

**HJR**

**30**

# FISCAL NOTE

No. 1  
 Bill Version: HJR 30  
 (H) Publish Date: 4/10/97

**STATE OF ALASKA  
 1997 LEGISLATIVE SESSION**

Revision Date: 4/8/97 Dept. Affected: None  
 Title: Creating a Twelfth Circuit Court BRU: \_\_\_\_\_  
           of Appeals Component: \_\_\_\_\_  
 Sponsor: House Judiciary Committee  
 Requester: House Judiciary Committee COMPONENT SERIAL NO. \_\_\_\_\_

**Expenditures/Revenues (Thousands of Dollars)**

| OPERATING EXPENDITURES | FY 98 | FY 99 | FY 00 | FY 01 | FY 02 | FY 03 |
|------------------------|-------|-------|-------|-------|-------|-------|
| PERSONAL SERVICES      |       |       |       |       |       |       |
| TRAVEL                 |       |       |       |       |       |       |
| CONTRACTUAL            |       |       |       |       |       |       |
| SUPPLIES               |       |       |       |       |       |       |
| EQUIPMENT              |       |       |       |       |       |       |
| LAND & STRUCTURES      |       |       |       |       |       |       |
| GRANTS, CLAIMS         |       |       |       |       |       |       |
| MISCELLANEOUS          |       |       |       |       |       |       |
| <b>TOTAL OPERATING</b> | 0.0   | 0.0   | 0.0   | 0.0   | 0.0   | 0.0   |

|                      |  |  |  |  |  |  |
|----------------------|--|--|--|--|--|--|
| CAPITAL EXPENDITURES |  |  |  |  |  |  |
|----------------------|--|--|--|--|--|--|

|                    |  |  |  |  |  |  |
|--------------------|--|--|--|--|--|--|
| CHANGE IN REVENUES |  |  |  |  |  |  |
|--------------------|--|--|--|--|--|--|

**FUND SOURCE (Thousands of Dollars)**

|                          |     |     |     |     |     |     |
|--------------------------|-----|-----|-----|-----|-----|-----|
| 1002 Federal Receipts    |     |     |     |     |     |     |
| 1003 GF Match            |     |     |     |     |     |     |
| 1004 GF                  |     |     |     |     |     |     |
| 1005 GF/Program Receipts |     |     |     |     |     |     |
| 1037 GF/Mental Health    |     |     |     |     |     |     |
| Other                    |     |     |     |     |     |     |
| <b>TOTAL</b>             | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |

Estimate of any current year (FY97) cost: \$ \_\_\_\_\_

**POSITIONS**

|           |  |  |  |  |  |  |
|-----------|--|--|--|--|--|--|
| FULL-TIME |  |  |  |  |  |  |
| PART-TIME |  |  |  |  |  |  |
| TEMPORARY |  |  |  |  |  |  |

**ANALYSIS:** (Attach a separate page if necessary)

Prepared by: Lisa Kirsh Phone: 465-4990  
 Division: House Judiciary Committee Date: 4/8/97  
 Approved by: Chair [Signature] Date: 4-8-97  
 Agency: House Judiciary Committee

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CBR

# SENATE COMMITTEE REPORT

DATE: 4/25/97

FURTHER:

DATE TURNED  
IN TO OFFICE: 4/28/97

Judiciary Committee considered HOUSE JOINT RESOLUTION NO. 30

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

and recommends:

- be replaced with S CS HJR 30 ( JU )
- adopt previous CS ( )
- attached amendment(s)
- adopt Letter of Intent by \_\_\_\_\_ Committee
- further referral to the \_\_\_\_\_ Committee

- Senate Bill:**
- same title
  - new title
- House Bill:**
- same title
  - technical change
  - new: SCR# \_\_\_\_\_

| SIGNING DO, PASS            | DP                                  | OTHER RECOMMENDATIONS | NR                                  | DNP | AM |
|-----------------------------|-------------------------------------|-----------------------|-------------------------------------|-----|----|
| <i>Mike Miller</i>          | <input checked="" type="checkbox"/> | <i>Hy Ellis</i>       | <input checked="" type="checkbox"/> |     |    |
| <i>Irma Leano</i>           | <input checked="" type="checkbox"/> |                       |                                     |     |    |
| <i>Sean Phannell</i>        | <input checked="" type="checkbox"/> |                       |                                     |     |    |
|                             |                                     |                       |                                     |     |    |
|                             |                                     |                       |                                     |     |    |
|                             |                                     |                       |                                     |     |    |
| CHAIR: <i>Adrian P. ...</i> |                                     | CHAIR:                |                                     |     |    |

**NEW FISCAL NOTE(S):**

| Department | Date | Zero | Fiscal |
|------------|------|------|--------|
|            |      |      |        |
|            |      |      |        |
|            |      |      |        |
|            |      |      |        |
|            |      |      |        |

**PREVIOUS FISCAL NOTE(S):\***

| Department           | Date          | Zero                                | Fiscal |
|----------------------|---------------|-------------------------------------|--------|
| <i>LAA-HOUSE JUD</i> | <i>4/8/97</i> | <input checked="" type="checkbox"/> |        |
|                      |               |                                     |        |
|                      |               |                                     |        |
|                      |               |                                     |        |
|                      |               |                                     |        |

APPROPRIATION -- no fiscal note

\*include fiscal notes accompanying Governor's bill

# Alaska State Legislature



House of Representatives  
House Judiciary Committee

State Capitol, Room 120  
Juneau, Alaska 99801-1182  
(907) 465-4990

## Sponsor Statement

### **HJR 30 - Endorsing S.431 and a new Twelfth US Circuit Court of Appeals**

The United States Court of Appeals for the Ninth Circuit encompasses nine states and two territories: Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, Guam and the Northern Mariana Islands. The circuit contains nearly 14 million square miles and 50 million people, and is the largest US court of appeals by any measure.

HJR 30 endorses S.431, introduced by Senators Frank Murkowski, Ted Stevens and four other western senators, which proposes to split the ninth circuit and create a new twelfth circuit, to include Alaska, Idaho, Montana, Oregon, and Washington.

The legislature should support S.431 because the ninth circuit is simply too large to respond to the needs of Alaska. Alaska cases represent only 2.4% of the court's total case load, while cases originating in California account for nearly 60%. At the end of 1996 there were 181 Alaska cases pending before the court, but 4440 cases pending from California. These numbers are staggering, especially in light of the fact that while most circuits have 12 or fewer judges, the ninth circuit has 28 active court of appeals judges.

The Attorneys General from all five states involved in the proposed twelfth circuit have endorsed the split. Here in Alaska, Governor Tony Knowles, and Attorney General Bruce Botelho have endorsed the idea. HJR 30 puts the Alaska legislature on record in support S.431, and a federal judiciary that is capable of responding to Alaska's needs.

ALASKA STATE LEGISLATURE  
HOUSE JOINT RESOLUTION NO. 30

HISTORY IN THE HOUSE

1997  
3/17 Read first time and referred to:  
Jud

4/10 Jud RPT CS( ) New Title  
7 DP 0 DNP 0 NR 0 AM  
FN 1 OFN Previous FN

RPT CS( ) New Title  
DP DNP NR AM  
FN OFN Previous FN

RPT CS( ) New Title  
DP DNP NR AM  
FN OFN Previous FN

4/22 Read second time  
CS( ) Adopted

Amended

4/22 Advanced

4/22 Read third time

Return to second for specific amendment

4/22 PASSED EFD Same \_\_\_ or  
Yeas 35 Yeas  
Nays 3 Nays  
Excused 2 Excused  
Absent 0 Absent

Intent adopted

4/22 Reconsideration Nichols

4/23 Reconsideration not taken up

PASSED ON RECON. EFD Same \_\_\_ or  
Yeas Yeas  
Nays Nays  
Excused Excused  
Absent Absent

Intent adopted

4/23 Reported correctly engrossed  
Signed by Speaker, to the Senate

Luigi Howler  
Chief Clerk of the House

HISTORY IN THE SENATE

19  
Read first time and referred to:

RPT( ) CS DP NR DNP AM  
New Title Same Title Previous FN  
FN OFN To

RPT( ) CS DP NR DNP AM  
New Title Same Title Previous FN  
FN OFN To

RPT( ) CS DP NR DNP AM  
New Title Same Title Previous FN  
FN OFN To

Rules Calendar( ) CS AM Other  
New Title Same Title Previous FN  
FN OFN

Read second time

CS Adopted ( ) New Title  
Amended Advanced

Read third time

Letter of Intent adopted  
Return to second for specific amendment

PASSED EFD Same \_\_\_ or  
Yeas Yeas  
Nays Nays  
Excused Excused  
Absent Absent

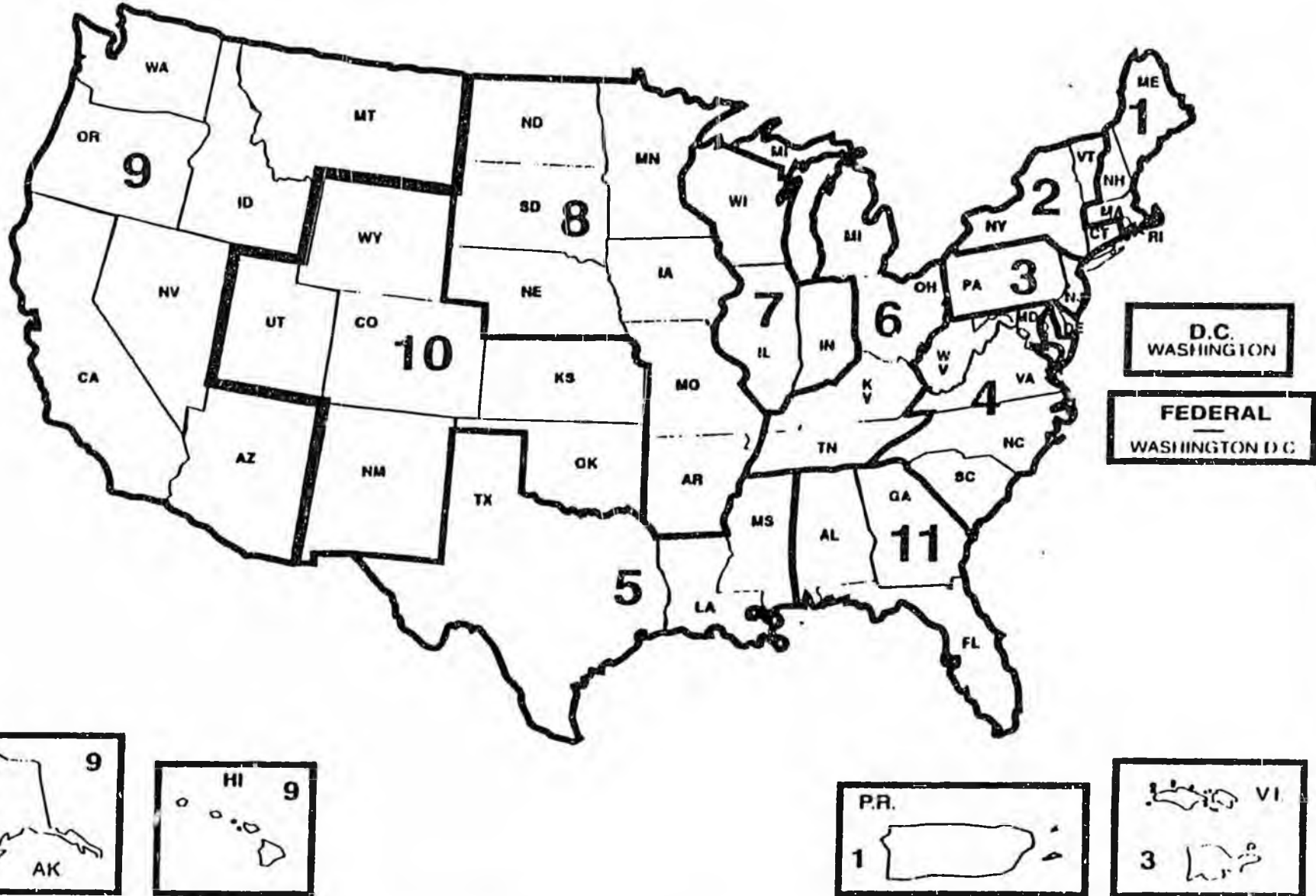
Reconsideration  
Reconsideration not taken up

PASSED EFD Same \_\_\_ or  
Yeas Yeas  
Nays Nays  
Excused Excused  
Absent Absent

Reported correctly engrossed  
Signed by President, to the House

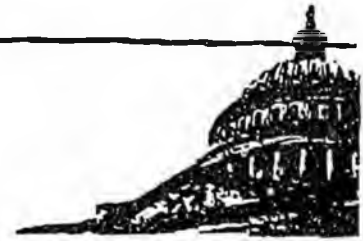
Secretary of the Senate

# The Thirteen Federal Judicial Circuits



# FRANK MURKOWSKI

*United States Senator - Alaska*



For Immediate Release:      Contact: Chuck Kleeschulte or Cindi Bookout  
March 12, 1997              O (202) 224-9306; H (301) 283-4149; O 224-8767  
(Email: [chuck\\_kleeschulte@murkowski.senate.gov](mailto:chuck_kleeschulte@murkowski.senate.gov))

## **MURKOWSKI-STEVENSONS INTRODUCE BILL TO CREATE NEW 12TH CIRCUIT FEDERAL COURT**

WASHINGTON -- Saying that citizens in the Pacific Northwest should not have to suffer from slow judicial decisions, Alaska's two Sens. Frank Murkowski and Ted Stevens today introduced legislation to create a new federal judicial court circuit to relieve the blacklogged caseload of the Ninth Circuit based in California.

The two senators, joined by Sens. Slade Gorton, R-Wash., Larry Craig and Dirk Kempthorne, R-Idaho; and Sen. Gordon Smith, R-Oregon, have proposed legislation to split the existing Ninth Circuit Court. Under the proposal, California, Hawaii and the Pacific Territories would remain in the Ninth Circuit, while a new Twelfth Circuit would be created to cover the states of Alaska, Washington, Oregon, Idaho and Montana.

The senators said the move would relieve the current caseload burden on the Ninth Circuit. They added the new court would create a Northwest Circuit that is historically, economically, culturally and philosophically united.

"No one court can effectively exercise its power in an area that extends from the Arctic Circle to the tropics. We must revamp the circuits to create a court with a regional sense of community and greater knowledge that will lead to greater consistency and dependency in legal decisions," said Murkowski.

"This bill will result in a better caseload distribution among states with a Northwest focus. Of the 28 judges on the Ninth Circuit, only one is an Alaskan," Sen. Stevens said.

"Many of those currently serving on the Ninth Circuit are activists that fail to understand the uniqueness of Alaska. In rendering their decisions, they often make, rather than interpret, the law.

"We have been pursuing this split for some time. Alaskans deserve a more responsive court that understands Alaska's unique circumstances," Sen. Stevens said.

The senators said they were offering the bill for a host of reasons:

- \* The Ninth Circuit serves a population of more than 45 million people, well over a third more than the next largest circuit in the federal system.

- \* Last year the court had 7,146 new filings, the second highest in the nation. In 1995 the court had 8,092 filings, that year almost 2,000 more (25 percent) than any other circuit.

**STATEMENT OF SENATOR FRANK MURKOWSKI**  
**Ninth Circuit Reorganization Act**  
**March 12, 1997**

Mr. President, today I am pleased to be joined by my colleagues, Senators Stevens, Gorton, Burns, Craig, Kempthorne and Senator Smith of Oregon, in introducing the Ninth Circuit Court of Appeals Reorganization Act of 1997.

Our legislation will create a new Twelfth Circuit comprised of Alaska, Washington, Oregon, Idaho and Montana. This legislation will ease the current burdens of the Ninth Circuit, as well as effectively create a new Northwest Circuit that is historically, economically, culturally and philosophically united.

Mr. President, one look at the contours of the 9th Circuit reveals the need for this reorganization. Stretching from the Arctic Circle to the Mexican border, past the tropics of Hawaii and across the International Dateline to Guam and the Mariana Islands, by any means of measurement, the Ninth Circuit is the largest of all U.S. Circuit Courts of Appeal.

There is also no denying the Ninth Circuit's mammoth caseload. It serves a population of more than 45 million people, well over a third more than the next largest Circuit.

- Last year, the Ninth Circuit had an astounding 7,146 new filings.
- By 2010, the Census Bureau estimates that the Ninth Circuit's population will be more than 63 million -- a 40 percent increase in just 13 years, which inevitably will create an even more daunting caseload.

We believe that this legislation is long overdue. Because of its size, the entire appellate process in the Ninth Circuit is the second slowest in the nation. As former Chief Judge Wallace of the Ninth Circuit stated, "It takes about four months longer to complete an appeal in our court as compared to the national median time." Mr. President, what this means is that while the national median time for filing a notice of appeal to final disposition is 315 days, the Ninth Circuit median time is a year and two months.

Furthermore, the massive size of the Ninth Circuit often results in a decrease in the ability to keep abreast of legal developments within its own jurisdiction. This unwieldy caseload creates an inconsistency in Constitutional interpretation. In fact, Ninth Circuit cases have an extraordinarily high reversal rate by the Supreme Court. (During the Supreme Court's 1994-95 session, the Supreme Court overturned 82% of the Ninth Circuit cases heard by the Court!) This lack of Constitutional consistency discourages settlements and leads to unnecessary litigation.

Mr President, the legislation I am introducing is not novel. Since the day the Circuit was founded, over a century ago, there were discussions of a split. Nearly a quarter century ago, in 1973, the Congressional Commission on the Revision of the Federal Court of Appellate System recommended that the Ninth Circuit be divided.

- Additionally, the American Bar Association has adopted a resolution expressing the benefits of divided the Ninth District.
- Since 1983, Senator Gorton and many others in this chamber have initiated legislation to split the circuit.
- There have been Senate hearings. In December 1995, Senator Hatch stated in a Committee Report that:

"The legislative history, in conjunction with available statistics and research concerning the Ninth Circuit, provides an ample record for an informed decision at this point as to whether to divide the Ninth Circuit...Upon careful consideration the time has indeed come."

Furthermore, splitting a circuit to respond to caseload and population growth is by no means unprecedented. Congress divided the original Eighth circuit to create the Tenth Circuit in 1929, and divided the former Fifth Circuit to create the Eleventh Circuit in 1980.

The legislation that I and my colleagues introduce today is the sensible reorganization of the Ninth Circuit. The new Ninth Circuit would embrace California, Nevada, Arizona, Hawaii and the U.S. Territories. The new Twelfth Circuit would be comprised solely of states in the Northwest region. Most importantly, this split would respect the economic, historical, cultural and legal ties which exist between the states involved.

Mr. President, no one Court can effectively exercise its power in an area that extends from the Arctic Circle to the tropics. The legislation introduced today will create a regional commonality which will lead to greater consistency and dependency in legal decisions.

Mr. President, we have waited long enough. The 45 million residents of the Ninth Circuit are the persons that suffer. Many wait years before cases are heard and decided, prompting many to forego the entire appellate process. The Ninth Circuit has become a circuit where justice is not swift and not always served.

I ask unanimous consent that the text of this legislation be printed in the Record.

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IN THE SENATE OF THE UNITED STATES

Mr. MURKOWSKI introduced the following bill; which was read twice and referred to the Committee on JUDICIARY

---

**A BILL**

To amend title 28, United States Code, to divide the ninth judicial circuit of the United States into two circuits, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Ninth Circuit Court  
5 of Appeals Reorganization Act of 1997".

6 **SEC. 2. NUMBER AND COMPOSITION OF CIRCUITS.**

7 Section 41 of title 28, United States Code, is amend-  
8 ed—

9 (1) in the matter before the table, by striking  
10 "thirteen" and inserting "fourteen";

1 (2) in the table, by striking the item relating to  
2 the ninth circuit and inserting the following new  
3 item:

Ninth ..... Arizona, California, Hawaii, Nevada,  
Guam, Northern Mariana Is-  
lands";

4 and

5 (3) between the last 2 items of the table, by in-  
6 serting the following new item:

Twelfth ..... Alaska, Idaho, Montana, Oregon,  
Washington.".

7 **SEC. 3. NUMBER OF CIRCUIT JUDGES.**

8 The table in section 44(a) of title 28, United States  
9 Code, is amended—

10 (1) by striking the item relating to the ninth  
11 circuit and inserting the following new item:

"Ninth ..... 19";

12 and

13 (2) by inserting between the last 2 items at the  
14 end thereof the following new item:

"Twelfth ..... 7"

15 **SEC. 4. PLACES OF CIRCUIT COURT.**

16 The table in section 48 of title 28, United States  
17 Code, is amended—

18 (1) by striking the item relating to the ninth  
19 circuit and inserting the following new item:

"Ninth ..... San Francisco, Los Angeles";

20 and

1           (2) by inserting, between the last 2 items at the  
2           end thereof the following new item:

    "Twelfth ..... Portland, Seattle."

3 **SEC. 5. ASSIGNMENT OF CIRCUIT JUDGES.**

4           Each circuit judge in regular active service of the  
5 former ninth circuit whose official station on the day be-  
6 fore the effective date of this Act—

7           (1) is in Arizona, California, Hawaii, Nevada,  
8           Guam, or the Northern Mariana Islands is assigned  
9           as a circuit judge of the new ninth circuit; and

10          (2) is in Alaska, Idaho, Montana, Oregon, or  
11          Washington is assigned as a circuit judge of the  
12          twelfth circuit.

13 **SEC. 6. ELECTION OF ASSIGNMENT BY SENIOR JUDGES.**

14          Each judge who is a senior judge of the former ninth  
15 circuit on the day before the effective date of this Act may  
16 elect to be assigned to the new ninth circuit or to the  
17 twelfth circuit and shall notify the Director of the Admin-  
18 istrative Office of the United States Courts of such elec-  
19 tion.

20 **SEC. 7. SENIORITY OF JUDGES.**

21          The seniority of each judge—

22          (1) who is assigned under section 5 of this Act,

23          or

24          (2) who elects to be assigned under section 6 of

25          this Act;

1 shall run from the date of commission of such judge as  
2 a judge of the former ninth circuit.

3 **SEC. 8. APPLICATION TO CASES.**

4 The provisions of the following paragraphs of this  
5 section apply to any case in which, on the day before the  
6 effective date of this Act, an appeal or other proceeding  
7 has been filed with the former ninth circuit:

8 (1) If the matter has been submitted for deci-  
9 sion, further proceedings in respect of the matter  
10 shall be had in the same manner and with the same  
11 effect as if this Act had not been enacted.

12 (2) If the matter has not been submitted for de-  
13 cision, the appeal or proceeding, together with the  
14 original papers, printed records, and record entries  
15 duly certified, shall, by appropriate orders, be trans-  
16 ferred to the court to which it would have gone had  
17 this Act been in full force and effect at the time  
18 such appeal was taken or other proceeding com-  
19 menced, and further proceedings in respect of the  
20 case shall be had in the same manner and with the  
21 same effect as if the appeal or other proceeding had  
22 been filed in such court.

23 (3) A petition for rehearing or a petition for re-  
24 hearing en banc in a matter decided before the effec-  
25 tive date of this Act, or submitted before the effec-

1       tive date of this Act and decided on or after the ef-  
2       fective date as provided in paragraph (1) of this sec-  
3       tion, shall be treated in the same manner and with  
4       the same effect as though this Act had not been en-  
5       acted. If a petition for rehearing en banc is granted,  
6       the matter shall be reheard by a court comprised as  
7       though this Act had not been enacted.

8 **SEC. 9. DEFINITIONS.**

9       For purposes of this Act, the term—

10           (1) "former ninth circuit" means the ninth ju-  
11       dicial circuit of the United States as in existence on  
12       the day before the effective date of this Act;

13           (2) "new ninth circuit" means the ninth judicial  
14       circuit of the United States established by the  
15       amendment made by section 2(2) of this Act; and

16           (3) "twelfth circuit" means the twelfth judicial  
17       circuit of the United States established by the  
18       amendment made by section 2(3) of this Act.

19 **SEC. 10. ADMINISTRATION.**

20       The court of appeals for the ninth circuit as con-  
21       stituted on the day before the effective date of this Act  
22       may take such administrative action as may be required  
23       to carry out this Act. Such court shall cease to exist for  
24       administrative purposes on July 1, 1999.

1 **SEC. 11. EFFECTIVE DATE.**

2       This Act and the amendments made by this Act shall  
3 become effective on October 1, 1997.

TESTIMONY ON HJR NO. 30  
APRIL 9, 1997

My name is Joanne Grace. I am an assistant attorney general here to testify on behalf of Attorney General Botelho, who supports the Ninth Circuit Court of Appeals Reorganization Act. The Ninth Circuit has by far the most judges and the largest area served of any circuit court, and these facts do not serve Alaska well. Such a large court with judges so far away cannot adequately understand and appreciate the issues unique to Alaska. In 1996, 60% of the cases the court heard came from California, while about 2% came from Alaska. Of the judges currently serving on the ninth circuit bench, 64% are from California, while only one is from Alaska.

A new circuit comprised of Montana, Alaska, Washington, Oregon, and Idaho would eliminate the dominance of California judges over these states. Proponents of splitting the circuit have complained that Californians and other southwestern judges fail to appreciate the effect of their environmental decisions on the economies of states dependant on natural resource development rather than on high-tech industries. As to Alaska, the lack of understanding extends far beyond economics; most judges on the ninth circuit have different sensibilities and perceptions of social, geographical, political, and economic matters.

For example, in interpreting the term "rural" as applied to Alaska, a ninth circuit panel consisting of three judges from

Pasadena, San Francisco, and San Diego obviously applied a non-Alaskan understanding of its meaning. The issue in *Kenaitze Indian Tribe v. State* was whether ANILCA's rural subsistence priority applies to the Kenai Peninsula. The state regulation defined "rural" as it generally is understood in Alaska, as the bush. It did so by excluding areas characterized primarily by a cash economy, and thus excluded the Kenai Peninsula. The court vehemently rejected this interpretation, calling it "unusual" and "exotic." The Court said:

The state's definition would exclude practically all areas of the United States that we think of as rural, including virtually the entirety of such farming and ranching states as Iowa and Wyoming . . . .

The term rural is not difficult to understand; it is not a term of art. It is a standard word in the English language commonly understood to refer to areas of the country that are sparsely populated, where the economy centers on agriculture or ranching . . . .

860 F.2d 312, 316-17.

The court completely rejected the possibility that "rural" might mean something different in Alaska, the only place that ANILCA applies, than it does in the Midwest or West.

Other examples of when an urban Californian perspective could work to Alaska's disadvantage might occur in the following situations:

\* First, when the court must decide whether an action of the United States constitutes "major federal action" under the National Environmental Policy Act, thereby requiring an environmental impact statement. Development activity on 80 acres might seem far more significant in Southern California than it does in Alaska.

\* Another example is when the court must decide fish and wildlife issues. Again, the perspective on hunting a wild animal or forgoing development to protect habitat probably differs greatly between California and Alaska.

\* Finally, the court's perspective hurts Alaska when the court faces issues of state vs. federal jurisdiction. The court has indicated in some of its decisions a bias against Alaska's state government and in favor of the federal government, implying that Alaskans cannot be trusted to protect their natural resources or subsistence interests.

Another concern of the Attorney General is the untimeliness of decisions from the Ninth Circuit. This is due in part to the volume of cases the court hears, but also is escalated in Alaska's case because of the court's oral argument calendar. In general, the court hears argument each year twelve times in San Francisco; twelve times in Pasadena; twelve times in Seattle; six

times in Portland; two times in Honolulu; and one time in Anchorage. A panel of three judges travels to Alaska each year in July or August to hear Alaska cases. As a result, the court "saves" Alaska cases for this annual trip, so that while a case from California may be set for argument a month or two after briefing is complete, Alaska cases generally are set for July or August, even if briefing is complete in January or February. This creates an unnecessary delay for Alaskan cases.

In conclusion, Alaska and the other states included would benefit from creation of a twelfth circuit comprised of Northwestern states because the twelfth circuit court judges would not bring foreign perspectives to their decisions.

# Justice Kennedy favors

By DAVID WHITNEY  
Daily News Washington Bureau

WASHINGTON — The move in Congress to divide the 9th Circuit U.S. Court of Appeals got a boost last week from Supreme Court Justice Anthony M. Kennedy, who sat on the 28-judge appeals bench before his elevation to the high court in 1988.

"I have increasing doubts and increasing reservations about the wisdom of retaining the 9th Circuit in its historic size, and with its historic jurisdiction," Kennedy told a Senate Appropriations Committee panel Thursday.

"I think institutionally, and from the collegial standpoint, that it is too large to have the discipline and con-

trol that's necessary for an effective circuit," Kennedy said.

The 9th Circuit is the largest of the 11 federal appeals courts, handling what Kennedy estimated to be about 22 percent of the nation's appellate caseload. It hears cases from California, Arizona, Nevada, Hawaii, Alaska, Oregon, Washington, Idaho and Montana.

## split of 9th Circuit

Legislation introduced in the Senate in March would shrink the 9th Circuit's jurisdiction to California, Arizona, Nevada and Hawaii and create a new 12th Circuit court to hear appeals from Alaska and the four Pacific Northwest states.

The legislation was sponsored by Alaska Sen. Frank Murkowski. It was co-sponsored by Alaska Sen.

Ted Stevens, Washington Sen. Slade Gorton, Montana Sen. Conrad Burns, Idaho Sens. Larry Craig and Dirk Kempthorne, and Oregon Sen. Gordon Smith. All are Republicans.

The Congressional Commission on the Revision of the Federal Court and Appellate System first recom-

Please see Page B-3, CIRUIT

### CIRCUIT: Split considered

Continued from Page B-1

mended dividing the court in 1973. Legislation has been introduced regularly in the Senate since 1983 but has failed to gain much steam.

In introducing the bill, Murkowski cited the appeals court's huge geographic jurisdiction and "unwieldy" caseload.

"No one court can effectively exercise its power in an area that extends from the Arctic Ocean to the tropics," Murkowski said, adding that the San Francisco-based court is the second slowest of the 11 circuits in deciding cases.

Kennedy's comments

came during questioning by Sen. Judd Gregg, R-N.H., at a hearing on the Supreme Court's budget.

Kennedy said that when he went onto the 9th Circuit in 1975, he was opposed to its division. He said he felt there was a place in the judicial system for "a very major circuit."

"So I was a defender of trying the experiment, and the experiment has now gone to the extent where we have 28 active judges," Kennedy said.

While he said he is "willing to think further about it," he urged Congress to swiftly "come to some resolution one way or the other as to the size of the 9th Circuit."

# The Anchorage Times

Publisher: BILL J. ALLEN

"Believing in Alaskans, putting Alaska first"

Editors: DENNIS FRADLEY, PAUL JENKINS, WILLIAM I. TOBEN

The Anchorage Times Commentary in this segment of the Anchorage Daily News does not represent the views of the Daily News. It is written and published under an agreement with former owners of The Times, in the interests of presenting a diversity of viewpoints in the community.

## Dividing the court

**I**T 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.

FRANK H. MURKOWSKI  
ALASKA

COMMITTEES:

CHAIRMAN  
ENERGY AND NATURAL RESOURCES

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# United States Senate

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October 19, 1995

Mr. John Katz  
Office of the Governor  
State of Alaska  
444 North Capitol Street, Room 518  
Washington, D.C. 20001

Dear John:

Please find enclosed Charlie Cole's testimony that was submitted for the Senate Judiciary Committee hearing on the "Ninth Circuit Court of Appeals Reorganization Act of 1995" held on September 13.

Sincerely,

  
Frank H. Murkowski  
United States Senator

STATEMENT OF CHARLES E. COLE  
BEFORE THE SENATE COMMITTEE ON THE JUDICIARY REFORMATION  
OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

I am an attorney at law practicing in Fairbanks, Alaska. I am a member of the State Bar of California, the Washington State Bar, and the Alaska Bar Association. I was admitted to the California and Washington bars in 1953, and the Alaska bar in 1955. The views I express here are entirely mine, and I speak for no one other than myself.

I support the enactment of S. 956. The reasons follow.

Forty years ago, while serving as a lowly law clerk to the then United States District Judge for the Territory of Alaska, at Fairbanks, in the course of my jurisprudential musing I stumbled across a remark by whom I recall as an internationally famed legal scholar. In response to an inquiry whether he would be willing to formulate a code of laws for a newly independent nation, such as, for example, the Napoleonic Code, he replied that before undertaking such a monumental task he first would want to live among the peoples for fifty years to learn their ways of life, their mores, and their economic and social values. Over the years as I have wandered my way along the path of the law I have thought again and again about that comment and have come increasingly to appreciate the wisdom that lay beneath it. Underlying it, of course, is the theory that in a republican form of government laws are to be made by the people's representatives. But the principle stops not there. Not only ought the laws be made by a representative body of the governed, the laws also ought to be interpreted and applied by representatives.

This seemingly self-evident principle has been cast adrift by the broad sweep of the appellate jurisdiction of the Court of Appeals for the Ninth Circuit. Its three-judge panels, laden with appointees from the States of California and Arizona, routinely decide case after case involving statutes applicable only to the State of Alaska, statutes such as the Alaska Native Claims Settlement Act and the Alaska National Interest Lands Conservation Act. While the judges comprising these geographically unbalanced panels are among the finest in the federal Courts of Appeal, because they have lived and practiced in what in many ways is a culture and an environment foreign to Alaska, when called upon to interpret these uniquely Alaska statutes, they lack a broad personal understanding of the competing interests involved in their enactment. These judges have the ability, to be sure, to apply the orthodox rules of statutory construction. Yet, when

called upon to interpret statutes unique to Alaska, they seem to apply an approach entirely inconsistent with those rules, a tendency to rocket to a result inapposite to that reached by jurists having a perspective gleaned from life in the North, from having lived amongst "the clash between traditional and modern ways of life" over fishing, for example, and from having lived amongst the clash between environmentalists and developmentalists, over logging, for another example.

This situation is classically illustrated by two recent appellate decisions interpreting the definition of "public lands" in the Alaska National Interest Lands Conservation Act, 16 U.S.C. §3101, et seq. (ANILCA), one by an esteemed panel of the Court of Appeals for the Ninth Circuit, the other by the Supreme Court of the State of Alaska.

In State of Alaska v. Babbitt, 54 F.3d 549 (9th Cir. 1995) the issue was whether the definition of "public lands" in ANILCA includes navigable waters. ANILCA defines "public lands" as "lands situated in Alaska which...are Federal lands, 16 U.S.C. §3102(3). "Federal Land" is defined as "lands the title to which is in the United States," 16 U.S.C. § 3102(2). "Land," is defined as "lands, waters, and interests therein." 16 U.S.C. §3102(1). Thus, ANILCA defines "public lands" as "lands, waters, and interests therein the title to which is in the United States." 54 F.3d at 552.

In Babbitt a panel of Ninth Circuit judges comprised of Eugene A. Wright, Cynthia Holcomb Hall, and Charles E. Wiggins faced for decision "whether the federal agencies' conclusion that public lands include some navigable waters under the reserved water rights doctrine is based on a permissible construction of the statute." 54 F.3d at 553. For three years in the litigation before the district court the federal agencies had agreed with the State that "public lands" exclude navigable waters, but at the second oral argument on the issue, those "agencies" modified their position, arguing that public lands include those navigable waters in which the federal government has an interest under the reserved water rights doctrine. 54 F.3d at 551, 552. "Prior to oral argument" the United States had more than merely "agreed with the State" in the early course of the litigation before the District Court. Early on the Secretary of the Interior had adopted regulations that supported the State's interpretation of the Act. As the Babbitt opinion points out, when in 1990 the United States took over implementation of the provisions of the ANILCA which gave rural residents a subsistence priority, "[t]he Secretary of the Interior, on behalf of all concerned federal agencies, published temporary subsistence management regulations that adopted a very narrow definition of public lands, explaining that 'navigable waters generally

are not included within the definition of public lands.' The final regulations do not differ significantly. See 57 Fed Reg. 22,940, at 22,942 (May 29, 1992)."

In a remarkably brief opinion, the Babbitt panel found "reasonable the federal agencies' conclusion that the definition of public lands includes those navigable waters in which the United States has an interest by virtue of the reserved water rights doctrine," and held that "the federal agencies that administer the subsistence priority are responsible for identifying those waters." The Babbitt panel determined that the navigational servitude held by the United States is not "'an interest...the title to which is in the United States,' such that all navigable waters are public lands within the meaning of ANILCA." 54 F.3d at 553. It also found that "[n]either the language nor the legislative history of ANILCA suggests that Congress intended to exercise its Commerce Clause powers over submerged lands and navigable Alaska waters." 54 F. 3d at 553. It concluded, however, that because the "United States has reserved vast parcels of land in Alaska for federal purposes through a myriad of statutes," it has "implicitly reserved appurtenant waters, including appurtenant navigable waters, to the extent needed to accomplish the purposes of the reservations," and therefore, "[b]y virtue of its reserved water rights, the United States has interests in some navigable waters," so "[c]onsequently public lands subject to subsistence management under ANILCA include certain navigable waters." 54 F.3d at 554.

Then, recognizing "that its holding may be inherently unsatisfactory," the panel said that it "hope[d] that the federal agencies will determine promptly which navigable waters are public lands subject to federal subsistence management," and that it "expect[ed] the federal agencies and the state to cooperate fully to protect and provide the opportunity for subsistence fishing in navigable waters." 54 F.3d at 554. Finally, the panel in Babbitt said that the "issue raised by the parties cries out for a legislative, not a judicial solution...only legislative action by Alaska or Congress will truly resolve the problem." 54 F.3d at 554. Noteworthy is the panel's comment that its decision has application to Alaska, and thus does not allow the United States to usurp state powers over navigable waters elsewhere. 54 F.3d at 552 n.9.

Not only is the holding in Babbitt "inherently unsatisfactory," so manifestly is the opinion. Inherently unsatisfactory is the opinion's failure to address the glaring legal issue of whether government trial counsel "at oral argument" could "modify" regulations validly adopted years earlier by the federal agency statutorily responsible for implementation of ANILCA. For the court to say that it holds

reasonable the "federal agencies" conclusion as to the scope of "public lands" without addressing this central issue, (an issue, by the way, on which there is substantial authority), is no less than remarkable. Also inherently unsatisfactory is the opinion's failure to address the issue of whether the United States holds "title" to "some navigable waters as a result of its reserved water rights." As the opinion points out, under ANILCA public lands are lands, waters, and interests therein, the title to which is in the United States. [Emphasis added]. 54 F.3d at 552. Conceding, as the Court says, that the United States "has interests in some navigable waters," the critical issue is whether it could be said to have "title" to this interest. The panel quietly passed over this issue, except to say that if it adopted the States' view and held that public lands exclude navigable waters, it "would give meaning to the term 'title' in the definition of the phrase 'public lands.'" Yet is that not precisely what ANILCA requires? Sidestepping the issue, the panel said that if it gave meaning to the term "title" it would "undermine congressional intent to protect and provide the opportunity for subsistence fishing," so legislating with fury, it decided not "to give meaning to the term 'title' in the [congressional] definition of the phrase 'public lands.'" "

The panel is far too able, far too experienced, to fail to recognize these basic issues. Its failure to address them in its opinion is inexplicable. Or can it be explained as a California Court bent on making law to suit a California judicial philosophy?'

When the identical issue, whether ANILCA's "public lands" definition includes navigable waters came before the Alaska Supreme Court, it addressed these issues head on, and concluded that it did not. Totemoff v. State of Alaska, \_\_\_ P. 2d \_\_\_, Opinion No. 4236, decided August 7, 1995. In Totemoff the Alaska Supreme Court noted that it was "not obligated to follow Babbitt, since it is not bound by decisions of federal courts other than the United States Supreme Court on questions of federal law." Slip Opinion, p. 18. It then went on to rigorously dismantle the Babbitt opinion on the public lands issue point by point. First, it said that even if the navigable servitude or reserved water rights can be considered interests to which the United States holds title, the State has an interest in fish and wildlife located in navigable waters which precludes federal regulation of such fish and wildlife, under §102(3)(a) of ANILCA and the

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<sup>1</sup> I recognize that the opinion's author, Eugene A. Wright, resides in Seattle, but that does not prevent him having become imbued with a California judicial philosophy from twenty-five years on the Ninth Circuit.

Submerged Lands Act of 1953, 43 U.S.C. §§1301-56 (1988).<sup>2</sup>

Next, the Alaska court said that "the navigational servitude and reserved water rights are not the type of property interests to which title can be held." Slip Opinion, p. 21. "Neither the navigational servitude nor reserved water rights," the Alaska court said, "are possessory rights in a body of water," and therefore, "the United States cannot hold title to the navigational servitude or reserved water rights." Slip Opinion, p. 22. The "interests" Congress had in mind when it included "interests" in "lands" or "waters," the title to which is in the United States, within the definition of public lands, the Court said, were "possessory interests less than fee interests such as leases [for which] there is considerable authority that title can be held to such interest." Slip Opinion, p. 23.

Another reason for rejecting the Babbitt holding, the Alaska court said, was because "even assuming the navigational servitude or reserved water rights are interests to which the United States holds title, the land management authority which the federal government obtains through these interests is limited by the purposes of the interests." Slip Opinion, p. 25. Accordingly, the navigational servitude only gives the United States the power to regulate navigable waters for navigation purposes without owing compensation;... it does not permit federal regulation of hunting and fishing in navigable waters. Similarly, the reserved water rights doctrine only grants to the government the right to either exclude others from appropriating water which feeds a government reservation or to use a limited volume of water in order to serve the federal land reserved.... The doctrine does not provide the federal government with plenary power over a body of water." Slip Opinion, pp. 25, 26.

Another reason advanced by the Alaska court for rejecting the Babbitt holding was that the navigational servitude is derived from the Commerce Clause and the power to reserve water rights comes from the Commerce and Property Clauses. Since neither of these clauses gives Congress the power to regulate hunting and fishing on state land or water, it follows, the court said, that "neither the navigational servitude power to regulate for navigation purposes nor the power to reserve water rights can grant the federal government

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<sup>2</sup> The Babbitt opinion avoided mention of the Submerged Lands Act.

<sup>3</sup> The Babbitt court made no mention of this well-recognized limitation on the navigational servitude or reserved water rights doctrine.

jurisdiction to manage hunting and fishing in navigable waters. The two powers are over navigation and water, not fish and game." Slip Opinion, p. 26.

According to the Alaska court a final reason its ruling on the navigable waters issue was the sheer impracticality, if not the impossibility, of employing the reserved water rights doctrine to define the geographic scope of navigable waters covered by ANILCA. Congress could not have intended to create, the court said, "such a complicated and uncertain regulatory scheme" as the Babbitt holding requires. Slip Opinion, p. 27.

Rejected outright by the Alaska Court were the Babbitt panel's view "that the position taken by the federal agencies that reserved water rights...define the scope of ANILCA was a reasonable agency interpretation owed deference," and its view that the position advocated by the State would undermine Congress' intent to protect subsistence fishing. Citing a 1995 Sixth Circuit decision, the Alaska high court said no deference is owed to positions on the interpretation of statutes adopted by agencies during litigation which contradict earlier regulations. Not surprisingly, the Alaska court said that "[i]f any interpretation is owed deference, it is the interpretation in the federal regulations that ANILCA generally does not apply to navigable waters, not the position adopted in a litigation context." Slip Opinion, p. 28.

With respect to the Babbitt panel's concern about undermining congressional intent to protect and provide the opportunity for subsistence fishing, the Alaska court pointed out that "public lands" in the federal regulations issued pursuant to ANILCA includes navigable waters over submerged lands owned by the United States, and also that some subsistence fishing occurs in non-navigable waters which are "public lands." Thus "fulfilling Congress' intent to provide an opportunity for subsistence fishing does not require ruling that reserved water rights define 'public lands' under ANILCA." Slip Opinion, p. 31.

The two opinions, Babbitt and Totemoff, could hardly present a more marked contrast; one, thoroughly researched and carefully crafted, replete with supporting authority; the other sketchy, shy of authority, and rampant with the exercise of legislative power. What accounts for this remarkable divergence in the two opinions? Certainly not the lack of ability on the Babbitt panel. It was an outstanding panel, able and experienced. Surely it recognized the issue presented by the United States' amazing revelation during oral argument about the proper interpretation of public lands; i.e. the issue of whether that position or the position

contained in regulations adopted by the Secretary of the Interior represent "the agencies' answer" to the interpretation of "public lands." Certainly the opinion's implicit conclusion that the position adopted during the oral argument represents "the agencies' answer" to the statutory ambiguity, rather than that adopted by the agencies in a published regulation, merits an explanation, for sheer common sense says that it is the duly adopted regulation of the federal agency responsible for implementation of legislation that supplies the "agencies' answer;" otherwise, the United States, whenever during litigation it views a regulation as inimical to its litigation interests, would disavow the interpretation contained in the regulation and ipso facto adopt a new one favorable to its position in the litigation. Also meriting an explanation is the court's conclusion that if it adopted the State's position it "would give meaning to the term 'title' in the definition of the phrase 'public lands.'" Surely the Babbitt panel knew that Congress intended the word "title" to have meaning when it used it in the definition of "public lands." Why then did the Babbitt panel not give the term meaning other than glibly to usurp the legislative prerogative by saying that if it gave the term meaning it would undermine congressional intent to protect subsistence fishing, and therefore conclude that the term "title" in the definition of "public lands" is devoid of meaning?

The answer lies in the panel's inability to comprehend the delicate sensitivities which underlying ANILCA's provisions dealing with subsistence. Residing thousands of miles afield from subsistence hunting and fishing in Alaska, learning of the issues presented by ANILCA's vagaries only from a sterile printed record and from tourist guides, judges in the Ninth Circuit who are life-long residents of the southern climates who lack life-long familiarity with the multi-faceted policies underling ANILCA's subsistence provisions, are less qualified to fill in its intricacies than jurists who have lived for a life time with first-hand knowledge of them. This is especially true where, so often, they are called upon to ascertain Congressional intent. The framework for "congressional intent" in the enactment of statutes of particular regional applicability is most often supplied by those with personal familiarity with the underling, wide-ranging policy issues. Such was the case with ANILCA. It was crafted basically by Alaskans having personal interests in subsistence hunting and fishing issues. Standing to reason, therefore, is that judges having historical and personal sensitivity to these policy issues are better qualified to decide the thorny issues emminating from it.

This undoubtedly is what accounts for the strikingly dissimilar opinions in Babbitt and Totemoff. The Alaska

court, comprised of judges who have lived for years among those subject to ANILCA's subsistence provisions and who themselves have fished in Alaska's navigable waters were simply better able to interpret ANILCA. If that does not account for the wide divergence in the two opinions, what, then, does? Surely not the lack of legal ability in either body.

Babbitt is not the only illustration of an "inherently unsatisfactory" opinion of a Ninth Circuit panel interpreting ANILCA. Compare the Babbitt panel's failure to address the meaning of the word "title" with Judge Kozinski's amazing opinion in Kenaitze Indian Tribe v. State of Alaska, 860 F.2d at 312 (9th Cir. 1988). There the issue was the meaning of "rural" in ANILCA's definition of "subsistence uses." An Alaska statute had defined "rural area" to mean "a community or area of the state in which the noncommercial, customary, and traditional use of fish or game for personal or family consumption is a principal characteristic of the economy of the community or area." Swiftly striking down this statute as inconsistent with ANILCA, the Kenaitze panel said that the "term 'rural' is not difficult to understand," and, for guidance as to its meaning in the statute the panel referred to Webster's Third New International Dictionary 1990 (1981), and went on to say that "rural" "is a standard word in the English language, one commonly understood to refer to areas of the county that are sparsely populated, where the economy centers on agriculture or ranching," and that the "State's definition would exclude practically all areas of the United States that we think of as rural, including virtually the entirety of such farming and ranching states as Iowa and Wyoming. The panel's reference to agriculture or ranching, in especially in areas of the United States other than Alaska in support of its decision is remarkable since, apparently unbeknownst to the panel, there is virtually no agriculture or ranching in Alaska. Searching for further support of the holding, Judge Kozinski then looked to use of "rural" in other federal contexts, citing as examples, of all things, the practice of the U.S. Census Bureau, the Social Security Act, the Housing Act of 1949, and definitions adopted of rural by the Federal Communications Commission and the Federal Housing Administration.<sup>4</sup> These practices, statutory definitions, and regulations, of course, are applicable to the entire United States, where in many areas ranching and agriculture constitute the major economic activity, grossly unlike Alaska,

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<sup>4</sup> Judge Kozinski knows better than to lift definitions from the Social Security Act and the Housing Act of 1949 as support for the congressional intent in using "rural" in ANILCA. He is among the brightest of the bright.

(where essentially there is none). ANILCA uses the term "rural" to divide the State of Alaska (not the entire United States), into rural versus urban areas. Referring to rural areas in Wyoming and Iowa in contrast to the Los Angeles urban area bears no resemblance to the urban/rural contrast between Anchorage and Ophir, Alaska.

The Kenaitze panel also supported its view that the Kenai, Alaska area is not urban by dividing its population into the area in which those inhabitants reside, and then, astoundingly, employing a tourist guide, The Milepost, to support the panel's view that the Kenai area is rural. The guide describes the Kenai area as one featuring "massive peaks and broad ice fields of Kenai mounts...dropping away to the great forested plateau of the western area," with its many lakes, rivers, and streams making Kenai a prime sport fishing destination. 860 F.2d at 314. If members of the panel had spent much time in the Kenai area they would have recognized how inaccurately this describes the Kenai/Soldotna area. The "massive peaks" and "broad ice fields" are miles and miles away from the central Kenai/Soldotna communities in "the Kenai area."

After rejecting "the states's contorted definition of rural," and adopting one used by Congress in the Social Security Act and the Housing Act of 1949, as well as definitions adopted by the FCC and FHA of the term defining rural "in terms of population," the opinion solemnly cautions against "creative interpretations"<sup>5</sup> and points out that "Congress passes laws, not purposes,....and that "[w]hat matters is not some general purpose that may have motivated lawmakers but the means they chose to achieve that end." 860 F.2d at 317. Apparently the Babbitt panel overlooked this admonition from Judge Kozinski when it ostensibly concluded that when Congress used the word "title" in the definition of "public lands" it did not intend it to have any meaning. If this is not a classic example of "creative interpretation," one has yet to discern it.

The views I express here are not an appeal to

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<sup>5</sup> See footnote 7, in the Kenaitze opinion, where Judge Kozinski says: "The state does not of course claim to be rewriting the statutory language. No one ever admits to taking a blue pencil to an Act of Congress. But precisely the same end is achieved through creative interpretation. Assigning exotic definitions to statutory terms alters the statute just as surely and effectively as changing the statutory language." By the same token exotic borrowing of definitions from unrelated contexts alters the statute "as surely and effectively as changing the statutory language."

regionalism. I agree with the remarks of former Chief Judge Warren Burger that it is offensive to believe that a United States judge, having taken the oath of office, is going to be biased because of the economic conditions of his own jurisdiction. I also agree with former Senator Pete Wilson's echoing of Justice Burger's concerns when he says that the "judges of the Circuit are there to apply the law, not make it," and that "it is not intended that federal courts abide by a sense of localism." Yet that is precisely what the California-laden panels are consistently doing when they are deciding cases under statutes unique to Alaska. They are applying a "California judicial philosophy" time and time again when interpreting and applying federal statutes specifically applicable to Alaska. They are making law, and the law they are making is rooted in a "California judicial philosophy" sprinkled heavily with a large measure of localism. If that is not exactly what Babbitt and Kenaitze show, what else accounts for these bizarre decisions?

If enactment of S. 956 is what it takes to bring this pernicious practice to a halt, then that is what ought to be done.

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

**STATE OF ALASKA**

TONY INGWER, GOVERNOR

**DEPARTMENT OF LAW  
OFFICE OF THE ATTORNEY GENERAL**

September 12, 1995

Honorable Orrin Hatch  
Chair, Senate Committee on the Judiciary  
224 Senate Dirksen Office Building  
Washington, D.C. 20510-6275:

Dear Chairman Hatch:

The undersigned attorneys general support the division of the existing Ninth Circuit Court of Appeals and the creation of a new Northwest circuit court consisting of judges from the five states that we serve, Alaska, Idaho, Montana, Oregon, and Washington, provided, of course, the new circuit is adequately funded.

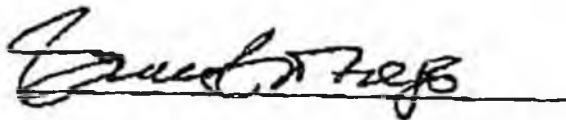
The creation of a Northwest circuit would mitigate the problems of the unwieldy size of the Ninth Circuit. The Ninth Circuit has by far the most judges, the largest area served, and the most cases of any circuit court. Our states are directly affected by the resulting intra-circuit inconsistencies in decisions, infrequency of *en banc* consideration, and potential for drawing panels with little familiarity with the laws and practices of our states. Judges serving a Northwest circuit would be more aware of issues pending before other panels, and more willing to hear matters important to our states *en banc*. Perhaps most importantly, the more manageable volume of cases will allow our states' citizens to have their cases heard and decided in a reasonable period of time.

The Ninth Circuit's caseload is steadily increasing with the greatest increase in cases coming from the Central District in California. In 1989, 22 percent of all Ninth Circuit cases were filed in the Central District of California; today, those cases constitute 27 percent. This trend will only aggravate our problems in the future if the Ninth Circuit is not divided.

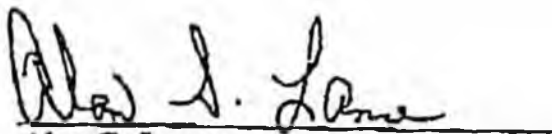
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For these reasons, we urge your support for the creation of an adequately funded and staffed Northwest Circuit Court. We appreciate your consideration of our comments and concerns.

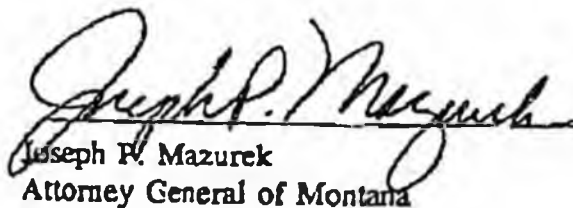
Sincerely,



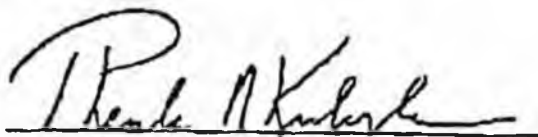
Bruce M. Botelho  
Attorney General of Alaska



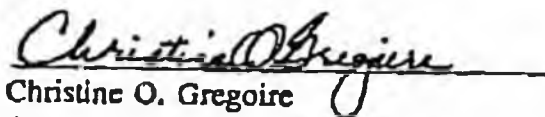
Alan G. Lance  
Attorney General of Idaho



Joseph P. Mazurek  
Attorney General of Montana



Theodore R. Kulongoŝki  
Attorney General of Oregon



Christine O. Gregoire  
Attorney General of Washington



# 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 course, splitting the circuit raises its own, equally serious issues. This committee must also consider, for example, whether creating another 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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Anchorage • Star of the North  
Chamber of Commerce

**Juvenile Criminal Records Resolution  
Anchorage Chamber of Commerce  
Resolution 96/97-14**

WHEREAS, juvenile crime is of utmost concern to both the Chamber and the community at large, and

WHEREAS, the curtain of security behind the juvenile justice system greatly erodes public confidence in the system, and

WHEREAS, the sealing of juvenile records impedes the ability of businesses and employers to conduct adequate background checks of prospective employees, and

WHEREAS, victims of crime, whether it be businesses or private individuals deserve to know the final resolution of the crime committed against them, and

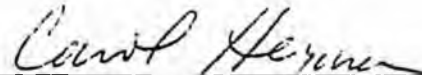
WHEREAS, the opening of records, especially records for violent crimes will serve as a deterrent for future crimes, and

WHEREAS, the opening of records will allow law enforcement officials and school officials to communicate legally regarding problems in the community;

NOW THEREFORE BE IT RESOLVED that the Anchorage Chamber of Commerce supports the concept of the opening of juvenile criminal records.

Approved April 18, 1997

  
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Tom Williams, Chair 1996-97

  
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Carol Heyman, President