ALASKA LEGISLATURE COMMITTEE FILES 1995-1996 8672
8801 HOUSE STATE AFFAIRS

HJR

47

Representative Tom Brice
ALASKA STATE LEGISLATURE

119 N. Cushman, Ste. 205
Fairbanks, AK 99701
907-456-7423 / Fax: 451-9293
While in Juneau
State Capitol
Juneau, AK 99801-1182
907-465-3466

SPONSOR STATEMENT

HJR 47: Supporting continued federal funding of the Alaska National Guard Youth Corps ChalleNGe Program

The Alaska National Guard Youth Corps ChalleNGe program seeks to prevent "at-risk" youths, those who have left school without having completed a high school program, from entering society's correctional systems. According to national statistics, 80 per cent of those in federal prisons do not have high school diplomas or GED certificates.

The ChalleNGe program offers the opportunity for students to complete a GED program, or return to high school with new, positive skills and strengths which allow them to obtain a diploma in a traditional setting. Currently, 85 per cent of the ChalleNGe program graduates are fully employed or attending school. 136 students have graduated from the ChalleNGe program, with another 64 slated to graduate February 16, 1996.

It can cost between $20,000 and $50,000 per year to house a prisoner in Alaska. For a fraction of that cost, the ANG Youth Corps ChalleNGe program offers Alaska's at-risk youths the skills necessary to not only stay out of our jails, but to succeed in today's ever more complicated society. The ChalleNGe program is cost effective, utilizing $2.9 (1996 program year) million in federal funding to provide opportunities to succeed to at-risk young people in Alaska. At $20,000 per year, 136 inmates would cost Alaska $2.72 million. According to the Department of Corrections, Alaska's approximate cost for a medium security prisoner is $107 per day, or $39,055 per year.

Through tough, structured military-style training, ChalleNGe program graduates receive the discipline and self-esteem needed to succeed. ChalleNGe program graduates tend to have a drive to succeed, become productive Alaskans, and serve as role models for other youths and adults. ChalleNGe program graduates are likely to stay off public assistance rolls. They are also likely to support their local economies, pay taxes, and contribute to the well-being of their communities.

Supporting continued funding of this program pays off far beyond its cost.

FISCAL NOTE

STATE OF ALASKA
1996 LEGISLATIVE SESSION

BILL NO. HJR 47

Revision Date:
Dept. Affected: Office of the Governor
Title: "A Resolution Supporting continued funding of the Alaska National Guard Youth Corps Challenge Program"
BRU: Executive Operations
Component: Office of the Lt. Governor
Sponsor: Representatives Brice, Mulder
Requester:
COMPONENT SERIAL NO. 11

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 97	FY 98	FY 99	FY 100	FY 01	FY 02
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	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						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY96) cost: $ 0.0

POSITIONS

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact.

Prepared by: John Lindback, Chief of Staff
Division: Office of the Lt. Governor
Phone: 465-3522
Date: 2/12/96

Approved by Commissioner: Lieutenant Governor Fran Ulmer
Agency:
Date: 2/12/96

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Representative Tom Brice
ALASKA STATE LEGISLATURE

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State Capitol
Juneau, AK 99801-1182
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MEMORANDUM

To: Representative Jeannette James, Chair
House State Affairs Committee

From: Representative Tom Brice TB

Date: February 20, 1996

Re: HJR 47: Supporting continued funding of the Alaska National Guard Youth Corps ChalleNGe Program.

I would appreciate the scheduling of HJR 47 for a hearing before the House Sate Affairs Committee at your earliest convenience.

The Alaska National Guard Youth Corps ChalleNGe Program takes "at risk" young people between the ages of 16 and 18 and offers them the opportunity to complete a high school education either through a GED program or actually returning to the traditional high school setting. Through a disciplined military style program, youngsters, who by leaving school early are potentially on the path to either incarceration or welfare, receive the necessary impetus to continue their educations and learn to become contributing members of our society

The success rate of this program speaks for itself. Currently, 85 per cent of the ChalleNGe program graduates are fully employed or attending school. 136 students have graduated from the ChalleNGe program, and another 64 students were slated to graduate February 16, 1996.

The Alaska National Guard Youth Corps ChalleNGe Program has earned the Alaska Legislature's support.

ALASKA NATIONAL GUARD YOUTH CORPS
ChalleNGe Program
Camp Carroll Training Site
P.O. Box 5727
Fort Richardson, Alaska 99505
(907) 384-6015/6017 or Toll Free 800-797-2267

13 February 1996

Rep. Tom Brice
State Capitol
Juneau, Alaska

Dear Rep. Brice;

Please accept my thanks for your support of the Alaska National Guard Youth Corps ChalleNGe Program. As you are aware, the program is designed to provide "at-risk" 16-18 year-old Alaskans with the opportunity to earn a general educational development (GED) certificate, gain some basic skills training, and learn important life skills.

The Alaska ChalleNGe Program will graduate its fourth class, Class 95-2 this coming Friday morning. The young men and women who will cross the stage of the Fort Richardson post theater have completed a demanding 22-week residence program, which will be followed by 12 months of one-on-one assistance and tracking.

We are proud to say that ChalleNGe Program graduates are doing very well. Through our post-residential tracking program we know that 85 percent of our graduates are either employed full-time, or are currently in academic or skills training. These graduates came to us with little hope of future success. None had completed high school programs. Many had troubled lives prior to entering our program. Statistically, most of these teenagers were headed for futures on welfare or, worse, in prison.

We are encouraged by your support for the ChalleNGe Program and the well-being of these successful Alaskan young adults. Your introduction of a joint resolution in support of our efforts on behalf of our students is truly appreciated.

If my staff or I may be of any assistance to you or your fellow legislators, please do not hesitate to call me.

Sincerely;

John G. Fleming, Col (Ret)
Director

HJR

49

FISCAL NOTE

STATE OF ALASKA
1996 LEGISLATIVE SESSION

BILL NO. HJR 49

Revision Date:
Title: Dedicated Highway Maintenance Fund
Sponsor: Rep. James
Requester: House State Affairs

Dept. Affected: DOT&PF
BRU: Statewide Maintenance & Operations
Component: Highways & Aviation (Central, Northern & Southeast)
COMPONENT SERIAL NO. 564, 2068, 603

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	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		(21,400.0)	(21,400.0)	(21,400.0)	(21,400.0)	(21,400.0)
1005 GF/Program Receipts						
1006 GF/MHTIA						
Highway Fund		21,400.0	21,400.0	21,400.0	21,400.0	21,400.0
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY96) cost: $ 0.0

POSITIONS

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary)

The amount of the funding switch from General Funds to the proposed Highway Fund is based on the FY95 actual net highway fuel taxes collected by the Department of Revenue (not including off-highway fuel taxes). Because the amount of fuel tax revenue currently collected is significantly less than the department's highway maintenance and operations (M&O) budget, it is assumed that the department can identify those locations where highway M&O is easily separated from aviation M&O. Therefore, administrative and accounting requirements will not increase significantly and so will not require additional positions or funding.
It is assumed the decrease in unrestricted revenues will be reported by the Department of Revenue.

Prepared by: Sam Kito III — Phone: 465-3900
Special Assistant
Division: Office of the Commissioner — Date:
Approved by: Joseph L. Perkins — Date:
Commissioner
Agency: Department of Transportation and Public Facilites

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9-LS1178\A.1
Chenoweth
1/31/96

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE JAMES

TO: HJR 49

Page 1, line 2, after "**fund**":

Insert "**from state taxes on fuel used for the propulsion of highway or road use motor vehicles**"

Page 1, line 15, after 'motor vehicles":

Insert "designed for and ordinarily used on highways or roads"

61A C.J.S., Motor Vehicles, 595.

title. (a) Unless otherwise
therwise requires, in this ti
title
erminate, by formal action
ation, license, permit or pr
or regulations adopted und
the document issued or the
person holding the documen

means a motor vehicle or a
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or vehicular way connected
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way with an average daily

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e than 15 passengers, includi

n of materials found by the U
to be hazardous for purpose
Materials Transportation Ac
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mmercial vehicles:
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, farm machinery, or farm su
used in the operations of a co
ed within 150 miles of the fa

exclusively for purposes othe

ns activities for which a per
tion or activities for which a
pensation but that are incide
person's primary business
co missioner of public safe
m ans a vehicle whose bo
1949 or a replica of a vehicle

y and frame were manufactured before 1949 and that has been
dified for safe road use; in this paragraph, "modified" includes a
terial alteration of the drive-train, suspension, brake system, or
ensions of the body;
(6) "department" means the Department of Public Safety;
(7) "driver" means a person who drives or is in actual physical
trol of a vehicle;
(8) "driver's license" or "license," when used in relation to driver
nsing, means a license or permit to drive a motor vehicle, or the
ivilege to drive or to obtain a license to drive a motor vehicle, under
laws of this state, whether or not a person holds a valid license
ued in this or another jurisdiction;
(9) "gross combination weight rating" means the value specified by
manufacturer as the loaded weight of a combination vehicle, ex-
t that if a value has not been specified by the manufacturer, the
oss combination weight rating is determined by adding the gross
hicle weight rating of the power unit and the total weight of the
wed unit and the load on the towed unit;
(10) "gross vehicle weight rating" means the value specified by the
nufacturer as the loaded weight of a single vehicle;
(11) "highway" means the entire width between the boundary lines
every way that is publicly maintained when a part of it is open to
public for purposes of vehicular travel, including but not limited to
y, street and the Alaska state marine highway system but not
icular ways or areas;
(12) "motor vehicle" means a vehicle which is self-propelled except
hicle moved by human or animal power;
(13) "motorcycle" means a vehicle having a seat or saddle for the
of the rider and designed to travel on not more than three wheels
ntact with the ground; the term does not include a tractor;
(14) "motor-driven cycle" means a motorcycle, motor scooter, motor-
bicycle, or similar conveyance with a motor attached and having
ngine with 50 or less cubic centimeters of displacement;
(15) "official traffic-control device" means a sign, signal, marking,
ther device not inconsistent with this title, placed or erected by
rity of a state or municipal agency or official having jurisdiction,
the purpose of traffic regulating, warning, and guiding;
(16) "owner" means a person, other than a lienholder, having the
erty in or title to a vehicle, including but not limited to a person
ed to the use and possession of a vehicle subject to a security
erest in another person, but exclusive of a lessee under a lease not
ded as security;
(17) "revoke" means the termination by formal action of the depart-
or a court of a certification, registration, license, permit, or priv-
issued or allowed under this title or regulations adopted under
title; the certification, registration, license, permit, or privilege

Alaska State Legislature

REPRESENTATIVE
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House of Representatives
House District 34

SPONSOR STATEMENT

HJR49
DEDICATED HIGHWAY FUND

HJR49 proposes amendments to the Alaska State Constitution creating a dedicated highway fund.

This resolution differs from similar ones in that

1. It utilizes ***ONLY STATE TAXES ON FUEL USED FOR THE PROPULSION OF MOTOR VEHICLES*** and

2. The legislature may appropriate money from the fund ***ONLY FOR THE MAINTENANCE OF ROADS AND HIGHWAYS.***

Previous proposals (all of which failed) were more complex. For example, they utilized revenues from *"State licenses and fees for the registration, operation, and use of motor vehicles, aircraft, and water craft, from the use of State transportation facilities, including the State ferry system, and from State taxes on fuel used for the propulsion of motor vehicles, aircraft, and water craft"* and allowed the legislature to appropriate money from the fund only for *"maintenance and operation of a State or local government transportation facility.... the improvement and construction of harbor facilities.... (or) the administration and enforcement of motor vehicle laws."*

HJR49 provides a mechanism to address the desperate need for improved maintenance of Alaska's roads and highways and, in its simplicity, stands a greater chance of passing than previous proposals.

Legislative Research Agency

Alaska State Legislature

130 Seward Street, Suite 218
Juneau, Alaska 99801-2196

Phone: (907) 465-3991
Fax: (907) 463-3351

May 30, 1995

MEMORANDUM

TO: Representative Jeannette James

FROM: Linda Brooks
Legislative Analyst

RE: **Dedicated Highway Funds in Other States**
Research Request 95.205

You requested a list of states with dedicated highway or transportation funds. According to *Earmarking State Taxes*, an April 1995 publication of the National Conference of State Legislators (NCSL), all fifty states dedicate at least a portion of motor fuel tax revenues for transportation purposes. That the NCSL lists Alaska as a state with a dedicated transportation fund may seem surprising, because Article IX, Section 7 of Alaska's Constitution prohibits the establishment of new dedicated funds.[1] However, since Alaska Statute 43.40.010 directs that revenues from motor fuel taxes shall be deposited in a special highway fuel tax account in the state general fund and that the legislature may appropriate funds from this account for transportation purposes, the NCSL holds the view that Alaska essentially has a dedicated transportation fund for all practical purposes.[2] New Jersey is similar to Alaska with motor fuel tax receipts first going into the general fund and then being appropriated by the legislature for transportation purposes.

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[1]The Alaska Constitution provides for two exceptions to the prohibition against dedicated funds. Dedicated funds in existence at the time of statehood were allowed to continue. Also, the state may establish a new dedicated fund when it is necessary to participate in a federal program.

[2]Alaska Statute 43.40.010 separates motor fuel tax revenues into three categories: aviation, watercraft, and all other motor fuel tax revenues. Sixty percent of aviation motor fuel tax receipts are to be returned to a municipality owning and operating or leasing and operating a municipal airport in the proportion that the aviation fuel tax revenue was collected at the airport. All other aviation fuel tax revenues are to be deposited into a special aviation motor fuel tax account in the general fund and may be appropriated by the legislature for aviation facilities. Revenues from watercraft motor fuel taxes are to be deposited into a special watercraft motor fuel tax account in the general fund and may be appropriated by the legislature for water and harbor facilities. All other motor fuel tax revenues are to be deposited into a special highway fuel tax account in the general fund and may be appropriated by the legislature for highways and ferries.

All states dedicate motor fuel taxes, but states vary in whether the dedication is established by statute or constitution. At least twenty-three states dedicate revenues from motor fuel taxes, vehicle licensing, vehicle registration, and/or operator licensing for transportation purposes per provisions in their state constitutions. States with constitutional dedication are Alabama, Arizona, California, Florida, Georgia, Idaho, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, Oregon, Pennsylvania, South Dakota, Texas, Utah, Washington, and West Virginia. We include sections from these constitutions as Attachment A. While the constitutional provisions differ, most of these states dedicate all revenues derived from fees, excises, and/or license taxes relating to the registration, operation and use of vehicles on public highways and to fuels used for the propulsion of such vehicles to a transportation fund.

Almost all of these state constitutional provisions are silent on the subject of tax rates. However, Florida's constitution designates a "second gas tax" of two cents per gallon upon gasoline and New Jersey's constitution stipulates that there shall be credited annually to a special account in the general fund an amount equivalent to the revenue derived from two and one-half cents per gallon from the tax imposed on motor fuel. Specifying a tax rate in the constitution would make it difficult to maintain the real value of the dedicated revenues in times of inflation, since an increase in the amount of dedicated taxes would require a constitutional amendment.

Most of the constitutional provisions direct that dedicated transportation revenues are to be spent on highway and road maintenance and construction, but several states also allow their revenues to be spent on traffic law enforcement. Several states use their dedicated transportation funds for local and county roads as well as state highways. The Minnesota and Missouri constitutions specify percentages of highway tax revenues to be spent on local and county roads.

Finally, we should note that while most states dedicate 100 percent of motor fuel tax revenues for transportation purposes, some states dedicate substantially less. For example, according to fiscal year 1993 figures in the NCSL publication, *Earmarking State Taxes*, New York dedicated only 20 percent of its motor fuel tax revenues to transportation purposes. Kentucky dedicated 48 percent, New Jersey 38 percent, and Rhode Island 59. Earmarking less than 100 of motor vehicle registration or licensing fees for transportation purposes appears to be even more common. For example, instead of dedicating all revenues for transportation purposes, Arizona specifically earmarked 17 percent of vehicle licensing fees to the support of public schools in fiscal year 1993. Similarly, California dedicated 25 percent of vehicle license to the support of county health and social service programs.

We include *Highway Taxes and Fees: How They Are Collected and Distributed 1993*, published by the U.S. Department of Transportation's Federal Highway Administration as Attachment B. How states pay for highway construction and maintenance is a complex topic, and this Federal Highway Administration publication provides detailed information on highway funding practices in all fifty states. Appendix A to the NCSL's 1995 publication, *Earmarking State Taxes*, is less detailed but shows the revenues each state raised through various highway user taxes during fiscal

year 1993 and the percentages of these revenues that were earmarked. We include the NCSL appendix as Attachment C. However, the NCSL appendix focuses on highway user *taxes* and omits information on *fees* such as operator licensing fees that might also be dedicated into state transportation funds.

We hope this information is useful to you.

Attachments

HJR

51

Alaska State Legislature

Representative Joe Green

District 12

Sponsor Statement

HJR 51 - Constitutional Amendment to Limit Sport Fish Guides

HJR 51 proposes a constitutional amendment to grant the state the authority to limit entry into the sport fish guide profession. HJR 51 is needed because the state's authority to impose such limits is not clear at this time. We believe that without a constitutional amendment, litigation is sure to follow any attempt to limit sport fish guides under current law.

While it is anticipated that such limits will be the conclusion of a public process, based on scientific data, HJR 51 does not address the specifics of implementing such restrictions. HJR 51 simply grants a clear and concise line of authority from the voters to the state.

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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Mail Stop 3101

130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM December 4, 1995

SUBJECT: "Open access" provisions of the Alaska Constitution and restrictions on sport fish guides (Work Order No. 9-LS1353)

TO: Representative Joseph Green

FROM: George Utermohle
Legislative Counsel

This memorandum briefly discusses the implications that the "open access" provisions of article VIII of the Alaska Constitution would have for any proposal to limit the number of sport fish guides.

Any proposal to limit the number of sport fish guides would infringe on the "open access" provisions of the Alaska Constitution, because it would have the effect of restricting free entry into the fishery. See, McDowell v. State, 785 P.2d 1 (Alaska 1989); Owsichek v. State, 763 P.2d 488 (Alaska 1988); Bozanich v. Noerenberg, Alaska Superior Court, First Judicial District, Juneau, Case No. 70-389, March 15, 1971. Even though they are not actually engaged in sport fishing while providing guide services, the Alaska Constitution protects the open access rights of sport fish guides to use fishery resources for professional purposes. "The common use clause makes no distinction between use for personal purposes and use for professional purposes." Owsichek, 763 P.2d at 497; see also, Tongass Sport Fishing Association, 866 P.2d 1314 (Alaska 1994); Alaska Fish Spotters Association, 838 P.2d 798 (Alaska 1992).

The "open access" provisions of article VIII of the Alaska Constitution are the "common use" section[1], "no exclusive right of fishery" clause[2], and the "uniform application" section[3].

---

[1] Article VIII, sec. 3 states:

Common Use. Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.

[2] Article VIII, sec. 15 states (emphasis added):

No Exclusive Right of Fishery. No exclusive right or special privilege of fishery shall be created or

(continued...)

These provisions provide that all persons shall have an equal opportunity to participate in the use of fish and game resources.

The current limited entry system for commercial fisheries (AS 16.43) would violate the open access provisions of the Alaska Constitution, unless the constitution had been amended to allow limited entry. State v. Ostrosky, 667 P.2d 1343 (Alaska 1983), appeal dismissed sub nom. Ostrosky v. Alaska, 467 U.S. 1201, 81 L.Ed.2d 339 (1984). In 1972, article VIII, section 15 was amended to create a limited entry exception to the "no exclusive right of fishery" clause. The limited entry exception provides that "[t]his section does not restrict the power of the State to limit entry into any fishery for purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State." Article VIII, sec. 15, in relevant part.

In order to place a limit on the number of sport fish guides, it would be necessary for such limitations to fall under the limited entry exception. Though the limited entry exception was largely adopted in the context of commercial fisheries, the exception does not expressly limit itself to only commercial fisheries. The courts may construe "any fishery" to include sport fisheries as well as commercial fisheries. Thus there is a possibility that the limited entry exception would authorize some form of limitation on the number of sport fish guides.

Assuming that the limited entry exception is construed broadly to include limited entry for sport fish guides, the next obstacle to be overcome is to establish that limitations or restrictions on who may become sport fish guides achieves the three purposes of the limited entry exception: resource conservation, prevention of economic distress among fishermen and others, and promotion of aquaculture. When the Alaska Supreme Court approved the commercial fisheries limited entry program, the court did not examine in any detail whether the program satisfied all of the purposes that the limited entry exception was to achieve. Ostrosky, 667 P.2d at 1190-95. In other cases where the court had occasion to review commercial fisheries limited entry, the court did not rigorously examine whether the program achieved all three of the purposes, but instead seemed to accept a challenged provision if it furthered one or two of the purposes of the limited entry exception. Johns v. Commercial

---

[2](...continued)
authorized in the natural waters of the State. This section does not restrict the power of the State to limit entry into any fishery for purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State.

[3] Article VIII, sec. 17 states:

Uniform Application. Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation.

Fisheries Entry Commission, 758 P.2d 1256, 1263-64 (Alaska 1988); Commercial Fisheries Entry Commission v. Apokedak, 606 P.2d 1255, 1265 (Alaska 1980). The burden would fall upon the legislature to establish a substantial record in the legislative history that any legislation limiting the number of sport fish guides achieves those purposes.

If the limited entry exception cannot be construed to authorize a limitation on the number of sport fish guides, then the only remaining option is to amend the Alaska Constitution accordingly.

Please contact me, if I can provide additional information on the open access provisions of the Alaska Constitution or other issues relating to sport fish guides.

GU:glc
95-452.glc

FISCAL NOTE

STATE OF ALASKA
1996 LEGISLATIVE SESSION

BILL NO. HJR 51

Revision Date:
Title: "...amendment to the Constitution of the State of Alaska relating to limited entry for sport fish guides..."
Sponsor: Representative Green
Requester: House State Affairs Committee

Dept. Affected: Department of Law
BRU: Civil Division
Component: General Legal Services
COMPONENT SERIAL NO. 2087

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	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						
1006 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY96) cost: $ 0.0

POSITIONS

FULL-TIME	0.0	0.0	0.0	0.0	0.0	0.0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

House Joint Resolution 51 proposes an amendment to the Constitution of the State of Alaska that, if approved by Alaska's voters, will permit the state to limit entry into the sport fish guiding profession and closely allied professions who are paid to assist others taking sport fish. Approval of the Resolution will place it on the ballot at the next general election for consideration by the voters. Therefore, approval of the Resolution will not have a fiscal impact for the Department of Law, because it simply places a ballot proposition before the voters. However, we caution that if the proposition is eventually approved by the voters, there will be some legal work for the Department of Law, depending upon the criteria that are established for entry into the sport fish guide profession.

The state's previous actions that established limited entry for commercial fishing resulted in substantial litigation which, until many of the basic issues raised by the program were resolved, took up to three attorneys

Prepared by: Richard I. Pegues, Director — Phone: 465-3672
Division: Administrative Services Division — Date: 1/22/96

Approved by Commissioner: Bruce M. Botelho, Attorney General — Date: 1/22/96
Agency: Department of Law

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STATE OF ALASKA
1996 LEGISLATIVE SESSION

BILL NO. HJR 51

ANALYSIS CONTINUATION:

to handle. There were about 1,547 sport fishing charter vessels registered in 1995, and there were about 1,835 fresh water fishing guides registered in 1995, or nearly 3,400 sport fish guides operating in the state last year. Based on these numbers, and based on past experience, it is not unreasonable to expect that litigation will arise from those who do not qualify under future entry rules. The department estimates the time of one full-time attorney may be required to defend the new limited entry program for a period of two or three years, beginning in FY98, if the voters amend the Constitution. The annual cost will be approximately $150,000, including the outside cost of expert witnesses. These costs are not shown on the fiscal note, because they are outside the scope of the Resolution.

FISCAL NOTE

STATE OF ALASKA
1996 LEGISLATIVE SESSION

BILL NO. HJR 51

Revision Date: 1/23/96
Title: Constitutional Amendement Re limited entry f
sport fish guides
Sponsor: Representative Green
Requester: Representative Green

Dept. Affected: Office of the Governor
BRU: Elective Operations
Component: General and Primary Elections

COMPONENT SERIAL NO. 22

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 97	FY 98	FY 99	FY 100	FY 01	FY 02
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL	2.2					
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	2.2	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	2.2					
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other						
TOTAL	2.2	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY96) cost: $ 0.0

POSITIONS

FULL-TIME	0					
PART-TIME	0					
TEMPORARY	0					

ANALYSIS: (Attach a separate page if necessary)

This figure includes the cost of providing information about this issue in the Official Election Pamphlet as required by AS 15.58, and the programming costs for counting votes cast on the measure. However, only four measures can be printed on a single ballot card. If this measure requires printing an additional ballot card, the costs will increase by $53.4.

Prepared by: Dana LaTour
Division: Division of Elections
Phone: 465-5347
Date: 1/23/96

Approved by
Commissioner: Lt. Governor Fran Ulmer
Agency: Office of the Lt. Governor
Date: 1/24/96

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1992 KENAI RIVER GUIDE SUMMARY
As of 10/15/92

March:	1 Res	1 Fishing,	1 Powerboat
	0 NonRes	0 NFishing	0 Drift
April:	30 Res	31 Fishing	26 Powerboat
	1 NonRes	0 NFishing	5 Drift
May:	98 Res	120 Fishing	113 Powerboat
	44 NonRes	22 NFishing	29 Drift
June:	50 Res	66 Fishing	53 Powerboat
	25 NonRes	9 NFishing	22 Drift
July:	13 Res	19 Fishing	18 Powerboat
	9 NonRes	3 NFishing	4 Drift
August:	2 Res	1 Fishing	1 Powerboat
	1 NonRes	2 NFishing	2 Drift
September:	0 Res	0 Fishing	0 Powerboat
	1 NonRes	1 NFishing	1 Drift

275 GUIDES TOTAL:

194 Residents	238 Fishing	212 Powerboat
81 Non-Residents	37 NFishing	63 Drift

53 New guides registered in 1992
49 Brand new guides, 5 previously registered
93 1991 Guides did not re-register in 1992.

2 Guides went from Res. in 1991 to NRes in 1992
- Steve Langston
- Hal Bor[illegible]

4 Guides went from NRes in 1992 to Res in 1992:
- Terry King
- Paul McMillen
- C. Larry Mills
- David VanLiere

134 Registered Drift boats on Kenai River in 1992
251 Registered Powerboats
Total: 385 Registered Kenai River Guide boats

124 Commercial Operators registered at Deep Creek, of those only 18 were not also registered for the Kenai River. (Note: 4 of the 18 were registered as Kenai River guides in previous years.)

127 Kenai River Guides also registered for Kasilof

24 Non-Competetive Commerical permits were issued for areas other than Deep Creek and Kenai River.

Total of 315 Non-Competitive Commercial Permits issued in 1992

1993 KENAI RIVER GUIDE SUMMARY
As of 10/11/93

February: 3	3 Res.	1 Fishing	3 Powerboat
	0 NonRes.	2 NFishing	0 Drift
March: 2	2 Res.	2 Fishing	1 Powerboat
	0 NonRes.	0 NFishing	1 Drift
April: 23	22 Res.	23 Fishing	20 Powerboat
	1 NonRes.	0 NFishing	3 Drift
May: 131	105 Res.	115 Fishing	99 Powerboat
	26 NonRes.	16 NFishing	32 Drift
June: 82	53 Res.	69 Fishing	58 Powerboat
	29 NonRes.	13 NFishing	24 Drift
July: 21	10 Res.	11 Fishing	13 Powerboat
	11 NonRes.	10 NFishing	8 Drift
August: 1	1 Res.	1 Fishing	0 Powerboat
	0 NonRes.	0 NFishing	1 Drift

263 GUIDES TOTAL:

196 Residents	222 Fishing	194 Powerboat
67 Non-Residents	41 Non-Fishing	69 Drift

57 New guides registered in 1993
48 Brand new guides, 9 previously registered
64 1992 Guides did not re-register in 1993

0 Guides went from Resident to Non-Resident in 1993

6 Guides went from Non-Resident in 1992 to Resident in 1993:

Dale Benson	Greg Brush
Catherine Campbell	Rolland LaFond
Pat Tolar	Bill Whitney

127 Registered Drift boats on the Kenai River in 1993
169 Registered Powerboats on the Kenai River in 1993
Total: 296 Registered Kenai River Guide boats in 1993

124
135 Commercial Operators registered at Deep Creek, 109 are Kenai River Guides, 26 are registered for Deep creek only.
18

122 Kenai River Guides were also registered for Kasilof

27 Non-Competitive Commercial permits were issued for areas other than Deep Creek and Kenai River.

Total of 316 non-Competitive Commercial Permits issued in 1993

1994 KENAI RIVER GUIDE SUMMARY
As of 10/12/94

February:	3	3 Res.	3 Fishing	3 Powerboat
		0 NonRes.	0 NFishing	0 Drift
March:	11	11 Res.	8 Fishing	8 Powerboat
		0 NonRes.	3 NFishing	3 Drift
April:	33	31 Res.	30 Fishing	24 Powerboat
		2 NonRes.	3 NFishing	9 Drift
May:	162	121 Res.	138 Fishing	126 Powerboat
		41 NonRes.	41 NFishing	36 Drift
June:	78	44 Res.	63 Fishing	43 Powerboat
		34 NonRes.	15 NFishing	35 Drift
July:	15	13 Res.	13 Fishing	9 Powerboat
		2 NonRes.	2 NFishing	6 Drift
August:	2	1 Res.	2 Fishing	1 Powerboat
		1 NonRes.	0 NFishing	1 Drift

+41 **304 GUIDES TOTAL:**

224 Residents 200,600 — 257 Fishing (206 R, 51 NR) — 214 Powerboat

80 Non-Residents — 47 Non-Fishing (17 R, 30 NR) — 90 Drift

76 New guides registered in 1994
59 Brand new guides, 18 previously registered
49 1993 Guides did not re-register in 1994

1 Guides went from Resident to Non-Resident in 1994
Rolland LaFond

5 Guides went from Non-Resident in 1993 to Resident in 1994:
David Anderson, David Corey, Jerry Strieby, Richard Fowler, Mark Glassmaker

157 Registered Drift boats on the Kenai River in 1994
182 Registered Powerboats on the Kenai River in 1994

+43 **Total: 339 Registered Kenai River Guide boats in 1994**

+64 219 Commercial Operators registered at Deep Creek, 187 are Kenai River Guides, 32 are registered for Deep creek only. +6

210 Kenai River Guides were also registered for Kasilof

10 Boat Rental Commercial Operator permits were issued for rental operations from the banks of the Kenai River

44 Non-Competitive Commercial permits were issued for areas other than Deep Creek and Kenai River.

Total of 380 non-Competitive Commercial Permits issued in 1994

1995 KENAI RIVER GUIDE SUMMARY
As of 9/12/95

February:	3	3 Res.	3 Fishing	3 Powerboat
		0 NonRes.	0 NFishing	0 Drift
March:	13	13 Res.	12 Fishing	8 Powerboat
		0 NonRes.	1 NFishing	5 Drift
April:	40	38 Res.	39 Fishing	33 Powerboat
		2 NonRes.	1 NFishing	7 Drift
May:	205	145 Res.	177 Fishing	163 Powerboat
		60 NonRes.	28 NFishing	42 Drift
June:	77	49 Res.	66 Fishing	48 Powerboat
		28 NonRes.	11 NFishing	29 Drift
July:	17	11 Res.	15 Fishing	8 Powerboat
		6 NonRes.	2 NFishing	9 Drift
August:	2	1 Res.	2 Fishing	0 Powerboat
		1 NonRes.	0 NFishing	2 Drift

357 GUIDES TOTAL:

260 Residents	314 Fishing	263 Powerboat
97 Non-Residents	43 Non-Fishing	94 Drift

of the 314 fishing guides, 243 are residents, 71 non-residents

77%

23%

94 New guides registered in 1995
84 Brand new guides, 10 previously registered
43 1994 Guides did not re-register in 1995

177 Registered Drift boats on the Kenai River in 1995
236 Registered Powerboats on the Kenai River in 1995
Total: 413 Registered Kenai River Guide boats in 1995

134 Commercial Operators registered at Deep Creek, 92 are Kenai River Guides, 42 are registered for Deep creek only.

174 Commercial Operators registered at Kasilof, 166 are Kenai River Guides, 8 are registered for Kasilof only.

10 Boat Rental Commercial Operator permits were issued for rental operations from the banks of the Kenai River. There are 51 rental boats under these permits.

54 Non-Competitive Commercial permits were issued for areas other than Deep Creek and Kenai River.

Total of 464 non-Competitive Commercial Permits issued in 1995

KENAI RIVER GUIDE TRENDS & NUMBERS
1982-1995 (As of 9/06/95)

YEAR	TOTAL GUIDES	RESIDENTS	NON RESIDENTS	MOTORIZED GUIDES	DRIFT GUIDES	TOTAL FISHING	NON FISHING
1995	357	260/ 73%	97/ 27%	263/ 74%	94/ 26%	314/ 88%	43/ 12%
1994	304	224/ 74%	80/ 26%	214/ 70%	90/ 30%	257/ 85%	47/ 15%
1993	263	196/ 75%	67/ 25%	194/ 74%	69/ 26%	222/ 84%	41/ 16%
1992	275	194/ 71%	81/ 29%	212/ 77%	63/ 23%	238/ 87%	37/ 13%
1991	315	214/ 68%	101/ 32%	229/ 73%	86/ 27%	290/ 92%	25/ 8%
1990	330	234/ 71%	96/ 29%	243/ 74%	87/ 26%	310/ 94%	20/ 6%
1989	312	212/ 68%	100/ 32%	215/ 69%	97/ 31%	292/ 94%	20/ 6%
1988	268	191/ 71%	77/ 29%	184/ 69%	84/ 31%	252/ 94%	16/ 6%
1987	232	188/ 81%	44/ 19%	155/ 67%	77/ 33%	222/ 96%	10/ 4%
1986	198	148/ 75%	50/ 25%	138/ 70%	60/ 30%	187/ 94%	11/ 6%
1985	171	131/ 77%	40/ 23%	131/ 77%	40/ 23%	160/ 94%	11/ 6%
1984	224					214/ 96%	10/ 4%
1983	208					198/ 95%	10/ 5%
1982	217					207/ 95%	10/ 5%

OPINION

PENINSULA CLARION 12-29-95 P.4

Number of river guides should be limited

A well-known, local Outdoors writer, one I have respect for, recently voiced his opinion concerning the number of guides operating on the Kenai River. I am excited to learn that his "second thoughts," as stated in Dec. 22, 1995, Outdoors section of the Peninsula Clarion, are finally more in line with my thinking. His fresh outlook will hopefully have an important impact on the Kenai River's future during 1996.

A writer's posture and comments made in print are always under attack. But make no mistake, they are important in a free society. On issues of grave importance such as overcrowding on the Kenai River, the "poison pen" carries an influential message that gives anyone an opportunity to make a darn fool out of themselves. And, I intend to make a darn fool out myself until something "realistic" is done to reduce the number of guides on this river!

I would like to clarify what that outdoor writer has recently, politely and carefully illustrated for you concerning Kenai River guides. I would like to allow you the opportunity to read selected parts of an important 1991 letter I wrote to Clem Tillion, the "fishing czar," who, by the way, was appointed by a governor to make recommendations concerning the river. No offense intended, but I question if Mr. Tillion even knows where Eagle Rock is located.

Before I do that, be aware of the fact that in 1974, I complained about too many Kenai River guides. I wrote a letter to Gov. Jay Hammond expressing my concern, and he responded by telling me he wasn't immediately concerned and that it was a local issue to be handled on the local level.

In 1976, I attended several meetings here and in Anchorage expressing my concern about the growing numbers of Kenai River guides. By 1978, I challenged the Coast Guard and demanded that all guides be licensed, registered and regulated. I won that battle which is another story. I never dreamed the guiding situation would be allowed to get so far out of hand.

In 1978, I retired my status as the "original Kenai River fishing guide" and elected to be no part of the guiding fraternity. I belong to no local fishing organizations, none of them represent me or speak for me. This information is much different than many have been led to believe. I was embarrassed to be put in the same category as some guides at the time. From that point, I constantly worked to control the number of guides working the Kenai River.

I have continued that mission ever since, in various ways. I sent several letters over the years to people who could have been influentially helpful but they proved useless. Now, many of these folks are concerned. Too late!

SPENCE DE VITO

Following are the brief, selected exerts from a long letter with a list of recommendations I made to Mr. Tillion and Gov. Walter Hickel's office in 1991.

Dear Mr. Tillion:

After our conversation last evening concerning the "Kenai River Guide Problem," I did a bit of brainstorming in an attempt to find and produce a more graceful solution in which to reduce the number of guides on the Kenai River.

I was pleased to learn that we are in concert with our thinking and that we both believe in the need for a drastic reduction of guides on the Kenai River. I anticipated problems in making a compatible solution concerning the number we could all live with. That number has been suggested to you in my letter of Jan. 4, 1991, concerning the lower river. I would hope that the number of guides for the entire river will not exceed 75, including the non-powered drift boats.

I realize there are many potential solutions, some better than others. Whatever you do:

a. Enforce an immediate moratorium on the number of fishing guides able to obtain guide permits for the Kenai River. Issue no more permits as of 9 a.m. ... today. Call Kenai Parks and Recreation and tell them to delay all new permits until further notice from the governor's office.

b. Establish the number of guides you want to operate on the Kenai River. Obtain a Kenai River map and count the well-known holes that are labeled on that map. The map can be obtained at the Moose Range Headquarters located as you enter Soldotna coming in from Homer. For example, from the Soldotna bridge downstream multiply each hole by two (two guides per hole). On the upper reaches, multiply the suggested holes by four (four guides per hole). This should help give you a starting point in which to determine numbers.

c. Once you have established a highly conservative number of guides, send notice to all Kenai River guides that were ever registered with Kenai Parks and Recreation. Try to be fair to meet the least resistance from as many folks as possible.

A sample of ideas for you to ponder for this notice to guides:

NOTICE:

1. One guide, one permit

2. Change the 6 o'clock starting time and closing time to read 7 and 5. One beginning at 7 a.m. and ending at noon and the other beginning at 1 p.m. and ending at 5 p.m. This would give the non-guide folks an opportunity to fish before or after work for a change without having to get up at 2 a.m. to beat the guides on the river. Clem, this also means that the guides not be allowed on the river before 7 or 1, and that they will be off the river by noon and 5 p.m. A guide will fish either in the morning or the afternoon rotation but not both. (By doing this, already one can see that twice as many guides could operate. Sure it would be a burden but isn't all this mess a burden on the rest of us?)

This equates to $650 per day per license, x 6 days = $3,900 per week x 8 June and July weeks = $31,200. The May, August, September, October (fishing) is "gravy frosting"! One boat, one guide, one license. A hard working guide could easily make $50,000 and spend the winter months in Mexico.

d. ALL guides who once held permits will receive a form to be completed along with the appropriate requirements. However, a new set of rules will be sent along and a warning will also be enclosed stating that not all guides will have the opportunity to fish this year. If they are not awarded or selected by the computer, or in an annual drawing, they will have to apply again next year, much like I have to when I apply for my sheep and goat permit.

When the rules are being passed out, everyone must have an equal opportunity. I realize it is difficult to wade through my suggestions but call on me if you need questions answered. I have more ideas on the rotating schedule but would hope we never have to come to that sort of participation.

I strongly feel, by limiting the guides, and by giving all guides the opportunity to go through the selection process, guides should be able to raise their premiums to somewhat compensate, and also to be able to adjust to the new ruling. At the same time, they will make non-guided fishermen and local fishermen happier. Their reputation as a guide on the Kenai will have more credibility and possibly the economy will stabilize.

Good luck!

Finally, I agree, Mr. Outdoor Writer. Yes, the number of guides should be limited but there are only a handful of folks that can make it actually happen. I know! I have been working on it for over 20 years. One of those people is the governor. Another, is the head of the Department of Fish and Game and perhaps the borough mayor. Then there are guys who have the skill and power of the "poison pen." You know, guys like you. Keep up the good work!

Spence De Vito is a former guide and a retired educator.

JAN 19 1996

KING'S BUDGET CHARTERS

Jeff King
Kenai River Guide

Box 2711
Soldotna, Alaska 99669
(907) 262-4564

We're Not Small • We're Exclusive

Representative Joe Green
State Capital
Juneau AK.

Dear Joe;

I wanted to write and thank you for the introduction of HJR #51. Being a long time fishing guide here on the Kenai and seeing the industry grow from infancy I am heartened that someone is trying to help us nurture the guiding along into something the entire State can be proud of. I know you're aware of our unique problems here on the Kenai so I won't elaborate any more than to say that all the rationale behind the limited entry scheme of the early 70's pertains every bit as much to our current situation as it did then to the commercial industry.

I wish you success in this resolution and hope you understand that this legislation's introduction means we need it now more than ever. I'm sure you realize that speculation runs rampant anytime someone thinks they must get their "foot in the door" before the door closes. Now that we're having this discussion of limiting participation openly we are in a situation that if this program does not go to fruition its failure will have an entirely reverse effect on the industry.

This is certainly a complex issue with many questions about the administration of a limited entry scheme to be addressed. As of now I am of the thinking that limited entry has been a tremdous success for the state in the commercial fisheries and a guide / charter program should be patterned after it...entirely. After all, the infrastructure is in place for such a program and experience has been gained in identifying overused areas and utilizing our resources for the best value to the State, we should take advantage of this now and not expect our resources and our citizens to accommodate the guide industry from the entire west coast.

As you can imagine I could go on and on about reasons for this program so I will end this by thanking you again and making myself available for any discussions on this matter. I am a member of the statewide guide / charter task force and a 15 year veteran of guiding. I also talked to you two years ago after a resource committee meeting about the future of our industry and appreciated your interest then.

Sincerely,

PENINSULA CLARION

Second thoughts on the number of tourists and guides on the Kenai

LES PALMER

An Outdoor View

Seven years ago, I said in this column that the number of Kenai River guides should be limited only by the law of supply and demand. If guides are to be limited, there must be a compelling reason for it, I opined. Our tourism industry is too immature to be putting on the brakes, I reasoned.

Well, I'm having second thoughts about guides and tourists.

I'm not alone either. Many Alaskans worry about the relentless growth of tourism. We worry that no one is keeping track of how tourists are exploiting our natural resources. We worry about the tons of fish and clams being taken out of Alaska in RVs and airplanes. We worry about wildlife viewers and other non-hunters becoming a political force with enough clout to stop hunting. We worry about whether we'll be able to get to the water, come salmon season.

An infinite number of tourists are stressing our finite resources. More and more, we see tourists and tourism not as an economic panacea, but as a threat to the reasons we live here.

The numbers are scary. In 1977, resident anglers outnumbered nonresidents by a ratio of 2-to-1. By 1990, Outsiders had caught up. Last year, they outnumbered us by 44,000. Every year, more come.

If tourism were any other business, it would be required to complete annual Environmental Impact Statements. Yet, no one measures its impacts on us Alaskans, or on our environment. Even as the state spends more of our money attracting more tourists and encouraging more tourism businesses, it spends less enforcing fish and wildlife regulations.

Palmer resident Rod Arno, a guide-outfitter who is also president of the Alaska Outdoor Council, agrees with me that Alaska needs to get a handle on what he calls "commercial users." These include fishing and hunting guides, eco-tour and wildlife-watching outfits, river rafters, transporters, air-taxi operators—everyone who exploits Alaskan's natural resources.

Arno says all users are "consumptive users," even those who just watch. And commercial users can be highly consumptive.

"Wildlife viewers exploit wildlife by their presence and by sheer numbers," Arno says. "All commercial users disturb and displace animals."

They can also exert enough political pressure to impact hunting, he says. Every viewing area exploited for "tourist green" is one less where hunters and other users are tolerated.

"If all these commercial uses were licensed, there could be some control on their encroachment into the habitat," Arno says. "There would be money to pay for monitoring their impacts on fish and game populations, and those impacts could be limited.

"I don't know anyone who wants things to get any worse than they are right now. There has to be some limit on commercial users."

For years, some hunting and fishing guides have asked for limited entry. It's high time that idea received serious consideration.

On the conflict-besieged Kenai River, 357 guides registered in 1995, up 53 from the previous year, an all-time record.

All is not well, on the Kenai. The price of a half-day king salmon trip is about what it was 10 years ago, indicating that the value of those trips has been steadily dropping.

Soldotna resident and Kenai River guide Jeff King has wanted to limit guides on the Kenai for several years, and he has plenty of company. In a carrying-capacity study of the Kenai, limiting the number of guides was what the public wanted most.

But any talk of regulating guides makes them jittery as a chinook in a creek. King is on the Guide Task Force, directed by the Board of Fisheries earlier this year to develop recommendation for managing the development of the fishing guide industry. Getting guides to even admit they should be licensed, let alone limited, is a chore, he says.

"You've got to crawl before you walk, and we're having a helluva time convincing people they ought to crawl," says King.

Statewide limits aren't necessary, he says. In many parts of Alaska, guiding would be beneficial, and it should be allowed to develop. But in places like the Kenai River, where some professionalism would be desirable, and where users would like to keep some "quality of experience" in their fishing, the number of guides should be limited, he says.

I don't know how best to limit or regulate commercial users. All I know is that it needs doing. Otherwise, we'll soon find that every lowbush cranberry has its own little price tag.

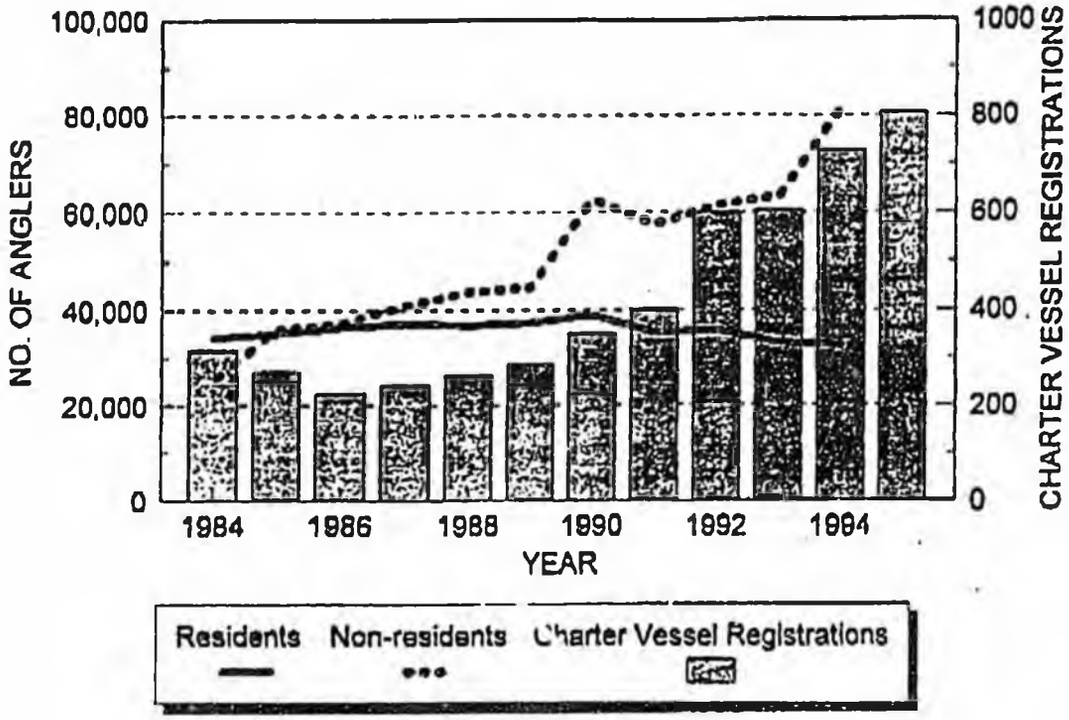

Figure 1. Estimated number of Alaska resident and non-resident anglers fishing in Southeast Alaska during 1984-1994 and number of charter vessel registrations, 1984-1995.

Sport fish harvest of king salmon from charter and private boats in Southeast Alaska (including Yakutat)

	charter boat	private boat
1993	13,977 (30%)	32,412 (70%)
1994	19,007 (48%)	20,770 (52%)

Sport fish harvest of coho salmon from charter and private boats in Southeast Alaska (including Yakutat)

	charter boat	private boat
1993	40,727 (40%)	61,611 (60%)
1994	43,083 (26%)	123,712 (74%)

Sport fishing effort (in angler days) from charter and private boats in Southeast Alaska (including Yakutat)

	charter boat	private boat
1993	77,161 (23%)	261,240 (77%)
1994	109,375 (27%)	295,104 (73%)

Alaska State Legislature

Please enter into the record my testimony to the HOUSE STATE AFFAIRS committee name

committee on HJR No. 51 bill/subject, dated 12/29/95.

I AM OPPOSED TO HJR NO. 51 TO LIMIT THE SPORT FISH GUIDE PARTICIPATION. I AM A LODGE OWNER AND CHARTER BOAT OPERATOR IN KODIAK. I WOULD PREFER THAT THE STATE ~~LIMIT~~ PLACE LIMITS ON THE DAILY CATCH AS OPPOSED TO LIMITING ENTRY FOR GUIDES. IF THE STATE WANTS TO LIMIT THE RESOURCE THAT SEEMS LIKE A MORE APPROPRIATE METHOD. WHY ARE SPORT GUIDES BEING SINGLED OUT WHEN RECREATIONAL FISHERMAN ARE NOT?

Signed: JOHN WITTEGEN
Testifier

WILD CREEK LODGE & CHARTERS
Representing (Optional)

BOX 2239 KODIAK, AK. 99615
Address

907-486-3953
Phone No.

9/86 Legislative Information Office

Alaska State Legislature

Please enter into the record my testimony to the House State Affairs committee name

committee on HJR51 bill/subject, dated 2/13/96.

Madame Chair:

I strongly urge that you allow the process to move forward. We, the state of Alaska are rapidly approaching a crossroads

The department of Fish & Game and the board of fisheries can not deal with this issue under regulatory change. This resolution allows the exploration of "Limited Entry" Allow this industry - "Sport Fish Guides" the opportunity to explore this issue as a managment option:

Respectfully: ERIC C STIRRUP

Signed: Eric C Stirrup
Testifier

Kodiak Western Charters
Representing (Optional)

Box 4123
Address

907-486-2200
Phone No.

Ketchikan Marine Charters, Inc.

KETCHIKAN MARINE CHARTER'S POSITION REGARDING KING SALMON ALLOCATION

The king salmon restrictions of the U.S./Canada treaty and the potential ramifications of the Endangered Species Act have created a king salmon resource management problem for the State of Alaska.

Ketchikan Marine Charters maintains that a comprehensive king salmon fisheries management plan is necessary to avoid continued conflict between user groups in order to maximize the socio-economic benefits of the king salmon fishery resource.

Ketchikan Marine Charters proposes the following as a "best-use" management scenario:

1. Limit the growth of the guided sport fishery by establishing a moratorium for charter vessels.
2. Allocate the U.S./Canada Southeast king salmon allocation as follows:
   33-1/3% to the sport fishery;
   33-1/3% to the guided sport fishery;
   and 33-1/3% to the commercial fisheries (Proposal #248).
3. Terminal hatchery area exclusions for all king salmon fisheries (Proposal #226)
4. Barbless hooks for all hook and line salmon fisheries (Proposal #214 sport; Proposal #289 & #290 troll)
   Proposal #214 amended to read: "In waters where live release is required by regulation or order because of size or possession limits only barbless single hooks may be used."
5. Ketchikan Marine Charters supports an export limit but does not feel proposals #202 & 203 adequately address the problem.
   Ketchikan Marine Charters opposes #202 & #203 on the grounds that neither proposal adequately addresses the problem without also negatively impacting the harvest opportunity of honest sport anglers.
6. Ketchikan Marine Charters supports a harvest record card reporting system to eliminate the expensive on-site creel census.
7. Ketchikan Marine Charters maintains that King Salmon Stamp money be used in area the stamp was sold, for enhancement.
8. Ketchikan Marine Charters supports directing a portion of Federal funds received by the State to private non-profit hatcheries to enhance King Salmon.
9. Ketchikan Marine Charters supports a "window of opportunity" for the use of bait by fresh water coho sport anglers.

I SUPPORT THIS KING SALMON MANAGEMENT PLAN

Name _____ Signature _____
PLEASE PRINT

Address _____ City _____ Zip _____

Return to: Ketchikan Marine Charters, Inc., P.O. Box 7896, Ketchikan, Alaska 99901

HJR

52

Alaska State Legislature

Representative Brian S. Porter

CHAIRMAN
HOUSE JUDICIARY COMMITTEE

MEMBER
HOUSE LABOR & COMMERCE COMMITTEE
HOUSE STATE AFFAIRS COMMITTEE
INTERNATIONAL TRADE & TOURISM COMMITTEE

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DEPARTMENT OF LAW
DEPARTMENT OF EDUCATION
COURTS

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ANCHORAGE, AK 99501-2133
PHONE: (907) 258-8197
FAX: (907) 258-5510

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.

FISCAL NOTE

STATE OF ALASKA
1996 LEGISLATIVE SESSION

BILL NO. HJR 52

Revision Date:
Title: "Relating to the creation of a new United States Court of Appeals for the Twelfth Circuit."
Sponsor: Representative Porter
Requester: Representative Porter

Dept. Affected: Department of Law
BRU: Civil Division
Component: General Legal Services

COMPONENT SERIAL NO. 2087

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	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						
1006 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY96) cost: $ 0.0

POSITIONS

FULL-TIME	0.0	0.0	0.0	0.0	0.0	0.0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

HJR 52 is provided in support of U.S. Senate Bill S.956, which would divide the Court of Appeals for the Ninth Circuit into two circuits. S.956 proposes to remove the states of Alaska, Idaho, Montana, Oregon, and Washington and place them in a new Court of Appeals for the Twelfth Circuit. This joint resolution will not have a fiscal impact for the Department of Law.

Prepared by: Richard I. Pegues, Director — Phone: 465-3672
Division: Administrative Services Division — Date: 1/18/96

Approved by Commissioner: Bruce M. Botelho, Attorney General — Date: 1/18/96
Agency: Department of Law

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MD/MJS - FYI

FRANK H. MURKOWSKI
ALASKA

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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?[1].

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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[1] I recognize that the opinion's author, Eugene A. Wright, resides in Seattle, but that does not prevent him having become inbred 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).[2]

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."[3] 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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[2] The Babbitt opinion avoided mention of the Submerged Lands Act.

[3] 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.[4] 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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[4] 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"[5] 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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[5] 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

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STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

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

Official Business
Fax : (907) 465-3472

Speaker of the House of Representatives

State Capitol
Juneau, Alaska 99801-1182
(907) 465-3720
(907) 465-2689

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 I. TOBIN
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 preserving a diversity of viewpoints in the community.

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."

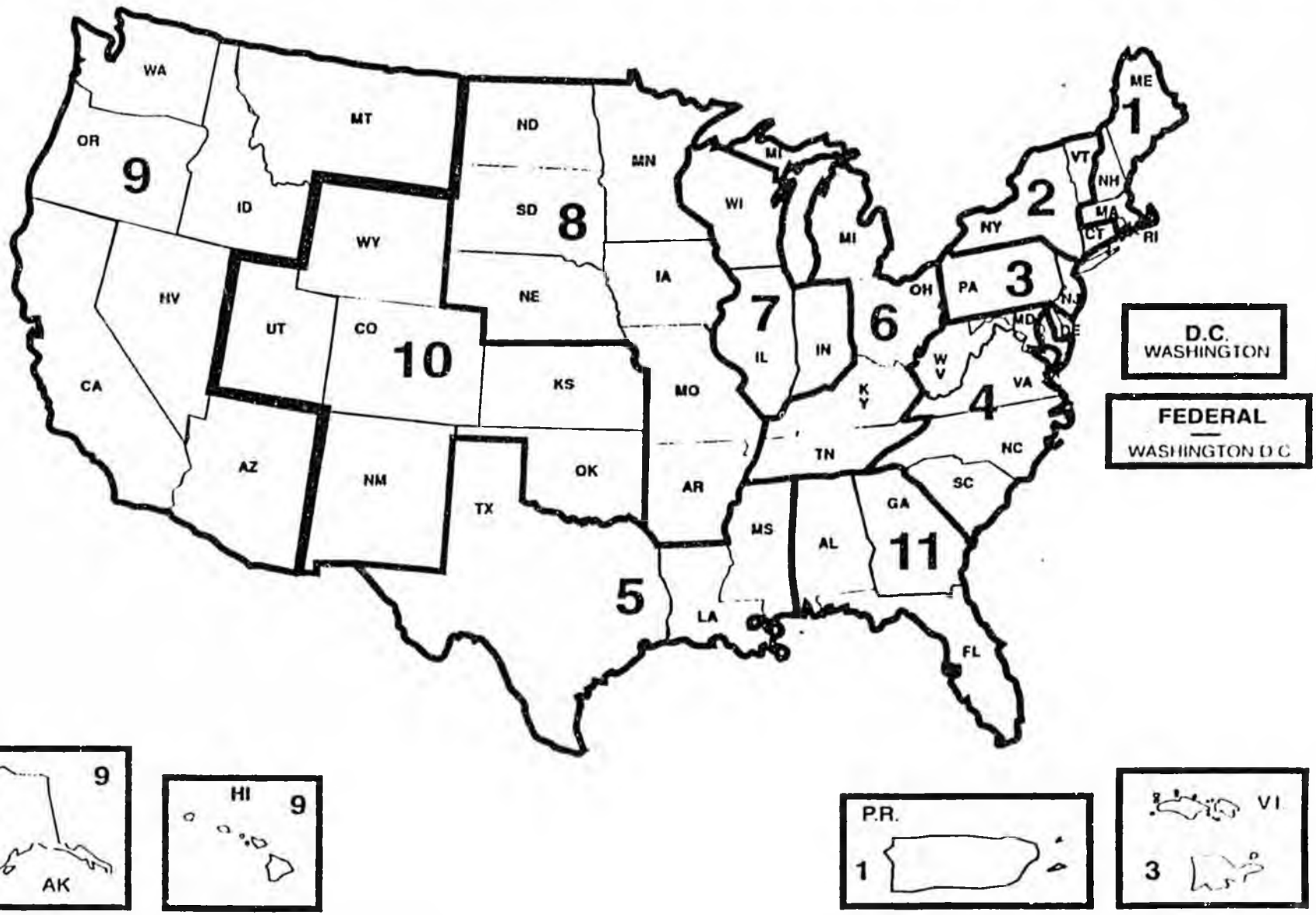
Similar concerns were expressed by Mr. Botelho and the top legal officials of the other four states that would be included in a new court.

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. Splitting 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 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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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

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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.[1]

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, cn. 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. 96-158, 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." [16] 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." [17] 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." [18] 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 rele vance 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 Senator 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, cit(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 64; 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 "revealfed] 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 332.

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 o 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.298 (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, **ci(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.