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Efforts to split the Ninth Circuit unsuccessful in the 109th Congress

by Carl Tobias

For practically the last quarter century, Republican members of Congress have attempted to split the United States Court of Appeals for the Ninth Circuit, and the 109th Congress was no exception. The attempt to divide the large appellate court that serves the West again proved unsuccessful; however, because of the perennial nature of attempts to restructure the tribunal it is worth analyzing the effort.

The attempt to realign the Ninth Circuit began in January 2005 when the 109th Congress convened. The representative who sponsored a bill in the 108th Congress, which would have trifurcated the court and which the House passed in fall 2004, reintroduced the identical legislation. The measure would have instituted a pair of new regional circuits: the Twelfth, comprised of Arizona, Idaho, Montana, and Nevada; and the Thirteenth, encompassing Alaska, Oregon, and Washington. The bill designated California, Hawaii, Guam, and the Northern Mariana Islands as the Ninth.

In October 2005, the Senate Judiciary Subcommittee on Administrative Oversight and the Courts conducted a hearing on the bill. Division champions and opponents recited the standard litany of arguments for and against a split. For example, advocates contended that size in terms of caseload, judges, and geography warranted realignment,

while opponents countered with magnitude's benefits, such as the flexibility that having a large judicial component affords. Division proponents concomitantly argued that more than 3000 combinations of three-judge panels can resolve an issue and that this fosters inconsistent decision making. Opponents questioned whether case precedent is disuniform and asserted that no empirical data show conflicts.

Western GOP lawmakers determined that bifurcation was a preferable course of action. Thus, in mid-November 2005, House members attached a split proviso to a deficit reduction measure that would have left California, Hawaii, Guam, and the Northern Mariana Islands as the Ninth Circuit, and assigned the remaining seven jurisdictions to the new Twelfth. However, the House-Senate Conference Committee omitted the provision, apparently because its inclusion with deficit reduction legislation circumvented thorough Senate evaluation. In November 2005, the Department of Justice, which typically assumes no official position on issues that are as controversial as tribunal division, announced its support for reconfiguration.

In July 2006, the Senate Judiciary Committee scheduled a split bill for markup. Senator Dianne Feinstein (D-Cal.) then requested a hearing. At the September 20 hearing, cham-

pions and opponents reiterated the pat litany of arguments favoring and opposing division. For instance, advocates said that the Supreme Court reverses a high percentage of Ninth Circuit appeals, while opponents contended that the reversal rate has matched the national averages for the last half decade. However, the Committee did not vote on bifurcation, and the 109th Congress adjourned without passing the split bill.

The arguments

Because lawmakers who favor restructuring will certainly introduce division measures when the 110th Congress opens in January 2007, arguments for and against a split deserve elaboration. One important argument against bifurcation is that nearly all Ninth Circuit judges do *not* support division. Only 3 of the 26 active judges have publicly endorsed a split. The court's judges are not alone. Others with excellent vantage points for analyzing the tribunal concur. Ninth Circuit practitioners' views are expressed in opposition from national bar organizations, including the American, Federal, and Hispanic National bar associations; every state bar association having a position on current division proposals, including Alaska, Arizona, Hawaii, Montana, and Washington; and numerous local bar associations in the circuit's nine states and two territories.

Size is one of the critical issues in the Ninth Circuit debate. In 2005, the tribunal received 16,000 appeals, triple the average and almost a third of the national caseload. Since 2001,

appeals have risen 70 percent. Virtually the whole increase can be attributed to President George W. Bush's decision to "streamline" Board of Immigration Appeals matters. The 109th Congress assessed legislation that would have modified the policy or diverted cases to the Federal Circuit, but no measure passed.

Empirical data show that the Ninth Circuit needed 16 months to decide appeals in 2005, the longest nationwide. Yet the duration in judges' chambers was brief: six weeks for argued cases, a period much shorter than the national average. Moreover, division would leave untouched the aggregate caseload, while lawyers express minimal concern about resolution periods. Disposition times have often fluctuated; last year's figure can mainly be ascribed to four judicial vacancies and BIA appeals whose large quantity and frequent extensions artificially inflated the statistic.

Congress has authorized 28 active Ninth Circuit judgeships. Last year, the Judicial Conference asked lawmakers for seven more, a request premised on conservative docket and workload projections. Split advocates maintain that the substantial number of judges reduces collegiality and enhances inconsistent decision making. Opponents claim that this large membership provides many benefits. For example, the variety of backgrounds that judges from numerous areas furnish enriches the tribunal and diminishes parochialism. When one court serves a big, diverse region, it concomitantly promotes uniform, coherent law and advances commerce by fostering orderly progress and stability. Moreover, the Ninth Circuit is the foremost laboratory for experimentation with valuable measures that growing courts will need.

Magnitude also implicates cost. Establishing a new Twelfth Circuit would be quite expensive. Costs are estimated at \$95 million in start-up expenses and \$14 million annually, while duplication of administrative functions increases costs and sacrifices economies because a court's

implementation demands rebuilding an administrative structure. The Administrative Office of the U.S. Courts recently announced that the judiciary could not absorb any "additional costs associated with [split] legislation."

The major division bill introduced during the 109th Congress would not have evenly distributed the substantial Ninth Circuit docket. The judges of the projected Ninth Circuit would have resolved more than 500 appeals yearly. This figure strikingly contrasts with the new Twelfth whose judges would have decided only 317. In addition, the proposed Ninth's appeals would be more complex and time-intensive because of 600 pending California death penalty appeals.

Another important question is whether Ninth Circuit precedent is consistent. Division advocates claim that the 3000-plus panels, which might resolve an issue, and the large numbers of appeals increase disuniformity. Most of the court's judges, many appellate counsel, and numerous bar associations believe case law is consistent, while independent evaluation finds disuniformity insufficiently problematic to warrant a split. The court employs many procedures that limit inconsistency. For example, staff attorneys fully review every appeal and code the issues for disposition into a computer; the same panels resolve cases raising analogous issues. Some observers maintain that splitting the extended western coastline between tribunals would promote disuniform maritime, commercial, and utility law, increasing business expense and complexity and mandating that attorneys research both courts' law for every possible cross-circuit transaction.

A third significant issue is whether the Supreme Court reverses the Ninth Circuit too often. As a threshold matter, a court's reversal rate has questionable importance. Even were the frequency with which the justices overturn the Ninth Circuit significant, the numbers fluctuate so much annually and across time, and there are so many variables, namely the decisions that parties appeal and the

Court hears, that the concept has minimal practical applicability. The Ninth Circuit rate since 2001 has also been less than a few courts and essentially matched the national averages.

Additional questions involve how much ideology and partisanship animate splitting efforts. For example, western senators have long maintained that Ninth Circuit opinions involving timber, mining, and agriculture, with which they disagree, justify division. Senator Feinstein and former California GOP Senator and Governor Pete Wilson have characterized these ideas as "environmental gerrymandering." However, division champions have recently couched their views in terms of court administration because they seem to find it more politically palatable. Indeed, the White Commission, which Congress authorized to study the appellate courts, emphatically rejected splitting regional circuits for ideological reasons.

Finally, circuit splitting ignores the real problem: workload. The Ninth and the other circuits must address burgeoning caseloads with static resources. This phenomenon has imposed two-tier justice, so that 20 percent of appeals receive full consideration, namely oral arguments and published opinions, and 80 percent do not. Moreover, Ninth Circuit bifurcation will simply divide the workload.

Proponents of Ninth Circuit division enjoyed considerable success in the 109th Congress, although the Senate adjourned without voting on a split. The November elections in which Democrats captured Senate and House majorities suggest that the 110th Congress may not realign the court. However, the perennial nature of the issue means that the new Congress will most likely debate Ninth Circuit division. ❧

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