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THE PROPOSAL TO SPLIT THE NINTH CIRCUIT

*Carl Tobias**

Individuals and organizations concerned about natural resources should be aware of the recent controversial proposal to divide the United States Court of Appeals for the Ninth Circuit. During the first session of the 104th Congress in the fall of 1995, the United States Senate Judiciary Committee approved Senate Bill 956, a measure that would establish a new Twelfth Circuit consisting of Alaska, Arizona, Idaho, Montana, Nevada, Oregon, and Washington, and that would leave California, Hawaii, Guam, and the Northern Mariana Islands in the Ninth Circuit. The Judiciary Committee vote was important for two reasons: the circuit's division could substantially affect natural resources in the region and throughout the nation, and no prior proposal to split the circuit has ever progressed so far, making bifurcation a possibility in the second session of the 104th Congress.

The stunning quantity and quality of resources that lie within the Ninth Circuit accentuate the environmental significance of the circuit-splitting issue. Many of the country's national parks, wilderness areas and wild and scenic rivers are located in the Ninth Circuit. Indeed, more than seventy percent of the federal public lands in the United States are within the circuit's jurisdiction.

Senators who represent Alaska, Idaho, Montana, Oregon, and Washington introduced the current circuit-dividing measure in May 1995. Senator Slade Gorton (R-Wash.) and Senator Conrad Burns (R-Mont.) have led the fight to bifurcate the circuit, and Senator Burns successfully pushed for holds on all nominees to the Ninth Circuit until Congress split the circuit. Although the bill initially stalled, the placement of holds on nominees apparently led Senator Orrin Hatch (R-Utah), Chair of the Judiciary Committee, to schedule a hearing on the proposed legislation in September 1995.

The sponsors have articulated three major propositions that support the measure, while opponents have formulated numerous responses to these ideas and developed several independent arguments against dividing the circuit. First, S.956's proponents contend that the Ninth Circuit's massive size engenders problems.

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These problems include geographic magnitude, the travel and concomitant expense entailed, the population served, the large number of judgeships (twenty-eight), the circuit's caseload and corresponding time for resolving appeals, and the expense of operating the circuit.

But the bill's opponents have responded in several ways to the propositions regarding size. They claim that the circuit has implemented reforms that treat the complications created by size. For instance, the location of court administrative units in Pasadena, Portland, and Seattle, where appeals can be orally argued, lessens the distances that lawyers and litigants must travel. Critics of the bill also suggest that the circuit's large size is an asset. For example, it offers economies of scale, and affords considerable diversity in the novelty and complexity of appeals, and in judges' race, gender, political perspectives and geographic origins.

A second important contention of S.956's advocates is that the circuit's case law is inconsistent. Proponents point out that the statistical opportunities for conflicting opinions are great; for instance, 3278 combinations of three-judge panels can theoretically be constituted to resolve an issue. However, the Ninth Circuit Executive Office and federal court experts who analyzed judicial decisionmaking in the circuit discovered insufficient inconsistency to warrant concern. The circuit nonetheless instituted measures to reduce the possibility of inconsistency. For example, staff attorneys fully review all appeals and code the issues for consideration into a computer. The circuit then assigns to a single three-judge panel those cases that raise similar issues and are ready for disposition at the same time.

The third argument of the measure's champions is that California judges, appeals and viewpoints dominate those of the rest of the circuit. This idea probably reflects proponents' discontent with the circuit's decisions in fields such as environmental law and natural resources. Indeed, Senator Conrad Burns observed that one purpose for the proposed legislation was to ensure local economic stability by discouraging litigation against natural resource extraction activities, such as mining, timber and water development. The senator later publicly declared that the existing Ninth Circuit deprives states that depend heavily on resource management of the opportunity to have resource-related cases heard by judges attuned to local needs.

It is this attitude that leads some critics of the circuit's bifurcation to characterize the legislation as "environmental gerrymandering." These opponents point out that substantive legal change is better effected by persuading Congress to modify the applicable law. Critics also question the sponsors' fundamental premise that the circuit's California-based judges, who do not even form a majority of the circuit, are monolithic and idiosyncratic. Assessment of the judges' philosophies and the computerized, random selection of panels undercut stereotypes of those members of the circuit who sit in California. More specifically, opponents assert that the present Ninth Circuit's record in resolving litigation that involves the environment and natural resources shows that the circuit is comparatively neutral. One study of the 125 most recent cases implicating these issues describes sixty-four decisions as "pro-environment" and sixty-five opinions as "con-environment."

Finally, the Senate Committee Report that accompanied the bill specifically rejected dissatisfaction with the circuit's environmental opinions as an appropriate rationale for dividing the circuit, even as the report acknowledged that some, but not all, proponents have registered such dissatisfaction.

There are a few other arguments in favor of and against bifurcating the circuit. Proponents of circuit-division contend that judges on a smaller circuit, such as the proposed Twelfth Circuit, which would have thirteen judges, will be more collegial, thereby enhancing efficiency. This may be true, but familiarity can also promote detrimental routinization, stifle intellectual discourse, and even (in unfortunate situations) breed contempt.

Furthermore, circuit-splitting's opponents claim that the proposed Ninth Circuit will have a substantially less favorable ratio of three-judge panels to appeals than the new Twelfth Circuit, as well as a less favorable ratio than that of the existing Ninth Circuit. Moreover, critics assert that the proposed Twelfth Circuit will create significant new administrative expenses and will replicate functions that the present Ninth Circuit discharges satisfactorily. They also suggest that dividing the circuit could fragment the unified interpretation of federal natural resources and environmental law that it now applies consistently throughout the West and across ecosystems spanning the political boundaries of the two proposed circuits.

During the fall of 1995, S.956's sponsors attempted to generate interest in the measure by encouraging governors and attorneys-general of Western states to announce their support for the bill. The advocates also participated in discussions with several Committee members and certain senators from states that would be affected by the Ninth Circuit's division. Arizona seemed especially important for S.956's proponents. They apparently found the committee vote of Senator Jon Kyl (R-Ariz.) significant and the state's caseload, population and Ninth Circuit active judges critical to securing felicitous bifurcation. The measure's champions had initially explored the prospect of placing Arizona in the Tenth Circuit but ultimately rejected that possibility, principally because it departed so much from the tradition of not shuttling states between circuits.

During a December Senate Judiciary Committee markup, the Committee agreed on an amended version that moves Arizona and Nevada to the proposed Twelfth Circuit, authorizes thirteen judges for the circuit, and locates its headquarters in Phoenix. Committee members, with the exception of Senator Howell Heflin (D-Ala.), voted along party lines in favor of sending the amended measure to the Senate floor. Senator Hatch announced that his vote was partly meant to encourage Senator Burns to remove the holds that he had imposed on Ninth Circuit nominees.

Senator Dianne Feinstein (D-Cal.) strongly opposed the amendment for many reasons. Perhaps most important, numerous benefits from the new Twelfth Circuit would come at the expense of the proposed Ninth Circuit. For instance, the proposed Ninth Circuit would have a very disadvantageous ratio of three-judge panels to appeals and would effectively be a single-state appellate court. Consequently, Senator Feinstein offered her own amendment that would have created a national commission to study the structure of the appeals courts, but the Committee rejected her proposal, 8-9.

While Congress debated S.956, several prominent public officials communicated their objections regarding the bill. For example, Governor Pete Wilson (R-Cal.) wrote Senator Hatch in December to voice strong opposition to any split of the Ninth Circuit until an objective study is completed, and expressed concern that bifurcation could foster inconsistency along the West Coast in fields such as environmental law. Chief Judge J. Clifford Wallace wrote every senator to explain why the Circuit Judicial

Council and virtually all of the circuit's active judges opposed the circuit's division and to request that Congress establish a national study commission. Ninth Circuit Judge Charles Wiggins wrote Senator Feinstein to register his vigorous opposition to S.956, to encourage her to fight the measure on the floor, and to urge the appointment of a national study commission.

It remains unclear exactly how the second session of the 104th Congress will treat S.956. The bill's advocates are attempting to secure support from senators who are not members of the Judiciary Committee. Much could depend on Senator Feinstein's efforts, principally whether she can forge an efficacious coalition that favors the creation of a national study commission. Should Senator Feinstein be unable to do so, the outcome may depend on her willingness to filibuster, whether Republicans can muster enough votes for cloture, and to what extent senators from the other forty-one states will defer to senators who represent the nine states in the Ninth Circuit. If the Senate approves S.956, the measure's prospects for passage in the House of Representatives will depend substantially on the views of Representative Henry Hyde (R-Ill.), Chair of the House Judiciary Committee, Representative Carlos Moorhead (R-Cal.), Chair of the Judiciary Subcommittee responsible for the bill, and the California members of the House. Individuals and groups that are interested in natural resources in the West and the country should closely follow congressional developments relating to S.956, because the measure's enactment could significantly affect the future of environmental jurisprudence.