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## Congress considers bill to split Ninth Circuit

by Carl Tobias

Late last year, the Senate Judiciary Committee approved a measure that would divide the U.S. Court of Appeals for the Ninth Circuit. The proposal, Senate Bill 956, would create a new Twelfth Circuit comprised of Alaska, Arizona, Idaho, Montana, Nevada, Oregon, and Washington, leaving California, Hawaii, Guam, and the Northern Mariana Islands in the Ninth Circuit. The Judiciary Committee vote is significant because no bill to split the Ninth Circuit has ever received floor debate. The second session of the 104th Congress could well divide the court.

Senators representing Alaska, Idaho, Montana, Oregon, and Washington introduced the circuit-dividing measure last May. Senators Slade Gorton (R-Washington) and Conrad Burns (R-Montana) have led the fight, and Senator Burns imposed holds on all Ninth Circuit judicial nominees until Congress enacts the measure. The proposed legislation appeared to languish, but the placement of holds on nominees seemingly prompted Senator Orrin Hatch (R-Utah), chair of the Judiciary Committee, to schedule a hearing in September.

At the hearing, S.956's advocates emphasized the difficulties presented by the circuit's substantial size, including the court's geographic magnitude, the number of people served, the circuit's numerous judgeships (28), the court's caseload, and the expense of operating the circuit. The measure's critics contended that to deal with its size the court has implemented reforms such as pre-briefing conferences and the location of circuit administrative units in Pasadena and Se-

attle. Moreover, opponents claimed that significant size is an asset, offering, for example, economies of scale and diversity in terms of the novelty and complexity of appeals and in terms of judges' race, gender, political perspectives, and geographic origins.

A second argument of the bill's proponents was that the court's case law is inconsistent, although the Ninth Circuit Executive Office and other federal court experts who have evaluated judicial decision making in the circuit have found little inconsistency, and the court has instituted procedures to limit inconsistency. Another contention of the bill's sponsors is that California judges, cases, and viewpoints dominate the circuit. This may reflect advocates' dissatisfaction with the court's opinions in areas such as criminal and environmental law. The bill's opponents suggest that the preferable way to effect substantive legal change is by persuading Congress to modify the applicable law. Moreover, they claim that the computerized, random selection of panels and the diverse philosophies of California judges undercut the premise that those judges are idiosyncratic and monolithic.

### Seeking support

S.956's champions attempted to maintain interest in the measure by encouraging members of Congress, governors, and attorneys general in the West to announce support. Proponents also participated in discussions among Judiciary Committee members and senators who represent states that would be affected by the circuit's split.

Advocates had earlier explored the prospect of placing Arizona in the

Tenth Circuit but ultimately rejected that possibility, primarily because it departed from the tradition of not moving states between appeals courts. During a December markup, the Judiciary Committee agreed on an amended bill that includes Arizona and Nevada in the new Twelfth Circuit, authorizes 13 judges for the court, and places its headquarters in Phoenix. Committee members voted 11-7 along party lines (except Senator Howell Heflin (D-Alabama)) to send the amended version to the full Senate. Senator Hatch suggested that his vote was partly aimed at encouraging Senator Burns to remove his hold on Ninth Circuit nominees.

### A study commission

Senator Dianne Feinstein (D-California) strongly opposed S.956 for numerous reasons. Perhaps most important, a number of advantages that the new Twelfth Circuit would realize would come at the expense of the proposed Ninth Circuit. For example, the proposed California-dominated Ninth Circuit would have an unfavorable ratio of three-judge panels and would effectively be a single-state appellate court. Senator Feinstein offered an amendment, which was rejected, that would have established a national commission to study circuit court structure.

According to proponents of such a commission, it is unclear whether the Ninth Circuit or other regional appeals courts are experiencing problems that pose enough difficulty to warrant treatment, particularly with solutions that are as controversial as circuit division. And even if the courts are encountering such complications, other remedies may be more efficacious. Moreover, proponents maintain that splitting the Ninth Circuit would eliminate a leading court for experimenting with procedures that improve the quality of appellate justice. Finally, they say that dividing the circuit now could irretrievably commit the nation to the limited reform of creating additional judgeships and splitting more appeals courts.

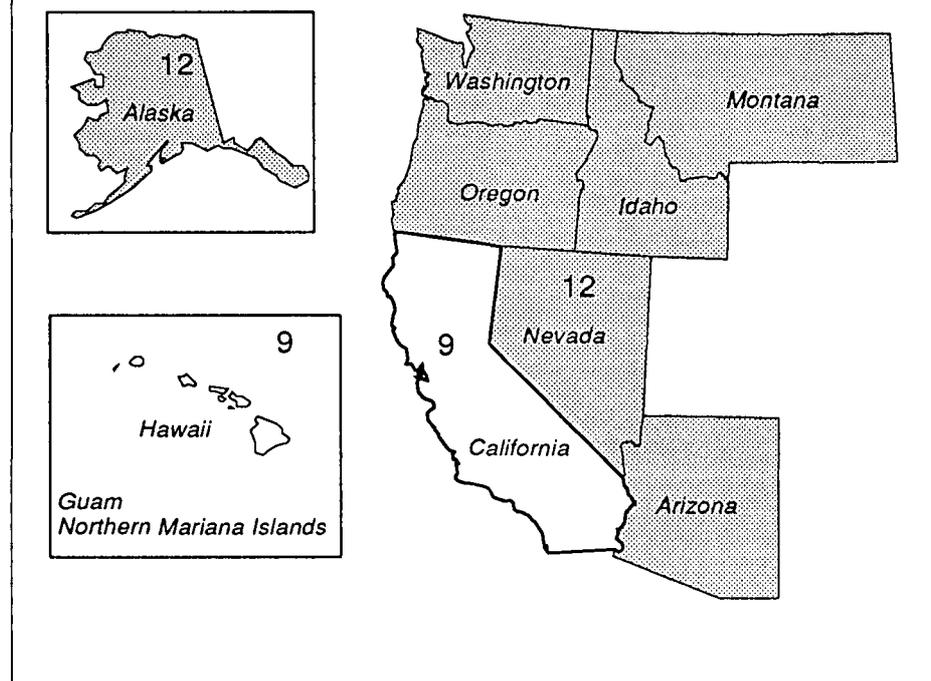
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It is unclear how the second session of the 104th Congress will treat S.956. The bill's advocates are attempting to enlist the support of senators who are not members of the Judiciary Committee. Much could depend on Senator Feinstein's efforts, primarily whether she can forge an effective coalition that favors a national assessment of the appellate system. Should Senator Feinstein be unable to do so, resolution of the circuit-splitting issue may depend on her willingness to filibuster, whether Republicans can secure needed votes for cloture, and how much senators from the other 41 states will defer to senators who represent the nine states in the Ninth Circuit. If the Senate approves S.956, prospects for passage in the House will depend substantially on Representative Henry Hyde (R-Illinois), chair of the Judiciary Committee, Representative Carlos Moorhead (R-California), chair of the Judiciary subcommittee with responsibility for the bill, and California members of the House. ☞☞

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### The proposed Ninth and Twelfth Circuits



## Trial by jury or judge: which is speedier? (continued from page 180)

The most probable explanation is that the actual trial and eventual decision by a judge are more prone to interruption and delay than the jury process. Others have observed this judicial tendency. Some lawyers have noted a "source of protraction in bench trials: the irregular or discontinuous scheduling of trial dates to meet the convenience of the judge but not the lawyers. These lawyers complained that the absence of a jury allows judges to start and stop the pro-

ceedings too easily."<sup>25</sup> Many commentators have also noted the judges' practice of postponing decision for an extended period.<sup>26</sup> Judge Prentice Marshall estimated the delay at "months" and attributed it to the diversion of other duties.<sup>27</sup> As Judge William Palmer put it:

Even if a judge announces his decision from the bench, written findings, conclusions and judgment nearly always must be prepared, and the work of preparing them may require not hours, but days. And if a cause is taken under submission by the judge to await the preparation and filing of briefs by counsel, their work on them, the judge's study of them, his research, and his work defining and announcing his decision may require considerably more time off the courtroom stage than would be equivalent to the excess of trial time by jury over that by judge. For very simple cases, it is true, no doubt, that trial by jury takes more time than trial by judge, but in

the overall functions of a large metropolitan court, frankly I do not know whether time would be saved if jury trials were abolished and every case were tried by only a judge.<sup>28</sup>

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In assessing the speed of trial by jury versus trial by judge, one must consider both the length of the actual trial and also the total time from filing to termination of the case. The actual trial may proceed more slowly before a jury than before a judge, because of extra procedural steps. Yet, contrary to intuition, jury-tried cases last less long on the docket than judge-tried cases, probably because the press of other duties leads judges to interrupt the trial and postpone eventual decision. Thus, reformers who seek to speed up civil litigation by eliminating the jury should consider other time-saving measures. ☞☞

25. Bermant et al., *supra* n. 4, at 45.

26. See *id.*; Bledsoe, *Jury or Nonjury Trial—A Defense Viewpoint*, 5 AM. JUR. TRIALS 123, 141-142 (1966); Marshall, *A View from the Bench: Practical Perspectives on Juries*, 1990 U. CHI. LEGAL F. 147, 155-156; Palmer, *On Trial: The Jury Trial*, 20 F.R.D. 65, 78 (1958).

27. Marshall, *id.* at 156.

28. Palmer, *supra* n. 26, at 78.