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SENATE

{ REPORT
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**NINTH CIRCUIT COURT OF APPEALS REORGANIZATION ACT
OF 1995**

DECEMBER 21, 1995.—Ordered to be printed

Mr. HATCH, from the Committee on the Judiciary, submitted the
following

REPORT

together with

MINORITY AND ADDITIONAL VIEWS

[To accompany S. 956]

The Committee on the Judiciary, to which was referred the bill (S. 956) to amend title 28, United States Code, to divide the ninth judicial circuit of the United States into two circuits, having considered the same, reports favorably thereon, with an amendment in the nature of a substitute, and recommends that the bill, as amended, do pass.

CONTENTS

	Page
I. Purpose	3
II. Legislative history	3
III. Discussion	6
IV. Vote of the committee	11
V. Section-by-section analysis	12
VI. Cost estimate	14
VII. Regulatory impact statement	15
VIII. Minority views of Senators Biden, Kennedy, Leahy, Simon, Kohl, Feinstein, and Feingold	16
IX. Additional views of Senators Feinstein and Kennedy	18
X. Changes in existing law	31

The amendment is as follows:
Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Ninth Circuit Court of Appeals Reorganization Act of 1995".

SEC. 2. NUMBER AND COMPOSITION OF CIRCUITS.

Section 21 of title 28, United States Code, is amended—

(1) in the matter before the table, by striking out "thirteen" and inserting in lieu thereof "fourteen";

(2) in the table, by striking out the item relating to the ninth circuit and inserting in lieu thereof the following new item.

"Ninth California, Hawaii, Guam, Northern Mariana Islands.";

and

(3) between the last 2 items of the table, by inserting the following new item:

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

SEC. 3. NUMBER OF CIRCUIT JUDGES.

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

(1) by striking out the item relating to the ninth circuit and inserting in lieu thereof the following new item:

"Ninth 15";

and

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

"Twelfth 13".

SEC. 4 PLACES OF CIRCUIT COURT.

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

(1) by striking out the item relating to the ninth circuit and inserting in lieu thereof the following new item:

"Ninth San Francisco, Los Angeles.";

and

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

"Twelfth Portland, Seattle, Phoenix."

SEC. 5. ASSIGNMENT OF CIRCUIT JUDGES AND CLERK OF THE COURT.

(a) CIRCUIT JUDGES.—No later than 60 days after the date of the enactment of this Act, the judicial council for the former ninth circuit shall make assignments of the circuit judges of the former ninth circuit to the new ninth circuit and the twelfth circuit, consistent with the provisions of this Act.

(b) CLERK OF THE COURT.—The Clerk of the Court for the Twelfth Circuit United States Court of Appeals shall be located in Phoenix, Arizona.

SEC. 6. ELECTION OF ASSIGNMENT BY SENIOR JUDGES.

Each judge who is a senior judge of the former ninth circuit on the day before the effective date of this Act may elect to be assigned to the new ninth circuit or to the twelfth circuit and shall notify the Director of the Administrative Office of the United States Courts of such election.

SEC. 7. SENIORITY OF JUDGES.

The seniority of each judge—

- (1) who is assigned under section 5 of this Act; or
- (2) who elects to be assigned under section 6 of this Act;

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

SEC. 8. APPLICATION TO CASES.

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

(1) If the matter has been submitted for decision, further proceedings in respect of the matter shall be had in the same manner and with the same effect as if this Act had not been enacted.

(2) If the matter has not been submitted for decision, the appeal or proceeding, together with the original papers, printed records, and record entries duly certified, shall, by appropriate orders, be transferred to the court to which it would have gone had this Act been in full force and effect at the time such appeal was taken or other proceeding commenced, and further proceedings in respect of the case shall be had in the same manner and with the same effect as if the appeal or other proceeding had been filed in such court.

(3) A petition for rehearing or a petition for rehearing en banc in a matter decided before the effective date of this Act, or submitted before the effective date of this Act and decided on or after the effective date as provided in paragraph (1) of this section, shall be treated in the same manner and with the same effect as though this Act had not been enacted. If a petition for rehearing en banc is granted, the matter shall be reheard by a court comprised as though this Act had not been enacted.

SEC. 9. DEFINITIONS.

For purposes of this Act, the term—

(1) “former ninth circuit” means the ninth judicial circuit of the United States as in existence on the day before the effective date of this Act;

(2) “new ninth circuit” means the ninth judicial circuit of the United States established by the amendment made by section 2(2) of this Act; and

(3) “twelfth circuit” means the twelfth judicial circuit of the United States established by the amendment made by section 2(3) of this Act.

SEC. 10. ADMINISTRATION.

The court of appeals for the ninth circuit as constituted on the day before the effective date of this Act may take such administrative action as may be required to carry out this Act. Such court shall cease to exist for administrative purposes on July 1, 1997.

SEC. 11. EFFECTIVE DATE.

This Act and the amendments made by this Act shall take effect 60 days after the date of the enactment of this Act.

I. PURPOSE

S. 956 is designed to improve the administration of justice in areas currently within the U.S. Court of Appeals for the Ninth Circuit.¹ The ninth circuit has long attracted attention as the largest court of appeals in the Federal system, and the issue of whether it should be split has been a recurring one. Upon careful consideration, the committee concludes that a division of the ninth circuit is warranted, particularly given the likely continued growth of that circuit. The committee substitute presents the most feasible manner of splitting the circuit at this time.

II. LEGISLATIVE HISTORY

The question of whether the U.S. Court of Appeals for the Ninth Circuit should be divided into two separate circuits has a lengthy history that spans three decades. In 1972, in recognition of problems faced by the courts of appeals, Congress created the Commission on the Revision of the Federal Court Appellate System, Public Law 92-489, 86 Stat. 807 (1972), commonly known as the Hruska Commission. In its 1973 report, the Hruska Commission recommended that the old fifth circuit and the ninth circuit be divided.² The Hruska Commission particularly noted the ninth circuit’s “striking” size, its “serious difficulties with backlog and

¹The ninth circuit comprises Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, Guam, and the Northern Mariana Islands. See 28 U.S.C. 41.

²See Commission on the Revision of the Federal Court Appellate System, *The Geographical Boundaries of the Several Judicial Circuits: Alternative Proposals*, 62 F.R.D. 224 (1973) [hereinafter *Hruska Commission Report*].

delay,” and its “apparently inconsistent decisions by different panels of the large court.”³ The Commission “concluded that the creation of two new circuits is essential to afford immediate relief” to the ninth circuit.⁴

Although Congress eventually split the old fifth circuit to create the current fifth and eleventh circuits,⁵ the ninth circuit was not split. Today it remains the same size geographically as when the Hruska Commission recommended it be split. In terms of judges and caseload, however, the court has grown substantially. In 1973, the ninth circuit was composed of 13 judges and received an annual caseload of approximately 2,300 filings.⁶ The ninth circuit has now mushroomed to 28 active circuit judges, and the caseload has grown to upwards of 8,000 appellate filings each year. In addition, the Judicial Conference of the United States has recommended that Congress approve 10 new judgeships for the ninth circuit court of appeals. One ninth-circuit judge has even suggested that the court be doubled in size to 56 judges. An even-larger ninth circuit appears highly likely in the not too distant future.

In the same period in which Congress was considering the split of the fifth circuit, Congress took steps to ameliorate effects of the ninth circuit’s size and continued growth. Congress decided to permit large circuits to hear *en banc* cases through limited *en banc* procedures, in which *en banc* cases could be decided without the participation of the full court, and to permit large circuits to divide themselves into administrative divisions.⁷ Although no other circuit follows those procedures, the ninth circuit adopted the two reforms in 1980. Despite those innovations, concern with the circuit’s size and with the effectiveness of reform has persisted.

Senate hearings exploring a split of the ninth circuit have been held on several occasions over the past 12 years, and numerous bills have been introduced to accomplish various splits of the ninth circuit. Senate hearings on the issue, chaired by then-Senator DeConcini, were held in the Judiciary Committee’s Subcommittee on Courts on March 7, 1984.⁸ On March 6, 1990, the Judiciary Committee’s Subcommittee on Courts and Administrative Practice, chaired by Senator Heflin, again held hearings on a proposal to split the ninth circuit.⁹

Senator Gorton, a leading proponent of splitting the ninth circuit, first introduced a proposal to split the ninth circuit in 1983. That bill, S. 1156, 98th Cong., 1st sess., would have divided the ninth circuit into a new ninth circuit consisting of Arizona, California, Nevada, Guam, and Hawaii; and a twelfth circuit consisting of Alaska, Idaho, Montana, Oregon, and Washington. In 1989, Senator Gorton and other Senators, primarily from States in the northwestern United States, introduced S. 948, 101st Cong., 1st sess., a

³See *Hruska Commission Report*, 62 F.R.D. at 228–229, 235.

⁴*Id.* at 228.

⁵See Fifth Circuit Court of Appeals Reorganization Act of 1980, Public Law 96–670, 94 Stat. 1994 (1980).

⁶*Hruska Commission Report*, 62 F.R.D. at 236.

⁷See Act of Oct. 10, 1978, Public Law 95–486, § 6, 92 Stat. 1629 (1978).

⁸*Oversight on the Federal Courts of Appeals and U.S. Claims Court Workload: Hearing before the Subcommittee on Courts of the Committee on the Judiciary, United States Senate, 98th Cong., 2d sess. (Mar. 7, 1984).*

⁹*Ninth Circuit Court of Appeals Reorganization Act of 1989: Hearing before the Subcommittee on Courts and Administrative Practice of the Committee on the Judiciary, United States Senate, 101st Cong., 2d sess. (Mar. 6, 1990).*

bill to divide the ninth circuit in a slightly different fashion. That bill would have divided the circuit by creating a new ninth circuit consisting of Arizona, California, and Nevada, and a twelfth circuit comprising the remaining States and territories of the ninth circuit. In the 102d Cong., 1st sess., S. 1686 was introduced in the Senate by Senator Gorton and others, which essentially reverted to the prior formulation. That bill proposed to split the ninth circuit by placing Arizona, California, Hawaii, Nevada, Guam, and the Northern Mariana Islands in the new ninth circuit, with the remaining States in the ninth circuit to be placed in the twelfth circuit. That formulation had also been introduced in the House in the 101st Cong., 2d sess., as H.R. 4900, and is the same formulation introduced by Senator Gorton this Congress in S. 956, 104th Cong., 1st sess.¹⁰

An entirely different formulation was introduced in the House in the 103d Cong., 1st sess., in a bill sponsored by Representative Kopetski, H.R. 3654. That proposal would have divided the ninth circuit in a manner similar to that recommended in 1973 by the Hruska Commission, which had recommended splitting the ninth circuit in a way that would have divided California between circuits. H.R. 3654 would have placed Alaska, Idaho, Montana, Oregon, Washington, Hawaii, Guam, the Northern Mariana Islands, and the Northern and Eastern Districts of California in the new ninth circuit, with the remaining ninth circuit districts to be placed in the twelfth circuit. That effort reflects a concern with ensuring that a split of the ninth circuit would create a fairly even split of the caseload and judgeships of the ninth circuit between the new circuits.

On September 13, 1995, the chairman of the Judiciary Committee, Senator Hatch, convened a hearing on splitting the ninth circuit, at which various proposals to divide the ninth circuit were discussed. The hearing focussed on Senator Gorton's bill, S. 956, and concerns raised by that particular split.¹¹ Testimony at the hearing was given by Senator Gorton; Senator Burns; Senator Inouye; Senator Reid; Senator Murray; Chief Judge J. Clifford Wallace of the U.S. Court of Appeals for the Ninth Circuit; Judge Diarmuid F. O'Scannlain of the U.S. Court of Appeals for the Ninth Circuit; Chief Judge Gerald Bard Tjoflat of the U.S. Court of Appeals for the Eleventh Circuit; Professor Arthur D. Hellman of the University of Pittsburgh School of Law; Charles E. Jones, Esq., a practitioner from Phoenix, AZ; and John McKay, Esq., a practitioner from Seattle, WA.

Particularly evident at the hearing were concerns that S. 956 would leave a ninth circuit that would still be too large and that could itself in the near future raise the question of whether it should be further subdivided. Judge O'Scannlain of the ninth circuit particularly noted that the Gorton bill as introduced "would do nothing to solve the problems of the remaining ninth circuit." To address those concerns, the principal cosponsors of the bill, Senator

¹⁰ Senator Gorton first introduced that version this Congress as S. 853. See 141 Cong. Rec. S7497. A minor technical correction was made to the bill, and it was reintroduced as S. 956. See 141 Cong. Rec. S8945.

¹¹ Original cosponsors of S. 956 include Senators Burns, Craig, Hatfield, Kempthorne, Murkowski, and Stevens.

Gorton and Senator Burns, developed an alternate proposal to split the ninth circuit that the committee considered in the form of an amendment in the nature of a substitute. Senator Hatch offered the substitute amendment in committee on their behalf. The committee substitute would establish a new ninth circuit consisting of California, Hawaii, Guam, and the Northern Mariana Islands; and a twelfth circuit comprising Alaska, Arizona, Idaho, Montana, Nevada, Oregon, and Washington.

On December 7, 1995, S. 956, as amended by the amendment in the nature of a substitute, was reported favorably out of the committee by a rollcall vote of 11 yeas to 7 nays.

III. DISCUSSION

OVERVIEW

As noted above, proposals to split the ninth circuit have been under consideration in Congress for some time and have been the subject of several hearings in the committee. A number of committee members expressed interest in commissioning a study of the structure of the Federal courts of appeals rather than taking immediate action to split the ninth circuit. In the committee's view, the legislative history, in conjunction with available statistics and research concerning the ninth circuit, provides an ample record for an informed decision at this point as to whether and how to divide the ninth circuit.

The ninth circuit stands well apart from the other Federal judicial circuits and remains in a unique position. It is by far the largest court of appeals in the Federal system by any measure. No other circuit presents anywhere near as compelling a case for being split, and no other circuit has attracted similar, long-term attention on the question of whether it should be split. Given that the ninth circuit has requested an additional 10 judgeships, the issue presents an immediacy that is not evident with respect to any other of the circuit courts.¹²

Nevertheless, the committee remains concerned with the continued growth of the Federal courts of appeals. Longer-term issues concerning the circuit courts have not been subject to the same attention either within Congress or within the legal community that the question of splitting the ninth circuit has received. A study of the future of the courts of appeals would be a valuable undertaking. In the committee's view, such a study would be perfectly appropriate in conjunction with a division of the ninth circuit or following such a division. The larger issues involving circuit organization and structure, as well as Federal court jurisdiction, will not be addressed by a split of the ninth circuit. Responses to those issues will be critical to the continued efficient administration of appellate justice in the Federal system and to the character and role of the appellate system.

¹² Splitting a circuit to respond to caseload and population growth is by no means unprecedented. Congress divided the original eighth circuit to create the tenth circuit in 1929, and divided the former fifth circuit to create the eleventh circuit in 1980.

COMMITTEE SUBSTITUTE TO S. 956

The committee substitute would produce a more even split of the ninth circuit than the original Gorton bill would have created. As introduced, S. 956 would have split the ninth circuit in a manner that would still have left a very large ninth circuit both in terms of judgeships and caseload.

Under the committee substitute, California, Hawaii, Guam, and the Northern Mariana Islands would form one circuit having 15 circuit judgeships. Alaska, Arizona, Idaho, Montana, Nevada, Oregon, and Washington would form a new twelfth circuit having 13 circuit judgeships. No new judgeships would be created, and the caseload would be split roughly 60 percent to 40 percent between the new circuits.¹³ The division of the judgeships represents a 54-percent to 46-percent division of the judges between the circuits. That breakdown creates a reasonable alignment of the caseload and judgeships without causing undue disruption to the current judges sitting on the ninth circuit.

The committee substitute embodies the most feasible way of dividing the ninth circuit without taking unusual and potentially problematic steps such as splitting California between circuits, having California alone be its own one-State circuit, or moving States from the ninth circuit into other circuits. In alignment with Hawaii and the territories, California would be joined by a significant appellate caseload from outside that State. According to data provided by the ninth circuit, over the past 5 years, on average more ninth circuit appeals originated from Hawaii than from Alaska, Idaho, or Montana. The arrangement embodied in the committee substitute ensures that interstate perspectives are represented in the new ninth circuit.

California will undoubtedly predominate in the new ninth circuit. Such a situation is not without precedent among the courts of appeals. Cases originating in New York unquestionably dominate the second circuit, while cases from Connecticut and Vermont contribute only a small portion of that circuit's docket.¹⁴ Texas is likewise the dominant State in the fifth circuit, with Mississippi and Louisiana maintaining a smaller presence in that circuit.¹⁵

CONDITIONS IN THE NINTH CIRCUIT

The committee commends the efforts of the ninth-circuit judges, clerk's office, and circuit executives in managing that very large

¹³That caseload split is based on figures provided by the ninth circuit and by the Administrative Office of the U.S. Courts. Figures from the ninth circuit do differ slightly from those provided by the Administrative Office. In the committee's opinion, those differences are not significant and appear to reflect slightly different bases for the data. Data provided to the committee by the Administrative Office reveal a caseload division between the new circuits that would average approximately 59 percent to 41 percent over the last 5 years. The ninth circuit's figures show that, over the last 5 years, the division would range from 59 percent to 41 percent to 62 percent to 38 percent, depending on the year. The 5-year average based on the ninth circuit's numbers is 60.8 percent to 39.2 percent. In any event, no matter which figures are used, the result is roughly a 60 to 40-percent caseload split between the new ninth circuit and the twelfth circuit. That represents a vast improvement over the original Gorton bill, which would have produced a lopsided 75- to 25-percent split in the caseload between the new circuits.

¹⁴According to figures provided by the Administrative Office of the U.S. Courts, over the past 5 years cases from Vermont have made up just 3 percent of the second circuit's caseload, while cases originating in Connecticut have contributed 10 percent of that circuit's caseload.

¹⁵According to figures provided by the Administrative Office of the U.S. Courts, over the past 5 years cases from Mississippi constituted 8 percent of the fifth circuit's caseload, and cases from Louisiana made up 23 percent of that circuit's docket.

circuit in what may be as efficient a manner as a circuit of that size can be run. Chief Judge Wallace has played a leading role in guiding the circuit through a period of growth and development. The committee recognizes his efforts and dedication to the ninth circuit. The committee finds that a split of the ninth circuit has simply become an inevitable prospect given the circuit's future growth coupled with current conditions in the circuit.

The judicial council of the ninth circuit has formally opposed a division of the circuit, as have a number of State bar associations and other entities. On the other hand, numerous State attorney generals and practitioners in the ninth circuit have indicated support for the circuit's division. Some individual district and circuit judges in the ninth circuit also express views that the circuit will need to be split. Due consideration has been given to all judgments expressed to the committee. Ideally, there might be agreement on the future of the ninth circuit, particularly among the district and circuit judges who would be affected by a split. That is not the case. The committee and the Congress nevertheless have an independent responsibility to oversee the functioning of the Federal courts of appeals and to address any difficulties presented therein. It is in that spirit that the committee finds that the interaction of several conditions in the ninth circuit warrant a split of the circuit at this time.

At the outset, the committee notes that some proponents of a ninth-circuit division have indicated support for splitting the circuit based on outcomes in certain cases or on a perceived liberal bias on the part of California judges. Frequently cited have been environmental cases affecting the northwest States. The committee does not support a split of the ninth circuit on those bases. As Chief Judge Wallace testified at the committee hearing, "[t]o divide a circuit in order to accommodate a regional interest is the antithesis of the federalizing function." Senators Biden and Feinstein both argued at the committee markup that a split on such grounds would amount to insupportable political "gerrymandering."

Although a number of parties have registered their dissatisfaction with certain environmental and other decisions of the ninth circuit, the committee finds such dissatisfaction an improper rationale for splitting the circuit. While it is the committee's hope that the courts of appeals will reach correct decisions on the law, the committee does not support altering circuit boundaries in order to achieve a given ideological outcome on the merits in any case or to benefit any regional interest.¹⁶ Litigants are entitled to a full, fair, and expeditious determination of the merits of their case. They are not entitled to a given result.

Moreover, the committee is highly skeptical as a practical matter as to whether any significant ideological shift in appellate decisions could be achieved through a circuit split. First, as testimony at the hearing highlighted, the philosophical tendencies of a particular judge are far more likely to be aligned with the President who appointed that judge than the State from which the judge came. As Senator Kyl pointed out, "when we look at predictors of how a

¹⁶In contrast, the committee finds that improving the consistency of circuit law is a desirable outcome and is appropriate to consider in assessing circuit boundaries.

judge might rule, it is a far greater predictor as to who appointed that judge than the region of the country from which the judge comes." Second, the twelfth circuit would likely adopt as binding precedent the case law of the circuit to which the region formerly belonged, which is what occurred when the eleventh circuit split from the old fifth circuit.¹⁷ Accordingly, cases from the ninth circuit would likely continue to be binding precedent in the twelfth circuit.

Despite the questionable propriety of considering the judicial philosophies and resulting opinions of particular judges or regions when examining circuit boundaries, various other factors do provide appropriate support for a division of the ninth circuit.

Size, delays and efficiency. The ninth circuit spans nine States and two territories covering 1.4 million square miles. It serves a population of more than 45 million people. The next largest circuit in terms of population, the sixth circuit, serves fewer than 29 million people. Every other Federal circuit serves fewer than 24 million people. By 2010, the Census Bureau estimates that the ninth circuit's population will be more than 63 million, which represents a 43-percent increase in 15 years. As Judge O'Scannlain of the ninth circuit testified, "In light of the demographic trends in our country, it is clear that the population of the states in the ninth circuit, and thus the caseload of the federal judiciary sitting in those states, will continue to increase at a rate significantly ahead of most other regions of the country."

The ninth circuit already has 28 active judges, making it by far the largest circuit. The next largest, the fifth circuit, has 17 circuit judges, while the smallest, the first circuit, has 6. The average number of judges in the Federal circuits other than the ninth is 12.6.

The circuit's size has contributed to delay in case processing in the circuit. As Chief Judge Wallace stated in written testimony submitted to the committee, "it takes about four months longer to complete an appeal in our court as compared to the national median time." The most recent statistics provided by the Administrative Office of the U.S. Courts reveal that the ninth circuit is noticeably slow by other measures. The ninth circuit is next to slowest in the time from the filing of a case in the lower court to the final disposition in the court of appeals. It is slowest from the filing of the last brief in a case to hearing and submission of the case for decision. The ninth circuit is indeed fastest by one minor measure: the time from submission of a case for decision to final disposition. That particular statistic is of negligible import given the circuit's notable delays in overall case processing.

Many have cited the court's enormous size as a factor in the court's ability to process the large number of cases filed in the circuit each year. Chief Judge Tjoflat of the eleventh circuit testified at the hearing as to efficiencies that have resulted in the fifth and eleventh circuits since the split of the old fifth circuit. He observed that the eleventh and fifth circuit combined process many more cases than the ninth circuit does. They have sometimes done so with fewer judges altogether, given judicial vacancies. In recent years, the combined fifth and eleventh circuits, containing a total

¹⁷ See *Bonner v. City of Pritchard*, 661 F.2d 1206 (11th Cir. 1981) (*en banc*).

of 29 judgeships, have resolved on the order of 50 percent more cases each year than the ninth circuit, which has 28 authorized judgeships. Significantly, the committee is not aware of any increase in conflicts between the circuits or any other negative result following the successful split of the old fifth circuit. The split of the fifth circuit has in fact been universally considered a success.¹⁸

On a related note, large circuits will necessarily be prone to a less collegial environment. The more judges that sit on a circuit, the less frequent a particular judge is likely to encounter any other judge on a three-judge panel. Breakdown in collegiality can lead to a diminished quality of decisionmaking. Judge O'Scannlain of the ninth circuit noted in testimony before the committee that "as a court of appeals becomes increasingly large, it loses the collegiality among judges that is such a fundamental ingredient in effective administration of justice."

Intracircuit conflicts and en banc review. The large number of judges also presents problems related to intracircuit conflicts and increases the likelihood of inconsistent decisions between panels within the circuit. With 28 judges on the ninth circuit, there are 3,276 possible combinations of panels, not including the significant number of panels including senior judges and judges sitting by designation. Despite computerization and other efforts, the proliferation of three-judge panel decisions and the sheer size of the caseload makes it increasingly difficult for judges to keep abreast of ninth circuit decisions to avoid conflicting decisions. District judges, litigants, and parties seeking to conform their conduct to circuit law also encounter serious obstacles in assessing what the law of the circuit is. Anecdotal evidence indicates that the ninth circuit is marked by an increased incidence of intracircuit conflicts.¹⁹

Compounding that problem, the ninth circuit does not use the traditional *en banc* procedure for resolving intracircuit conflicts. Instead, the circuit uses a limited *en banc* procedure in which an 11-judge panel, consisting of the chief judge and 10 circuit judges chosen by lot, review cases *en banc*. This method could permit as few as six of the sitting judges to dictate the outcome of a case contrary to the judgment of 22 others, solely depending on the luck of the draw. Under the ninth circuit's rules, the circuit may decide to review a case using the full *en banc* court. However, ever since the adoption in 1980 of circuit rules permitting the ninth circuit to hear cases through limited *en banc* procedures, the ninth circuit has never elected to hear a case sitting as a full *en banc* court. True *en banc* review in the ninth circuit is effectively nonexistent, and intracircuit inconsistencies are more likely to go unreviewed.

¹⁸ See, e.g., *A Move to Chop Up the Ninth Circuit*, *The American Lawyer*, January–February 1992, at 89 (observing that maybe a ninth circuit split "would be a good idea, like breaking up the Fifth Circuit in 1980"). Concern about any split of the ninth circuit leading to increased conflicts between the circuits is belied by the experience of the old fifth circuit and is overstated. In response to a question from Senator Thurmond at the hearing in this regard, Judge O'Scannlain pointed out, "simply having a large number of circuits does not necessarily mean that you are going to have a large number of conflicts [because conflicts] tend to be reduced to two or three fundamental approaches to the same legal issue, no matter how many circuits are involved."

¹⁹ Although one empirical study suggested that the ninth circuit may not suffer from significant intracircuit conflicts, that study received criticism at the committee hearing. Chief Judge Tjoflat of the eleventh circuit, for example, argued that it would in fact be impossible to conduct a reliable empirical study of intracircuit conflicts because "[t]here are so many ways in which precedent can be disregarded in cases."

(This may also explain in part why the ninth circuit typically has a high reversal rate in the Supreme Court²⁰). Without effective review, it is increasingly likely that a particular three-judge panel might choose to sidestep circuit precedent.

Conclusion. These factors as a whole have led the committee, after careful consideration, to conclude that a split of the ninth circuit is warranted, particularly given the circuit's impending growth. It is the committee's view that the split of the ninth circuit accomplished by the committee substitute presents the most reasonable split of that circuit at this time. The costs of the committee substitute will not be prohibitive. Reliable estimates suggest that any costs will be moderate and will not be long-term. Significant long-term savings could be realized, for example, if the new circuits experience similar efficiencies to those that emerged in the fifth and eleventh circuits. In any event, the committee remains dedicated to ensuring that any costs associated with a split are minimized.

IV. VOTE OF THE COMMITTEE

Pursuant to paragraph 7 of rule XXVI of the Standing Rules of the Senate, each committee is to announce the results of rollcall votes taken in any meeting of the committee on any measure or amendment. The Senate Judiciary Committee, with a quorum present, met on Thursday, November 30, 1995, at 10 a.m., to begin marking up S. 956. On Thursday, December 7, 1995, the committee, again with a quorum present, met to complete the markup of the bill. At that meeting, the following rollcall votes occurred on an amendment proposed to the bill and on the motion to favorably report S. 956 as amended by an amendment in the nature of a substitute:

(1) The Feinstein amendment to create, in lieu of a split of the ninth circuit, a commission to study the structure of the Federal courts of appeals. The amendment was defeated: 8 yeas to 9 nays.

YEAS	NAYS
Biden	Thurmond
Kennedy	Simpson (proxy)
Leahy	Grassley
Heflin	Brown
Simon	Thompson
Kohl	Kyl
Feinstein	DeWine
Feingold	Abraham (proxy)
	Hatch

(2) Motion to favorably report S. 956 as amended by an amendment in the nature of a substitute. The motion was adopted: 11 yeas to 7 nays.

²⁰ Senator Feinstein suggests, in her additional views, that the observation that the ninth circuit experiences a higher reversal rate in the Supreme Court is without support. To the contrary, that circuit's reversal rate, while fluctuating from year to year, has been documented to be notably high. See *e.g.*, Marcia Coyle, *A Working Majority: Supreme Court Review*, National Law Journal (July 31, 1995) at C1 (ninth-circuit reversal rate in the Supreme Court for the 1994-1995 term was 82 percent); David Lauter, *In Moderate Pursuit of Conservative Goals: Supreme Court Review*, National Law Journal (Sept. 2, 1985) at S-2 (noting that "The justices continue to reverse a disproportionately high percentage of the cases coming to them from the 9th U.S. Circuit Court of Appeals.)

YEAS	NAYS
Thurmond	Biden
Simpson (proxy)	Kennedy
Grassley	Leahy
Specter (proxy)	Simon
Brown	Kohl
Thompson	Feinstein
Kyl	Feingold
DeWine	
Abraham (proxy)	
Heflin	
Hatch	

V. SECTION-BY-SECTION ANALYSIS

SECTION 1. SHORT TITLE

This section sets forth the title of the act, the “Ninth Circuit Court of Appeals Reorganization Act of 1995.”

SECTION 2. NUMBER AND COMPOSITION OF CIRCUITS

This section amends section 41 of title 28, which sets forth both the number of the circuit courts of appeals and the States and territories that each circuit comprises. The section is amended to specify that there will be a total of 14 judicial circuits of the United States. The listing of the States and territories in the ninth circuit is amended to provide that the ninth circuit contains only California, Hawaii, Guam, and the Northern Mariana Islands. A new listing for the twelfth circuit is added to the section, specifying that the twelfth circuit will consist of Alaska, Arizona, Idaho, Montana, Nevada, Oregon, and Washington.

SECTION 3. NUMBER OF CIRCUIT JUDGES

Section 44(a) of title 28 contains a table listing the judicial circuits and the number of active circuit judgeships for each circuit. Currently, the ninth circuit contains 28 circuit judgeships. Section 44(a) is amended to provide that the ninth circuit will have 15 circuit judges, and to provide that the twelfth circuit created by the bill will have 13 circuit judges. The bill accordingly does not add any judgeships; rather, it divides the current ninth circuit judgeships between the new ninth and twelfth circuits in a manner roughly proportional to the division of the appellate caseload between those circuits.

SECTION 4. PLACES OF CIRCUIT COURT

Section 48(a) of title 28 provides that the courts of appeals shall hold regular sessions at certain specified locations, as well as at other places within the circuit as each court may specify by rule. The places at which regular sessions of the ninth circuit shall take place will include San Francisco and Los Angeles. A new listing for the twelfth circuit is added, providing that regular sessions shall be held in Portland, Seattle, and Phoenix.

SECTION 5. ASSIGNMENT OF CIRCUIT JUDGES AND CLERK OF THE COURT

The bill provides that, no later than 60 days after the date of enactment, the judicial council for the ninth circuit shall make assignments of the circuit judges of the former ninth circuit to the new ninth circuit and the twelfth circuit, consistent with the provisions of the bill. In addition, the bill establishes that the Clerk of the Court for the twelfth circuit shall be located in Phoenix.

SECTION 6. ELECTION OF ASSIGNMENT BY SENIOR JUDGES

Under the bill, each judge who is a senior judge of the former ninth circuit on the day before the effective date of the act may elect to be assigned either to the new ninth circuit or to the twelfth circuit and is to notify the Director of the Administrative Office of the U.S. Courts of that election.

SECTION 7. SENIORITY OF JUDGES

The seniority of any circuit judge assigned under section 5 of the act or having elected to be assigned under section 6 of the act shall run from the date of commission of that judge as a judge of the former ninth circuit. This provision permits the judges of the ninth circuit to maintain their current seniority, regardless of whether they end up in the new ninth circuit or in the twelfth circuit.

SECTION 8. APPLICATION TO CASES

This section provides for the processing of cases in which an appeal or other proceeding has been filed with the ninth circuit before the effective date of the act. First, if the matter has been submitted for decision, the case is to be further processed as if the act had not been enacted. Second, where a matter has not yet been submitted for decision, the appellate proceeding, along with the original papers, printed records, and record entries, are to be transferred to the court to which it would have gone had the act been in effect at the time the matter was commenced. Further proceedings will then be conducted as if the matter had been filed in that court. Finally, in the case of a petition for rehearing or a petition for rehearing en banc, if the matter had been decided on appeal before the effective date of the act, or had been submitted before the effective date and decided on or after the effective date as provided above, then the petition is to be handled as if the act had not been enacted. If a petition for rehearing en banc is granted, the matter will be reheard by a court comprised as though the act had not been enacted.

SECTION 9. DEFINITIONS

This section defines three terms. The "former ninth circuit" is defined as the ninth circuit as in existence on the day before the effective date of the act. The term "new ninth circuit" refers to the ninth circuit established by the amendments contained in the act. Likewise, the "twelfth circuit" is the twelfth circuit established by the amendments embodied in the act.

SECTION 10. ADMINISTRATION

This section permits the ninth circuit, as constituted before the effective date of the act, to take any administrative action that may be required to carry out the act. It also provides that the former ninth circuit shall cease to exist for administrative purposes on July 1, 1997.

SECTION 11. EFFECTIVE DATE

The effective date of the act is 60 days after the date of enactment.

VI. COST ESTIMATE

In accordance with paragraph 11(a), rule XXVI, of the Standing Rules of the Senate, the committee offers the report of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, December 19, 1995.

Hon. ORRIN G. HATCH,
*Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 956, the Ninth Circuit Court of Appeals Reorganization Act of 1995, as ordered reported by the Senate Committee on the Judiciary on December 7, 1995. CBO estimates that enacting S. 956 would result in discretionary cost of the federal government of about \$3 million in each of the fiscal years 1996 through 2000, assuming appropriation of the necessary funds. Enacting the bill also would require a one-time cost for building construction or rehabilitation, which could be as much as \$23 million, subject to appropriation of the necessary amounts. Because enacting S. 956 would not affect direct spending or receipts, pay-as-you-go procedures would not apply to this legislation.

S. 956 would divide the Ninth Judicial Circuit United States Court of Appeals into two circuits. The reduced ninth circuit would include California, Hawaii, Guam, and the Northern Mariana Islands, while the newly created twelfth circuit would include Alaska, Washington, Oregon, Idaho, Montana, Nevada, and Arizona. The headquarters for the twelfth circuit would be located in Phoenix.

Enacting S. 956 would require the creation of offices of the Clerk of the Court and the Circuit Executive, which perform administrative functions for the circuit, for the new twelfth circuit. (Currently, these offices for the ninth circuit are located in San Francisco.) The new Clerk's and Circuit Executive's offices in Phoenix would engender one-time costs—probably in fiscal year 1996—for new computer systems (about \$1 million) and for a library (about \$2 million). The net incremental cost to staff these offices, assuming a reduction in the number of positions in San Francisco proportional to the expected decline in caseload for the ninth circuit, would be about \$1 million annually, starting in fiscal year 1997. Other changes in net costs for operations of the San Francisco office, including severance

costs, moving expenses, and savings for a reduction in San Francisco office space and lower travel costs, are not likely to be significant.

Additionally, there would be costs to house the twelfth circuit headquarters in Phoenix, which could be accomplished through various alternatives. Assuming current design standards for federal courthouses are adhered to, the General Services Administration estimates that it would cost about \$23 million to construct a new courthouse facility for the twelfth circuit. Such a facility probably could be built by the year 2002. However, there is already a federal district courthouse in Phoenix, which will be replaced by a new district courthouse now in the planning stages. If design standards are not followed precisely, and if those two buildings are utilized, it is possible that facilities for the twelfth circuit headquarters could be provided for significantly less than \$23 million. In any case, such costs would be subject to appropriations action.

Assuming enactment of this bill in early 1996, the twelfth circuit probably could be operational by fiscal year 1997. Presumably, space would be leased in Phoenix until permanent facilities are acquired, either through new construction or retrofitting an existing building. The cost to lease temporary space would be about \$2 million annually.

In summary, enacting S. 956 would result in added costs of about \$3 million annually from fiscal year 1996 until whenever permanent facilities are established, after which additional annual costs would be about \$1 million. There would also be one-time costs to acquire permanent space for the twelfth circuit headquarters, which could be as much as \$23 million.

Enacting S. 956 would result in no costs to state or local governments.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mark Grabowicz.

Sincerely,

JUNE E. O'NEILL, *Director*.

VII. REGULATORY IMPACT STATEMENT

In compliance with paragraph 11(b)(1), rule XXVI of the Standing Rules of the Senate, it is hereby stated that the committee finds that the bill will have no additional direct regulatory impact.

VIII. MINORITY VIEWS OF SENATORS BIDEN, KENNEDY,
LEAHY, SIMON, KOHL, FEINSTEIN, AND FEINGOLD

NINTH CIRCUIT COURT OF APPEALS REORGANIZATION ACT OF 1995

The fundamental problem with S. 956 is the absence of any data to support the circuit realignment it proposes. Unlike the efforts which preceded the split of the Fifth Circuit, there is no recent study to demonstrate that the Ninth Circuit should be divided. In fact, the considerable thought and study Congress gave to the problems faced by the circuit courts of appeals prior to the last circuit realignment is overwhelming in light of the history of S. 956.

In 1972, after extensive Committee hearings and in recognition of the complexity of the problem, Congress determined that a commission should be created to study the problems faced by the courts of appeals. As Congressman Charles E. Wiggins later testified, "It was clear that something had to be done, and yet, the problem was sufficiently complex that it was felt that Congress should not undertake it without at least the advice or counsel of a panel of genuine national experts in this field." Thus the creation of the Commission on Revision of the Federal Court Appellate System of the United States (the Hruska Commission).

In carrying out its mission, the Hruska Commission conducted hearings throughout the country and issued a preliminary report. Thousands of copies of the report were circulated, in addition to those that were published in the Federal reporter system, and all concerned were invited to comment. A final report was issued in December 1973. It would seem that if Congress is again to address a "crisis" in the federal courts of appeals, then there should at least be a comprehensive study similar to that of the Hruska Commission.

In contrast, however, the Committee has conducted only one hearing. The two Ninth Circuit judges who testified did not recommend splitting the circuit at this time. Chief Judge Wallace suggested that "Instead of dividing the Ninth Circuit, why not study whether or not the Ninth Circuit is the better way to approach it and leave the Congress the opportunity of thinking in the future of what courts should look like." Judge O'Scannlain testified that "the Congress should direct the circuit judges of the Ninth Circuit to reflect over the next few years and then to recommend, as did the judges of the Fifth Circuit Court of Appeals in the 1980s, what the proper division of their circuit should be. That recommendation should be based on an analysis of the factors which will affect the court's ability to meet its goals in the coming years. Any restructuring of the Ninth Circuit must guarantee accountability to all the people it currently serves." And Judge Tjoflat, who shared his experience as a judge of the old Fifth Circuit and now Chief Judge of the Eleventh Circuit, suggested that "maybe a new commission

should be formed, like the Hruska Commission. Maybe some circuits should be linked together and maybe some should be divided.”

Given the absence of a recent study, deference should be given to those who are most familiar with the Ninth Circuit and the extent to which its size affects the administration of justice. On four occasions in the past fifteen years, the Ninth Circuit Judicial Conference has voted overwhelmingly in opposition to splitting the circuit. In August 1995, the Ninth Circuit Judicial Council, the governing body for all Ninth Circuit courts, voted unanimously to oppose the original legislation introduced by Senator Gorton. Similarly, the State Bar of Arizona, the State Bar of California, the Hawaii State Bar Association, the State Bar of Montana, and the State Bar of Nevada all opposed the original legislation. The manner in which the substitute was prepared prevented the Committee from hearing from all of these groups on the substitute before it was reported out of the Committee.

As testified at the hearing by Professor Arthur Hellman, Deputy Executive Director of the Hruska Commission, “speculation is no substitute for evidence.” The basis of any proposal to realign a circuit should be a deliberate review and thorough understanding of the problems which exist and the solutions that might best address those problems. One hearing is insufficient.

JOE BIDEN.

IX. ADDITIONAL VIEWS OF SENATORS FEINSTEIN AND KENNEDY

1. A PIECEMEAL APPROACH IS NOT THE ANSWER TO A NATIONWIDE PROBLEM

If Congress passes legislation to divide the Ninth Circuit and create a new Twelfth Circuit, it will be making an irreversible decision that will have far reaching and long-term implications for all circuits. By dividing the Ninth Circuit despite the overwhelming opposition of its bench and bar, Congress will set a precedent that it may subsequently regret. Federal legislators will be making the arbitrary policy decision that circuits of a given size will be divided even if they are functioning well. Congress will be endorsing the view that circuit division is the solution to dealing with the nationwide problem of caseload growth. It will be creating new infrastructures and institutionalizing ways of doing business that will make comprehensive reform more difficult in the future.

If Congress passes S. 956, it will be proceeding with a policy in the absence of adequate or timely information. The key questions have not been answered: Is circuit splitting the solution to caseload growth, and, if so, where should new circuit boundaries be drawn? Until Congress can better answer these questions, it should not be breaking up a circuit which, in the judgment of those who know it best, is working well.

In recent weeks, the Judiciary Committee has been presented with two radically different proposals for splitting the Ninth Circuit, with no adequate analytical foundation for either. There have been no hearings on the proposal that is being reported to the Senate floor. The current bill would create a seven-state Twelfth Circuit running from the Arctic Circle to the Mexican border, and a two-state Ninth Circuit consisting of California, Hawaii, and the Pacific territories. This proposal was devised only a few weeks ago. Prior to that, there was another proposal that would have cut the northern from the southern part of the Ninth Circuit.

Judiciary Committee hearings on the earlier bill indicated that there are many questions on how to deal with caseload growth, and no consensus on how to resolve them. Some believe we need more judges. Some believe we need specialized courts. Some believe we need larger circuits, and others prefer the compactness and collegiality of smaller circuits. As the federal caseload continues to grow, we will increasingly be required to choose between maintaining larger circuits or further splitting circuits and balkanizing federal law.

FAILURE OF PAST ATTEMPTS TO SPLIT THE CIRCUIT

The majority report emphasizes the “lengthy history” of proposals to divide the Ninth Circuit. Section II states that “numerous

bills have been introduced” and that hearings have been held in the Senate on “several occasions.”

It is true that earlier attempts have been made to divide the Ninth Circuit. On various occasions beginning in 1983, Senator Slade Gorton, joined at times by other northwestern Senators, has offered legislation to split the circuit. But the crucial fact is that these attempts were rejected uniformly. Every one of the bills cited by the majority died in committee. None was reported to the floor. This was true when the Democrats controlled the Senate in 1990, and it was true when the Republicans controlled the Senate in 1984. The fact that a measure has been rejected repeatedly—no matter which political party was in power—argues against the merits of the proposal, not in its favor.¹

A COMMISSION TO RECOMMEND CHANGES IN CIRCUIT STRUCTURE AND BOUNDARIES

Past experience with circuit division, undertaken only twice since the courts of appeal were created in 1891, has provided unclear results. According to the Administrative Office of the U.S. Courts, the Eleventh Circuit, which split from the Fifth Circuit in 1981, is now the slowest circuit in the country from filing of the appeal to final disposition.

This is not necessarily to criticize the Eleventh Circuit.² The fact is that the Eleventh Circuit is laboring under the same kinds of caseload pressures that beset the Ninth. So are all of the other circuits. To the extent that S. 956 is grounded in legitimate concerns about judicial administration, it is bound to fail because it represents a piecemeal approach to a national problem.

Rather than targeting one circuit and dividing it haphazardly, Congress should create a Commission that would proceed systematically, examine problems on a nationwide basis, and make recommendations that will serve the country for the long term. Before we implement Draconian structural reforms, we should be absolutely certain that innovations in case processing and other management solutions would not suffice. Any “solution” carries trade-offs. Only a careful, holistic examination can provide a sound foundation for choosing among various options for reform or realignment of the circuit courts of appeal. Senator Heflin’s remarks at September’s Judiciary Committee hearing are instructive:

In my judgment, the overall structure of the circuit courts of appeals needs careful study * * * The federalizing of various crimes is going to vastly increase the workload of the district courts and circuit courts of appeals. Proposals that are out in the field of tort reform and others will also increase the work of the Federal courts relative to civil actions in the future. Congress continues to add to the workload of the judiciary and all of the circuit

¹ The majority notes that a 1984 hearing was chaired by Senator DeConcini. What the majority fails to note was that Senator DeConcini opposed the split, and testified against splitting the circuit in a 1990 hearing. See, Hearing on S. 948 Before the Subcommittee on Courts and Administrative Practices of the Senate Committee on the Judiciary, 101st Cong., 2d sess. 18 (1990), at 288-89, cited in Carl Tobias, “The Impoverished Idea of Circuit Splitting,” 39 *Emory Law Journal* (forthcoming, 1996).

² Table B-4 (12-month period ended Sept. 30), Judicial Business of the United States Courts—1994, Administrative Office of the United States Courts.

courts will be impacted by this. We also continue to develop conflicts between the various circuits, and there have been proposals over a period of time to do something about it. I really think that in the long run, there needs to be a careful evaluation of the entire circuit court structure and the administration of justice, how decisions are decided.³

The importance of conducting a study before dividing the Ninth Circuit also has been emphasized by Governor Pete Wilson of California. In a letter to Chairman Hatch of Dec. 6, 1995, Governor Wilson registered his “strong opposition to any split before an objective study is concluded,” and urged that the study “be commissioned to carefully examine the concerns about the Ninth Circuit and determine whether the concerns are legitimate and whether a change in the circuit’s boundaries is the best method of addressing them.”

A means of implementing such a study is readily at hand. As the majority report notes, the Committee rejected by only the narrowest of margins an amendment by Senator Feinstein “to create, in lieu of a split of the ninth circuit, a commission to study the structure of the federal courts of appeals.” The proposed commission would enable Congress to act in a sound, comprehensive way to improve the quality of appellate justice nationwide.⁴ This represents a far better and more reasoned approach than S. 956 in any of its variations.

2. THE BENCH AND BAR OPPOSE THE NINTH CIRCUIT SPLIT.

In deciding whether to divide the Ninth Circuit, the greatest weight should be given to the views of the judges and lawyers of the circuit. The record before this Committee demonstrates that the bench and bar of the circuit overwhelmingly oppose the division.

The bar associations of Arizona, Nevada, Montana, California, and Hawaii all have passed resolutions expressing their opposition to splitting the circuit, as did Idaho the last time this came up. The Federal Bar Association, which is composed entirely of lawyers with substantial practice in the federal courts, also opposes the splitting of the Ninth Circuit. On four occasions over the last decade, the judges and lawyers at the Ninth Circuit Judicial Conference voted against division of the circuit. The official voice of the Ninth Circuit judges is unanimously opposed to the measure—the Judicial Council of the Circuit has adopted strong resolutions of opposition. At the Judiciary Committee’s September hearing on S. 956, the Chief Judge of the Circuit appeared in opposition.

³Hearing on S. 956, Committee on the Judiciary, United States Senate, 104th Cong., 1st sess. (Sept. 13, 1995).

⁴Specifically, the “Commission on Structural Alternatives to the Federal Courts of Appeals” would:

(a) study the present division of the United States into the several judicial circuits;
 (b) study the structure of the Federal court of appeals system; and
 (c) issue recommendations to the President and Congress relating to “such changes in circuit boundaries or structure as may be appropriate for the expeditious and effective disposition of the caseload of the Federal courts of appeals, consistent with fundamental concepts of fairness and due process.” Feinstein Substitute Amendment to S. 956, 104th Cong., 1st sess., Nov. 30, 1995.

The Arizona and Nevada bar associations already have passed resolutions opposing the new Committee proposal. According to the Arizona Bar resolution:

Such a plan would be extremely unfortunate for Arizona and wastefully unwise as a matter of judicial administration * * * The proposal cuts Arizona off from California, the state with which it shares the greatest legal and economic ties. The proposed division puts a premium on racing for choice of forum so that California and Arizona parties to a disputed business transaction will each have an incentive to sue first to keep the matter in "their" circuit; and yet this may be a matter which, without fostering a race to the courthouse, might never be litigated at all.

The majority report quotes one judge of the Ninth Circuit—Judge O'Scannlain—who testified at the September hearings about the possible loss of collegiality on a large court. However, Judge O'Scannlain also told the Committee, "In my view, many of those administrative innovations have been successful. I entirely agree with Chief Judge Wallace that the Ninth Circuit is handling its caseload reasonably well, and there is not currently a crisis."⁵ He further testified that the bill before the Committee would do "nothing to resolve [the Ninth Circuit's] long-term problems, and may actually exacerbate them."⁶ Judge O'Scannlain urged that Congress conduct a careful study of the problems of the courts of appeals before dividing one circuit.

It is a telling demonstration of the weakness of the arguments for S. 956 that the Ninth Circuit judge relied on so heavily by the majority did not support the bill. Rather, he urged the course of action embodied in the proposed substitute—a careful study.

3. THE DIVISION OF THE FIFTH CIRCUIT PROVIDES NO PRECEDENT FOR DIVIDING THE NINTH

The most recent splitting of a circuit was that of the old Fifth Circuit, with its division into the new Fifth Circuit and the Eleventh Circuit. The difference between the two situations dramatizes why the same remedy is neither desirable nor practical here.

Legislation to divide the Fifth Circuit was first considered as early as 1975. But it was not enacted at that time because there was strong opposition from judges and lawyers in the affected states. By 1980, however, professional opinion had coalesced. Division of the Fifth Circuit had the unanimous support of the judges of the court of appeals. It was also endorsed by the bar associations of each of the six states in the circuit, as well as by other judges and lawyers.

The contrast with the present legislation could not be sharper. As described above, the Ninth Circuit Judicial Council and the Judicial Conference oppose splitting the circuit. State bar associations in the circuit have spoken out against the proposal.

In dividing the Fifth Circuit in 1980, Congress acted in accordance with the overwhelming weight of professional opinion within

⁵Written statement at 4.

⁶*Id.*, at 13.

the circuit. That same respect for professional opinion leads to the conclusion that the Ninth Circuit should not be divided.

In the aftermath of the Omnibus Judgeship Act of 1978, Congress declined to realign federal circuit courts unilaterally. Subsequently, after the judges and bar were fully united behind the idea, the Fifth Circuit chose to split and create a new Eleventh Circuit. By contrast, the Ninth Circuit responded to the 1978 reorganization Act by implementing a series of innovative changes in court structure, and those innovations have proven extremely successful.

EARLIER SPLITTING OF THE FIFTH CIRCUIT—QUESTIONABLE RESULTS

The majority report asserts, without documentation, that “[t]he split of the fifth circuit has in fact been universally considered a success.” Yet there have been no scholarly, independent studies of the Fifth or the Eleventh Circuits. The Ninth Circuit, on the other hand, has benefitted from intensive scrutiny, documented in Professor Arthur Hellman’s comprehensive review, *Restructuring Justice: The Innovations of the Ninth Circuit and the Future of the Federal Courts*.⁷

By many standard measures, the Ninth Circuit is doing better than either the Fifth or the Eleventh. As noted earlier, the Eleventh Circuit, a product of the Fifth Circuit split, is now the *slowest* circuit in the country from filing of an appeal to disposition.⁸ The pending caseloads for the Eleventh and the Fifth Circuits have *increased* by 40 and 54 percent respectively over the past 5 years, while the pending caseload of the Ninth Circuit has *decreased* by 11 percent over the same time period.⁹ For each of the past 5 years, the Ninth Circuit has shortened its time from filing to final disposition, and has terminated more cases than have been filed.¹⁰ The Ninth Circuit hears oral argument in a substantially greater percentage of cases than either the Fifth or the Eleventh Circuits—40 percent for the Ninth Circuit, compared to 37 percent for the Eleventh Circuit and 25 percent for the Fifth.¹¹

Another indication of the productivity and effectiveness of a court is its ability to issue written, reasoned dispositions for the parties in the cases that come before it. The higher the percentage of cases in which a court of appeals issues written decisions in disposing of its cases, the more effective it is in providing guidance to litigants about that court’s interpretation and application of the law. The Ninth Circuit furnishes written dispositions in 92 percent of its over 4300 dispositions each year.¹² The Eleventh Circuit, in contrast, issues written, reasoned dispositions in only 65 percent of its 1600 cases each year—the second lowest percentage (after the Third Circuit) among all of the federal courts of appeals.¹³

⁷ Cornell University Press (1990).

⁸ Table B-4 (12-month period ended Sept. 30), Judicial Business of the United States Courts—1994, Administrative Office of the United States Courts.

⁹ Table B (12-month period ended Sept. 20), Judicial Business of the United States Courts—1994; 1993; 1992; Table B (June 30); 1991 Annual Report of the Director, Book One, Administrative Office of the United States Courts.

¹⁰ *Id.*

¹¹ Table S-1 (12-month period ended Sept. 30), Judicial Business of the United States Courts—1994, Administrative Office of the United States Courts.

¹² Table S-3 (12-month period ended Sept. 30), Judicial Business of the United States Courts—1994, Administrative Office of the United States Courts.

¹³ *Id.*

A review of the growth of caseloads in the two most recently split circuits when compared to the Ninth Circuit demonstrates the very point that the Arizona Bar resolution highlighted—a split may in fact engender more litigation because it creates a “race-to-the-courthouse” mentality, when in a single circuit no litigation would have been considered. Appeals have increased 30 and 31 percent respectively in the Fifth and Eleventh circuits since the 1980 split, compared to less than 28 percent for the Ninth Circuit.¹⁴

4. 1995 LEGISLATION SHOULD NOT BE BASED ON A 1973 REPORT

In the debate over the current proposal to divide the Ninth Circuit, frequent reference has been made to the 1973 report by the Commission on Revision of the Federal Court Appellate System (Hruska Commission), which recommended that the Fifth and Ninth circuits each be divided. Ninth Circuit Judge Charles Wiggins of Nevada,¹⁵ who served as a member of the Hruska Commission and who once supported a split of the circuit, recently wrote to Senator Feinstein to register strong opposition to the split:

I am pleased that you are going to carry your opposition to S. 956 to the floor * * * My understanding of the role of the circuit courts in our system of federal justice has changed over the years from that which I held when the Hruska Commission issued its final report in 1973. At that time, I endorsed the recommendations of the Commission calling for a division of the Fifth and Ninth Circuits. I have grown wiser in the succeeding 22 years.¹⁶

Professor Arthur Hellman, a leading expert on the circuit court system, served as Deputy Executive Director of the Hruska Commission, and in that capacity drafted the Commission’s 1973 report. Like Judge Wiggins, Professor Hellman supported a Ninth Circuit split 22 years ago. He now writes: “Although the Hruska Commission recommended in 1973 that the Ninth Circuit be divided, that recommendation has been made obsolete by intervening events.” Professor Hellman emphasized that “[r]ecent studies of the federal courts have declined to endorse the Hruska Commission recommendation. On the contrary, they have recognized that the large circuit may provide a more workable alternative to the traditional model.”¹⁷

In the 22 years since the Hruska Commission finished its work, no other study has focused exclusively on the federal appellate courts. Two blue-ribbon study groups have analyzed problems of the federal judicial system as a whole. Neither of these endorsed the Hruska Commission’s recommendation for a division of the

¹⁴Table B (12-month period ended Sept. 30), Judicial Business of the United States Courts—1995; 1993; 1992; Table B (June 30), Annual Report of the Director, 1981–1991, Administrative Office of the United States Courts.

¹⁵Judge Wiggins speaks with unique authority on the issue of dividing the Ninth Circuit. He was a Republican member of the United States House of Representatives from a district in southern California from 1967 to 1979. He served continuously on the House Judiciary Committee. In that capacity, he served on the Hruska Commission from 1972–73. In 1984, he was appointed by President Reagan to the United States Court of Appeals for the Ninth Circuit. He is now an active judge on the circuit.

¹⁶Letter to Senator Dianne Feinstein, Dec. 18, 1995.

¹⁷Memorandum to Senator Dianne Feinstein, Dec. 12, 1995.

Ninth Circuit. Rather, both expressed skepticism about dividing circuits as a remedy for appellate overload.

The Federal Courts Study Committee of 1990 did not take any position on whether the Ninth Circuit should be split. The Committee observed, however, that “The Court of Appeals for the Ninth Circuit—a ‘jumbo’ circuit today—apparently manages effectively * * * Perhaps the Ninth Circuit represents a workable alternative to the traditional model.”

The Report of the Committee on Long-Range Planning of the Judicial Conference of the United States stands in even starker contrast to the Hruska Commission report issued 22 years ago. The report disclaimed any “fixed numerical limit to circuit size.” It emphasized that proposed changes in circuit boundaries “must be considered in the light of the disruption of precedent and judicial administration that such changes generally entail.” The report concluded that “Circuit restructuring should occur *only if compelling empirical evidence demonstrates* adjudicative or administrative dysfunction in a court so that it cannot continue to deliver quality justice and coherent, consistent circuit law in the face of increasing caseload.”

It would be unwise to rely on a 22-year-old report, such as the Hruska Commission’s report, as the basis for deciding issues of health care policy, telecommunications policy, or any other legislative issue. It is no more sensible to do so when the question involves the structure of the federal courts.

5. CREATING A NEW CIRCUIT IS A COSTLY PROPOSITION

This Congress is concerned with reducing costs of the federal judiciary. In fact, the Senate recently adopted an amendment to limit the costs of the Circuit Judicial Conferences in order to help “fight unnecessary spending in the judiciary.” At a time when we are seeking to save money, we ought not to be building duplicative and superfluous bureaucracies, particularly when there is *no demonstrated gain*.

The costs of any version of S. 956 would be substantial:

- No matter where the lines are drawn, splitting the circuit would require duplicative offices of clerk of court, circuit executive, staff attorneys, settlement attorneys, and library, as well as courtrooms, mail and computer facilities.
- Estimated costs of a new or rehabilitated courthouse in Phoenix range from \$23 million to \$59.5 million. Three alternatives currently are being explored to house a new court of appeals headquarters in Phoenix. These include: (1) a newly constructed Twelfth Circuit headquarters building, (2) transformation of the old Phoenix district courthouse into a circuit headquarters, or (3) altering the plans for the proposed new district court building to accommodate circuit headquarters.

The General Services Administration (GSA) has estimated the cost of a newly-constructed circuit headquarters building at \$23 million. This estimate does not include site purchase costs.

The second alternative would be to house the court of appeals in the existing Federal courthouse after the district court vacates it in 1999 or 2000. GSA estimates the

cost of a “partial” rehabilitation of the building at \$28.4 million. The Congressional Budget Office (CBO) estimates the costs of a “partial” rehabilitation at “less than 23 million.” The GSA has indicated that it is extremely rare to do a “partial” mechanical and systems rehabilitation. The more likely procedure would be a complete building mechanical rehabilitation at \$59.5 million.

The third alternative would be for the court of appeals to share the new building that has been designed to house the district court in Phoenix. Neither GSA nor CBO have estimated the costs of this alternative as it is probably the least viable. According to the Ninth Circuit Executive Office, this option would “generate huge redesign costs, delay the project significantly, and result in very little if any savings.”

- GSA and CBO have allocated one-time start-up costs at \$3 million, including \$1 million for computers and \$2 million for a new circuit library.
- GSA and CBO have estimated annual costs of duplicative staff positions at \$1 million, and an additional \$2 million for the cost of leasing space for the headquarters until permanent quarters could be made available.
- Congress has authorized, and GSA has virtually completed, an extensive post-earthquake restoration of the Ninth Circuit headquarters building in San Francisco at a cost of over \$100 million. In addition, the GSA completed the build-out of the court of appeals courthouse in Pasadena within the last two years. Both projects were designed to accommodate the full compliment of Ninth Circuit judges and staff. If the Twelfth Circuit were to be created, substantial expenses already incurred would be wasted. According to the Ninth Circuit Executive Office, “the taxpayers would be asked to spend money preparing facilities in Phoenix when they have just finished paying for the same facilities in San Francisco and Pasadena.” As much as 35 percent of the space in San Francisco and Pasadena would no longer be necessary.
- The Committee bill interferes with future flexibility by specifying that the Clerk of the Court for the Twelfth Circuit shall be in Phoenix. This provision is unprecedented. Current law does not specify the location of the Clerk’s Office for the Ninth or any other circuit. Even if more economic facilities were available elsewhere, the new court would be precluded from using them without going through the process of securing amendatory legislation from the Congress.

6. REGIONALISM AND IDEOLOGY SHOULD PLAY NO PART IN THE DRAWING OF CIRCUIT BOUNDARIES

The Committee disavows the notion that one purpose of dividing the circuit is to change the substantive outcomes of decisions. Some of the language of the sponsors, however, suggests that the so-called domination of a “California” judicial philosophy is a factor driving this legislation. In an earlier proposal to split the Ninth Circuit, a sponsor stated that the Northwestern states were “dominated by California judges, and California attitudes” and that

“[o]ur interests cannot be fully addressed from a California perspective.” A look at the current proposal on a map shows that California would be segregated from all contiguous states.

In a recent article in the *New York Times*, a sponsor of S. 956 added that the circuit was unwieldy and deprived states “which are more dependent on how we manage our resources” from having their issues considered by judges who might more be sensitive to local needs.¹⁸ In a May 25 press release, a sponsor commented, “We are seeing an increase in legal actions against economic activities in states like Montana such as timbering, mining and water development. This threatens local economic stability.”¹⁹ In a September 8 press release, the principal sponsor of the current bill condemned a Ninth Circuit ruling against a Montana sheriff’s appeal of background checks under the Brady handgun control law, calling it further evidence of the need to split the Northwest states from the Ninth Circuit: “There they go again * * * Once again the Ninth Circuit has shown itself far out of step with the views of mainstream Montanans and the rest of the Northwest.”²⁰

To divide circuits in order to accommodate regional interests is antithetical to the federalizing function of the circuit courts of appeal. Former Chief Justice Warren Burger rejected such a premise as completely unacceptable in testimony about an earlier version of this legislation, stating, “I find it a very offensive statement to be made 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.”²¹

In his recent letter, Judge Charles Wiggins commented on this issue:

The majority report also contains the misleading statement that the recommended division of the Ninth Circuit is not in response to ideological differences between judges from California and judges from elsewhere in the circuit. I strongly disagree that such a motive does not in fact underlie the proposal for the change. Such a regionalization of the circuits in accordance with state interests is wrong. There is *one* federal law. It is enacted by the Congress, signed by the President, and is to be respected in every state in the union. The law in Montana and Washington is the same law as exists in Maine and Vermont. It is the mission of the Supreme Court to maintain one consistent federal law. I do hope that you will challenge the supporters of the revision to explain the reasons justifying their proposal.²²

If regional ideological preferences are animating forces behind this legislation, they are misguided. The Ninth Circuit is not an ideologically uniform circuit, as some proponents have suggested.

¹⁸Neil A. Lewis, “Partisan Gridlock Blocks Senate Confirmation of Federal Judges,” *New York Times*, Nov. 29, 1995.

¹⁹Press Release, Senator Conrad Burns, “Gorton-Burns Bill Would Split the Ninth Circuit Court of Appeals; Burns to Hold Up Judicial Nominations Until Bill is Approved,” May 25, 1995.

²⁰Press Release, Senator Conrad Burns, “Need to Split the Ninth Circuit,” Sept. 8, 1995.

²¹Quoted in Statement of Chief Judge Wallace, Hearing on S. 956, Committee on the Judiciary, United States Senate, 104th Cong., 1st sess. (Sept. 13, 1995).

²²Letter to Senator Feinstein, Dec. 8, 1995.

In terms of sitting judges, the circuit includes 15 Republican appointees and only 9 Democratic appointees. Sitting Ninth Circuit judges in California include 7 Republican appointees and only 4 Democratic appointees. Another myth is that the circuit is “pro-environmental” in its decisions. Contrary to this assumption, in an examination of the 125 most recent environmental cases in the Ninth Circuit—cases spanning 3 years—researchers documented 64 pro-environmental cases and 65 con—signs of a properly objective judiciary. And what is more important is that there was no sectional breakdown of the judges in those cases.

7. NINTH CIRCUIT INNOVATIONS SINCE THE HRUSKA COMMISSION’S REPORT SHOW THAT A LARGE CIRCUIT CAN FUNCTION EFFECTIVELY

The Ninth Circuit’s experience in the 22 years following the Hruska Commission’s report demonstrates that innovative approaches to adjudication and administration can go far towards mitigating potential problems of operating a large court. The Ninth Circuit has become a national leader in experimentation in judicial administration, developing solutions that are models for the rest of the country.

LIMITED EN BANC PROCEDURE AUTHORIZED BY CONGRESS

The majority report views the Ninth Circuit’s use of a limited en banc court as a reason for dividing the circuit. It is not. The Ninth Circuit’s use of the “limited en banc” procedure has proved effective in resolving the occasional intracircuit conflicts that arise.

The 11-judge limited en banc was authorized by Congress to establish the law of the Circuit without the participation of all active judges. In so doing, Congress acted on the recommendation of the Hruska Commission—the same commission that is quoted with approval in the majority report.

Critics of the limited en banc procedure should note that en banc decisions, in the Ninth Circuit and elsewhere, comprise only a small minority of precedential decisions. The Ninth Circuit holds only about 12–13 limited en banc sittings per year, out of over 4,000 written decisions.²³ Critics should also note that the law of all the federal circuits is overwhelmingly established by three-judge panels, with two judges sufficient for a majority. These decisions are every bit as authoritative as decisions that are signed by a majority of the full court.

All judges participate in the decision as to whether a case will go en banc, and the court’s rules allow for rehearing by the full court at the request of either judges or litigants. The fact that a full hearing has never been held is not a cause for complaint; on the contrary, it simply points out the legitimacy of the device. There is no basis for viewing the limited en banc in anything other than a favorable light.

OTHER INNOVATIONS

The Ninth Circuit was the first federal court to automate its docket. Computerized issue tracking systems, far more sophisti-

²³Table S-1 (12-month period ended Sept. 30), Judicial Business of the United States Courts—1994, Administrative Office of the United States Courts.

cated than anything available in 1973, keep Ninth Circuit panels appraised of other panel decisions, helping them avoid intracircuit conflicts. Circuit-wide electronic networks also keep the court in close communication.

The Ninth Circuit's use of an Appellate Commissioner has expedited rulings on minor and non-dispositive motions. The Appellate Mediation Program has fostered earlier case settlement.

The Circuit's decentralized budget process, emulated by other circuits, has promoted economic efficiency through better targeting of resources to local needs.

The Ninth Circuit is the only circuit to have a Bankruptcy Appellate Panel in place. This revolving 3-judge panel is regionally diverse. It is drawn from districts *other than* districts from which the cases arise, and it expeditiously dispatches bankruptcy cases.

8. THE NINTH CIRCUIT IS DOING A GOOD JOB

The Ninth Circuit is operating smoothly and proficiently in terminating over 8,500 cases a year, almost two-fifths more than the number it terminated only seven years ago with the same number of judges.

In disposition of cases after they have been submitted, the Circuit is fast in getting out its work. The average time from oral argument submission to disposition is 1.9 months, or a half a month less than the national average.²⁴ In fact, the Ninth Circuit is the 2nd most efficient circuit in deciding cases once they are submitted to judges.²⁵

One indication of whether a court of appeals is keeping up with its workload is whether the number of pending cases is decreasing. Since 1992, the number of cases pending before the Ninth Circuit has decreased annually. As noted earlier, while the pending caseloads for the Eleventh and the Fifth Circuits have increased by 40 and 54 percent respectively over the past 5 years, the Ninth Circuit's pending caseload has decreased by 11 percent over the same time period.²⁶ For each of the past 5 years, the Ninth Circuit has shortened its time from filing to final disposition, and has terminated more cases than have been filed.²⁷

INTRACIRCUIT CONFLICT: NO EMPIRICAL EVIDENCE

The majority cites problems of intracircuit conflict as a reason for dividing the Ninth Circuit. The majority admittedly relies only upon "[a]necdotal evidence." Anecdotal evidence is no substitute for objective, systematic study. As the Federal Judicial Center stated in 1993, there has been only one "systematic study of the operation of precedent in a large circuit." The scholar who conducted that study, Professor Arthur Hellman, testified at the Committee's hearing. He stated: "The conclusion I reached after examining [hun-

²⁴ Table B-4 (12-month period ended Sept. 30), Judicial Business of the United States Courts—1994, Administrative Office of the United States Courts.

²⁵ *Id.*

²⁶ Table B (12-month period ended Sept. 30), Judicial Business of the United States Courts—1994; 1993; 1992; Table B (June 30) 1991 Annual Report of the Director, Book One, Administrative Office of the United States Courts.

²⁷ *Id.*

dreds] of cases is that the Ninth Circuit has generally succeeded in avoiding intracircuit conflict.”

The majority also mentions the Ninth Circuit’s 3,276 possible panel combinations. In actual practice, the circuit uses fewer than 100 different combinations of judges per year.²⁸ This is likely to be a lower figure than for certain other circuits, where panels are shuffled on a daily basis during a single week of sittings.²⁹

Finally, without documentation, the majority report alludes to a high reversal rate of Ninth Circuit cases in the Supreme Court. In fact, the Supreme Court elects to hear only 13–24 Ninth Circuit cases per year—hardly representative of the more than 4000 final dispositions issued annually by the circuit.³⁰

DELAY AND SIZE: NO PROVEN CONNECTION

The majority report states that the Ninth Circuit’s size “has contributed to delay in case processing in the circuit.” It is true that the circuit’s median interval from filing the appeal to hearing or submission could be reduced. It is noteworthy, however, that the Ninth Circuit’s interval is close to the national median and is shorter than that of the Eleventh Circuit. It is hard to see why the majority report refers to the split of the Eleventh Circuit from the Fifth as a “success,” when one of the new courts has the nation’s poorest record for delay.

Furthermore, it does not necessarily follow that any delay in the Ninth Circuit is related to circuit size. This could be attributable to the need for more judges,³¹ variations in caseload mix, or judicial unwillingness to take substantive shortcuts, such as issuing orders without explanation.

As noted above, the Third Circuit, for example, disposes of 59 percent of its cases by unpublished orders that contain no explanation for the result. In the Ninth Circuit, only 5 percent of cases have no statement of reasons. It is not surprising that the Third Circuit is faster than the Ninth in disposing of cases. But the Third Circuit’s tradeoff is not necessarily desirable.

9. S. 956 WOULD CREATE THREE UNDESIRABLE PRECEDENTS

ONE STATE WOULD PREDOMINATE IN THE PROPOSED NEW NINTH CIRCUIT

The majority acknowledges that “California will undoubtedly predominate in the new Ninth Circuit,” but insists that this situation “is not without precedent in the courts of appeals.” The fact is that California would predominate in the proposed new Ninth Circuit Court of Appeals to a degree that is without precedent or parallel.

According to the majority’s own figures on other circuits dominated by one state, New York contributes 87 percent of the caseload of the Second Circuit, while Texas contributes only 69 percent of the Fifth Circuit’s caseload. In the proposed new Ninth Circuit,

²⁸ Office of the Circuit Executive, United States Courts for the Ninth Circuit.

²⁹ Internal figures, Clerk, Ninth Circuit Court of Appeals (available upon request).

³⁰ *Id.*

³¹ The majority quotes, out of context, from Chief Judge Wallace’s testimony relating to the issue of delay. At the Committee hearing, Judge Wallace mentioned the current four-month delay to emphasize the need for more judges: “Hundreds of cases are available to be heard by judges; there simply are not enough judges to hear them.”

however, 94 percent of the caseload would come from California.³² This is a far cry from the two examples cited by the majority.

A TWO-STATE CIRCUIT WOULD WEAKEN THE FEDERALIZING FUNCTION
OF THE FEDERAL COURTS OF APPEALS

Since their establishment in 1891, the circuits have been structured to draw upon the legal traditions of several states. The Ninth Circuit proposed in the Committee bill would contain only 2 states, California and Hawaii—the latter dwarfed by the former. In the entire history of the federal courts of appeal, there has never been a circuit composed of fewer than 3 states. Congress has recognized the importance of preserving the federalizing function of the courts of appeals by insisting that each circuit have at least three states.

In the proposed new Ninth Circuit, California would contribute 94 percent of the caseload and, in all likelihood, would contribute all but one of the judges. Indeed, at the present time, every one of the active judges in the proposed new Ninth Circuit is from California.

In the past, Congress has recognized the undesirability of two-state circuits. For much of the time when division of the old Fifth Circuit was under consideration, the principal proposal would have created a four-state/two-state split. Congress rejected this proposal in part because it would have created a two-state circuit. Only when a consensus developed on a three-three split did the division proceed. The same concerns that led Congress to insist on a three-three split of the former Fifth Circuit should lead it to reject S. 956.

CONGRESS HAS NEVER DIVIDED A CIRCUIT UNTIL THE JUDGES AND
LAWYERS OF THE CIRCUIT EXPRESSED OVERWHELMING SUPPORT
FOR THE DIVISION

The majority is of course correct in stating that Congress has an independent responsibility to oversee the functioning of the federal courts of appeals. However, in exercising this responsibility, Congress has always given greatest weight to the judgment of those who know the courts best. In the 105-year history of the federal courts of appeals, Congress has never divided a circuit until the judges and lawyers of the circuit expressed overwhelming support for the division.

Congress has divided circuits only twice since the courts of appeals were created in 1891. In 1929, the Tenth Circuit was carved out of the old Eighth. By the time hearings were held on the proposal, all of the judges of the existing Eighth Circuit and bar associations of eight states had expressed their approval.

The division of the Fifth Circuit in 1980 provides an even more apt comparison with what the majority proposes to do. Legislation to divide the Fifth Circuit was considered by Congress as early as 1975. But it was not enacted at that time. One reason was that there was strong opposition to the proposal from judges and lawyers in the affected states. By 1980, however, as noted earlier, professional opinion had coalesced. Division of the Fifth Circuit had

³² Internal figures, Clerk, Ninth Circuit Court of Appeals (available upon request).

the unanimous support of the circuit judges and the bar associations of every state.

As Chief Judge Wallace noted in his testimony before the Judiciary Committee, “the burden of proof should be put on those proponents of splitting the circuit.” The Ninth Circuit is functioning well, there are advantages to size, and it is not clear that splitting the circuit would achieve any benefits.

The debate over dividing the Ninth Circuit is not simply a regional debate. The future of the national judiciary is at stake. It is in the national interest to keep the Ninth Circuit intact to continue on the path of innovation that will ultimately benefit all of the circuits.

DIANNE FEINSTEIN.

X. CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 956, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets; new matter is printed in italic; existing law in which no change is proposed is shown in roman):

UNITED STATES CODE

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Title 28—Judiciary and Judicial Procedure

* * * * *

CHAPTER 3—COURTS OF APPEALS

* * * * *

§41. Number and composition of circuits

The [thirteen] *fourteen* judicial circuits of the United States are constituted as follows:

<i>Circuits</i>	<i>Composition</i>
District of Columbia	District of Columbia.
First	Maine, Massachusetts, New Hampshire, Puerto Rico, Rhode Island.
	* * * * *
Eighth	Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, South Dakota.
[Ninth	Alaska, Arizona, California, Idaho, Montana, Nevada, Oregon, Washington, Guam, Hawaii.]
<i>Ninth</i>	<i>California, Hawaii, Guam, Northern Mariana Islands.</i>
Tenth	Colorado, Kansas, New Mexico, Oklahoma, Utah, Wyoming.
Eleventh	Alabama, Florida, Georgia.
<i>Twelfth</i>	<i>Alaska, Arizona, Idaho, Montana, Nevada, Oregon, Washington.</i>
Federal	All Federal judicial districts.
	* * * * *

§44. Appointment, tenure, residence and salary of circuit judges

(a) The President shall appoint, by and with the advice and consent of the Senate, circuit judges for the several circuits as follows:

	Number of Judges
Circuits:	
District of Columbia	12
First	6
* * * * * * *	
Eighth	11
[Ninth	28]
<i>Ninth</i>	<i>15</i>
Tenth	12
Eleventh	12
<i>Twelfth</i>	<i>13</i>
Federal	12
* * * * * * *	

§48. Terms of court

(a) The courts of appeals shall hold regular sessions at the places listed below, and at such other places within the respective circuit as each court may designate by rule.

Circuits	Places
District of Columbia	Washington.
First	Boston.
* * * * * * *	
Eighth	St. Louis, Kansas City, Omaha, St. Paul.
[Ninth	San Francisco, Los Angeles, Portland, Seattle]
<i>Ninth</i>	<i>San Francisco, Los Angeles.</i>
Tenth	Denver, Wichita, Oklahoma City.
<i>Twelfth</i>	<i>Portland, Seattle, Phoenix.</i>
Eleventh	Atlanta, Jacksonville, Montgomery.
Federal	District of Columbia, and in any other place listed above as the court by rule directs.
* * * * * * *	