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# AN ANALYSIS OF FEDERAL APPELLATE COURT STUDY COMMISSIONS

CARL TOBIAS\*

During the 104th Congress, senators representing Pacific Northwest states mounted the fourth serious effort to split the United States Court of Appeals for the Ninth Circuit since 1983.<sup>1</sup> The Senate Judiciary Committee approved a bill that would have divided the court;<sup>2</sup> however, the Senate eventually passed a measure which would have created a national study commission to analyze the federal appellate system.<sup>3</sup> This compromise was only one of several study proposals that Congress considered in 1995 and 1996. For example, California Governor Pete Wilson and Ninth Circuit Judge Diarmuid O'Scannlain recommended the establishment of commissions which would have assessed the Ninth Circuit.<sup>4</sup> Nevertheless, Congress ultimately decided neither to authorize a commission that would evaluate the appeals courts nor to bifurcate the Ninth Circuit partly because each action proved to be rather controversial.

Congressional failure to pass legislation which would have created a study commission or which would have split the court during the last two years does not mean that Congress will ignore these possibilities in the future. Indeed, many public officials who participated most actively in considering the study proposals and the circuit's possible division have clearly stated that they intend to have the 105th Congress seriously examine both prospects.<sup>5</sup> The events described above and the difficulties which growing caseloads increasingly pose for the appeals courts suggest that it is an appropriate time to assess recent proposals for studying the appellate system. This essay undertakes that effort.

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1. See SEN. COMM. ON THE JUDICIARY, NINTH CIRCUIT COURT OF APPEALS REORGANIZATION ACT OF 1995, S. REP. NO. 104-197, at 4-5 (1995).

2. *Id.* at 11.

3. 142 CONG. REC. S2544-45 (daily ed. Mar. 20, 1996).

4. Letter from Pete Wilson, Governor of California, to Senator Orrin Hatch, Chair, U.S. Senate Judiciary Comm. (Dec. 6, 1995) (on file with author) [hereinafter Wilson Letter]; *Ninth Circuit Split: Hearings on S. 956 Before the Senate Comm. on the Judiciary*, 104th Cong. (1995) [hereinafter *Ninth Circuit Split*], available in WESTLAW, Database CONGHRT, File No. 1995 WL 10382809, at \*29; see also Diarmuid O'Scannlain, *A Ninth Circuit Split is Inevitable, but Not Imminent*, 56 OHIO ST. L.J. 947, 950 (1995) (repeating Judge O'Scannlain's recommendations).

5. This assertion is premised on conversations with numerous participants and members of their staff.

The first section of the paper emphasizes congressional consideration of the Ninth Circuit's potential bifurcation while briefly describing legislative branch examination of appeals courts studies. The second part scrutinizes four study commission proposals which public officials proffered. Finding that these proposals either would have afforded insufficient time for a commission to complete the work envisioned or would have been overly narrow in scope, the third section offers suggestions for a national commission which would analyze the appellate courts.

### I. ACTIVITIES OF THE 104TH CONGRESS

Congressional activity relating to the possible division of the Ninth Circuit warrants considerable treatment here, although some features of the applicable history have been evaluated elsewhere.<sup>6</sup> Moreover, assessment of relevant developments involving the appellate courts that occurred during the most recent Congress should enhance understanding of the study commission proposals which senators and representatives analyzed.

Senators from Pacific Northwest states introduced a bill that would have split the Ninth Circuit in late May 1995.<sup>7</sup> This measure's introduction constituted the fourth analogous effort to divide the appeals court in the last thirteen years.<sup>8</sup> The proposal would have included Alaska, Idaho, Montana, Oregon and Washington in a new Twelfth Circuit and would have placed Arizona, California, Hawaii, Nevada, Guam and the Northern Mariana Islands in the Ninth Circuit.<sup>9</sup> The proposed Twelfth Circuit would have been assigned nine active judges and the new Ninth Circuit would have had nineteen active members, but Senate Bill 956 authorized no new judgeships.<sup>10</sup>

On September 13, 1995, the Senate Judiciary Committee held a hearing on S. 956, and the Committee received much cogent testimony from advocates and critics of circuit-division.<sup>11</sup> In a December Committee markup session, the Judiciary Committee approved an amendment in the proposal as introduced which would have left California, Hawaii, Guam and the Northern Mariana Islands in the Ninth Circuit with fifteen judges and would have placed Alaska, Arizona, Idaho, Montana, Nevada, Oregon and Washington, the remaining states of the existing Ninth Circuit, in a new Twelfth Circuit with thirteen judges.<sup>12</sup>

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6. See S. REP. NO. 104-197, at 2; 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); Carl Tobias, *The Impoverished Idea of Circuit-Splitting*, 44 EMORY L.J. 1357 (1995).

7. S. 956, 104th Cong. (1995); see also S. 853, 104th Cong. (1995) (setting forth an earlier proposed amendment to Title 28 of the United States Code).

8. See S. REP. NO. 104-197, at 4-5; see also Baker, *supra* note 6, at 923-45 (chronicling early and modern attempts to divide the Ninth Circuit and listing the motivations for such efforts); Tobias, *supra* note 6, at 1363-75 (describing the historical proposals for splitting the Ninth Circuit and the arguments for doing so).

9. S. 956, 104th Cong. § 2 (1995).

10. *Id.* § 3.

11. See *Ninth Circuit Split*, *supra* note 4, at \*1-69.

12. See *Markup of Pending Legislation: Hearing of the Senate Judiciary Committee*, 104th

The Senate and Committee members received and assessed numerous well-considered ideas that favored and opposed splitting the Ninth Circuit. Division's advocates stressed the problems which have purportedly resulted from the circuit's mammoth size. These encompassed the court's gigantic geographic magnitude, the Circuit's substantial number of judges (twenty-eight members), the court's massive caseload, and the substantial expenses of operating the circuit.<sup>13</sup>

Opponents of the court's division addressed the above arguments in several ways. They claimed that the circuit has instituted reforms which treat complications ascribed to size.<sup>14</sup> For instance, over a decade ago, the circuit created an administrative unit in Seattle where appeals can be filed and orally argued, and this change has proved responsive to the distances that counsel and litigants must travel.<sup>15</sup> Establishment of the projected Twelfth Circuit would not have modified this circumstance for many attorneys who now practice in the proposed circuit. Furthermore, critics suggest that the court's magnitude affords benefits. For example, it offers economies of scale, and provides considerable diversity both in terms of the complexity and novelty of cases, and in terms of the judges' gender, race, political views and geographic origins.<sup>16</sup>

Another important contention of circuit-splitting's proponents was that Ninth Circuit case law is inconsistent. The statistical possibilities for conflicting opinions on a twenty-eight judge court seem significant because, for instance, 3,276 combinations of three-judge panels could resolve an issue.<sup>17</sup> The Ninth Circuit Executive Office and experts who have analyzed the circuit have found insufficient inconsistency to warrant concern.<sup>18</sup> The court has correspondingly instituted measures to reduce conflicts. For example, the circuit's staff attorneys fully review every appeal and code into a computer the issues for resolution. The court then assigns to the same three-judge panel those cases which raise similar issues and are ready for resolution at the same time.<sup>19</sup>

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Cong. (Dec. 7, 1995) [hereinafter *S. 956 Markup*]; S. REP. NO. 104-197, at 2.

13. See, e.g., 141 CONG. REC. S7504 (daily ed. May 25, 1995) (statement of Sen. Gorton); *id.* at S7505 (statement of Sen. Burns).

14. See *Ninth Circuit Split*, *supra* note 4, at \*15 (statement of Sen. Feinstein).

15. See generally JOSEPH S. CECIL, ADMINISTRATION OF JUSTICE IN A LARGE APPELLATE COURT: THE NINTH CIRCUIT INNOVATIONS PROJECT 13-14 (1985); Baker, *supra* note 6, at 929.

16. See, e.g., OFFICE OF THE CIRCUIT EXECUTIVE FOR THE U.S. COURTS FOR THE NINTH CIRCUIT, POSITION PAPER IN OPPOSITION TO S. 956—NINTH CIRCUIT COURT OF APPEALS REORGANIZATION ACT OF 1995 (6/22/95) (1995) [hereinafter *S. 956 POSITION PAPER*]; Steve Albert, *Congress Weighs Plan to Divide the 9th Circuit*, LEGAL TIMES, Feb. 1, 1993, at 12, 13 (quoting former Chief Judge James Browning's assertion that court's diversity is an asset in response to previous attempts at splitting the circuit).

17. See Baker, *supra* note 6, at 938; *Ninth Circuit Split*, *supra* note 4, at \*10 (statement of Sen. Gorton).

18. See *S. 956 POSITION PAPER*, *supra* note 16, at 4-5; Arthur D. Hellman, *Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court*, 56 U. CHI. L. REV. 541 (1989).

19. Arthur D. Hellman, *Central Staff in Appellate Courts: The Experience of the Ninth Circuit*, 68 CAL. L. REV. 937, 944-45, 957-58 (1980).

The third argument of S. 956's advocates was that the court's California judges, perspectives and appeals have dominated the Pacific Northwest.<sup>20</sup> This contention partly reflected the champions' dissatisfaction with Ninth Circuit decisions in fields, such as environmental law and the death penalty.<sup>21</sup> In prior attempts to divide the court, some opponents charged proponents of circuit splitting of acting primarily for political reasons, and of specifically engaging in "environmental gerrymandering."<sup>22</sup> Critics also challenged the proponents' underlying premise that judges who were located in California were monolithic and idiosyncratic.<sup>23</sup> Assessment of the judges' viewpoints and the computerized, random selection of three-judge panels made untenable efforts to stereotype the circuit's California judges.<sup>24</sup> Finally, a majority of the court's active judges were not even stationed in California.<sup>25</sup>

There are certain additional ideas which proponents and critics enunciated in support of and against the Ninth Circuit's division. Critics emphasized that the proposed Ninth Circuit would have had a significantly less beneficial ratio of three-judge panels to appeals than the new Twelfth Circuit and a considerably less advantageous ratio than the current Ninth Circuit. Panels of the proposed Ninth Circuit would have annually faced 1,014 appeals and panels of the proposed Twelfth Circuit would have annually confronted 645 cases, while panels of the existing Ninth Circuit addressed 868 filings in 1994.<sup>26</sup> Critics also argued that the proposed Twelfth Circuit would have imposed much new administrative expense and would have replicated functions which the Ninth Circuit now discharges satisfactorily.<sup>27</sup> Moreover, opponents claimed that most active members of the court and many attorneys who practice before it opposed bifurcation.<sup>28</sup>

Proponents of circuit-splitting urged that judges on a smaller court, such as the proposed Twelfth Circuit which would have had nine judges, would be more collegial, thereby enhancing efficiency.<sup>29</sup> This proposition has some

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20. See, e.g., 141 CONG. REC. S7504 (daily ed. May 25, 1995) (statement of Sen. Gorton).

21. See, e.g., 141 CONG. REC. S7504-05, (daily ed. May 25, 1995) (statements of Sen. Gorton and Sen. Burns).

22. See, e.g., *Ninth Circuit Court of Appeals Act of 1989: Hearing on S. 948 Before the Subcomm. on Courts and Admin. Practice of the Senate Comm. on the Judiciary*, 101st Cong. 284, 286 (1990) (statement of Sen. Wilson); Dan Trigoboff, *Northwest Favors Splitting "California" Circuit*, LEGAL TIMES, June 12, 1989, at 2 (quoting former Chief Judge Goodwin).

23. Baker, *supra* note 6, at 941; Tobias, *supra* note 6, at 1373.

24. Baker, *supra* note 6, at 941-42.

25. See THE AMERICAN BENCH: JUDGES OF THE NATION 4, 22-93 (Marie T. Finn et al. eds., 1995-96).

26. See S. 956 POSITION PAPER, *supra* note 16, at 5-6; see also OFFICE OF THE CIRCUIT EXECUTIVE FOR THE U.S. COURTS FOR THE NINTH CIRCUIT, POSITION PAPER IN OPPOSITION TO S. 956—NINTH CIRCUIT COURT OF APPEALS REORGANIZATION ACT OF 1995 (12/7/95) AND COMPANION BILL H.R. 2935 (2/1/96) 3 (Mar. 7, 1996) [hereinafter SECOND S. 956 POSITION PAPER] (finding that reconfiguration, approved in December markup, meant that proposed Ninth Circuit would have annually faced 1065 appeals and proposed Twelfth Circuit would have annually confronted 765 appeals).

27. See S. 956 POSITION PAPER, *supra* note 16, at 2-3.

28. See S. REP. NO. 104-197, at 20-21; SECOND S. 956 POSITION PAPER, *supra* note 26, at 5.

29. See S. REP. NO. 104-197, at 10; see also S. 956 Markup, *supra* note 12 (approving thirteen judges for proposed reconfigured Twelfth Circuit and fifteen judges for proposed reconfigured Ninth Circuit).

validity; however, additional evidence suggested that familiarity could lead to disadvantageous routinization and in certain situations might have fostered disagreement.<sup>30</sup> The circuit's small size may have concomitantly sacrificed the benefits of diversity and economies of scale that a bigger court offers.

On March 18, 1996, a few of S. 956's advocates attempted to have the Senate consider the circuit-splitting measure as an amendment to federal courts appropriations legislation. Critics of the bill sharply attacked this effort on procedural grounds; however, senators participated in much substantive debate over the court's division.<sup>31</sup> Proponents and opponents ultimately agreed on a study commission proposal which received strong bipartisan support, and the Senate approved a commission on March 20.<sup>32</sup> Upon receipt of the Senate measure, the House assigned the proposal to the Judiciary Subcommittee on Intellectual Property and Judicial Administration which Representative Carlos Moorhead (R-Cal.) chaired; however, Congress took no final action on the Senate proposal during the 104th Congress.<sup>33</sup>

## II. ANALYSIS OF COMMISSION PROPOSALS

### A. *The Senate Proposal*

The Senate proposal required that the commission "transmit its report to the President and the Congress no later than February 28, 1997" and that the Senate Judiciary Committee act within sixty days of the document's transmittal.<sup>34</sup> This measure was somewhat different than an earlier study commission suggestion that Senator Dianne Feinstein (D-Cal.) had developed and offered as an amendment which the Judiciary Committee narrowly rejected during its December 7, 1995 markup.<sup>35</sup> Senator Feinstein's proposal provided a two-year period for a commission to complete its analysis and did not require that the Judiciary Committee act on the commission report.<sup>36</sup>

The time frame which the March 21, 1996 proposal provided for the commission to conclude its assessment was insufficient at the time that the Senate approved it. An informative yardstick for evaluating this temporal consideration is the time which analogous study entities have required to finish similar projects. The Federal Courts Study Committee conducted the most recent analogous endeavor, and that entity consumed eighteen months in

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30. See Carl Tobias, *The D.C. Circuit as a National Court*, 48 U. MIAMI L. REV. 159, 168-70 (1993). See generally FRANK M. COFFIN, ON APPEAL 213-29 (1994) (defining appellate collegiality and discussing what can be done to foster it).

31. See 142 CONG. REC. S2219-48 (daily ed. Mar. 18, 1996).

32. 142 CONG. REC. S2544-45 (daily ed. Mar. 20, 1996). The Senate decision to leave the Ninth Circuit intact was advisable. Dividing the court would have been a limited reform, and it could have precluded implementation of numerous solutions which might prove more effective, such as realigning the existing regional circuits, establishing a third tier of appellate courts, or creating additional judgeships.

33. See 142 CONG. REC. H11644-01, H11859 (daily ed. Sept. 28, 1996).

34. See 142 CONG. REC. S2545 (daily ed. Mar. 20, 1996).

35. See *S. 956 Markup*, *supra* note 12 (statement of Sen. Feinstein); S. REP. NO. 104-197, at 20.

36. See *S. 956 Markup*, *supra* note 12 (statement of Sen. Feinstein).

completing its work.<sup>37</sup> Some federal court observers found this time period inadequate and suggested that the temporal limitation might have prevented the Study Committee from assembling an even better report.<sup>38</sup> The Commission on Revision of the Federal Court Appellate System (Hruska Commission) undertook another similar endeavor, and this group concluded its study of the appeals courts after eighteen months.<sup>39</sup>

Comparison of the March 21, 1996 Senate proposal with these prior, analogous study commission efforts thus suggests that the recent Senate measure would have allotted too little time for the proposed commission to complete the finest possible study. Legislative inaction, therefore, was probably advisable. Congress should not have established a commission which lacked adequate time to collect the most accurate data and to formulate the best suggestions.

Rather similar difficulties involving scope also seemed to accompany the proposed commission's mandate which the Senate included in the March 21, 1996 measure. This proposal provided that the commission's functions were to:

- (1) study the present division of the United States into the several judicial circuits;
- (2) study the structure and alignment of the Federal courts of appeals with particular reference to the Ninth Circuit; and
- (3) report to the President and the Congress its recommendations for such changes in circuit boundaries or structure as may be appropriate for the expeditious and effective disposition of the caseload of the Federal Courts of Appeal, consistent with fundamental concepts of fairness and due process.<sup>40</sup>

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37. See FEDERAL COURTS STUDY COMMITTEE, JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 31 (1990) [hereinafter FEDERAL COURTS STUDY COMMITTEE REPORT]; see also Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642, 4644-45 (1988).

38. Telephone Interview with Arthur Hellman, Professor of Law, University of Pittsburgh (June 1, 1996); Tobias, *supra* note 6, at 1408.

39. See COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, THE GEOGRAPHIC BOUNDARIES OF THE SEVERAL JUDICIAL CIRCUITS: RECOMMENDATION FOR CHANGE, reprinted in 62 F.R.D. 223 (1973) [hereinafter CIRCUIT BOUNDARY RECOMMENDATION]; see also Act of Oct. 13, 1972, Pub. L. No. 92-489, 86 Stat. 807-08 (1973) (establishing the Commission on Revision of the Federal Appellate System of the United States). The Act required the Commission to report its recommendations regarding the geographical boundaries of the circuits within 180 days after the ninth member was appointed and to report on the structure and internal procedures of the appellate system within 15 months of the date the ninth member was appointed. The Long Range Planning Committee of the Judicial Conference recently required over four years to compile its final long range plan; however, given the Committee's emphasis on long-term planning, that endeavor resembled less closely the March 21, 1996 proposal which the Senate considered than the Hruska Commission and the Federal Courts Study Committee. See JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS 3 (1995); COMMITTEE ON LONG RANGE PLANNING, JUDICIAL CONFERENCE OF THE UNITED STATES, PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS 2 (1995).

40. 142 CONG. REC. S2545 (daily ed. Mar. 20, 1996).

The charge provided appeared overly narrow. For instance, the initial two mandates required the commission to analyze the country's present division into several appeals courts and the structure and alignment of the federal circuits "with particular reference to the ninth circuit"<sup>41</sup> but did not speak to the increasing number of appeals which is the major complication that the appellate courts currently face.<sup>42</sup> The two strictures probably could have been interpreted, however, to include docket growth.

The third command did specifically prescribe suggestions for improvement that would lead to "expeditious and effective disposition" of appeals.<sup>43</sup> Nevertheless, those recommendations for alterations were limited to "such changes in circuit boundaries or structure as may be appropriate for" prompt and efficacious resolution.<sup>44</sup> Confining commission consideration to structural alternatives would have been too narrow. There are many other ways of treating the problems attributable to mounting caseloads which should not be described as structural. Examples are increases in the complement of judges authorized and measures, such as those implemented by the Ninth Circuit, which a number of appellate courts have instituted.<sup>45</sup> Precluding commission consideration of non-structural options seemed unwise because it would have eliminated numerous apparently promising approaches. This circumstance was worsened because it was quite difficult to ascertain which measures would have appeared most efficacious until the commission that was established had carefully assembled, assessed and synthesized the maximum applicable information.

#### B. *Additional Ninth Circuit-Specific Proposals*

During the debate over the advisability of dividing the Ninth Circuit and of passing S. 956, Governor Wilson and Judge O'Scannlain offered separate proposals to create a commission to study the circuit. Governor Wilson raised the possibility of establishing a commission in a letter which he sent to Senator Orrin Hatch (R-Utah), Chair of the Senate Judiciary Committee, on the eve of the December 1995 Committee markup.<sup>46</sup> Judge O'Scannlain mentioned the prospect during his testimony in the September 1995 Judiciary Committee hearing.<sup>47</sup>

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41. *Id.* The proposal that Senator Feinstein developed was similar, but it did not include the phrase "with particular reference to the Ninth Circuit." *See S. 956 Markup, supra* note 12 (statement of Sen. Feinstein). However, "any national analysis of the appeals courts may well emphasize this circuit." *See infra* text accompanying note 59.

42. *See, e.g.,* FEDERAL COURTS STUDY COMMITTEE REPORT, *supra* note 37, at 109; THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL 31-51 (1994).

43. 142 CONG. REC. S2545 (daily ed. Mar. 20, 1996).

44. *Id.*

45. *See, e.g.,* S. REP. NO. 104-197, at 27-28; Tobias, *supra* note 6, at 1363-64, 1405-07; *supra* notes 15, 19 and accompanying text.

46. Wilson Letter, *supra* note 4.

47. *See Ninth Circuit Split, supra* note 4, at \*29.



Governor Wilson wrote Senator Hatch to register his "strong opposition to any split before an objective study is concluded as to whether a split will properly address the concerns that have been raised concerning the size of the circuit."<sup>48</sup> The governor expressed the belief that such an analysis could "focus on the concerns raised about the Ninth Circuit and determine whether a split is the answer."<sup>49</sup> By way of illustration, he observed that "reform of our habeas corpus procedures and reforms which curb frivolous inmate litigation may do more to address a growing caseload than splitting the circuit." Governor Wilson urged that "a study be commissioned to carefully examine the concerns raised about the Ninth Circuit and determine whether the concerns are legitimate and whether a change in the circuit's boundaries is the best method of addressing them."<sup>50</sup> The Governor offered no additional specific recommendations regarding the study. Perhaps most salient was his clear suggestion that the evaluation be limited in scope to the Ninth Circuit.

Judge O'Scannlain proposed that Congress "direct the Circuit judges of the Ninth Circuit to reflect over the next few years and then to recommend, as did the judges on the Fifth Circuit Court of Appeals in the 1980s, what the proper division of their circuit should be."<sup>51</sup> He proposed that the Ninth Circuit judges' suggestion be premised on an assessment of those considerations which would best enable the court to fulfill its objectives in the future.<sup>52</sup> Judge O'Scannlain urged that any Ninth Circuit realignment or restructuring insure accountability to all individuals whom the court now serves.<sup>53</sup> He admonished champions of prompt circuit bifurcation that there had been "no recent systematic evaluation of the division of the Ninth Circuit . . . since the . . . [Hruska] Commission report in the 1970s."<sup>54</sup>

The problem with the studies which Governor Wilson and Judge O'Scannlain proposed was that their geographic scope would have been overly narrow. An assessment confined to the Ninth Circuit would by definition have been incomplete. The major difficulties that most of the circuits and the appellate system now face involve increasing caseloads, and these problems are essentially systemic complications which will probably require systemic treatment. A study that encompassed solely the Ninth Circuit, therefore, necessarily would have failed to address all of the difficulties being experienced and would have resulted in only partial recommendations. Had Congress implemented remedies which applied only to the Ninth Circuit, those

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48. Wilson Letter, *supra* note 4. For a sense of the divergent views regarding the size of the Ninth Circuit see *supra* notes 13-16 and accompanying text.

49. Wilson Letter, *supra* note 4.

50. *Id.*

51. *Ninth Circuit Split*, *supra* note 4, at \*29; see generally Tobias, *supra* note 6, at 1361-62 (analyzing the decision to divide the Fifth Circuit).

52. *Ninth Circuit Split*, *supra* note 4, at \*29.

53. *Id.*

54. *Id.* For the first set of recommendations by the Hruska Commission regarding boundaries for the circuits, see CIRCUIT BOUNDARY RECOMMENDATION, *supra* note 39. For a brief historical treatment of the Hruska Commission see Baker, *supra* note 6, at 924-26 and Tobias, *supra* note 6, at 1361-63.

measures could well have precluded subsequent effectuation of more comprehensive solutions.

### III. SUGGESTIONS FOR THE FUTURE

The material in the second segment of this essay indicates that the time frame provided for concluding the commission's work and that entity's charter, which the Senate prescribed in the March 20, 1996 proposal, were too circumscribed. The study suggestion that Senator Feinstein developed was responsive to temporal concerns because it afforded two years for completion of the effort; however, the analysis which she recommended would have been only marginally broader in scope than the Senate measure.<sup>55</sup> The evaluations that Governor Wilson and Judge O'Scannlain suggested would correspondingly have been too limited in terms of their geographic compass.<sup>56</sup>

The difficulties which attended these study proposals do not necessarily mean that national examination of the appellate courts is inadvisable. Indeed, there is an important need to assess the appeals courts before growing dockets overwhelm the system and additionally undermine the quality of appellate justice dispensed by, for instance, further reducing the number of oral arguments granted or published opinions issued.<sup>57</sup>

When the 105th Congress considers proposals for studying the appeals courts, it should broadly view the temporal aspect, and the scope, of projected commission efforts. The time required for completing prior similar assessments, namely the Hruska Commission and the Federal Courts Study Committee, indicates that Congress ought to provide any commission proposed at least eighteen months, but probably two years, to finish its work. This time frame should permit the entity to collect, analyze and synthesize the maximum relevant material and to develop the most effective suggestions.

Congress could rather felicitously enlarge the evaluation's scope by omitting the limiting commands that the Senate imposed in the mandate for the projected commission which the Senate considered during 1996. For example, the "study" restrictions regarding "structure and alignment" as well as respecting the Ninth Circuit included in the Senate measure,<sup>58</sup> the latter of which resembled the Ninth Circuit limitation articulated by Governor Wilson and Judge O'Scannlain, might be deleted. However, the considerations, principally involving the Ninth Circuit's magnitude, which I surveyed earlier<sup>59</sup> mean that any national analysis of the appeals courts may well emphasize this circuit. The "recommendations" stricture regarding "changes in

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55. See *S. 956 Markup*, *supra* note 12 (statement of Sen. Feinstein); see also *supra* text accompanying notes 35 and 36 and text of note 41 (discussing Sen. Feinstein's proposal).

56. See *supra* notes 46-54 and accompanying text.

57. For 12 month's data on the disposition of cases heard by the appeals courts through September 30, 1995, see LEONIDAS R. MECHAM, JUDICIAL BUSINESS OF THE UNITED STATES COURTS, tbl. S-1, at 28; tbl. S-3, at 30 (1995). See generally Martha J. Dragich, *Once a Century: Time for a Structural Overhaul of the Federal Courts*, 1996 WIS. L. REV. 11, 25-32 (arguing that burgeoning caseloads cause a "dilution of appellate justice in individual cases").

58. See *supra* note 40 and accompanying text.

59. See *supra* notes 13, 17 and accompanying text.

circuit boundaries or structure" in the Senate measure should concomitantly be omitted.<sup>60</sup>

The suggestions that I propose will allow any commission which Congress authorizes to study all of the significant problems confronting the appellate courts, to scrutinize a plethora of potential solutions, and to recommend those modifications which seem most efficacious.

#### CONCLUSION

The Senate passed a measure in the 104th Congress that would have instituted a national commission to evaluate the federal appellate system. Senator Feinstein developed an analogous proposal that would have afforded greater time for a study, while Governor Wilson and Judge O'Scannlain called for analysis of the Ninth Circuit. The difficulties facing the appellate courts deserve systemic assessment and probably require systemic treatment, but all of the evaluations suggested were too narrow in terms of both time allocated and scope. When Congress considers the prospect of establishing a study commission during 1997, it should seriously examine the possibilities of allotting considerable time for the entity to conclude its study and of prescribing an expansive commission charter. Those improvements would facilitate compilation of the most—and most accurate—data, analysis of a broad spectrum of potential solutions and formulation of the most defensible suggestions.

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60. See *supra* note 40 and accompanying text.