supra* note 10, at 4.

19. THE JUDICIAL COUNCIL AND UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FOURTH BIENNIAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF SECTION 6 OF THE OMNIBUS JUDGESHIPS ACT OF 1978 AND OTHER MEASURES TO IMPROVE THE ADMINISTRATION OF JUSTICE IN THE NINTH CIRCUIT 1 (July 1989). *See generally* S. 948 POSITION PAPER, *supra* note 15, at 6-7.

20. *The Ninth Circuit Court of Appeals Reorganization Act of 1989: Hearing Before the Subcomm. on Courts and Admin. Practice of the Senate Comm. on the Judiciary on S. 948*, 101st Cong., 2d Sess. (1990) [hereinafter S. 948 Hearing].

21. These involved geography, the travel and corresponding costs entailed, the population served, the number of judgeships, the court's docket, the time for processing appeals, and the operating expenses. For helpful overviews of the issues that size implicates, see Baker, *Redrawing*, *supra* note 1, at 934-38; S. 956 POSITION PAPER, *supra* note 10, at 3-5; *see also* Tobias, *supra* note 1, at 1366-69 (affording discussion of size).

22. *See* 135 CONG. REC. S5026 (daily ed. May 9, 1989) (statement of Sen. Gorton); *id.* at S5027 (statement of Sen. Hatfield).

observed that the opportunities for conflicts on a court with twenty-eight judges are great because 3276 combinations of panels might decide a question.²³ Several sponsors provided ideas from a northwestern regional viewpoint that evinced different degrees of concern about California. For example, Senator Slade Gorton (R-Wash.), who has led the fight to split the court, stated that "California judges and California attitudes" strongly dominate litigants in the Pacific Northwest.²⁴

The Ninth Circuit Judicial Conference, with nearly all of its active judges opposing bifurcation, officially suggested that Congress reject any proposal for bifurcating the court during its 1989 annual meeting.²⁵ Senate Bill 948's champions apparently did not carry the burden of persuasion that the court's boundaries needed change, while the measure's opponents seemed to counter effectively the proponents' arguments.²⁶ The Senate Judiciary Committee refused to send the circuit-dividing proposal to the floor during 1990.²⁷ The opposition of the court's members, of the Senators from the affected states, and of environmental groups and the recommendation of the Federal Courts Study Committee that Congress authorize a comprehensive circuit study apparently explain Congress's decision.²⁸

A few developments which are relevant to dividing the Ninth Circuit occurred in the 1990s. Circuit-splitting bills were introduced;²⁹ however, Congress did not seriously consider the bills or authorize an official study of the type that the Study Committee envisioned.³⁰ The Federal Judicial Center (FJC) concluded a 1993 analysis of structural measures but found minimal evidence suggesting that intracircuit inconsistency is a major difficulty or that it strongly correlates with circuit size.³¹ The FJC stated that the appeals courts were experiencing stress which structural change would not "significantly alleviate."³² The Long Range Planning Committee of the Judicial Conference also broadly assessed the federal courts and issued a March 1995 report in which it strongly opposed circuit

23. See Baker, *Redrawing*, *supra* note 1, at 938.

24. See 135 CONG. REC. S5026 (daily ed. May 9, 1989) (statement of Sen. Gorton). *Accord* 135 CONG. REC. S5028 (daily ed. May 9, 1989) (statement of Sen. Burns).

25. See S. 1686 POSITION PAPER, *supra* note 11, at 2; see also S. 956 POSITION PAPER, *supra* note 10, at 3.

26. See, e.g., S. 948 Hearing, *supra* note 20; S. 948 POSITION PAPER, *supra* note 15. See generally Baker, *Redrawing*, *supra* note 1, at 934.

27. See S. 1686 POSITION PAPER, *supra* note 11, at 8-9; S. 956 POSITION PAPER, *supra* note 10, at 2. See generally Steve Albert, *Congress Weighs Plan to Divide the 9th Circuit*, LEGAL TIMES, Feb. 1, 1993, at 12.

28. See REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 109 (1990). The Committee was an independent entity that Congress authorized to study the federal courts and make recommendations for improving them. See Federal Courts Study Act, Pub. L. No. 100-702, §§ 101-109, 102 Stat. 4642, 4644 (1994).

29. See S. 1686, 102d Cong., 1st Sess. (1991); H.R. 3654, 103d Cong., 1st Sess. (1993).

30. See *supra* text accompanying note 28.

31. JUDITH A. MCKENNA, FEDERAL JUDICIAL CENTER, STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS 94 (1993).

32. See *id.* at 155.

restructuring.³³

II. ANALYSIS OF SENATE BILL 956

A. DESCRIPTIVE ANALYSIS OF SENATE BILL 956

Senate Bill 956 modifies Senate Bill 948 in only two significant ways.³⁴ The major changes are the states that would comprise, and the active judges who would be authorized for, the Ninth and Twelfth Circuits. Senate Bill 956 differs from Senate Bill 948 by leaving Hawaii, Guam, and the Northern Mariana Islands in the proposed Ninth Circuit and including Arizona and Nevada in the new Twelfth Circuit, and by assigning thirteen, rather than nine, judges to the new court.³⁵

The Senate Judiciary Committee held a September 1995 hearing on Senate Bill 956 which yielded little information that had not been adduced on Senate Bill 948 in 1990. A partial exception was Ninth Circuit Judge Diarmuid F. O'Scannlain. Judge O'Scannlain was probably the court's first active judge to endorse publicly the idea of splitting the Ninth Circuit. He explored the possibilities of the existing court's trifurcation, of a realignment analogous to Senate Bill 956's most recent iteration, and of California's division.³⁶ Senator Howell Heflin (D-Ala.) also called for a "careful evaluation of the entire circuit court structure and the administration of justice."³⁷

During a December Judiciary Committee markup, the Committee approved a substitute measure which would place Arizona and Nevada in the proposed Twelfth Circuit, authorize thirteen judges for the court, and locate the court's headquarters in Phoenix.³⁸ With the exception of Senator Heflin, Committee members voted 11-7 along party lines.³⁹ Senator

33. COMMITTEE ON LONG RANGE PLANNING OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS 42, 123-24 (1995) [hereinafter LONG RANGE PLAN].

34. For example, the provisions that prescribe the places where circuit court is held, the assignment of active judges and senior judges' election of assignment, the seniority of judges, as well as the measure's application to cases and its effective date, definitions, and administration are the same or analogous. Compare S. 948, 101st Cong., 1st Sess. §§ 2-3 (1989) with S. 956, 104th Cong., 1st Sess. §§ 2-3 (1995).

35. Compare S. 948, 101st Cong., 1st Sess. (1989) with S. 956, 104th Cong., 1st Sess. (1995). An earlier measure had prescribed seven judges for the projected Twelfth Circuit. See S. 853, 104th Cong., 1st Sess. (1995). Moreover, Senate Bill 956 originally placed Arizona and Nevada in the proposed Ninth Circuit. See Tobias, *supra* note 1, at 1412-13.

36. *The Ninth Circuit Split: Hearings on S. 956 Before the Senate Committee on the Judiciary*, 104th Cong., 1st Sess. (1995) (statement of Diarmuid F. O'Scannlain, U.S. Circuit Judge for the Ninth Circuit) [hereinafter *S. 956 Hearings*]. Those ideas were not new, as the Hruska Commission had examined them in 1973. See *Hruska Commission*, *supra* note 7, at 235-39.

37. *S. 956 Hearings*, *supra* note 36; see also S. REP. NO. 197, Ninth Circuit Court of Appeals Reorganization Act of 1995, 104th Cong., 1st Sess. (1995) [hereinafter Senate Report].

38. See S. 956, 104th Cong., 1st Sess. (1995); SENATE JUDICIARY COMMITTEE, 104TH CONG., 1ST SESS., MARKUP OF S. 956 (Dec. 7, 1995) [hereinafter DECEMBER 7 MARKUP]; see also Adrienne Flynn, *Senate Panel OKs New Appeals Court; Circuit Would Be Based in Phoenix*, ARIZ. REPUBLIC, Dec. 8, 1995, at B1.

39. See DECEMBER 7 MARKUP, *supra* note 38; see also Flynn, *supra* note 38.

Orrin Hatch (R-Utah), the Committee chair, announced that his vote was partly aimed at encouraging Senator Conrad Burns (R-Mont.) to lift the hold which he had placed on all Ninth Circuit nominees in June.⁴⁰ Senator Dianne Feinstein (D-Cal.) strongly opposed the bill; however, the Committee rejected 8-9 her proposal to create a national study commission.⁴¹

In March 1996, Senate Bill 956's advocates attempted to have the Senate consider the measure in the context of federal courts appropriations legislation.⁴² Considerable substantive debate on circuit-splitting's merits ensued; however, the Bill's proponents concluded that they lacked the necessary votes to pass Senate Bill 956. The champions, therefore, agreed to a measure that would create a national study commission which passed easily with bipartisan support.⁴³ The proposal was assigned to the House Subcommittee on Intellectual Property and Judicial Administration which Representative Carlos Moorhead (R-Cal.) chaired.⁴⁴ The measure remained in that subcommittee until autumn, when several senators threatened to attach the study commission proposal to court appropriations legislation. This led Representative Moorhead to move the legislation out of his subcommittee. However, Congress adjourned without passing the measure that would have authorized the study commission, although it did appropriate funds for the study.⁴⁵

B. PROPONENTS' ARGUMENTS FOR SENATE BILL 956 AND RESPONSES

Senate Bill 956's champions, when introducing the measure and testifying at the hearing, reiterated the three principal concepts articulated for Senate Bill 948: size, inconsistency and California domination of the Northwest.⁴⁶ For example, Senator Gorton observed that the Ninth Circuit is the largest appeals court and that its massive size fosters inconsistency, while stating that California parties file fifty-five percent of the circuit's cases, so that "California judges and California judicial philosophy" dominate litigants in the Pacific Northwest.⁴⁷ The proponents enunciated a few new ideas which were variations on the concepts above.

40. See SENATE JUDICIARY COMMITTEE, 104TH CONG., 1ST SESS., MARKUP OF S. 956 (Nov. 30, 1995); Howard Mintz, *Time of the Essence for Clinton's Judicial Nominees*, THE RECORDER, Aug. 1, 1995, at 1.

41. See DECEMBER 7 MARKUP, *supra* note 38; see also Flynn, *supra* note 38. In March, 1996, the Senate authorized a commission. See 142 CONG. REC. S2544-45 (daily ed. Mar. 20, 1996). Congress appropriated funding for the Commission but failed to authorize it. See H.R. REP. NO. 104-863, 104th Cong., 2nd Sess. (1996), reprinted in 142 CONG. REC. H11,6444, 11,859 (Sept. 28, 1996).

42. 142 CONG. REC. S2219-2303 (Mar. 18, 1996); see also Carl Tobias, *A Proposal to Study the Federal Appellate System*, 167 F.R.D. 275, 279 (1996).

43. See 142 CONG. REC. S2544-45 (daily ed. Mar. 20, 1996).

44. I rely in this sentence and in the remainder of this paragraph on conversations with numerous individuals who are familiar with the developments that transpired.

45. See 142 CONG. REC. H11,859 (daily ed. Sept. 28, 1996).

46. See *supra* notes 20-24 and accompanying text.

47. 141 CONG. REC. S7504 (daily ed. May 25, 1995) (statement of Sen. Gorton) [hereinafter Gorton Statement]. Accord 141 CONG. REC. S7505-06 (daily ed. May 25, 1995) (statement of Sen. Burns) [hereinafter Burns Statement].

Senator Gorton claimed that the court is presently the "slowest of 12 regional circuits in hearing and deciding appeals, on average taking a full 16 months" and that the "number of pending cases swelled by almost 20 percent in the last year."⁴⁸ The average processing time and the pending appeals are rather problematic; however, the additional 1.5 months is comparatively small, both figures may fluctuate, and the circuit lacked a complete contingent of active judges in the applicable period. Moreover, the "average time from oral argument submission to disposition—that is, the actual time the judges have the cases in their hands—is 1.9 months, or .5 months less than the national average."⁴⁹

Senator Burns contended that the court's bifurcation would "bring much needed caseload relief to the Ninth Circuit while providing overall relief to states like my own Montana."⁵⁰ These assertions appear plausible, but scrutiny shows that they leave much pertinent material unsaid. The proposed Ninth Circuit would receive fewer filings in an absolute sense than the existing Ninth Circuit. This reduction will offer no actual advantage and could be deleterious. Senate Bill 956, by authorizing fifteen active judges, affords a ratio of three-judge panels per appeal, which is considerably less beneficial than the ratio that the current court has and which would be substantially less favorable than the new Twelfth Circuit. Senate Bill 956's judicial assignments would significantly increase caseloads in the projected Ninth Circuit from 868 to 1065 appeals per three-judge panel annually.⁵¹ This contrasts markedly with the approximately 765 appeals that judges on the new Twelfth Circuit would face.⁵² These statistics indicate that the proposed Ninth Circuit will realize no true caseload relief and that states in the new Twelfth Circuit will secure relief, but at the projected Ninth Circuit's expense.

The above material demonstrates that the Ninth Circuit's division will afford the proposed Twelfth Circuit a measure of relief.⁵³ This benefit may be rather expensive and could be delayed at least in the near future.⁵⁴ Any endeavor as substantial as establishing a new circuit will experience a number of start-up and permanent costs. For instance, the

48. Gorton Statement, *supra* note 47, at S7504. Accord Burns Statement, *supra* note 47, at S7506.

49. See S. 956 POSITION PAPER, *supra* note 10, at 5-6 (emphasis added).

50. See Burns Statement, *supra* note 47, at S7506.

51. See OFFICE OF THE CIRCUIT EXECUTIVE OF THE U.S. COURTS FOR THE NINTH CIRCUIT, POSITION PAPER IN OPPOSITION TO S. 956—NINTH CIRCUIT COURT OF APPEALS REORGANIZATION ACT OF JULY 27, 1995 AND COMPANION BILL H.R. 2935 1, 3 (Feb. 1, 1996) [hereinafter SECOND S. 956 POSITION PAPER]; Telephone Interview with Mark Mendenhall, Assistant Circuit Executive for Communications, U.S. Courts for the Ninth Circuit (Dec. 20, 1995) [hereinafter Interview]; see also S. 956 POSITION PAPER, *supra* note 10, at 6-7 (affording figure of 1014 appeals for Ninth Circuit initially proposed in Senate Bill 956).

52. See Interview, *supra* note 51; see also S. 956 POSITION PAPER, *supra* note 10, at 6 (affording figure of 645 appeals for Twelfth Circuit initially proposed in Senate Bill 956). The proposed Ninth Circuit would also treat a more complicated, time-intensive docket than the existing Ninth Circuit does or the new Twelfth Circuit would. *Id.*

53. See *supra* notes 50-52 and accompanying text.

54. S. 948 POSITION PAPER, *supra* note 15, at 12-13; S. 956 POSITION PAPER, *supra* note 10, at 2-3.

projected Twelfth Circuit must expend time and money on creating and maintaining Clerk of Court and Circuit Executive Offices and on training court administrative staff, who must acquire an understanding of other circuits' operations.⁵⁵ Some judges may find the Twelfth Circuit's more homogenous appellate docket less challenging. The new Twelfth Circuit would also duplicate responsibilities which the larger Ninth Circuit currently discharges well.⁵⁶ However, Senator Jon Kyl (R-Az.) suggested that certain of these costs would be rather small.⁵⁷

The relatively small size of the proposed Twelfth Circuit could foster collegiality. The thirteen judges authorized for the court contrast sharply with the twenty-eight members of the existing Ninth Circuit. Thirteen is somewhat fewer than the fifteen judges the Judicial Conference recommended constitute the maximum.⁵⁸ This judicial complement should increase the possibilities for exchange among the court's members. For example, every Twelfth Circuit judge will sit with other members of the circuit and labor on Circuit Judicial Council projects more often. The enhanced interaction should increase cooperation and productivity in numerous situations, particularly when resolving cases.⁵⁹ The court's recent addition of four more judges, however, undermines the force of the collegiality idea because it will simply limit the opportunities for interchange.

55. See Senate Report, *supra* note 37, at 24-25. After the nascent Twelfth Circuit is formed and has solved the essential difficulties implicating its creation, the court will experience foreseeable and unpredictable problems. For example, the circuit's administrative personnel must comprehend the court's docket, while the circuit's judges will have to sit more often on panels with identical colleagues and resolve promptly a modified case mix. *But see id.* at 6.

56. Administratively, the creation of a new circuit would require duplicative offices of clerk of court, circuit executive, staff attorneys, settlement attorneys, and library, as well as courtrooms and mail and computer facilities. In addition, approximately 40,000 square feet of new headquarters space would be required, all of which would duplicate offices and space in San Francisco. Further, a small circuit, with its concomitant small caseload, would underutilize judicial resources and reduce the opportunities for efficiencies available to a larger circuit.

S. 956 POSITION PAPER, *supra* note 10, at 2.

57. See DECEMBER 7 MARKUP, *supra* note 38.

58. JUDICIAL CONFERENCE OF THE UNITED STATES, REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 48 (1974). Caseload expansion, congressional authorization of 28 judges for the Ninth Circuit, and the former Fifth Circuit's division probably make this suggestion dated.

59. See Senate Report, *supra* note 37, at 9. An appeals court consisting of fewer judges might correspondingly eliminate the need to apply certain unusual mechanisms, such as the Ninth Circuit's limited en banc technique, which some observers believe is rather ineffective. See Baker, *Redrawing*, *supra* note 1, at 930; Senator Slade Gorton, Position Paper on the "Ninth Circuit Court of Appeals Reorganization Act of 1989" (S. 948) 7 (Mar. 6, 1990), reprinted in S. 948 Hearing, *supra* note 20, at 24 [hereinafter Gorton Position Paper]. *But see* REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 28, at 114-15; Judge J. Clifford Wallace, Address at the University of California Law School at Berkeley (Dec. 2, 1982), reprinted in John Lateef, *Justice on Appeal; A Proposal*, L.A. DAILY J. REP., Sept. 29, 1989, at 6, 9.

C. ADDITIONAL ARGUMENTS AGAINST SENATE BILL 956

1. *The Limited Strategy of Circuit-Splitting*

The bifurcation of circuits is a limited reform. The numerous, above-mentioned arguments against Senate Bill 956 deserve limited treatment here. Perhaps most important, the proposed Ninth Circuit would have a ratio of three-judge panels to cases which will complicate its efforts to resolve appeals expeditiously, economically, and fairly.⁶⁰ Moreover, the projected Twelfth Circuit's establishment could require significant start-up and permanent expenditures, while some advantages that the new Twelfth Circuit realizes would be at the proposed Ninth Circuit's expense.⁶¹ The larger appeals courts, such as the Second and District of Columbia Circuits, that experience more problems than the other appellate courts, defy feasible division.⁶² Splitting appeals courts also irrevocably decreases their federalizing role, reducing circuits' responsibility to reconcile the Constitution and national policy with state and local policy concerns.⁶³ Judges and commentators have insisted that mincing appeals courts is worse than bifurcating them because the symmetry and few benefits secured would erode the courts' federalizing role and further fragment the fractured law of the circuits.⁶⁴

Bifurcating the Ninth Circuit or relying on it as a reason for establishing numerous smaller appellate courts is unwise because each proposition ignores the real problem. Dividing circuits does not remedy one court's difficulties; it merely defers resolution of two circuits' complications.⁶⁵ The solution afforded for the Ninth Circuit thus embodies a much larger problem. Distributing that court's current docket between the projected Ninth and Twelfth Circuits will simply shift, not decrease, the workload. The total quantity of appeals decided would be the same, regardless of the number of courts available to resolve the cases. The big circuits' difficulties primarily result from congressional willingness to authorize addi-

60. See *supra* notes 51-52 and accompanying text.

61. See *supra* notes 53-56 and accompanying text.

62. See, e.g., Paul D. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 587 (1969); Hellman, *supra* note 12, at 1192-1237. The few benefits and the numerous detriments accompanying the former Fifth Circuit's bifurcation demonstrate its ineffectiveness. See Letter from J. Clifford Wallace, Chief U.S. Circuit Judge for the Ninth Circuit, to Sen. Spencer Abraham (Dec. 21, 1995) (on file with author) [hereinafter Wallace Letter]; see also *supra* notes 6-10 and accompanying text. But see Senate Report, *supra* note 37, at 9.

63. See CHARLES A. WRIGHT, LAW OF FEDERAL COURTS § 3 (5th ed. 1994); John M. Wisdom, *Requiem for a Great Court*, 26 LOY. L. REV. 787, 788 (1980). Circuit-splitting might seem more workable, as a theoretical matter, if Congress redrew at once the boundaries of the entire appellate system; however, the initial equalization attained by, for instance, creating 20 circuits of nine judges apiece might be overly disruptive. See Hruska Commission, *supra* note 7, at 228; see also Thomas E. Baker & Douglas D. McFarland, *The Need for a New National Court*, 100 HARV. L. REV. 1400, 1404-09 (1987).

64. See Baker, *Redrawing*, *supra* note 1, at 945-46; Thomas G. Gee, *The Imminent Destruction of the Fifth Circuit: Or, How not to Deal with a Blossoming Docket*, 9 TEX. TECH. L. REV. 799, 806 (1978).

65. See Thomas E. Baker, *A Postscript on Precedent in the Divided Fifth Circuit*, 36 SW. L.J. 725, 742 (1982).

tional judgeships and to enlarge jurisdiction without addressing expanded dockets.⁶⁶ Adding judges and bifurcating circuits has undermined important characteristics of the appellate system. For example, the several thousand possible three-judge panels that typify the big circuits can complicate rehearing en banc and monitoring of the law, increase the prospects for intracircuit inconsistencies, and strain relationships involving judges.⁶⁷

The above ideas have prompted some experts to question whether authorizing more judgeships for the current appellate system is appropriate.⁶⁸ Numerous highly-respected people and institutions have challenged the advisability of applying structural approaches to the problems confronting circuits.⁶⁹ A number of persons and organizations which are intimately familiar with the Ninth Circuit have stated that the court is not encountering complications which require its division.⁷⁰

2. *The Problems of a One-State Circuit*

Another reason why bifurcation would be unwise is that the proposed Ninth Circuit will effectively be a one-state circuit. The last iteration of Senate Bill 956 have placed Hawaii, Guam, and the Northern Mariana Islands in this court; however, the circuit essentially consists of California,

66. Alfred T. Goodwin, *Splitting the Ninth Circuit—No Answer to Caseload Growth*, OR. ST. B. BULL., Jan. 1990, at 10, 11.

67. See Harry T. Edwards, *The Rising Work Load and Perceived "Bureaucracy" of the Federal Courts: A Causation-Based Approach to the Search for Appropriate Remedies*, 68 IOWA L. REV. 871, 918-19 (1983); Ruth B. Ginsburg, *Reflections on the Independence, Good Behavior, and Workload of Federal Judges*, 55 U. COLO. L. REV. 1, 10-11 (1983).

68. See Patrick E. Higginbotham, *Bureaucracy—the Carcinoma of the Federal Judiciary*, 31 ALA. L. REV. 261, 270 (1980); see also *Lumberman's Mut. Casualty Co. v. Elbert*, 348 U.S. 48, 59 (1954) (Frankfurter, J., concurring); Howell Heflin, *Fifth Circuit Court of Appeals Reorganization Act of 1980—Overdue Relief for an Overworked Court*, 11 CUMB. L. REV. 597, 616 (1980). Judge Higginbotham recently chaired the Advisory Committee on the Civil Rules. In 1980, Judge Higginbotham observed that congressional addition of judges "seemed to be the only positive response to the courts' increasing number of cases [but that it] ought to be the last resort, not the first." Higginbotham, *supra*, at 270.

69. For example, the Judicial Conference Committee on Long Range Planning recently found circuit restructuring warranted "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." LONG RANGE PLAN, *supra* note 33, at 42; see also Heflin, *supra* note 68, at 616. The Federal Judicial Center also ascertained in 1993 that the appeals courts were experiencing pressure but that it did "not appear to be a stress that would be significantly relieved by structural change to the appellate system at this time." MCKENNA, *supra* note 31, at 155.

70. For instance, Professor Thomas Baker, who recently included a comprehensive assessment of the appeals courts and who carefully evaluated Senate Bill 948, suggested: [T]he strategy of adding judges and dividing circuits simply has been played out and is no longer defensible as a long-range plan. . . . The justifications offered so far for dividing the Ninth Circuit simply do not withstand a close scrutiny Dividing the Ninth Circuit is the least available application of the strategy of division [because] [i]t will prove nothing that has not been demonstrated repeatedly, most recently at the division of the Fifth Circuit.

Baker, *Redrawing*, *supra* note 1, at 960-61; see also BAKER, RATIONING, *supra* note 1 (providing thorough study); Tobias, *supra* note 1, at 1392-94 (affording similar statements by other federal court experts).

as that jurisdiction would generate ninety-four percent of the court's appeals and all of the active judges who would serve on the court are presently stationed in California.⁷¹

The institution of a single-state circuit is effectively unprecedented. Two large courts, the District of Columbia and Second Circuits, are the closest analogues, but the D.C. Circuit differs greatly from the regional circuits. The court's location in the seat of the national government and the circuit's peculiar jurisdiction and venue mean that the circuit principally resolves cases challenging federal administrative agency decision-making.⁷² In the Second Circuit, New York does not dominate Connecticut and Vermont to the degree that California would probably overwhelm Hawaii, Guam, and the Northern Mariana Islands because, for example, Connecticut and Vermont account for considerably more than six percent of the court's caseload and for six of its thirteen active judges.⁷³

A single-jurisdiction circuit would apparently have numerous detrimental impacts. The Hruska Commission asserted that a "one-state circuit would lack the diversity of background and attitude brought to a court by judges who have lived and practiced in different states," characterizing this as a "highly desirable, and perhaps essential, condition" for creating circuits,⁷⁴ and that a single senator who had long tenure and who was actively involved in judicial selection could shape the appeals court for an entire generation.⁷⁵

3. *The Ninth Circuit and Experimentation*

An important systemic disadvantage of dividing the Ninth Circuit would be the loss of the best large court for experimenting with procedures which promise to improve the quality of appellate justice. Much of the above information shows that the Ninth Circuit has been the acknowledged national leader in testing myriad innovative techniques, involving, for example, pre-briefing conferences and capital punishment cases.⁷⁶ This experimentation will assume critical significance as the other appeals courts, with their inexorably expanding dockets, continue

71. See DECEMBER 7 MARKUP, *supra* note 38 (statement of Sen. Feinstein).

72. See Act of June 25, 1948, ch. 646, § 41, 62 Stat. 869, 870 (current version at 28 U.S.C. § 41 (1994)); see also Spottswood W. Robinson, III, *The D.C. Circuit: An Era of Change*, 55 GEO. WASH. L. REV. 715 (1987); Patricia M. Wald, *Life on the District of Columbia Circuit: Literally and Figuratively Halfway Between the Capital and the White House*, 72 MINN. L. REV. 1 (1987).

73. New York is responsible for 87% of the caseload. See Senate Report, *supra* note 37, at 29; see also *supra* note 62 and accompanying text. *But see* Senate Report, *supra* note 37, at 7.

74. See Hruska Commission, *supra* note 7, at 237; see also S. 956 POSITION PAPER, *supra* note 10, at 4 (affording similar ideas regarding diversity in the Ninth Circuit).

75. See Hruska Commission, *supra* note 7, at 237; see also *id.* at 236-37 (rejecting as "clearly inferior" suggested realignment identical to Senate Bill 948 except that Arizona would be included in the Tenth Circuit).

76. See *supra* notes 15-19 and accompanying text.

to grow and to resemble more closely the Ninth Circuit.⁷⁷

4. A Closer Look at the Ninth Circuit

Perhaps the most important difficulty with Senate Bill 956 is that the existing Ninth Circuit resists practical bifurcation.⁷⁸ My recent attempt to delineate a feasible reconfiguration showed that the court defies workable division and that the preferable approach is to leave the circuit in its current alignment.⁷⁹

The new Ninth Circuit would have few judges to address a large, relatively complex caseload, a situation which will worsen in the future.⁸⁰ That court's constitution which Senate Bill 956 envisions, therefore, would be less satisfactory than the present court's composition. The latest iteration of the Twelfth Circuit also entails certain disadvantages. The court's creation, nascent existence, and ongoing operation will be expensive. Even some benefits of its establishment might be delayed or be costly to attain, while advances which will materialize at the projected Ninth Circuit's expense probably do not deserve that characterization. Moreover, the thirteen-member court could lack the diversity and flexibility to make special judicial assignments, while it may be too large to enhance collegiality.

No practicable realignment of the present Ninth Circuit apparently remains. One possibility not explored above would be to divide California and assign each of its four districts to separate circuits.⁸¹ The major difficulty with this approach is that the two courts could interpret California law differently. The Hruska Commission minimized the complications of

77. Former Ninth Circuit Chief Judge James Browning, who spearheaded implementation of many innovative reforms, summarized most of these ideas:

The Ninth Circuit is the only remaining laboratory in which to test whether the values of a large circuit can be preserved. If we fail, there is no alternative to fragmentation of the circuits, centralization of administrative authority in Washington, increased conflict in circuit decisions, a growing burden on the Supreme Court, and creation of a fourth tier of appellate review in the federal system. If we succeed, no further division of circuits will be necessary. Indeed, combining the circuits into four or five might well be feasible—creating stronger and more effective appellate courts, lightening the burden on the Supreme Court, and resulting in a decentralized and more efficient administrative system for the federal judicial system.

Mary M. Schroeder, *Jim Browning as a Leader of Judges: A View from a Follower*, 21 ARIZ. ST. L.J. 3, 7 (1989) (quoting Chief Judge James R. Browning). Accord Levin H. Campbell, *Into the Third Century: Views of the Appellate System from the Federal Courts Study Committee*, 74 MASS. L. REV. 292, 298 (1989).

78. See *supra* notes 65-66 and accompanying text; see also Tobias, *supra* note 1, at 1412.

79. See Tobias, *supra* note 1, at 1412-15.

80. See *supra* notes 51-52 and accompanying text; Tobias, *supra* note 1, at 1366-69, 1380-81; see also *supra* notes 71-75 and accompanying text (suggesting creation of a one-state circuit consisting of California is unprecedented and has never been seriously considered apparently because of its disadvantages).

81. See Tobias, *supra* note 1, at 1413; see also Hruska Commission, *supra* note 7, at 238-39; Hellman, *supra* note 12, at 1281.

inconsistency because the possibility remains in the regional circuits;⁸² however, its 1973 proposal that California be split has received minimal support.⁸³

5. *Miscellaneous Disadvantages*

Dividing the Ninth Circuit today, by reconfiguring it as Senate Bill 956 recently proposed, could have other detrimental consequences. Bifurcation might prove premature and wasteful, should Congress subsequently choose to pursue one of many approaches that differ from, and are as promising as, the practice of creating additional judgeships and dividing circuits. For instance, senators and representatives may, and probably should, find that they now lack adequate, reliable empirical data to resolve definitively the complex, crucial issues posed by the Ninth Circuit's bifurcation. If Congress so determines, it could appoint a national study commission to ascertain whether mounting appellate dockets are sufficiently problematic to justify treatment and, if so, which remedies seem most effective.

This assessment might show, or Congress, itself, may conclude, that growing caseloads are not troubling enough to warrant remediation with techniques which are as controversial as circuit-splitting. Were a national study to demonstrate, or Congress to discover, that expanding dockets cause problems that are sufficiently serious to deserve treatment, senators and representatives could consider preferable to circuit-splitting numerous non-structural measures, such as discretionary appellate review or the restriction of district courts' original jurisdiction.⁸⁴ Should Congress decide to adopt structural alternatives, it might find nationally-applicable solutions more promising, including the combination of the existing regional circuits into fewer jumbo courts or the further division of the present circuits into twenty appellate courts with nine judges each.⁸⁵

Even if senators and representatives favored a more localized structural remedy, they could prefer arrangements other than Senate Bill 956's last iteration. For example, Congress might consider better a different alignment of the states that now comprise the Ninth Circuit, choosing to establish new courts which are more compact, encompass only contiguous jurisdictions, or directly address the California conundrum.⁸⁶ Senators and representatives may also wish to fashion circuits by combining some states that are in the present Ninth Circuit with states that are in the existing Eighth or Tenth Circuits.⁸⁷

82. See *Hruska Commission*, *supra* note 7, at 238-39. *Accord* Hellman, *supra* note 12, at 1281.

83. See *supra* notes 12-13 and accompanying text. *But cf. supra* note 36 and accompanying text (exploring other possibilities that have not been seriously considered).

84. See, e.g., BAKER, RATIONING, *supra* note 1, at 234-38; MCKENNA, *supra* note 31, at 123-27; LONG RANGE PLAN, *supra* note 33, at 23-37.

85. See, e.g., J. Clifford Wallace, *The Case for Large Federal Courts of Appeal*, 77 JUDICATURE 288, 289 (1994).

86. See *supra* notes 78-83 and accompanying text.

87. See *Hruska Commission*, *supra* note 7, at 236-37.

D. RESOLUTION

Much of the material above indicates that the quantitative and qualitative detriments of splitting the Ninth Circuit outweigh the benefits and that Congress should leave the court intact. More specifically, the proposed Ninth Circuit would have a disadvantageous ratio of three-judge panels to cases and would effectively be a one-state circuit, entailing significant problems.⁸⁸ The proposed Twelfth Circuit would enjoy a favorable ratio of judges to appeals and other benefits, such as the somewhat greater collegiality of a smaller court. The Twelfth Circuit's creation and ongoing operation could be costly, while the realization of certain advantages may be delayed, with a number of these gains coming at the expense of the projected Ninth Circuit.

Bifurcation of the Ninth Circuit would also have deleterious consequences for the appellate system. Division will perpetuate, and could reinforce, the policy of adding judges and splitting circuits; this is a limited technique, the continuation of which may postpone more efficacious reform. Bifurcation will eliminate the preeminent court for experimenting with promising procedures. Dividing the Ninth Circuit now could also prove unnecessary, and even profligate, if Congress then adopted any of numerous effective alternatives.

In sum, the detriments of the Ninth Circuit's bifurcation outweigh the benefits realized both for the region covered by the present court and nationally. Congress, therefore, properly rejected Senate Bill 956 and should now consider several suggestions, primarily the creation of a commission which would assess expanding dockets and appellate courts.

III. SUGGESTIONS FOR THE FUTURE

The above analysis shows that circuit-splitting is a limited reform and that the Ninth Circuit and other courts encounter some phenomena, principally implicating caseload increases, which may deserve consideration. Many solutions have also been proffered to the problems that growing appeals purportedly create. Those remedies require little analysis here as they have been canvassed elsewhere⁸⁹ and more evaluation seems unnecessary, at least until it is clearer that rising dockets pose difficulties which are sufficiently problematic to justify application of solutions that are as controversial as circuit-splitting. Insofar as expanding caseloads are cre-

88. See *supra* notes 51-52, 71-75 and accompanying text.

89. See, e.g., Baker, *Redrawing*, *supra* note 1; Tobias, *supra* note 1, at 1396-1404. The remedies include relatively basic reforms that principally implicate appellate structure. The Federal Courts Study Committee canvassed five possibilities, such as creation of a new appellate level and consolidation of existing circuits. See REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 28, at 118-23; see also BAKER, RATIONING, *supra* note 1, at 238-79. Other basic reforms include limiting the number of circuit judges who must resolve cases, differentiated appeal management, discretionary appellate review, and restricting district courts' original jurisdiction. See Tobias, *supra* note 1, at 1396-1404. For additional analysis of these and other reforms, see BAKER, RATIONING, *supra* note 1; MCKENNA, *supra* note 31; LONG RANGE PLAN, *supra* note 33.

ating complications which are serious enough to need remediation, it appears that other courts are experiencing difficulties similar to those of the Ninth Circuit and that the problems may require treatment extending beyond this court. Therefore, the preferable approach is the establishment of a commission to study the circuits.

A. NATIONAL STUDY

Congress should authorize a comprehensive, national assessment of the appellate system and circuits' caseloads. The numerous evaluations of the complications ascribed to increasing dockets and the many solutions posited might indicate that the difficulties and possible remedies have received sufficient examination and that Congress now ought to decide.⁹⁰

The considerable lingering uncertainty about whether those phenomena which observers attribute to mounting caseloads create problems that are troubling enough to deserve treatment and, if so, which measures might prove most effective, suggests that Congress should prescribe a new study. In fact, the Federal Courts Study Committee and Professor Baker proposed that a thorough analysis be conducted to ameliorate imperfect understanding, while Senator Heflin stated at the September hearing that there "needs to be a careful evaluation of the entire circuit court structure and the administration of justice."⁹¹

The assessment's particulars warrant cursory examination here because similar proposals have been explored elsewhere,⁹² two as recently as the March 1996 Senate floor debate and the December 1995 Judiciary Committee markup.⁹³ The success of the Hruska Commission and the Federal Courts Study Committee means that they might function as instructive prototypes. Congress should evaluate those efforts to avoid problems that they experienced. For example, Congress probably gave the Study Committee an overly broad charge which was difficult to complete in a year and a half. This proposition indicates that senators and representatives should authorize a full-time professional staff, draft a limited, specific mandate, and provide the new study group more than eighteen months for concluding its task.

Congress ought to assemble a committee that resembles the Hruska

90. See Stephen Reinhardt, *Surveys Without Solutions: Another Study of the United States Courts of Appeals*, 73 TEX. L. REV. 1504, 1512 (1995) (reviewing THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS (1994)). Judge Reinhardt observes that evaluators have performed 10 important studies. See *id.* at 1521 n.33; see also BAKER, RATIONING, *supra* note 1, at 33-43 (summarizing 10 studies).

91. See REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 28, at 116-17; BAKER, RATIONING, *supra* note 1, at 292-300; S. 956 Hearings, *supra* note 36 (statement of Sen. Heflin).

92. See BAKER, RATIONING, *supra* note 1, at 292-300; see also Thomas E. Baker, *A Proposal That Congress Create a Commission on Federal Court Structure*, 14 MISS. C. L. REV. 271 (1994); Tobias, *supra* note 1, at 1407.

93. See *supra* notes 38-43 and accompanying text.

Commission or the Federal Courts Study Committee.⁹⁴ The commission must be comprised of senators and representatives, preferably ones who serve on the respective Judiciary Committees, federal judges, and Executive Branch officials, and should probably include representatives of state governments, the practicing bar, and law schools. The chair might be a senator or representative or a federal judge, such as a Supreme Court Justice. Congress needs to allocate sufficient funding for travel, hearings, and a committee staff of full-time professionals. Most of these individuals should possess applicable expertise, relating to the collection, analysis, and synthesis of data which involve demographic trends and future demands that the federal civil and criminal justice systems will encounter.

The entity and its personnel should be diverse, particularly in terms of their views on the federal courts.⁹⁵ The commission must encourage full participation in its activities of interested people and institutions. The committee should seek the help of numerous public and private entities, including the Judiciary Committees, the Administrative Office of the United States Courts, the American Bar Association, and the National Center for State Courts, which have much relevant experience and material respecting the federal court system.⁹⁶

Congress must ask that the commission identify, as precisely as possible, the phenomena which can be ascribed to growing circuit caseloads and determine whether they are sufficiently troubling to justify treatment, and, if so, with what measures. Should the committee find that remediation is necessary, it then ought to analyze the efficacy, including the benefits and detriments, of the possible solutions. The entity might next explore potential reforms and develop criteria for congressional consideration.⁹⁷

After the Senate and the House of Representatives receive the commission's suggestions, Congress must evaluate those recommendations and draft proposed legislation that embodies the best approaches.⁹⁸ Once the Senate and House hold hearings on these possibilities, Congress should be able to agree on the most felicitous mechanisms for treating the problems attributable to expanding appeals court dockets.⁹⁹

94. See *Hruska Commission*, *supra* note 7; REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 28. See BAKER, RATIONING, *supra* note 1, at 295-99.

95. See BAKER, RATIONING, *supra* note 1, at 297.

96. This list is obviously not exhaustive. See also BAKER, RATIONING, *supra* note 1, at 295-96 (affording additional suggestions). The entity should rely on states' experiences in reforming their appellate systems. See *id.* at 298. See generally DANIEL J. MEADOR, APPELLATE COURTS: STAFF AND PROCESS IN THE CRISIS OF VOLUME (1974) (discussing entities which could assist such a committee).

97. See BAKER, RATIONING, *supra* note 1, at 297.

98. See BAKER, RATIONING, *supra* note 1, at 296. See generally FRANKFURTER & LANDIS, *supra* note 2, at 107.

99. A modest approach that Congress might prescribe is additional experimentation that seeks to ameliorate the complications faced by circuits. See Tobias, *supra* note 1, at 1405-07.

B. IMPROVEMENTS IN SENATE BILL 956

Much material above suggests the inadvisability of splitting the Ninth Circuit and of enacting Senate Bill 956.¹⁰⁰ Were Congress to find this information unpersuasive and seriously examine a proposal analogous to Senate Bill 956, however, it must consider improving the measure, at least by authorizing adequate resources so that the new Ninth and Twelfth Circuits can fulfill their duties.

The most recent iteration of Senate Bill 956 assigns fifteen judges to the projected Ninth Circuit and thirteen judges to the new Twelfth Circuit.¹⁰¹ Many factors, such as identifying exactly how many appeals the two courts will receive, make it difficult to specify the precise number of judges who should sit on the respective circuits. Certain applicable material permits relatively reliable approximations. Perhaps most relevant, mounting workloads led the Ninth Circuit to seek ten additional judges in 1992, and the Judicial Conference asked that Congress authorize those positions during 1993.¹⁰² Estimates can also be posited by consulting recent data implicating the number, complexity, and disposition rates of cases appealed from the projected circuits' district courts, by allowing for applicable variables, and by extrapolating into the future.¹⁰³ The approximations indicate that Senate Bill 956 will require the new Ninth Circuit to address a bigger, more complex docket with proportionately fewer judges than the present Ninth, or the proposed Twelfth, Circuit.¹⁰⁴

These propositions, especially the ratio of three-judge panels to cases, show that Congress should approve at least ten more judges for the two projected circuits. Congress ought to assign a majority of the judges to the proposed Ninth Circuit,¹⁰⁵ authorizing some one and a half times as many judges for this court as the projected Twelfth Circuit.¹⁰⁶ Should

100. In fact, the strength of the evidence that favors keeping the court intact practically convinced me to afford no suggestions for improving the circuit-dividing proposal. My concern was that my recommendations would be viewed as an endorsement of a concept I believe to be faulty.

101. See S. 956, 104th Cong., 1st Sess. (1995); see also DECEMBER 7 MARKUP, *supra* note 38.

102. See Albert, *supra* note 27; see also Wallace Letter, *supra* note 62.

103. Indeed, Senator Gorton acknowledged a half-decade ago that the circuit's docket would have justified adding 10 more judgeships. See Gorton Position Paper, *supra* note 59, at 2.

104. See *supra* notes 51-52 and accompanying text. Moreover, foreseeable and unpredictable complications may accompany the new courts' establishment and nascent existence.

105. The 10 judges and their allocation are approximations that I based primarily on the Executive Office data and the Ninth Circuit and Judicial Conference requests. The requests are probably dated, given caseload increases. See *supra* notes 51-52, 102 and accompanying text. Indeed, Congress might assign most of the judges suggested to the new Ninth Circuit, in light of the small and less complex docket that the new Twelfth Circuit will have and the potential it has for underutilizing its judicial resources. See *supra* notes 56, 58-59 and accompanying text.

106. The multiplier is an approximation which I based primarily on the Executive Office data. See *supra* notes 51-52 and accompanying text. If Congress approves no new judges for the proposed courts, it should consider allocating judges between the courts in accordance with the multiplier.

Congress reject these suggestions, it ought to create enough new judge-ships and allocate them so that the two courts can efficaciously discharge their responsibilities.¹⁰⁷

Were Congress to consider seriously a new version of Senate Bill 956, it should prescribe the best composition of each proposed circuit. The problem with constituting the projected courts is that the present Ninth Circuit defies feasible division. My effort to identify a practicable realignment indicates that the court resists workable bifurcation.¹⁰⁸ Congress, therefore, should leave the circuit in its existing configuration.

IV. CONCLUSION

The proposal for splitting the Ninth Circuit that the second session of the 104th Congress considered would have minimally improved the court's division which was first proffered; however, the recent recommendation would prove more detrimental than beneficial for the proposed Ninth Circuit and for the appellate system. Congress, accordingly, should leave the Ninth Circuit intact to continue performing a vital function as the premier appeals court for experimenting with efficacious procedures while simultaneously allocating the requisite resources for the court to operate effectively. Congress must seriously consider creating a commission, modeled on the Hruska Commission and the Federal Courts Study Committee, which would ascertain whether the phenomena that can be ascribed to docket growth pose sufficient difficulty to warrant treatment, and, if so, what solutions are most promising.

107. The polestar which Congress should employ and which I have used is the effective discharge of judicial duties. Similar factors apply to allocation of other resources, such as the Circuit Executive Office.

108. See Tobias, *supra* note 1, at 1412-15; see also *supra* notes 78-83 and accompanying text.

