HJR

52

Alaska State Legislature

Representative Brian S. Porter

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SPONSOR STATEMENT

HJR 52 THE 12TH CIRCUIT COURT OF APPEALS

Alaska belongs to the Ninth Circuit Court Of Appeals. The Ninth Circuit encompasses a population between 40 and 50 million people. The Circuit's geographic outlay consists of nine states and two territories: Washington, Idaho, Montana, Oregon, Nevada, California, Arizona, Alaska, Hawaii, Guam and Northern Mariana Islands. The court is simply too large to effectively respond to the needs of Alaska.

The **voluminous size** of the Ninth Circuit causes **unacceptable delays** when rendering decisions. California cases alone represent over half of the Ninth Circuit's caseload. As a result, most cases must be heard by smaller panels of judges, with increased reliance on staff and summary procedures. There are over 3,276 combinations of panels that may decide cases that involve similar issues leading to conflicting and unpublished opinions, and little consistency in the court's determination.

To remedy the situation, HJR 52 would send a **clear message to Congress** that the swift and sure administration of justice is a right that should no longer be compromised in the Ninth Circuit. The resolution would divide the current circuit court into two courts, with one covering the states of **Alaska, Washington, Idaho, and Montana.** The Ninth Circuit would retain jurisdiction over the states of California, Arizona, Nevada, and Hawaii, and American possessions in the Pacific.

The Attorneys General from all five states involved in the proposed Twelfth Circuit have endorsed the proposal.

TONY KNOWLES
GOVERNOR

STATE OF ALASKA
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September 8, 1995

The Honorable Orrin Hatch, Chair
Senate Committee on the Judiciary
Senate Dirksen Office Building
Washington, DC 20510-6275

Dear Senator Hatch:

I write this letter to urge passage of S. 956, a bill to divide the Ninth Circuit Court of Appeals into two circuits. In doing so, I note with pride and satisfaction that Senators Stevens and Murkowski have both joined as co-sponsors of this important legislation.

Alaskans have long observed that the Ninth Circuit, the largest in the nation both in territory and membership, has concerned itself predominantly with issues arising out of California. Indeed, the court's membership is heavily weighted to that state. The court's case filings are larger than any other circuit in the country, thus frequently leading to inordinate delay in decisions important to our state.

Alaskans have suffered from these shortcomings. For instance, despite the court's granting of expedited consideration in an important case involving Alaska Native subsistence use in a case known popularly as the Katie John case, the court required more than thirteen months to render its decision (now being reconsidered) after oral argument. In other cases, panels of the court have shown a surprising lack of understanding of Alaska's geography and people. As a consequence, decisions rendered from San Francisco have often caused unnecessary hardships on Alaskans.

The creation of a Twelfth Circuit Court of Appeals encompassing the Northwestern states and Alaska would benefit this region by providing for speedier and more consistent rulings rendered by jurists who have greater familiarity with the social, geographical, political, and economic life of the region.

Sincerely,

Tony Knowles
Governor

cc: The Honorable Ted Stevens, U.S. Senate
The Honorable Frank Murkowski, U.S. Senate

Alaska State Legislature

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Speaker of the House of Representatives

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October 12, 1995

The Honorable Clyde Ballard
Speaker of the Washington State House

Fax: 1-360-786-7871

Dear Speaker Ballard:

We in Alaska will be considering the adoption of a resolution splitting the 9th Circuit Court and creating a Northwest Circuit Court, to be know as the 12th Circuit Court. It is my understanding that your State's attorney general will also be offering a similar resolution. Would you please send me a copy of your resolution as soon as it has passed your legislature and I will do likewise.

I've enclosed an editorial from The Anchorage Times, September 15, 1995, that you may find beneficial. I feel this is something we can work together on for our common good.

Thank you.

Sincerely,

Gail Phillips
SPEAKER OF THE HOUSE

GP:brg

Enclosure

cc: Representative Brian Porter, Judiciary Committee Chairman
Mr. Bruce Botelho, Alaska Attorney General

The Anchorage Times

Publisher: BILL J. ALLEN
"Believing in Alaskans, putting Alaska first"
Editors DENNIS FRADLEY PAUL JENKINS WILLIAM J. TOBIN
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Dividing the court

IT MAY NOT yet be a bandwagon, but there is some favorable forward movement toward dividing the 9th U.S. Court of Appeals and creating a new appellate court serving Alaska, Idaho, Montana, Oregon and Washington.

The latest to join the rising chorus endorsing the proposal include some powerful political figures — among them the Democratic governor of Alaska, Tony Knowles, and the state's attorney general, Bruce Botelho.

Legislation to split the 9th Circuit — the nation's largest, with 11 more judges than any other circuit — is actively under consideration in the U.S. Senate. The bill's sponsors include Republican Sens. Frank Murkowski and Ted Stevens of Alaska.

In a letter to Sen. Orrin Hatch, chairman of the Senate Judiciary Committee, which is holding hearings on the bill, Gov. Knowles said the existing court "has concerned itself predominately with issues arising out of California." That's not surprising, considering that 55 percent of all the cases before the court come from California and a majority of the court's 28 active judges are Californians.

The court's case filings also are larger than any other appeals court in the country, the governor said, "thus frequently leading to inordinate delay in decisions important to our state."

Mr. Knowles is not the first to complain about this, but adding his voice to those pointing out the drawbacks of the existing over-sized court is important.

"For instance," the governor told Sen. Hatch, "despite the court's granting of expedited consideration of an important case involving Alaska Native subsistence use in a case known as the *Katie John* case, the court required 13 months to render its decision (now being reconsidered) after oral argument.

"In other cases, panels of the court have shown a surprising lack of understanding of Alaska's geography and people. As a consequence, decisions rendered from San Francisco have often caused unnecessary hardships on Alaskans."

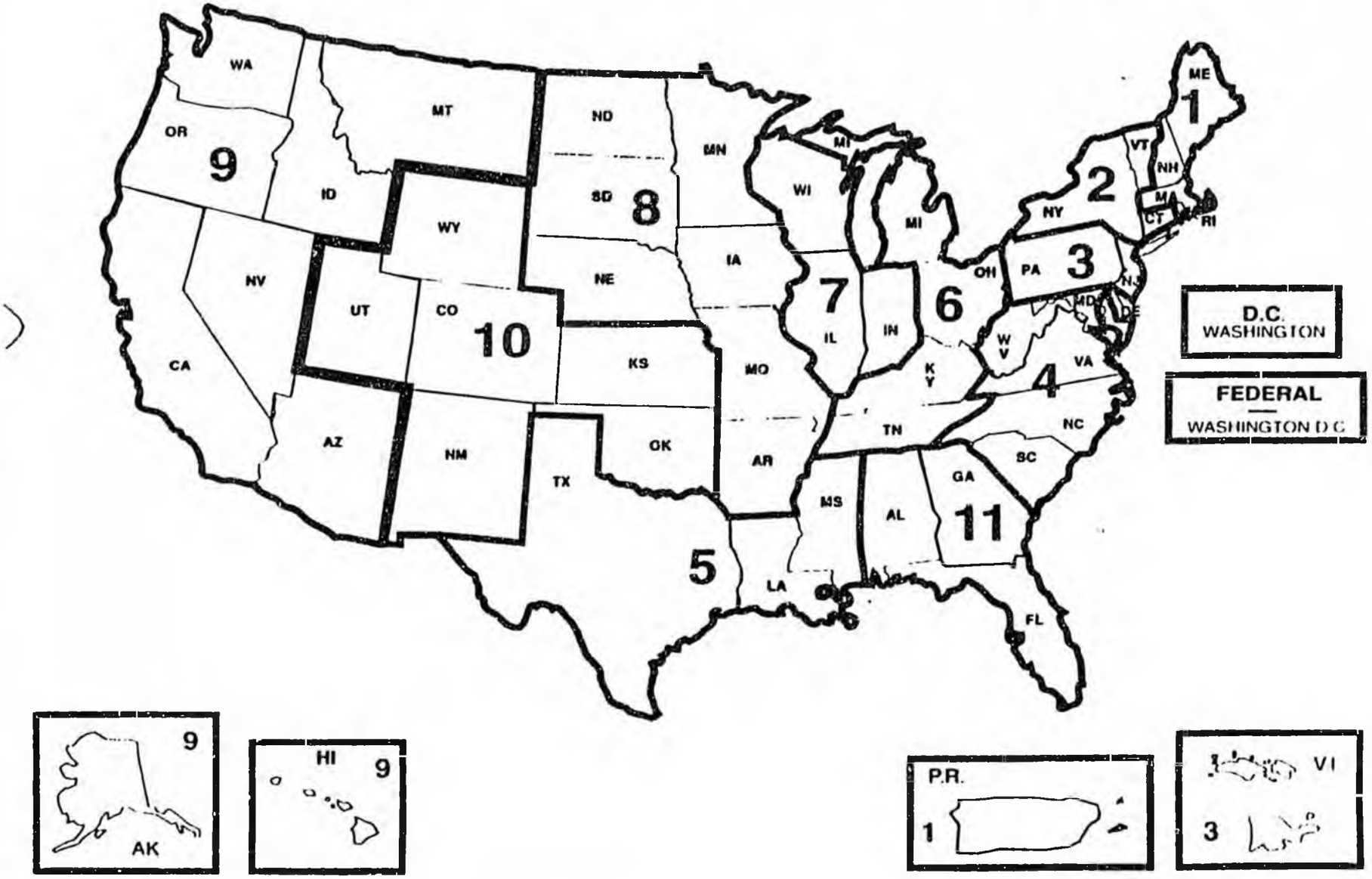
Similar concerns were expressed by Mr. Botelho and the top legal officials of the other four states that would be included in a new court.

In a letter to Sen. Hatch, the five state attorneys general said the creation of "a Northwest circuit court would mitigate the problems of the unwieldy size of the 9th Circuit."

If approved, Alaska, Idaho, Montana, Oregon and Washington would be placed in a new 12th Circuit Court — leaving California, Arizona, Hawaii, Nevada, Guam and the Northern Mariana Islands in the 9th Circuit. Dividing overgrown circuit courts is not an unusual move. The most recent split came as the 11th Circuit was created out of the 5th Circuit.

Creation of a new 12th Circuit is long overdue.

The Thirteen Federal Judicial Circuits



News Release
JUDICIARY COMMITTEE
United States Senate • Senator Orrin Hatch, Chairman

September 13, 1995 Contact: Jeanne Lopatto, 202/224-5225

STATEMENT OF SEN. ORRIN HATCH

SENATE JUDICIARY COMMITTEE

HEARING ON THE NINTH CIRCUIT SPLIT

Good Morning. I am pleased to chair this hearing on whether the United States Court of Appeals for the Ninth Circuit should be divided. I am approaching this issue with an open mind, and I look forward to the testimony on both sides of this issue today. It is my hope that this hearing will illuminate two questions: first, the extent to which any difficulties may in fact exist in the ninth circuit due to its size; and second, whether a split of the ninth circuit would remedy any problems that may be present.

As the map we have before us demonstrates, the current federal judicial system includes thirteen federal judicial circuits: the eleven numbered circuits, the D.C. Circuit and the Federal Circuit. Even a brief glance confirms that, among those circuits, the ninth unquestionably stands apart.

The ninth circuit is the largest court of appeals by any measure. It contains nine states and two territories totaling approximately fourteen million square miles, and it spreads from Alaska to the Mexican border.

Of all the regional courts of appeals, the ninth circuit serves the largest population by far: Almost 50 million people fall under the geographical jurisdiction of the ninth circuit.

The ninth circuit also has 28 active court of appeals judges. The next largest court of appeals, the fifth circuit, has 17 active judges, and most of the circuits have 12 or fewer court of appeals judges.

As most of the participants in today's hearing are aware, this is not the first time that Congress has faced the question of whether this large circuit should be split. In 1973, the Hruska Commission recommended the split of the old fifth circuit and a split of the ninth. Although the fifth circuit was split in 1981 to create the eleventh circuit, the ninth circuit was not divided.

In lieu of splitting the ninth circuit, Congress chose instead to address the ninth circuit's administrative difficulties by enacting a statutory provision that permitted the ninth circuit to form administrative units and to conduct en banc proceedings with fewer than the full court. Nonetheless, the size of the circuit continues to attract attention, and in the last ten years several bills have been introduced in the Senate that would split the circuit.

Some proponents of a split have noted that the circuit's large and rapidly changing body of case law has made it difficult for district courts, practitioners, and even the court of appeals judges themselves to keep up with the current law of the circuit. Others have raised concerns about collegiality among the judges of such a large circuit, and still others have remarked on delays in the ninth circuit.

The size of the circuit has also been argued to have caused an increased incidence of intracircuit splits -- that is, conflicting decisions within the ninth circuit itself. Whether such conflicts occur in the ninth circuit at a higher rate than in other circuits raises serious issues of judicial efficiency and legal stability. Uncertainty in circuit law not only presents difficulties for district judges and legal practitioners but also imposes costs on private parties who are trying to conform their conduct to circuit law and avoid litigation.

On the other hand, many in the ninth circuit emphasize that the circuit has made significant strides in dealing with its great size through a number of administrative innovations. I am eager to hear about the ninth circuit's experience in dealing with its heavy caseload.

And of [illegible] splitting the circuit raises its own, equally serious issu[illegible]s committee must also consider, for example, whether creat[illegible]other circuit would increase conflicts between the circuits. We must examine whether a split would needlessly dilute the federalizing function of the courts of appeals, or would lead us down a slippery slope to the unending balkanization of the circuits. Finally, we must consider whether splitting the ninth circuit without increasing judgeships would alleviate burdens created by growing caseloads.

I thank our distinguished witnesses for taking the time to testify before the committee today, and I remind witnesses that in the interests of time they should keep their opening remarks to five minutes.

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Testimony of John McKay
Senate Judiciary Committee
Hearing on the 9th Circuit Reorganization

The proposal to divide the 9th Circuit, which is being offered for the fourth time, has received considerable support over the years. As early as 1973, the Congressional Commission on the Revision of the Federal Court Appellate System recommended that the 9th Circuit be divided. Previous efforts to divide the 9th Circuit has earned the support of attorneys and judges in the 9th Circuit, the American Bar Association, the Washington State Bar Association, attorneys general of the western states, the Department of Justice, and the former Chief Justice of the United States Supreme Court, Warren E. Berger.

I am here today to testify not only as to my own experience as a litigator in the 9th Circuit, but also to present the position of the Washington State Bar Association on this proposed legislation. The Washington Bar Association, as it has in the past, renews its support for the 9th Circuit reorganization, and endorses S. 956.

There are currently 45 million residents living within the 9th Circuit. This represents 60% more than is served by the next largest circuit. Worse, the population in the states and territories that comprise the 9th Circuit is the fastest growing in the nation. Geographically, it is huge. The 9th Circuit stretches from Alaska to Mexico, and from Montana to Hawaii, Guam and the Northern Marianas. One commentator reminds us that, as a land mass, the 9th Circuit is comparable to all of Western Europe.

The sheer size of the Court's jurisdiction results in obvious and not-so-obvious problems. It is expensive and time-consuming for the judges to travel throughout the Circuit, expending time and money which could be better spent reducing the Court's growing caseload. Also, it is difficult for a judge to understand such a large community. Our own Judge Eugene Wright testified to Congress on this subject, "Judges whose background and experience lie in places a thousand miles from a given Court are unlikely to have a full appreciation of regional aspects of an issue, even if they are aware of them." (Hearings on S. 1156 Before the Subcommittee on Courts of the Senate Judiciary Committee, 98th Congress, 2nd Session (1984), at p.19.)

The 9th Circuit is not only the largest circuit in the country, it is one of the slowest. The Court's 1994 caseload, viewed on a per judge or per panel basis, is average when compared with the other Circuits. Yet a comparison of the 1994 disposition time (filing notice of appeal to final disposition) reveals that, but for the 11th Circuit, the 9th Circuit is the slowest in the country. Two circuits, the 3rd and the 8th, are nearly twice as fast as the 9th Circuit.

Interestingly, the 9th Circuit's Executive Office recently asserted that the Court "is functioning well and has devised innovative ways of managing its caseload that are

models for other circuits." (Position Paper, Executive Summary.) The 9th Circuit's own statistics, however, show that despite its average caseload, it is unable to dispose of its cases in a timely manner.

Another reason why the 9th Circuit should be divided is the continuing problem of inconsistent rulings from the different panels. This has resulted in a growing body of unpublished opinions which give no reliable guide and leave the impression that *stare decisis* has perished as a guiding principle in the 9th Circuit. This problem has been discussed for many years, but will never be resolved until the Court size is reduced. Judge Wright has noted that

> [S]ome of the judges on the 9th Circuit are now no longer able to remain current with the law of the Circuit as it develops. [Because of] the volume of ... printed material, judges are obliged to rely upon law clerks, staff attorneys, librarians, and the eternal hope that their opinions do not stray too far from the current law of the Circuit.

(Hearings, at p.17.) One would also suspect that collegiality, a critical element in a successful court, is much harder to maintain when there are 28 judges spread out over so many states.

This same problem in the Southeast was successfully addressed in 1980 when the 5th Circuit (originally encompassing Texas, Louisiana, Mississippi, Alabama, Georgia and Florida) was divided into two circuits with the new, smaller 5th Circuit now including Texas, Louisiana, and Mississippi. Fifth Circuit Chief Judge George Clark reported to Congress on its success:

> The principal benefit gained remains that judges, lawyers, and litigants can better cope with a smaller, more predictable universe of case law. Effective conduct and management of litigation requires mastery of the corpus juris. Circuit judges must know its status on a daily basis to keep the law consistent.

(Hearing, at p.96.) Judge Clark also observed that "the law of the circuit would be more consistent if all of the judges charged with making the law participated in the en banc court." (Hearing, at p.90.) Such a device is not a viable solution for our 28-member 9th Circuit Court. Judge Clark's comments help us understand why the U.S. Judicial Conference found that any more than 15 judges in any circuit is an unworkable situation.

Since 1989, when the Washington Bar Association discussed the problems of the 9th Circuit and voted to support division of the circuit, only one thing has changed -- size. The problems have only grown larger. Those who did not want division concede that eventually size will require division. They just say, "Not now!"

On behalf of the Washington Bar Association, and on my own behalf, I urge this subcommittee to act quickly and favorably on this legislation.

RATIONING JUSTICE ON APPEAL

THE PROBLEMS OF THE U.S. COURTS OF APPEALS

By

THOMAS E. BAKER
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A Report of the Justice Research Institute

ST. PAUL, MINN.
WEST PUBLISHING CO.
1994

Chapter Five

CONGRESS DECLINES TO DIVIDE THE NINTH CIRCUIT

A. INTRODUCTION

As this Chapter was being written in mid–1993, legal commentators were speculating that the 103d Congress would revisit the issue whether to divide the Ninth Circuit in earnest, if the Judicial Conference of the United States accepted a pending recommendation that ten additional judgeships be added to that bench that now numbers twenty-eight judges.[1] But such speculation about the likelihood of a division goes back nearly fifty years. What is more

1. Back in 1990, the Judicial Conference decided to oppose setting any absolute maximum on the number of article III judges. In March of 1993, the Conference deferred action on a committee recommendation and a request from the Ninth Circuit for an additional ten judgeships until the completion of the Report of the Long-Range Planning Committee on the size of the whole federal judiciary. Steve Albert, *Congress Weighs Plan to Divide the 9th Circuit*, Legal Times, Feb. 1, 1993, at 12; Steve Albert, *9th Circuit Rethinks Its Bid for 10 More Judges*, Legal Times, Aug. 16, 1993, at 11; Marcia Coyle, *Some Judges Seek Cap on Ranks*, Nat'l L.J., May 31, 1993, at 9. At the September 1993 meeting, the Judicial Conference, by a close vote, rejected a proposal to call on Congress to limit the federal judiciary to 1,000 judges. The Conference did reaffirm, however, the judicial branch's commitment to the principle of limited federal courts staffed by the necessary number of judges to perform its role.

The last Congress rather obliquely considered a bill to divide the Ninth Circuit. S. 1686, 102d Cong., 1st Sess. (1991). That bill, introduced during the last Congress by Senator Slade Gorton, would have divided the current Ninth Circuit into the two circuits: a new Twelfth Circuit, comprised of Alaska, Idaho, Montana, Oregon, and Washington; and a new Ninth Circuit made up of the remaining states of Arizona, California, Hawaii, Nevada, Guam, and the Northern Mariana Islands. The bill was referred to the senate Judiciary Committee in August of 1991. *See* 137 Cong. Rec. S12,182 (daily ed. Aug. 2, 1991). However, no further action was taken on the bill.

important, for present purposes, than the likelihood that such a bill might be introduced is to understand the debate over dividing the Ninth Circuit within the larger context of the how Congress might respond to the problems of the United States Courts of Appeals.

In March of 1990, extensive hearings were held on S. 948, a bill introduced in the 101st Congress to accomplish the division of the Ninth Circuit.[2] Because that bill went quite far along in the legislative process and was fully considered, this Chapter will focus on those 1990 hearings and debates in the Senate.[3] That legislative consideration represents the most recent and most thorough congressional evaluation of the problems facing the largest judicial circuit and, indirectly, sheds some light on current congressional thinking about the entire intermediate level of the federal courts, particularly the problems of the large circuits.[4]

2. S. 948, 101st Cong., 1st Sess. (1989). *See generally Hearing on S. 948 Before the Subcomm. on Courts and Admin. Practice of the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. (1990). S. 948 was introduced in May of 1989 by Senator Slade Gorton and was referred to the Judiciary Committee. *See* 135 Cong. Rec. S5026 (daily ed. May 9, 1989). On March 6, 1990, the Subcommittee on Courts and Administrative Practice began and concluded hearings on the bill. *See* 136 Cong. Rec. D211 (daily ed. Mar. 6, 1990).

3. The 101st Congress also considered a related bill, H.R. 4900, which would have divided the Ninth Circuit but which proposed to reassign the states and territories differently to create a new Ninth Circuit composed of Arizona, California, Nevada, Hawaii, Guam, and the Northern Marina Islands, and a new Twelfth Circuit composed of Alaska, Idaho, Montana, Oregon and Washington. H.R. 4900, 101st Cong., 2d Sess. (1990). The House bill was referred to committee and a hearing was held before the Committee on the Judiciary's Subcommittee on Courts, Intellectual Property, and the Administration of Justice on June 13, 1990. 136 Cong. Rec. D730 (daily ed. June 13, 1990). Such differences over possible realignments have the potential to take away significantly from the momentum to divide, as was true during the protracted congressional consideration of dividing the Fifth Circuit. *But see supra* note 1 (later Senate proposal followed the division in H.R. 4900).

The primary emphasis here will be on the Senate version because that debate was more developed and because the arguments in the House of Representatives for and against division follow along the same lines. *See* 136 Cong. Rec. E1700–01 (daily ed. May 24, 1990) (statements of Reps. Morrison and Craig) (WESTLAW: fi 136 cr e1700). For the most part, the arguments pro and con division do not vary from bill to bill. *See generally* Position Paper Prepared by the Circuit Executive, U.S. Court of Appeals for the Ninth Circuit (1991).

4. This account has been adapted, with permission, from: 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) (WESTLAW: AZSLJ database, ci(22 - 5 917)).

B. THE HISTORICAL BOUNDARY OF THE NINTH CIRCUIT

In Chapter One, the history of the United States Courts of Appeals and their boundary lines were described at some length. That detail will not be rehearsed here, except briefly to recall the legislative map drawing of the federal circuits in the western States. In 1855, California was constituted as a separate circuit [5] and along with Oregon was reconstituted as the Tenth Circuit in 1863.[6] Nevada was added to the Tenth Circuit in 1865.[7] In1866, Congress again rearranged the circuits, realigning the States to draw nine circuits.[8] This legislation grouped California, Nevada, and Oregon in a then newly-numbered Ninth circuit to which Montana, Idaho, and Washington soon were added.[9] The landmark Evarts Act, passed in 1891, created a new court—the circuit court of appeals—for each of the nine circuits, including the Ninth Judicial Circuit.[10] Around the time that Congress abolished the anachronistic circuit courts, the modern Ninth Circuit took shape [11]; Alaska, Arizona, Hawaii, and eventually Guam were added.[12] Finally, in 1948, the Judicial Code officially renamed all the circuit courts of appeals and the westernmost intermediate court formally became the United States Court of Appeals for the Ninth Circuit.[13]

Even this abbreviated summary of the experience in the western States demonstrates a passing era of congressional willingness to redraw circuit boundaries and to reassign States to existing or newly-created circuits. Viewed historically, these incidents of redrawing describe an earlier evanescence to the boundary lines. Viewed functionally, these incidents are best explained as past

5. Act of Mar. 2, 1855, ch. 142, 10 Stat. 631.

6. Act of Mar. 3, 1863, ch. 100, 12 Stat. 794.

7. Act of Feb. 24, 1865, ch. 64, 13 Stat. 440.

8. *See* Act of July 23, 1866, ch. 210, § 2, 14 Stat. 209.

9. *See id.* Montana was added to the Ninth Circuit by the Act of Feb. 22, 1889, ch. 180, 25 Stat. 682. Washington was added to the Ninth Circuit by the Act of Feb. 22, 1889, ch. 180, § 2, 25 Stat. 676, 682. Idaho was added to the Ninth Circuit by the Act of July 3, 1890, ch. 656, § 16, 26 Stat. 215, 217.

10. Act of Mar. 3, 1891, ch. 517, 26 Stat. 826.

11. *See* Act of Mar. 3, 1911, ch. 231, 36 Stat. 1087.

12. Hawaii was included in the Ninth Circuit by the Act of Mar. 3, 1911, ch. 231, 36 Stat. 1087, 1131. Arizona was included in the Ninth Circuit by the Act of Feb. 28, 1929, ch. 363, 45 Stat. 1346. Alaska district court decisions were made reviewable in the Ninth Circuit by the Act of Feb. 13, 1925, ch. 229, 43 Stat. 936. Guam was added to the Ninth Circuit by the Act of Oct. 31, 1951, ch. 655, 65 Stat. 710, 723.

13. Act of June 25, 1948, ch. 646, § 2680, 62 Stat. 869, 985.

exercises of the near-plenary congressional power to "from time to time ordain and establish" the "inferior courts" of the United States.[14] Finally, it is noteworthy that for the last century or more the Congress has made no changes in the Ninth Circuit boundary, except to add new States. Downsizing thus would go against the historical experience.

C. OTHER PROPOSALS TO CHANGE THE BOUNDARY OF THE NINTH CIRCUIT

Responding to the urgings of Chief Justice Burger and others, in 1973 Congress created the Commission on Revision of the Federal Court Appellate System, the so-called Hruska Commission.[15] What was noteworthy was the Commission's reluctance to redraw all the circuit boundaries:

> We have not recommended a general realignment of all the circuits. To be sure, the present boundaries are largely the result of historical accident and do not satisfy such criteria as parity of caseloads and geographical compactness. But these boundaries have stood since the nineteenth century, except for the creation of the Tenth Circuit in 1929, and whatever the actual extent of variation in the law from circuit to circuit, relocation would take from the bench and bar at least some of the law now familiar to them. Moreover, the Commission has heard eloquent testimony evidencing the sense of community shared by lawyers and judges within the present circuits. Except for the most compelling reasons, we are reluctant to disturb institutions which have acquired not only the respect but also the loyalty of their constituents.[16]

After extensive consideration and debate, the Hruska Commission recommended that Congress divide only what were at that time the two biggest circuits. Instead of a national reconfiguration of all the circuit boundaries, that comprehensive study thus recommended that Congress divide two courts of appeals—the Fifth Circuit, which has been accomplished, and the Ninth Circuit, which Congress still has not decided to divide. These two recommendations satisfied the general criteria for realignment the Commission

14. U.S. Const. art. III, § 1 ("inferior" is the term in article III).

15. Act of Oct. 13, 1972, Pub. L. No. 92-489, 86 Stat. 807 (1973).

16. 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, 228 (1973).

had established at the time: (1) circuits should be composed of at least three States; (2) no circuit should be created that would immediately require more than nine judges; (3) a circuit should contain States with a diversity of legal business, socioeconomic interests and population; (4) realignment should avoid excessive interference with established circuit boundaries; and (5) no circuit should contain noncontiguous States.[17]

Neither of these recommendations was really "new." The long legislative history of the division of the Fifth Circuit is chronicled in Chapter Four. Proposals to divide the Ninth Circuit had been around since before World War II and the Commission recommendation came as no surprise.[18] What was surprising was the Commission's 1973 proposal to carve up California and reassign district courts in the same State to different circuits.[19] That was enough to end the matter back then, although division has been a perennial proposal of recent Congresses.[20]

D. NINTH CIRCUIT ADMINISTRATIVE INNOVATIONS

During the seemingly interminable debate over its division, the Ninth Circuit has attempted to meet the legislative challenge to administer a large circuit efficiently through innovation and industry. In 1978, Congress at least temporarily decided against the recommendation to divide both the Fifth Circuit and the Ninth Circuit. Instead, Congress authorized:

> Any court of appeals having more than 15 active judges may constitute itself into administrative units complete with such facilities and staff as may be prescribed by the Administrative Office of the United States Courts, and may perform its en banc function by such number of members of its en banc courts as may be prescribed by rule of the court of appeals.[21]

17. *Id.* at 231-32.

18. *Id.* at 234-35.

19. *See generally* Arthur D. Hellman, *Legal Problems of Dividing a State Between Federal Judicial Circuits*, 122 U. Pa. L. Rev. 1188 (1974).

20. Previous to S. 948, chronicled here, the last bill that would have divided the Ninth Circuit was introduced in 1983 but went nowhere. S. 1156, 98th Cong., 1st Sess. (1983); Faye A. Silas, *Circuit Breaker—Move on to Split the Ninth*, A.B.A.J., Jan. 1984, at 34.

21. Omnibus Judgeship Act of 1978, Pub. L. No. 95-486, § 6, 92 Stat. 1629, 1633, *supplemented by* Act of Oct. 15, 1980, Pub. L. No. 96-458, 94 Stat. 2035 (1981).

As we have seen in Chapter Four, Congress soon thereafter did enact legislation to divide the Fifth Circuit largely at the instigation of the judges from that circuit. The Ninth Circuit judges, by contrast, have accepted Congress's invitation to innovate in numerous ways.[22] And so far, Congress has sanctioned these innovations by declining to divide the circuit, in effect, allowing the Ninth Circuit experiment in administering a large circuit to continue.

The Court of Appeals reorganized itself internally into three administrative units to allow for a more decentralized and more efficient administration. The most senior active judge acts as the administrative judge for each unit. The chief judge,[23] the three administrative judges, and five active judges drawn by lot from among those willing to serve, constitute an executive committee that is authorized to act between regular court meetings, in emergencies and on lesser matters. The executive committee's chief function is to review proposals on operating procedures and to make recommendations to the full court.[24] The argument has been made that "[s]ooner or later, the Ninth Circuit will be divided, either by Act of Congress or on a de facto basis by the creation of regional administrative units within the circuit."[25] Even if one were to concede, as one must, that circuit division is most properly accomplished by legislation, the Ninth Circuit's present administrative arrangement still seems far from a "de facto division." After all, the administrative arrangement is expressly authorized by a federal statute. Furthermore, the position taken in this Chapter is not that the court *never* be divided but that it not be divided *now*.

22. 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 Judgeship Act of 1978 and Other Measures to Improve the Administration of Justice in the Ninth Circuit 1 (July 1989), *reprinted in Hearing on S. 948 Before the Subcomm. on Courts and Admin. Practice of the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. 361 (1990) [hereinafter Fourth Biennial Report to Congress]; *see also* Joe S. Cecil, Federal Judicial Ctr., Administration of Justice in a Large Appellate Court: The Ninth Circuit Innovations Project (1985); Thomas Church, *Administration of An Appellate Leviathan: Court Management in the Ninth Circuit Court of Appeals*, in Restructuring Justice—The Innovations of the Ninth Circuit and the Future of Federal Courts 226 (Arthur D. Hellman ed., 1990) [hereinafter Restructuring Justice]; Clifford J. Wallace, *Before State and Federal Courts Clash*, Judges' J., Fall 1985, at 37.

23. *See* 28 U.S.C.A. §§ 45, 136 (1988).

24. Noel V. Lateef, *Justice on Appeal: A Proposal*, L.A. Daily J. Rep., Sept. 29, 1989, at 6, 10.

25. *Hearing on S. 948 Before the Subcomm. on Courts and Admin. Practice of the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. 250–51 (1990) (testimony of Sen. Mark O. Hatfield) [hereinafter Testimony of Senator Mark O. Hatfield].

The argument, in short, is that Congress should allow the Ninth Circuit experiment to complete its full course.

By circuit rule, as authorized by Congress, the Court of Appeals has adopted a limited en banc court procedure.[26] The chief judge and the ten active judges chosen by lot sit on each en banc panel; however, an en banc rehearing is granted only on the vote of a majority of all active judges. Retired Chief Justice Burger seems to think this is a practice that will not work in theory.[27] Critics of the limited en banc complain that the device is expensive and time consuming without being effective to maintain a unity in the law of the circuit. The "luck of the draw" selection procedure is singled out as a self-limiting weakness that diminishes allegiance to the en banc holdings and makes the reconciliation of precedents even less likely.[28] Based on its institutional experience, the Department of Justice has concluded that the Ninth Circuit judges themselves have "a strong aversion to using this limited en banc procedure."[29] As is true in some other circuits, it is not uncommon for the judges

26. 9th Cir. R. 35-3 (formerly Rule 25). *See generally* Steve Bennett & Christine Pembroke, *"Mini" In Banc Proceedings: A Survey of Circuit Practices*, 34 Clev. St. L. Rev. 531 (1986).

27. This was the basis of his objection to retaining the current circuit boundary:

> Now calling that panel of eleven judges an en banc hearing is what modern-day law students call an oxymoron. It is a horrible word—an inherent contradiction. It isn't an en banc hearing at all. If you take the very words "en banc," French or English, it means all the judges involved. And, of course, the Ninth Circuit judges saw from the experience of the Fifth Circuit that they had to do something.
>
> * * *
>
> I don't think there is an en banc procedure in the Ninth Circuit at all. An en banc procedure would be every judge who, *under the law*, by virtue of active service, is entitled to vote.

Hearing on S. 948 Before the Subcomm. on Courts and Admin. Practice of the Senate Comm. on the Judiciary, 101st Cong., 2d Sess. 467 (1990) (testimony of Retired Chief Justice Warren E. Burger) (hereinafter Testimony of Retired Chief Justice Warren E. Burger) (emphasis added).

28. *Hearing on S. 948 Before the Subcomm. on Courts and Admin. Practice of the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. 275 (1990) (statement of Sen. Conrad Burns) (hereinafter Statement of Senator Conrad Burns); Senators Slade Gorton, Mark O. Hatfield, and Ted Stevens, Response to Tentative Recommendations of the Federal Courts Study Committee (Jan. 31, 1990), *reprinted in Hearing on S. 948 Before the Subcomm. on Courts and Admin. Practice of the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. 27 (1990) (hereinafter Response to Tentative Recommendations).

29. Letter from Bruce C. Navarro, Acting Assistant Attorney General, U.S. Department of Justice, to Sen. Howell Heflin, Chair, Subcomm. on Courts and Admin. Practice 5 (Mar. 6, 1990), *reprinted in Hearing on S. 948 Before the Subcomm. on Courts and Admin. Practice of the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. 571 (1990) (hereinafter Letter from Bruce C. Navarro).

not to vote on petitions for en banc rehearing. On average, only nine cases are reheard by the limited en banc each year and the "super-en banc" convening all twenty-eight judges, though still statutorily possible, has never once been held.[30] Part of this reluctance presumably is due to the unwieldiness, in terms of costs and delay, of any en banc rehearings. These rehearings are judicially labor intensive: considering motions for rehearing, convening and conferencing, building and maintaining the more complicated and more fragile full-court consensus. Besides the problems caused by the additional workload, there is the not yet completely fantastic expectation that the Supreme Court might eventually grant review in a case being considered for en banc rehearing, rendering the extra effort nugatory.

These seem to be telling criticisms. First, there is a general skepticism about the continued efficacy of the en banc mechanism in general, both in the Ninth Circuit and at large in the other Courts of Appeals.[31] Second, there are further compromises attendant on the limited en banc with fewer than all judges. But these have been traded off against the alternative of a hearing panel with twenty-eight members, which had proved wholly unworkable in the actual experience of the judges on the former Fifth Circuit.[32] After all, these trade-offs were made first by Congress in 1978 in the controlling statutory provision and second by the Ninth Circuit judges themselves who sought to exercise this statutory delegation. The Court of Appeals can hardly be faulted for choosing a legislated option and for avoiding the demonstrated problems of the status quo en banc, the over-sized bench that is the only other choice.[33] Concerns that a limited en banc is, at best, only a necessary evil are allayed somewhat by the testimonials of some of the actual judicial participants. For example then-Judge (now Chief Judge) Wallace publicly has observed:

30. Position paper of Senator Slade Gorton on the "Ninth Circuit Court of Appeals Reorganization Act of 1989" (S.948) 7, *reprinted in Hearing on S. 948 Before the Subcomm. on Courts and Admin. Practice of the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. 18 (1990) (hereinafter Position Paper of Senator Slade Gorton); Statement of Senator Conrad Burns, *supra* note 28, at 276.

31. *See* Thomas E. Baker, *A Compendium of Proposals to Reform the United States Courts of Appeals*, 37 U Fla. L. Rev. 225, 291–92 (1985). *See generally* Arthur D. Hellman, *Maintaining Consistency in the Law of the Large Circuit*, in Restructuring Justice, *supra* note 22, at 55, 73–78.

32. *See supra* Chapter Four.

33. *But see Hearing on S. 948 Before the Subcomm. on Courts and Admin. Practice of the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. 559 (1990) (statement of Mark C. Rutznick) (hereinafter Statement of Mark C. Rutznick).

> Having sat on seven of these limited *en banc* cases, my impressions are positive. The critical question is whether each judge of the court of appeals will conclude that he or she need not vote on every *en banc* case. From my own observations, I sense a different climate when the selected judges represent the court. *En bancs* under the traditional system often centered around attempts by the author of the panel opinion to justify his or her position, in the face of repeated attacks by the panel dissenter. Now, only by chance is a member of the panel on the *en banc* court, and, so far, I have not witnessed any great defensiveness.[34]

From the point of view of lawyers and litigants, one might suppose a 6–5 decision by a limited en banc court to be as trustworthy a precedential datum as some 5–4 or more fractured decision by the Supreme Court.[35] Finally, it is significant that the Report of the Federal Courts Study Committee recommended that the limited en banc mechanism actually be extended to other courts "to allow more efficient use of court of appeals resources ... [since] [t]he growth in the number of circuit judges is likely to continue, increasing the potential for in banc courts of unwieldy size."[36]

The Ninth Circuit judges also have worked to increase their judicial output and have adopted a number of intramural reforms, including a submission-without-oral argument track for more straightforward appeals and a prebriefing conference program designed to narrow issues, shorten briefs, and encourage settlements. The support role of staff has been made more efficient.[37] The Ninth Circuit likewise has been a leader in judicial utilization of advances in technology in such areas as electronic mail and computerized case management.[38]

34. Judge J. Clifford Wallace, Address at the Univ. of Cal. Law School at Berkeley (Dec. 2, 1982), *in* Lateef, *supra* note 24 at 9.

35. *Hearing on S. 948 Before the Subcomm. on Courts and Admin. Practice of the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. 692 (1990) (statement of Eric Redman) [hereinafter Statement of Eric Redman].

36. Report of the Federal Courts Study Committee 115 (Apr. 2, 1990) [hereinafter Study Committee Report].

37. *But see* Position Paper of Senator Slade Gorton, *supra* note 30, at 8 (critical of "bureaucratic procedures").

38. *See generally* Cathy Catterson, *The Changing Ninth Circuit*, 21 Ariz. St. L.J. 173 (1989); Stephen L. Wasby, *Technology and Communication in a Federal Court: The Ninth Circuit*, 28 Santa Clara L. Rev. 1 (1988).

In their 1989 Biennial Report to Congress under the 1978 statute, the judges of the Ninth Circuit themselves concluded that their experiment may be deemed a success.[39] The First Report in 1982 described the planned changes. The Second Report in 1984 noted progress and acknowledged problems. The Third Report in 1986 concluded that a large court could dispose of a huge caseload effectively. The Fourth Report in 1989 carefully documented the judges' conclusion that there is no reason to divide their court. Indeed, the judges expressed confidence that "the innovations of the past decade provide a solid foundation for the *continued growth* of the Ninth Circuit." [40] This Ninth Circuit judicial attitude stands in sharp contrast to the story of frustration described by the judges in the former Fifth Circuit, who took the opposite approach: to continue the traditional full en banc rehearing and to take a comparatively timid approach to administrative reorganization. As we saw in Chapter Four, that approach failed in the considered opinion of the Fifth Circuit judges themselves. Of course, whether the experiment in the Ninth Circuit is a success and, for that matter, whether the experiment is over, are questions ultimately left to Congress.

E. THE CONGRESSIONAL DEBATE ON S. 948

Introduced by Senators from the Pacific Northwest in 1989, S. 948 would have divided the Ninth Circuit into two new circuits: a new ninth circuit composed of Arizona, California, and Nevada, and a new twelfth circuit composed of Alaska, Hawaii, Idaho, Montana, Oregon, Washington, Guam, and the Northern Mariana Islands.[41]

39. Fourth Biennial Report to Congress, *supra* note 22, at 71.

40. *Id.* (emphasis added). The studied silence of the most recent annual report may be a significant indicator of judicial attitudes or it may be judges whistling past their Court's graveyard: the subject of division is not mentioned and one of the highlights is long-range planning for the Ninth Circuit. See 1992 Annual Report of the Ninth Circuit. These studies and reports are often highly persuasive with members of Congress. *See Hearing on S. 948 Before the Subcomm. on Courts and Admin. Practice of the Senate Judiciary Comm.*, 101st Cong., 2d Sess. 289 (1990) (statement of Sen. Dennis DeConcini) [hereinafter Statement of Senator DeConcini].

41. S. 948, 101st Cong., 1st Sess. (1989).

This is one significant difference between the 1989 measure and the later proposal in the 102d Congress. S. 1686 would have redrawn the circuit boundary along the same lines as the 1989 House of Representatives bill, H.R. 4900. *See supra* notes 1, 3. The later proposal would have created a new ninth circuit composed of Arizona, California, Hawaii, Nevada, Guam, and the

The debate over S. 948, in fact, amounted to a debate over whether the Ninth Circuit experiment with administering a large circuit has been successful and whether it should be allowed to continue.[42] Although campaigns to divide have been somewhat cyclical over the years, this was the most credible effort in the modern era, as eight Senators joined as co-sponsors.[43] In a significant new development, the Department of Justice endorsed the measure, after having taken an official "no position" during earlier consideration.[44] On March 6, 1990, a full-scale hearing was held before the Subcommittee on Courts and Administrative Practice of the Senate Judiciary Committee and, as disclosed in the footnoted sources to this Chapter, a full schedule of witnesses gave lengthy and detailed testimony, some in favor and some opposed to the measure. Five Senators from affected states went on record as being opposed to division.[45] Senator DeConcini, the only member of the Judiciary Committee to testify, opposed the bill. Other members of the Committee were never required to declare their position, however, because the measure was left to expire with the end of that Congress.

While the early reaction by then-Chief Judge Goodwin of the Ninth Circuit seems correct, that the proposal was "blatantly

Northern Mariana Islands, and a new twelfth circuit composed of Alaska, Idaho, Montana, Oregon, and Washington. S. 1686, 102d Cong., 1st Sess. (1991).

42. *Compare* Mark O. Hatfield, *Time for a New Federal Circuit in the West: Why the Ninth Circuit Should Be Divided*, Or. St. B. Bull., Jan. 1990, at 6, 7 *with* Alfred T. Goodwin, *Splitting the Ninth Circuit—No Answer to Caseload Growth*, Or. St. B. Bull., Jan. 1990, at 10, 11.

43. Original sponsors included Senators Burns (Mont.), Gorton (Wash.), Hatfield (Or.), Packwood (Or.), McClure (Idaho), Murkowski (Alaska), and Stevens (Alaska). *See generally* 135 Cong. Rec. S5027 (daily ed. May 9, 1989) (statements of Introduction). Senator Symms (Idaho) and Senator Baucus (Mont.) later were added as cosponsors. *See* 135 Cong. Rec. S5847 (daily ed. May 31, 1989); 135 Cong. Rec. S5198 (daily ed. May 11, 1989).

44. Letter from Bruce C. Navarro, *supra* note 29. Earlier the same year, then-Attorney General Thornburgh had testified before the Federal Courts Study Committee on the general problem:

> What the Committee has not done, nor could it have reasonably been expected to do in the short time allotted, is to evaluate measures to return logic to the chaos and historical accident of circuit boundaries. It makes little sense to have one circuit with six judges (the First Circuit) and another with 28 judges (the Ninth Circuit). We must ultimately come to grips with the historical anomalies of the regional circuits and develop ways to maintain consistency and predictability.

Statement of Attorney General Richard Thornburgh before the Federal Courts Study Committee 7 (Jan. 31, 1990).

45. *See generally Hearing on S. 948 Before the Subcomm. on Courts and Admin. Practice of the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. (1990) (statements of Senators Alan Cranston, Dennis DeConcini, Daniel K. Inouye and Pete Wilson).

political." [46] most all issues having to do with federal courts are political. Ultimately, federal jurisdiction is about politics. Furthermore, in public debates with Congress over the administration of the courts, "federal judges in the United States are by nature and necessity politicians." [47] Published news accounts suggest that this bill was part of "a long running political fight between the Northwest's pro-growth developers and the environmentalists." [48] The point is that proponents of division are serious and committed and the proposal to divide the Ninth Circuit deserves careful analysis.

One would suppose that those who would redraw circuit boundaries would bear the burden of persuasion, a burden which ultimately went unsatisfied in the consideration of S. 948. In their formal responses summarized here, the Ninth Circuit's judicial defenders who opposed the division seemed to have persuasively

46. Dan Trigoboff, *Northwest Favors Splitting "California" Circuit*, Legal Times, June 12, 1989, at 2, col. 1 (quoting former Chief Judge Alfred Goodwin). In a later interview, former Chief Judge Goodwin said he no longer felt it appropriate to comment on the motivation of the measure's sponsors. N.Y. Times, Mar. 9, 1990, at B6.

47. Deborah J. Barrow & Thomas G. Walker, A Court Divided—The Fifth Circuit Court of Appeals and the Politics of Judicial Reform at ix (1988).

48. Trigoboff, *supra* note 46, at 2, col. 1. The alleged political motive was to overcome the so-called California-judge dominance of the Ninth Circuit, which lately has delivered too many "decisions—frequently reversals of district judges in Washington and Oregon—favoring such plaintiffs as Save the Yaak (a river in Montana) and Friends of the Earth. Often the defendants are governmental agencies cooperating with private concerns attempting to develop or draw resources from public lands." *Id.* at 2, 15; *see, e.g.*, Portland Audubon Soc'y v. Hodel, 866 F.2d 302, 303 (9th Cir.1989). The popular press also figured that the Ninth Circuit's decisions to stay state executions of various murderers from Washington and Montana have contributed to a regional hostility among elected officials toward the Court of Appeals. Kim Murphy, *Critics Say 9th Circuit Is Too Big for the Job, Seek to Secede*, L.A. Times, June 27, 1989, at 3; *compare, e.g.* Campbell v. Kincheloe, 829 F.2d 1453, 1457 (9th Cir.1987), *cert. denied* 488 U.S. 948, 109 S.Ct. 380, 102 L.Ed.2d 369 (1988), *rehearing denied* 488 U.S. 1023, 109 S.Ct. 827, 102 L.Ed.2d 815 (1989) (affirming the denial of relief, but after a stay pending appeal) *with* Vasquez v. Harris, ___ U.S. ___, ___, 112 S.Ct. 1713, 1714, 118 L.Ed.2d 418 (1992) (ordering "no further stays of a [state] execution shall be entered by the federal courts except upon order of this Court."). *See generally Hearing on S. 948 Before the Subcomm. on Courts and Admin. Practice of the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. 627 (1990) (statement of Kenneth O. Eikenberry) [hereinafter Statement of Kenneth O. Eikenberry]. The debate has become personal on both sides. Senator Gorton responded: "As expected, this bill has been taken personally by the Ninth Circuit hierarchy—God Bless their souls—who has [sic] set out to defeat this bill and protect their power base." Position Paper of Senator Slade Gorton, *supra* note 30, at 5.

rebutted the allegations of the Senate sponsors.[49] At least this much can be said: Congress could not agree to divide the Ninth Circuit. In the context of the present study, it is important first to understand the pros and cons in the debate over the fate of the Ninth Circuit and, second, to appreciate the implications of these arguments for the future of all the Courts of Appeals.

1. SIZE

Senator Gorton, who led the effort to divide the Ninth Circuit, deems the size of the circuit to be a problem in and of itself, just as the size of the former Fifth Circuit once was considered an inherent problem.[50] He concludes:

> In a nutshell: the Ninth Circuit is simply too large. This huge circuit requires too much travel, and has too many judges handing down too many opinions that breed inconsistency and lack of uniformity, and require of judges and lawyers too much reading, in too little time, encouraging frivolous lawsuits and overburdening the court calendar, which costs the public too much money and delivers too slowly, too little justice.[51]

The Ninth Circuit covers nine states and two territories totalling approximately 14 million square miles. Distances and travel expenses for lawyers are greater as a result.[52] Travel expenses for the Ninth Circuit are the highest in the federal courts. But any circuit with Alaska will be the largest geographically and besides Alaska amounts to Anchorage for judicial purposes. A typical panel sitting away from chambers usually involves only two hours travel time

49. *See generally* Position Paper Prepared by the Circuit Executive, U.S. Courts for the Ninth Circuit (1989), *reprinted in Hearing on S. 948 Before the Subcomm. on Courts and Admin. Practice of the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. 340 (1990) [hereinafter Position Paper of the Circuit Executive]. The 1989 Ninth Circuit Judicial Conference recommended that Congress reject any proposal to divide the court, and an overwhelming number of the circuit's active judges opposed division. *Hearing Scheduled on Ninth Circuit Split*, Third Branch, Feb. 1990, at 3.

50. 135 Cong. Rec. S5026 (daily ed. May 9, 1989) (statement of Sen. Gorton); *see also* Statement of Senator Conrad Burns, *supra* note 28; Testimony of Senator Mark O. Hatfield, *supra* note 25.

51. Position Paper of Senator Slade Gorton, *supra* note 30, at 1; *see also* Letter from Bruce C. Navarro, *supra* note 29, at 3–5.

52. Lawyers and litigants from the large cities in the Pacific Northwest often are obliged to travel 600 to 1000 miles, at about that dollar cost, to San Francisco sittings. Statement of Mark C. Rutzick, *supra* note 33, at 8.

each way for a 20–30 hour stint on the bench.[53] Air travel time and expense are the only relevance of geography today.

The Ninth Circuit serves a population of almost 44 million people, fifteen million more than the next largest Sixth Circuit and about twenty million more than any of the other Courts of Appeals.[54] This is roughly one-sixth of the entire nation's population, the approximate proportion in the old Eighth Circuit when Congress divided it in 1929.[55] But nearly any conceivable circuit with the whole of California will be among the largest in population.

With twenty-eight judgeships, at the time of the congressional hearings, the Ninth Circuit had twelve more than the next largest Fifth Circuit and sixteen more than the average of all the other circuits. In 1990, the Ninth Circuit courts were staffed by 28 circuit judges, 11 senior circuit judges, 87 district judges, 40 senior district judges, 50 magistrates, and 62 active plus 8 recalled bankruptcy judges. By the estimate of Senato Gorton, as many as 10 additional circuit judgeships were already justified by the standard caseload formula, which would have meant a total of 38 appellate judges.[56] In the abstract, size might be viewed as an asset. The bench is enriched by diversity and there is a flexibility in the court of appeals and in the district court to shift judges around to meet episodic needs. The recent experience arguably has been to the benefit of the Pacific Northwest and particularly Washington. During 1988 alone, 42 assignments of judges were made from districts in the proposed new ninth circuit to districts in the proposed twelfth circuit.[57] The point is well-taken, however, that maintaining the Ninth Circuit to permit such transfers is not to be preferred over the forthright solution of appointing the number of judges that are needed in the over-burdened districts.[58]

53. *Hearing on S. 948 Before the Subcomm. on Courts and Admin. Practice of the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. 315 (1990) (statement of former Chief Judge Alfred T. Goodwin) [hereinafter Statement of former Chief Judge Alfred T. Goodwin].

54. Population estimates indicated an increase of 17% over the 1980 census. Letter from Bruce C. Navarro, *supra* note 29, at 4.

55. Statement of Mark C. Rutzick, *supra* note 33, at 558.

56. Position Paper of Senator Slade Gorton, *supra* note 30, at 2. *See supra* text accompanying note 1.

57. *Hearing on S. 948 Before the Subcomm. on Courts and Admin. Practice of the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. 503 (1990) (statement of Irwin H. Schwartz).

58. Letter from Edward F. Shea, Washington State Bar Ass'n., to Senator Strom Thurmond, Senate Judiciary Subcomm. on Courts and Admin. Practice 2 (April 25, 1990), *reprinted in Hearing on S. 948 Before the Subcomm. on Courts*

The Ninth Circuit's caseload of more than 6,000 appeals annually is 2,000 larger than the next largest Court of Appeals and accounts for nearly one-sixth of the total appeals in all the twelve regional Courts of Appeals.[59] Projections promise an even more Brobdignagian docket as the current rate of growth would double the 1980 docket well before the year 2000. In the year ending March 31, 1989, the Ninth Circuit terminated 6,659 appeals, 15% more than the previous year.[60] Despite three unfilled vacancies, the court's calendar was by one measure "current" during the time Congress was debating the division bill: once an appeal was fully briefed by counsel, it was scheduled for the next argument calendar.[61] Such statistics should not be the final word, however, for they are too often difficult to assess meaningfully. Increases in the quantity and the complexity of appeals have come to be a "given" in the federal system. We know, intuitively, however, that division would ameliorate somewhat the burden on district judges and attorneys to keep up with the law of the circuit, for the simple reason that there would be fewer slip opinions to read in each new Court of Appeals.[62]

One Senate sponsor noted that 14.5 months was the median time the Ninth Circuit took to process an appeal, at that time the longest in the nation.[63] Of that period, however, the Circuit

and Admin. Practice of the Senate Comm. on the Judiciary, 101st Cong., 2d Sess. 546 (1990).

The number of bankruptcy judges has allowed the Ninth Circuit to be an important leader in bankruptcy appellate panels. *Hearing on S. 948 Before the Subcomm. on Courts and Admin. Practice of the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. 457–62 (1990) (statement of Thomas E. Carlson, U.S. Bankruptcy Judge). *See generally* Judy B. Sloan & Gordon Bermant, *Bankruptcy Appellate Panels: The Ninth Circuit's Experience*, 21 Ariz. St. L.J. 181 (1989). The Federal Courts Study Committee held up this example to Congress and the other circuits. Study Committee Report, *supra* note 36, at 74–76.

59. Letter from Bruce C. Navarro, *supra* note 29, at 4.

60. Position Paper of the Circuit Executive, *supra* note 49, at 2. The latest available data seem to substantiate the inexorable quality of the Ninth Circuit's docket growth. In 1990, there were 6,725 filings (+ 5.6%), 5,544 terminations (–0.6%), and 8,402 appeals pending (+16.4%). 1990 Annual Report of the Ninth Circuit 61 (hereinafter 1990 Annual Report).

61. Position Paper of the Circuit Executive, *supra* note 49, at 3.

62. Position Paper of Senator Slade Gorton, *supra* note 30, at 3; Letter from Edward F. Shea, *supra* note 58, at 2; *Hearing on S. 948 Before the Subcomm. on Courts and Admin. Practice of the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. 708 (1990) (statement of Judge Eugene A. Wright).

63. 135 Cong. Rec. S5027 (daily ed. May 9, 1989) (statement of Sen. Burns); *see also* Position Paper of Senator Slade Gorton, *supra* note 30, at 3 (15.3 months as of June 30, 1989). "The median disposition time from notice of appeal to final disposition decreased from 15.9

Executive submits that only a fraction is spent in judges' chambers; from submission to disposition: 2.5 months for orally argued cases and 0.9 months for submitted cases. These figures are less than the national average.[64] The remainder of the 14.5 months is spent by court reporters and attorneys in record preparation and briefing. Still this is a troubling statistic: mathematically half the appeals take longer than two years. Some opponents of division maintain that practicing attorneys do not complain of undue delay.[65] And the point is repeated that simply dividing the circuit will absolutely not reduce the workload in any way.[66] Still appellate justice delayed is justice denied. Even the judges themselves have expressed a concern that the Ninth Circuit has been able to "improve[] its performance in every area except the interval between filing of last briefs to case hearing or submission."[67] Manipulating

months in 1989 to 15.6 months in 1990." 1990 Annual Report, *supra* note 60, at 63. In the years since, the disposition time has substantially remained the same. In the most recent Annual Report, the Court announced: "The Ninth Circuit has improved its performance in every area except the interval between filing of last briefs to hearing or submission." 1992 Annual Report of the Ninth Circuit at 71.

64. Position Paper of the Circuit Executive, *supra* note 49, at 9–10. An outside evaluator has concluded:

> It is true that in recent years the Ninth Circuit has ranked low among the twelve regional circuits in the number of appeals terminated on the merits per three judge panel. The court has also had one of the poorest records for speed of case processing, if one measures the median time from filing notice of appeal to disposition. However, the court comes off quite favorably in the size of its backlog as measured by the number of appeals pending per panel. Similarly, if one looks at the median time for processing cases after the judges have begun work, the Ninth Circuit looks quite good. Perhaps the judges on other courts of appeals handle more cases individually because those courts do not have as many judgeships as their caseloads would warrant.
>
> Even if one were to focus solely on the Ninth Circuit's modest showing in the statistical data on case participations per judge it would be impossible to identify a cause and effect relationship because so many other factors may also be at work (for example, the Ninth Circuit's practice of writing self-contained memoranda in cases not decided by published opinion).

Arthur D. Hellman, *Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court*, 56 U. Chi. L. Rev. 541, 600 n.255 (1989) (WESTLAW: UCHILR database, ci(56 +5 541)).

65. *See* Statement of Senator Deconcini, *supra* note 40, at 288. The former Chief Judge seems to explain away the delay by attributing it to "slow panels," not the size of the court. Statement of former Chief Judge Alfred T. Goodwin, *supra* note 53, at 6.

66. *Hearing on S. 948 Before the Subcomm. on Courts and Admin. Practice of the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. 442 (1990) (statement of James W. O'Brien, State Bar of California).

67. 1990 Annual Report, *supra* note 60, at 63 n.67: Another outside evaluator echoed these concerns:

> The Ninth Circuit is not, however, without its problems . . . We begin with the median time from filing a

appellate interval statistics is not a sufficient response on the court's part. At the same time, that the Ninth Circuit is relatively slow overall when compared to other circuits or that some of its judges may not be productive as other judges in other circuits, for whatever reasons, are not sufficient justifications to divide the circuit. Without more detailed study, the only confident prediction would be that the effect of division presumably would be to create two slow benches out of one, if all else were to remain the same.

Finally, the Ninth Circuit may be sized by cost.[68] Circuit expenses for 1988 totalled $25.3 million, that was about one-fifth of the total for all the courts of appeals. Division would add to this total. An initial expenditure confidently estimated at $1.4 million would be required to establish the new twelfth circuit. While there was some testimonial speculation—against logic and the whole experience of the federal government—that the two new circuits somehow would be more cost efficient than the existing circuit and would result in a net savings, the realistic fiscal expectation is that two circuits will be more costly to administer than one.[69]

The discussion of the size of the Ninth Circuit—its dimensions of geography, population, judgeships, docket and cost—suffers from a lack of context more often than not. Two comparisons illustrate the need for context. Consider that the Ninth Circuit is today larger than the entire federal appellate judiciary of 1939, with nearly twice the total national caseload of 1939. Consider also that there are approximately the same number of federal judges, trial and appellate, in the entire Ninth Circuit as there are state judges, trial and appellate, in the single state of Arizona. Workload and efficiency, not size, are the problems of the Ninth Circuit. Even if

notice of appeal to final disposition in cases adjudicated on the merits. Since 1984 the figure has increased every year, and in 1988, the last year for which published statistics are available, the figure was 14.5 months, ranking the Ninth eleventh among the twelve regional circuits. Less than a month separated the Ninth from the cellar, and the median for the Ninth was more than twice as long as that for each of the two fastest circuits. To lawyers and litigants fourteen and one-half months elapsed time may seem long enough, but it bears emphasis that this is only a median figure: half the cases took longer.

A. Leo Levin, *Lessons for Smaller Circuits, Caution for Larger Ones*, in Restructuring Justice, *supra* note 22, at 331, 334. *See also* Steven Flanders, *Celebrating Size*, 75 Judicature 276, 277 (1992) (WESTLAW: JUDICATURE database, ci(75 +5 276)).

68. Position Paper of Senator Slade Gorton, *supra* note 30, at 4, 9.

69. Testimony of Retired Chief Justice Warren E. Burger, *supra* note 27, at 469. *But see Hearing on S. 948 Before the Subcomm. on Courts and Admin. Practice of the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. 442 (1990) (statement of Chief Judge Bar-

one were disposed in favor of circuit-splitting, it seems inescapable that any bill that keeps Arizona and California together, as S. 948 would have done, cannot promise anything but a few speculative and marginal gains.[70]

2. CONSISTENCY

Senator Gorton and Senator Hatfield expressed a serious concern for decreased consistency and the latter gave as one main reason for division "the increased likelihood of intracircuit conflicts."[71] Statistically, opportunities for conflicting holdings are numerous: on a 28 judge court there are 3,276 combinations of panels that may decide an issue, without counting senior judges, district judges and judges sitting by designation. In 1989, there were 9310 individual judge participations in panels.[72]

Defenders from the Ninth Circuit respond:

> Preservation of a single circuit with a single Court of Appeals has resulted in the maintenance of a consistent and predictable body of federal law throughout the western states and the Pacific maritime area, facilitating trade and commerce and contributing to stability and orderly progress. If the admiralty and commercial law of the Pacific ports were to be divided between two separate and independent Courts of Appeals, conflicts would inevitably develop and predictability of the law would be diminished in this vitally important region.[73]

Consistent with the newspaper explanation of the politics of this recent proposal, the sponsors impliedly would hope for conflicts between the two proposed circuits. Only then would the federal law in the Pacific Northwest differ substantially from the federal law in Arizona, California and Nevada.[74] They were after a change in federal law, not consistency. Senator Hatfield made much to do

bara J. Rothstein) ("[T]he cost is certain to be exorbitant.").

70. S. 1686 likewise would have kept these two states together. *See* S. 1686, 102d Cong., 1st Sess. (1991). *See supra* note 1.

71. 135 Cong. Rec. S5026 (daily ed. May 9, 1990) (statement of Senator Gorton); *Id.* at S5027 (statement of Sen. Hatfield); *see also* Statement of Senator Conrad Burns, *supra* note 28, at 275; Response to Tentative Recommendations, *supra* note 28, at 6–9.

72. Position Paper of Senator Slade Gorton, *supra* note 30, at 5.

73. Position Paper of the Circuit Executive, *supra* note 49, at 5–6; *see also* Statement of Chief Judge Alfred T. Goodwin, *supra* note 53, at 314–16. The Golden Gate U. L. Rev. publishes an annual survey of Ninth Circuit case law.

74. *See* 135 Cong. Rec. S5026–28 (daily ed. May 9, 1989); *see also* Position Paper of Senator Slade Gorton, *supra* note 30, at 5–6

about a survey of judges and attorneys conducted by the Ninth Circuit in which a majority of judges and lawyers disagreed with the statement that "[t]here is consistency between panels considering the same issue." [75] Whatever else might be said about the polling validity of this phrasing, a contrary impression is suggested by the responses to other questions in the very same survey. A majority of both judges and lawyers agreed with statements that the "Ninth Circuit decisions generally adhere to law announced in earlier opinions" and that the "quality of published opinions is good." [76] As one practicing lawyer testified at the Subcommittee hearing: "splitting the Ninth Circuit is not something that the lawyers who practice before the Ninth Circuit have requested." [77]

Arguably, the Ninth Circuit has done more than other circuits to deal intramurally with intracircuit conflicts. All fully briefed cases are reviewed by central staff attorneys who code the issues on appeal into a computer.[78] Cases that raise the same issue and become ready for calendaring around the same time are assigned to the same three-judge panel. This computer program also informs later panels when an earlier panel has heard but not yet decided the same issue; the first panel that gets the issue then decides it authoritatively.[79] Even judges who are not on the hearing panel participate to write memoranda that not infrequently result in modification and clarification of a draft panel opinion. The limited en banc procedure already described decides conflicts that arise despite these procedures. Arguably, one indication of the effectiveness of this array of procedures is the relatively small number of en

75. 135 Cong. Rec. S5027 (daily ed. May 9, 1989) (statement of Sen. Hatfield). *See generally* Ninth Circuit Judicial Council. Survey of District Judges and Attorneys Regarding the U.S. Court of Appeals for the Ninth Circuit 19 (July 1987).

76. Position Paper of the Circuit Executive, *supra* note 49, at 8.

77. Statement of Eric Redman, *supra* note 35, at 691. At a Judicial Conference of the Courts of the Ninth Circuit, in a secret ballot among all judges and lawyer representatives attending, 90% voted to oppose S. 948. Lawyers voted 69 to 10 to oppose the measure. S. 948 was opposed by Bar Associations in Arizona, California, Hawaii, Idaho, Montana, Nevada, and the Northern Mariana Islands. S. 948 was endorsed by the Washington Bar Association and the Conference of Western Attorneys General.

78. Arthur D. Hellman, *Central Staff in Appellate Courts: The Experience of the Ninth Circuit*, 68 Cal. L. Rev. 937, 945 (1980). A more recent innovation with the Staff Attorneys Office illustrates the effort to monitor and manage the law of the circuit. The Office reviews all appeals in the volatile area of sentencing guidelines and notifies the panel of any relevant published or unpublished opinions. Eventually, the system will be computerized.

79. United States Court of Appeals for the Ninth Circuit General Orders 4.1 (1987).

banc rehearings that are granted each year. The most comprehensive empirical study of precedent in the Ninth Circuit concluded: "On the problem of inconsistency in the law, . . . the Ninth Circuit has generally succeeded in avoiding conflicts between panel decisions."[80]

This is one of those rare situations when the assertions made by both sides of a public policy debate have been subjected to the careful and objective study of an independent scholar. Professor Arthur D. Hellman has conducted the only systematic study of the operation of precedent in the Ninth Circuit. Hellman analyzed one-fifth of the Ninth Circuit's published panel opinions in each of two calendar years (1983 and 1986) and then tracked those same issues through later decisions. He also analyzed all published panel decisions in which there was a dissent filed during the year 1986.

Professor Hellman contemplated the concept of indeterminacy in the law of a circuit in general and attempted to take the measure of unpredictability in the law of the Ninth Circuit in particular. The Professor summarized his conclusions, based on a multiple-year study of thousands of opinions of the Ninth Circuit, as follows:

> 1. The Ninth Circuit has generally succeeded in avoiding conflicts between panel decisions. Although there can be disagreement over what constitutes an intracircuit conflict, the points of dispute would be irrelevant in the vast majority of

80. Arthur D. Hellman, *Breaking the Banc: the Common-Law Process in the Large Appellate Court*, 23 Ariz. St. L.J. 915, 921 (1991) (WESTLAW: AZSLJ database, cit(23 -5 915)). His summary went on to explain:

> The most significant new finding is that multiple-precedent issues can be of several different kinds, with different implications for structural reform depending on the circumstances that give rise to them. Also noteworthy is evidence suggesting that what makes appellate outcomes unpredictable, even in a large court, is not an array of decisions pointing in different directions, but, more often than not, the absence of a precedent that is closely on point.

Id. An earlier study, by the same author, concluded: "On the basis of an admittedly limited sample, it does not appear that intracircuit inconsistency is as much of a problem as many lawyers think." Hellman, *supra* note 64, at 544. *See also* Restructuring Justice, *supra* note 22, at 27, 85 (concluding actual intra-circuit conflicts are relatively rare, but that appeal outcomes do seem to vary on often-litigated legal issues that are governed by fact-specific rules). If there is a perception of inconsistency it may be best explained by the disarray in a few prominent areas of law, which are not characteristic of the general law of the Ninth Circuit. Hellman, *supra* note 64, at 595; *see also Hearing on S. 948 Before Subcomm. on Courts and Admin. Practice of the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. 661-62 (1990) (statement of Arthur D. Hellman).

cases. The study found very few instances in which two panels reached contrary results that could not easily be reconciled on the basis of obvious differences in the factual or legal setting. Moreover, when decisions were not unanimous, dissenters rarely argued that circuit precedent compelled a result contrary to the majority's.

2. Contrary to what some observers have hypothesized, unpredictability of appellate outcomes is not primarily a consequence of the proliferation of precedents. The study found that what makes for an unpredictable outcome generally is not an oversupply of circuit decisions, but the absence of a circuit precedent that is closely on point.

3. From the perspective of lawyers and trial judges, the most serious problem associated with the large appellate court is the existence of multiple precedents governing the same issue. A "multiple-precedent issue" is created when the number of precedents is large; the results are varied; the decisions are handed down in a relatively short span of time; and the opinions discuss the operative facts in some detail. The study estimated that about one-sixth of the Ninth Circuit's published decisions may involve a multiple-precedent issue.

Typically, multiple-precedent issues involve fact-specific legal rules (e.g., defining the moment when a defendant has been arrested), but some arise when the law is in the process of evolution because the courts are still struggling to articulate the governing standard (e.g., the union's duty of fair representation). The question remains whether these circumstances make the law unpredictable for lawyers and trial judges irrespective of the number of binding relevant precedents.[81]

The chief gain to be expected from a division, in terms of consistency, therefore, might be that judges, lawyers and litigants could cope better with a smaller, more manageable, and more predictable universe of case law. Perhaps the most troubling aspect of the debate over consistency is the cynical charge of "discretionary justice." The charge is that there is so much case law in the Ninth Circuit that it has become increasingly easy for

81. Arthur D. Hellman, *Maintaining Coherence in the Law of the Large Circuit: The Empirical Record*, 1993 National Workshop for Circuit Judges of the U.S. Courts of Appeals in Washington, DC (Feb. 7-10, 1993). This summary was based on previously published works cited above. *Id.* (citing Restructuring Justice, *supra* note 22, at 55-90; Hellman, *supra* note 34; Hellman, *supra* note 80).

panels to act like legal realist tribunals, picking out the precedents that lead to the desired result. In this kind of judicial environment, philosophy becomes controlling and such subjectivity generates uncertainty which in turn attracts more appeals. The best answer to this argument may be found in the first part of the statement of an Oregon district judge who raised it at the Subcommittee hearing: "To an extent this is true throughout the country, but it is even more pronounced in the Ninth Circuit."[82] Dividing the Ninth Circuit simply will not solve this problem, to the extent it exists in that Court of Appeals.

3. CALIFORNIA ATTITUDES

Senator Gorton complained that the Northwest states "are simply dominated by California judges and California attitudes."[83] He expressed concerns for geographical representation and for a regional familiarity he says California judges do not have toward his own Pacific Northwest. He hoped for appellate judges who better understand the unique issues of the Northwest.[84] Senator Burns said that "it is [not] fair or in the best interest of the judicial process" for citizens of states such as Montana to suffer because California, like the population centers on both coasts, "continues to experience an economic and population boom."[85] He compared the arrangement of six circuits on the east coast with only the one circuit on the west coast to call for "judicial fairness," invoking a kind of sovereign representation theory.[86] Senator Hatfield, another co-sponsor, seemed to distance himself from the California xenophobia somewhat by arguing positively for the desirability of a northwest circuit comprised of a small set of contiguous States with common interests, presumably, interests which those States do not share with California.[87]

82. *Hearing on S. 948 Before the Subcomm. on Courts and Admin. Practice of the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. 448 (1990) (statement of Chief Judge Owen M. Panner) [hereinafter Statement of Chief Judge Owen M. Panner]; *see, e.g.*, Greenhow v. Secretary of Health & Human Servs., 863 F.2d 633, 635–36 (9th Cir.1988). *See also* Hellman, *supra* note 80, at 986–87.

83. 135 Cong. Rec. S5026 (daily ed. May 9, 1989) (statement of Sen. Gorton).

84. Position Paper of Senator Slade Gorton, *supra* note 30, at 6–7.

85. 135 Cong. Rec. S5028 (daily ed. May 9, 1989) (statement of Sen. Burns).

86. Statement of Senator Conrad Burns, *supra* note 28, at 3–4.

87. Testimony of Senator Mark O. Hatfield, *supra* note 25, at 253. Senator Hatfield explained:

> Opponents of the Bill respond to such an argument by branding it as an illegitimate attempt to "gerrymander" the make-up of the Court, or imper-

While "California attitudes" may be a quite deserved epithet in the general life of the nation, the sponsors' underlying premise that California judges are idiosyncratic and monolithic, a distinct subset among Ninth Circuit judges, simply is beyond the threshold of absurdity. One need not be a Turnerian historian to observe first, how the coastal zeitgeist seems to move from each coast inward and second, how the western influence on the life of the nation and the nation's law appears to be in the ascendancy. The sentiment hostile to California judges appears to be more pronounced regarding environmental law, and it seems to be an unfounded stereotype.[88] Anyone who studied the individual judicial philosophies on the Ninth Circuit or understood the way hearing panels are constituted would not be persuaded.[89] Panels are drawn by computer from a pool that includes all the judges on the Ninth Circuit. The program is designed so that each judge sits with every other judge

missibly balkanize federal law. The former is not the motivation, and the latter will not be the result. Circuit court boundaries were originally created to reflect this regional identity. Circuit size was determined, in part, by identification of a small set of contiguous states that shared a common background. The goal is not to avoid differences of opinion on various legal issues, nor to splinter the uniform development of federal caselaw. Rather, it is to foster reasoned decisions (which take into account the social, economic and historical circumstances from which legal issues arise) by judges who share similar backgrounds and experiences.

Id.

88. *See* Editorial, *Don't Split the Ninth Circuit*, S.F. Chron., Mar. 12, 1990, at A16. The Sierra Club Legal Defense Fund, admittedly an institution without claim of objectivity, surveyed the published opinions of the Ninth Circuit since 1987 on environmental issues and found them to be "about evenly split between affirming and reversing judgments." *Hearing on S. 948 Before the Subcomm. on Courts and Admin. Practice of the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. 514 (1990) (statement of Michael Traynor, Chair, Sierra Club Legal Defense Fund). The study "revealled] neither domination of a particular region by judges appointed from states outside the [northwest] region nor an overall tendency in the existing Ninth Circuit to side with environmental interests." *Id.* It seems noteworthy, however, that environmental groups are so visible in the opposition to the proposal to divide the Ninth Circuit. Something must be at stake for them. Republican Senator Wilson, then a candidate for Governor in California, where environmental issues are important, raised an environmental hue and cry. *See* W. John Moore, *Debating an Appeals Court Boundaries*, Nat'l J., Mar. 10, 1990, at 582.

89. *See* Position Paper of Circuit Executive, *supra* note 49, at 8–9; *see also* Hellman, *supra* note 64, at 547 n.20. The price for the arrangement of panels is not small, in time and energy of judges. One thoughtful critic has suggested this is not worth it, that "the net is a pattern of having judges sit together far too few times in the course of a cycle which requires the better part of two years to complete and yet travelling over a far-flung circuit." *Hearing on S. 948 Before the Subcomm. on Courts and Admin. Practice of the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. 684 (1990) (statement of former Sen. Roman L. Hruska).

in the pool an equal number of times, and sits at each place for holding court an equal number of times. It is quite rare that all three judges from a panel are from the same place. Except for the Chief Judge, the en banc court is randomized in each case. To correlate decisions with the geographic origins of the judges would appear impossible even for the most avid number-crunching social scientist. At least, no one has tried it thus far.

To the extent that a "regional milieu" may be relevant in a case, the district judge can be expected to have incorporated it into the litigation at the trial level.[90] At the appellate level, a judge's hometown, as distinct from judicial philosophy, cannot reasonably be expected to play a large role. Local bias is offensive to the very notion of a federal court. Balkanization of federal law is contrary to federalism. The proper function of the regional Courts of Appeals is to federalize the law.[91] Simply stated, it is difficult to believe the complaint of a California judge domination.[92] But if one did believe it, S. 948 would actually increase this concern, because the supposed dominance of California judges in the new ninth circuit would be strengthened drastically by the division.

90. Statement of Eric Redman, *supra* note 35, at 694. There is also some question whether the division of the Ninth Circuit actually would generate and maintain appellate "victories" for the Northwest. *Id.*

91. Judge Wisdom explains why circuit splitting threatens this function:

> If this process were carried to its logical conclusion, the states of Texas, California and New York would each constitute a circuit. A United States Court of Appeals does not just settle disputes between litigants. It has a federalizing function as well as a purely appellate function of reviewing errors. The federal courts' role is to bring local policy in line with the Constitution and national policy. Within the framework of "cases and controversies" and subject to all the appropriate judicial disciplines, federal courts adjust the body politic to stresses and strains produced by conflicts (1) between the nation and the states and (2) between the government (national, state and local) and private citizens asserting federally-created or federally-protected rights. The federalizing role of circuit courts should not be diluted by the creation of a circuit court so narrowly based that it will be difficult for such a court to overcome the influence of local prides and prejudices.

John Minor Wisdom, *Requiem for a Great Court*, 26 Loy. L. Rev. 787, 788 (1980). Arguments to the contrary are simply wrong. *See* Statement of Mark C. Rutzick, *supra* note 33, at 565 ("The argument for extra-regional appellate judges is at bottom historically ignorant and incorrect.").

92. Letter from Chief Judge Goodwin to Senator Heflin 2 (April 2, 1990), *reprinted in Hearing on S. 948 Before the Subcomm. on Courts and Admin. Practice of the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. 435 (1990) ("If there is a California domination I am afraid that Diogenes and his lantern will have to find it."). Two of the most visible "California judges," Chief Judges Browning and Goodwin, were appointed from Montana and Oregon, respectively.

The comparison to the east coast, while instructive, should not be pushed too far. Granted, the east coast, with multiple circuits, has a commercial viability that does not seem to be weakened by the existence of multiple federal appellate venues. But this arrangement resulted from history and the accident of accumulated ad hoc redrawing of circuit boundaries, accelerated in the east by earlier population growth and economic development. It seems more prudent to recognize that history has provided the west coast with an opportunity to be a region in a sense that the east coast is not. One implication, perhaps, of this recognition is that Congress should be reluctant to unalterably sub-divide the federal judicial region on the west coast without serious and careful reflection. Finally, if the political decision is that the federal law should vary regionally, then Congress should legislate those particular variations; variations should not be created indirectly by changing the structure of the federal court system.

4. MASTERY OF STATE LAW

Upon introduction of the S. 948, Senator Packwood urged that dividing the Ninth Circuit "will allow judges and their clerks to develop an even greater mastery of the State laws which their circuit encompasses than the high level of expertise which they currently exhibit."[93] First, this argument seems to include its own refutation: the current "high level of expertise" does not appear inadequate. Second, the actual experience borne out by the statistics further diminishes this argument. The Ninth Circuit currently decides about 225 appeals in diversity cases each year and in three-fourths of those the district judge, who in the typical case was a long-time practitioner in that State's law, is affirmed.[94] The remaining 5,800-plus cases raise issues of federal law.

5. REDUCING THE REVERSAL RATE

Senator Packwood suggested that dividing the Ninth Circuit might reduce the reversal rate by the Supreme Court.[95] Admitted-

93. 135 Cong. Rec. S5027 (daily ed May 9, 1989) (statement of Sen. Packwood); *see also* Statement of Kenneth O. Eikenberry, *supra* note 48, at 632.

94. Position Paper of Circuit Executive, *supra* note 49, at 10. *But cf.* In re McLinn, 739 F.2d 1395, 1397 (9th Cir. 1984) (en banc) (questions of state law are reviewable under same independent de novo standard as are questions of federal law); *accord* Salve Regina College v. Russell, 499 U.S. 225, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991), *on remand* 938 F.2d 315 (1st Cir.1991); *see also supra* note 48.

95. 135 Cong. Rec. S5027 (daily ed May 9, 1989) (statement of Sen. Packwood); *see also* Statement of Chief

ly, the statistics fluctuate from term to term, but as recently as October Term 1986 the Ninth Circuit ranked tenth among the twelve regional circuits in reversal rate with a 47% reversal rate compared to a national average of 62%.[96] In any event this argument seems something of a non sequitur.[97] It should be noted that dividing the Fifth Circuit did not seem appreciably to affect the number of cases claiming Supreme Court review from the region of the new Fifth and Eleventh Circuits. There is a lay person's crude perception that the Ninth Circuit was a conservative court in the 1970s, which the Carter appointments made more liberal for a time and which the Reagan–Bush appointments later made more conservative. The common newspaper-style explanation is that the reversal rate was high for a period when the Ninth Circuit was out of synchrony with the Supreme Court. What this argument may prove ultimately may be very little: any characterization of a bench as large as the Ninth Circuit must be a gross generality and will prove highly evanescent. After all, each new Administration brings its own approach to Article III patronage.

F. THE ARGUMENT FOR A MORATORIUM ON DIVIDING THE NINTH CIRCUIT

Senator Hatfield, one of the sponsors of the bill, explained: "one of the major goals of the sponsors of S. 948 has been accomplished.... For too long, the problems facing the Ninth Circuit, and the entire federal circuit system for that matter, have not received the thoughtful attention of Congress and public discussion they deserve."[98] The effort of the present study is to join the debate and to bring some more attention to it. The argument offered here, however, is that Congress should not declare cloture in the filibuster over the fate of the Ninth Circuit, at least not prematurely.

The most recent arguments for division individually and cumulatively appear in part to be craftsmanlike efforts to achieve an

Judge Owen M. Panner, *supra* note 81, at 449.

96. Position Paper of Circuit Executive, *supra* note 49, at 10.

97. *See* Harold J. Spaeth, *Supreme Court Disposition of Federal Circuit Court Decisions*, 68 Judicature 245, 249–50 (1985); Gerald F. Uelmen, *The Influence of the Solicitor General upon Supreme Court Disposition of Federal Circuit Court Decisions: A Closer Look at the Ninth Circuit Record*, 69 Judicature 361, 366 (1986).

98. Statement of Senator Hatfield, *supra* note 25, at 250.

underlying political goal to shift the direction of law in the Pacific Northwest, notwithstanding Congressional protests to the contrary. This may be attributable, perhaps, to some unarticulated realization that the traditional means of influence by the two political branches—appointment and confirmation—have become less effective, either because of the then long-standing party division between the President and the Congress or because the Ninth Circuit bench has grown too large to pack easily or quickly. Accidents of retirement happen too infrequently for large-scale substitutions and senior circuit judges continue to hear appeals, thus further diluting the impact of new appointees. Of course, there is nothing inherently wrong with that political goal. Indeed, the desire on the part of those in the Pacific Northwest to have a circuit of their own, independent of the California presence, goes back to the 1940s and likely will continue. The judges who resist the division are practicing "politics" as well.[99] Their apparent desires for size and the status quo likewise fuel this debate. The judges opposing the division may just be more "conservative" of institutions (not necessarily ideologically); some may relish judicial administration on the grand scale; being a member of a court which is larger than the first Senate may be attractive to some judges; even sessions in Hawaii can be seen as a perquisite to be protected.[100] There is a certain political irony in the overall Senatorial impatience exhibited by S. 984, however. The Ninth Circuit had a nominal Republican majority when the 1989 bill was introduced, that grew larger by the end of the last Administration.[101] Yet, the measure's chief advocates were Republican. Once before when this ineluctable constitutional influence of nomination and confirmation was overlooked during the ill-fated court-packing plan of 1937,[102] Senator James Byrnes of South Carolina observed about such political impatience. "Never run for a train after you have caught it."

99. *See generally* Judges and Legislators: Toward Institutional Comity (Robert A. Katzmann ed., 1988); *see supra* note 49.

100. Judge Kozinski was quoted, perhaps tongue-in-cheek, as saying that he did not want to give up circuit meetings in Hawaii. Trigaboff, *supra* note 46, at 15. Stranger considerations have controlled redrawing decisions. *See* Thomas E. Baker, *Precedent Times Three: Stare Decisis in the Divided Fifth Circuit*, 35 Sw. L.J. 687, 726 n.288 (1981) (Canal Zone alignment in the Fifth Circuit depended on scheduled airline connections).

101. *See* Hellman, *supra* note 64, at 547 n.19. *See generally* Goldman, *Reagan's Judicial Legacy: Completing the Puzzle and Summing Up*, 72 Judicature 318 (1989) (WESTLAW: JUDICATURE database, cit(72 +5 318)).

102. *See* William H. Rehnquist, The Supreme Court: How It Was, How It Is 215–34 (1987).

Ultimately and properly considered as a political issue, the national interest is the larger context within which Congress must decide. The defenders of the Ninth Circuit boundary assert a powerful defense against division, sounding the importance of a national presence in the Pacific Rim. Then–Chief Judge Goodwin made the argument on that level:

> Commercial law affecting worldwide maritime trade, aircraft and automobile manufacturing plants, agriculture and the entertainment industry is applied uniformly throughout a vast area of land and water from which emerges about one-fifth of the federal litigation in the United States.[103]

Congress necessarily ought to pause to consider that "[v]irtually all active judges of the court of appeals, and the majority of all judges and lawyers in the circuit, are against the proposed division." [104]

Beyond the particulars of the Ninth Circuit, there is an inevitable downside to the technique of splitting circuits generally. It irreversibly lessens the "federalizing function of courts of appeals." [105] And everyone is bound to agree that subdividing Courts of Appeals must logically be understood to be a limited strategy.[106] The best argument against dividing existing circuits is that it is a reform that simply does not work to reduce workload. As Chapter Four concluded, the division of the Fifth Circuit did not perform any lasting miracle. Furthermore, the larger Courts of Appeals, with the larger problems—the District of Columbia, Second and Ninth Circuits—practically resist any feasible division.[107]

As an academic matter, dividing circuits might be more feasible and would be more effective if the entire geographical scheme could

103. Statement of former Chief Judge Alfred T. Goodwin, *supra* note 53, at 312; *see also Hearing on S. 948 Before the Subcomm. on Courts and Admin. Practice of the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. 282 (1990) (statement of Sen. Alan Cranston). *See generally* Lateef, *supra* note 24, at 11.

104. 1990 Annual Report, *supra* note 60, at v.

105. Charles Alan Wright, *The Overloaded Fifth Circuit: A Crisis in Judicial Administration*, 42 Tex. L. Rev. 949, 974 (1964); Wisdom, *supra* note 91, at 788.

106. 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, 799 (1978) ("[A]re we to continue the splitting process until it becomes mincing, with a United States Court of Appeals for the Houston Metropolitan Area?").

107. *See* 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 19, at 1192–1237.

be redrawn, the approach rejected by the Hruska Commission in 1973 as much too unsettling.[108] This would permit an initial levelling of caseload and judgeships. For example, Congress might create twenty circuits of nine judges organized with roughly equal caseload under a completely redrawn system of boundary lines.[109] This symmetry would be gained, however, at a high cost in disruption. Much federalizing influence of the Courts of Appeals would be lost with so many smaller circuits. The balkanized precedent of the law of the circuits already present in the current arrangement would be worsened likely without any compensating improvements. More circuits multiply intercircuit conflicts, and the resulting balkanized hegemony of national law arguably is one of the principal banes of the federal court system.[110] If circuit splitting is a bad idea, circuit mincing is even worse.

Dividing the Ninth Circuit or using it as an excuse to create a system of mini-circuits simply will not address the real problem. The cure is worse than the disease, for circuit splitting does not solve the problems of one circuit and merely postpones solution of the problems of two to some future day.[111] Again, then-Chief Judge Goodwin summed up the problem:

> Splitting the Ninth Circuit, or other circuits, would not address the real problem facing the Federal Courts of Appeals. The problem is not structure, but workload. Creating more regional circuits would not diminish the work, but merely divide it. The number of cases that must be heard by three-judge panels nationwide would remain the same and continue to grow no matter how many new circuits are formed.[112]

Among the subjects within the explicit charge of the Federal Courts Study Committee was Congress' request for an evaluation of the structure and administration of the Courts of Appeals. Perhaps, the timing of the introduction of S. 948 can be understood as having been some not-so-subtle attempt to influence the Study Committee's deliberation with the hope of some support for the proposal to divide the Ninth Circuit. The sponsors of S. 948 did in

108. *See supra* text accompanying notes 15–16.

109. *See* Alvin B. Rubin, *Views from the Lower Court*, 23 UCLA L. Rev. 448, 459 (1976).

110. Thomas E. Baker & Douglas D. McFarland, *The Need for a New National Court*, 100 Harv. L. Rev. 1400, 1404–09 (1987) (WESTLAW: HVLR database, ci(100 +5 1400)).

111. *See* Thomas E. Baker, *A Postscript on Precedent in the Divided Fifth Circuit*, 36 Sw. L.J. 725, 742 (1982) (WESTLAW: SWLJ database, ci(36 +5 725)).

112. Goodwin, *supra* note 42, at 11.

fact respond to the Committee's Tentative Recommendations [113] and directly requested that the Committee's Final Report include a specific endorsement for the proposal.[114] The Study Committee resisted these efforts for the most part, and in the Final Report took "no position" on the proposal, deciding instead to defer to the political process.[115]

The Federal Courts Study Committee instead entreated Congress to reconceptualize the debate over the Courts of Appeals. The direction of analysis in the debate over S. 948, that "big is bad"—that we must add circuit judges to keep up with caseload and then divide Courts of Appeals to keep them recognizable as courts—is only one possible direction of thought. Admittedly, it has been the congressional approach now for some one hundred years. But, the Study Committee challenged Congress to stop thinking linearly, or at least alternatively to begin to think in the other direction:

> The current debate between Ninth Circuit and the other circuits revolves around two very different conceptions of an appellate court. The Ninth Circuit works as a rotating system of three-judge panels (over 3,000 combinations are possible) covering an enormous geographic area, bonded by a very capable administration and serviced by the nation's only small, or limited, in banc of ten randomly selected judges and the chief judge. Other courts prefer the traditional concept of a smaller, more intimate, unitary tribunal, even as their growing caseload makes this ideal more and more difficult to sustain. Perhaps the Ninth Circuit represents a workable alternative to the traditional model. If not, the entire present appellate system needs restructuring before other circuits become the "jumbo" courts toward which they are gradually evolving.[116]

113. Senators Gorton, Hatfield, and Stevens repeatedly agreed with the direction of analysis of the Committee. *See generally* Response to Tentative Recommendations, *supra* note 28.

114. Letter from Senators Slade Gorton and Mark O. Hatfield to Judge Joseph F. Weiss, Chair of the Federal Courts Study Committee (Sept. 5, 1989).

115. Study Committee Report, *supra* note 36, at 123 ("We take no position on whether the Ninth Circuit should be split. That question involves issues peculiar to that region that we are not qualified to address, given our deadline and resources.").

The Ninth Circuit otherwise was featured prominently in the Committee's report. Its uniqueness and size were emphasized. *Id.* at 114. As previously mentioned, the limited en banc procedure was endorsed. *Id.* at 115. The court's administrative innovations were found praiseworthy. *Id.* at 115–16. *See also infra* Chapter Nine.

116. *Id.* at 122–23.

(7) [redacted]OUSE COMMITTEE REPO[redacted]

Date Referred to Committee: January 30, 1996 **FURTHER REFERRALS:**

Date of Committee Action: 2.5.96

The JUDICIARY Committee considered: HJR 52

HOUSE JOINT RESOLUTION NO. 52 **CIRCUIT COURT OF APPEALS FOR 12TH CIRCUIT**

Relating to the creation of a new United States Court of Appeals for the Twelfth Circuit.

recommends it be replaced with the following committee substitute HJR 52

[✓] the same title
[ ] a new title

[ ] additional referral to _____ Committee
[ ] attached amendment(s)

ADOPTS: _____ Letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept)

[ ] fiscal note(s) _____

_____

[✓] zero fiscal note(s) _____

APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal note(s) _____

_____

[ ] zero fiscal note(s) _____

SIGNING WITH RECOMMENDATIONS	DP	DNP	NR	AM
	✓			
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CHAIR'S SIGNATURE Brian A Porter _____

CS FOR HOUSE JOINT RESOLUTION NO. 52(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINETEENTH LEGISLATURE - SECOND SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVES PORTER, Rokeberg

A RESOLUTION

Relating to the creation of a new United States Court of Appeals for the Twelfth Circuit.

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

WHEREAS the State of Alaska is within the jurisdiction of the United States Court of Appeals for the Ninth Circuit; and

WHEREAS the Court of Appeals for the Ninth Circuit consists of the States of Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington and the federal territories, possessions, and protectorates in the Pacific; and

WHEREAS United States Representatives Bunn and White of Oregon, Representative Dunn of Washington, and Representative Young of Alaska have introduced H.R. 2935, a bill that would amend Title 28 of the United States Code to divide the Court of Appeals for the Ninth Circuit into two circuits, and that has the short title of the "Ninth Circuit Court of Appeals Reorganization Act of 1996"; and

WHEREAS H.R. 2935 proposes to remove the states of Alaska, Arizona, Idaho, Montana, Nevada, Oregon, and Washington from the Court of Appeals for the Ninth Circuit and place them in a new Court of Appeals for the Twelfth Circuit to be headquartered in

Portland, Oregon; and

WHEREAS H.R. 2935 would make each circuit judge of the Court of Appeals for the Ninth Circuit whose duty station is in Alaska, Arizona, Idaho, Montana, Nevada, Oregon, or Washington a circuit judge of the new Court of Appeals for the Twelfth Circuit; and

WHEREAS the membership of the Court of Appeals for the Ninth Circuit is heavily weighted toward the State of California and the court seems to concern itself predominately with issues arising out of California and the southwestern United States; and

WHEREAS the Court of Appeals for the Ninth Circuit's case filings are greater than any other federal circuit; and

WHEREAS members of the Court of Appeals for the Ninth Circuit have shown a surprising lack of understanding of Alaska's people and geography that has resulted in decisions that have often caused the people of Alaska unnecessary hardship; and

WHEREAS, in the so-called "Katie John" subsistence case, which is of tremendous importance to the people of the State of Alaska, even though the Court of Appeals for the Ninth Circuit granted expedited consideration of that case, the court did not issue its decision for over 13 months; this expedited decision is now under reconsideration by the court; and

WHEREAS Attorney General Bruce Botelho estimates that there are more than 200 Alaska cases currently pending before the Court of Appeals for the Ninth Circuit; and

WHEREAS the Attorneys General of the States of Idaho, Montana, Oregon, and Washington have also found that similar issues of unnecessary delay concerning, lack of understanding of, and lack of consideration for cases and issues by the Court of Appeals for the Ninth Circuit exist in regard to those states; and

WHEREAS the Attorneys General of the States of Alaska, Idaho, Montana, Oregon, and Washington have endorsed S. 956, the United States Senate counterpart to H.R. 2935; and

WHEREAS the creation of a new Court of Appeals for the Twelfth Circuit encompassing the States of Alaska, Arizona, Idaho, Montana, Nevada, Oregon, and Washington by H.R. 2935 would benefit these similar states by providing speedier and more consistent rulings by jurists who have a greater familiarity with the social, geographical, political, and economic life of the region;

BE IT RESOLVED that the Alaska State Legislature supports H.R. 2935 and its creation of a new Court of Appeals for the Twelfth Circuit for the States of Alaska, Arizona,

Idaho, Montana, Nevada, Oregon, and Washington headquartered in the Pacific Northwest; and be it

FURTHER RESOLVED that the Alaska State Legislature respectfully requests the United States Congress to pass H.R. 2935 in an expeditious manner.

COPIES of this resolution shall be sent to the Honorable Al Gore, Jr., Vice-President of the United States and President of the U.S. Senate; the Honorable Strom Thurmond, President Pro Tempore of the U.S. Senate; the Honorable Newt Gingrich, Speaker of the U.S. House of Representatives; the Honorable Bob Dole, Majority Leader of the U.S. Senate; the Honorable Dick Armey, Majority Leader of the U.S. House of Representatives; the Honorable Thomas Daschle, Minority Leader of the U.S. Senate; the Honorable Richard A. Gephardt, Minority Leader of the U.S. House of Representatives; the Honorable Orrin G. Hatch, Chair of the U.S. Senate Committee on the Judiciary; the Honorable Henry J. Hyde, Chair of the U.S. House Committee on the Judiciary; and to the Honorable Ted Stevens and the Honorable Frank Murkowski, U.S. Senators, and the Honorable Don Young, U.S. Representative, members of the Alaska delegation in Congress.

HOUSE JOINT RESOLUTION NO. 52

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINETEENTH LEGISLATURE - SECOND SESSION

BY REPRESENTATIVE PORTER

Introduced: 1/9/96
Referred: State Affairs, Judiciary

A RESOLUTION

Relating to the creation of a new United States Court of Appeals for the Twelfth Circuit.

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

WHEREAS the State of Alaska is within the jurisdiction of the United States Court of Appeals for the Ninth Circuit; and

WHEREAS the Court of Appeals for the Ninth Circuit consists of the States of Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington and the federal territories, possessions, and protectorates in the Pacific; and

WHEREAS United States Senators Burns of Montana, Murkowski and Stevens of Alaska, Kempthorne and Craig of Idaho, and Packwood and Hatfield of Oregon have introduced S. 956, a bill that would amend Title 28 of the United States Code to divide the Court of Appeals for the Ninth Circuit into two circuits, and that has the short title of the "Ninth Circuit Court of Appeals Reorganization Act of 1995"; and

WHEREAS S. 956 proposes to remove the states of Alaska, Idaho, Montana, Oregon, and Washington from the Court of Appeals for the Ninth Circuit and place them in a new Court of Appeals for the Twelfth Circuit; and

WHEREAS S. 956 would make each circuit judge of the Court of Appeals for the Ninth Circuit whose duty station is in Alaska, Idaho, Mont., Oregon, or Washington a circuit judge of the new Court of Appeals for the Twelfth Circuit; and

WHEREAS the membership of the Court of Appeals for the Ninth Circuit is heavily weighted toward the State of California and the court seems to concern itself predominately with issues arising out of California and the southwestern United States; and

WHEREAS the Court of Appeals for the Ninth Circuit's case filings are greater than any other federal circuit; and

WHEREAS members of the Court of Appeals for the Ninth Circuit have shown a surprising lack of understanding of Alaska's people and geography that has resulted in decisions that have often caused the people of Alaska unnecessary hardship; and

WHEREAS, in the so-called "Katie John" subsistence case, which is of tremendous importance to the people of the State of Alaska, even though the Court of Appeals for the Ninth Circuit granted expedited consideration of that case, the court did not issue its decision for over 13 months; this expedited decision is now under reconsideration by the court; and

WHEREAS Attorney General Bruce Botelho estimates that there are more than 200 Alaska cases currently pending before the Court of Appeals for the Ninth Circuit; and

WHEREAS the Attorneys General of the States of Idaho, Montana, Oregon, and Washington have also found that similar issues of unnecessary delay concerning, lack of understanding of, and lack of consideration for cases and issues by the Court of Appeals for the Ninth Circuit exist in regard to those states; and

WHEREAS the Attorneys General of the States of Alaska, Idaho, Montana, Oregon, and Washington have endorsed S. 956; and

WHEREAS the creation of a new Court of Appeals for the Twelfth Circuit encompassing the States of Alaska, Idaho, Montana, Oregon, and Washington by S. 956 would benefit these similar states by providing speedier and more consistent rulings by jurists who have a greater familiarity with the social, geographical, political, and economic life of the region;

BE IT RESOLVED that the Alaska State Legislature supports S. 956 and its creation of a new Court of Appeals for the Twelfth Circuit for the States of Alaska, Idaho, Montana, Oregon, and Washington; and be it

FURTHER RESOLVED that the Alaska State Legislature respectfully requests the United States Congress to pass S. 956 in an expeditious manner.

COPIES of this resolution shall be sent to the Honorable Al Gore, Jr., Vice-President of the United States and President of the U.S. Senate; the Honorable Strom Thurmond, President Pro Tempore of the U.S. Senate; the Honorable Newt Gingrich, Speaker of the U.S. House of Representatives; the Honorable Bob Dole, Majority Leader of the U.S. Senate; the Honorable Dick Armey, Majority Leader of the U.S. House of Representatives; the Honorable Thomas Daschle, Minority Leader of the U.S. Senate; the Honorable Richard A. Gephardt, Minority Leader of the U.S. House of Representatives; the Honorable Orrin G. Hatch, Chair of the U.S. Senate Committee on the Judiciary; the Honorable Henry J. Hyde, Chair of the U.S. House Committee on the Judiciary; and to the Honorable Ted Stevens and the Honorable Frank Murkowski, U.S. Senators, and the Honorable Don Young, U.S. Representative, members of the Alaska delegation in Congress.