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Split Up the Ninth Circuit—but Not Because It's Liberal

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President Trump's frustration with federal judges, particularly on immigration issues, has led him to join calls to "break up" the sprawling Ninth U.S. Circuit Court of Appeals, based in San Francisco. "It just shows how broken and unfair our Court System is," the president tweeted this week after an unfavorable ruling from a district judge, "when the opposing side in a case (such as DACA) always runs to the 9th Circuit and almost always wins before being reversed by higher courts."

Splitting up the court would be the right decision, but not for the political reasons Republicans often invoke.

The Ninth Circuit has been a boogeyman for conservatives for decades. The only federal appellate court that already had a majority of Democrat-appointed judges when Barack Obama took office, it epitomizes the progressive legal vanguard on environmental regulation, same-sex marriage, gun control, immigration and almost everything else.

But splitting the court wouldn't necessarily push jurisprudence in a conservative direction. The Ninth Circuit's ideological tilt is a function not of geography but history. To reflect the growing population of Western states, and thus the caseload, Congress added 10 judgeships to the Ninth Circuit in 1978, nearly doubling its size. Jimmy Carter filled those seats.

Later, most semiretired judges on the Ninth Circuit timed their taking of senior status to coincide with Democratic presidencies. The result is a political skew that would take a long run of Republican presidents to flip.

There are other reasons, however, for breaking up the Ninth Circuit. One is its sheer size. The court covers territory running from Arizona to Alaska and Montana to Hawaii. That's 40% of the nation's land mass and 20% of its population. As a result, it decides an extraordinary number of appeals—more than 11,000 a year, half again as many as the second-busiest circuit and nearly triple the average.

The Ninth Circuit has an astonishing backlog, accounting for nearly a third of all pending federal appeals. It takes an average of 13 months to decide a case, the longest of any circuit and almost five months more than the national median. Judge Richard Tallman, a Clinton appointee on the Ninth Circuit who favors a split, told the Senate last summer that a legal brief in a pending appeal "is frequently years old and contains stale case law, by the time we can get to it."

A second problem is the court's unpredictability. Federal appeals courts hear cases in three-judge panels. But the Ninth Circuit has 29 judgeships, meaning there are more than 3,600 combinations of three. Judges can go years before hearing cases with some of their colleagues.

That's before including senior judges and visiting judges, which the Ninth Circuit uses more than any other court. These visitors do yeoman's work managing the caseload, but they can hardly be expected to be familiar with local precedents, given that the Ninth Circuit generates more than 550 published opinions a year.

"Such a system affords hardly enough time for Ninth Circuit judges even to stay informed about developments in our law, let alone to ensure consistency," Judge Diarmuid O'Scannlain, a Reagan appointee, wrote in testimony to the Senate this year. In 1999, Justice John Paul Stevens said the Ninth Circuit was "so large that even the most conscientious judge probably cannot keep abreast of her own court's output."

Even more striking is the court's peculiar "en banc" process. In every other circuit, all the judges on the court sit together to hear an en banc appeal from a panel decision. But because of its size, the Ninth Circuit uses a randomly selected 11-judge panel instead. That means that a six-judge majority can set precedent that binds 23 others. The Ninth Circuit does have a provision for a full-court "super" en banc, but it's so unwieldy that it has never been used.

Proponents of the status quo have emphasized the "economies of scale" from a large circuit. But if bigger were inherently better, then why not dispense with regional circuits altogether and just employ one gargantuan nationwide court of appeals? Smaller circuits encourage substantive knowledge of local law and collegiality among the judges.

A common idea for splitting the court is to hive off California, Hawaii and the Pacific islands (and possibly Oregon) into a new circuit. Skeptics complain the resulting court would be unbalanced given California's size. But in many circuits one state dwarfs the others: New York generates nearly 90% of cases in the Second Circuit, Texas 60% in the Fifth, Illinois 64% in the Seventh, and Florida 62% in the 11th (which was split from Fifth in 1981).

Because the Supreme Court reviews so few cases, the legal buck generally stops in the circuit courts. The quality of justice is harmed, therefore, when circuit rulings are slow, inconsistent and made by judges unfamiliar with local law.

At an appropriations hearing in 2007, Justices Anthony Kennedy and Clarence Thomas testified that there was a consensus on the Supreme Court that the Ninth Circuit should be broken up. That would require an act of Congress. Lawmakers should give Mr. Trump what he wants, even if for a completely different reason.

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