

It's Time to Split the Circuit

Greg Mitchell
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With the rumble of war in Iraq and the hum of helicopters over San Francisco, it's a little hard to concentrate on something as mundane as the need to split up the overstretched and understaffed Ninth Circuit U.S. Court of Appeals.

And mundane it surely is. Which may explain why, as pressing as the courts' needs have become, they only surface on the political agenda in the context of this or that decision that offended this or that senator. Or all of them, as the Pledge of Allegiance ruling did.

The circuit shouldn't be split to punish it for producing opinions some find offensive, or to prevent it from doing so again. It should be split for the ho-hum reason that it is just too big to operate as intended and needs to become bigger still to carry what has become the heaviest caseload in the country.

The Judicial Conference said this week it would seek 11 new circuit judgeships from Congress, with seven intended for the Ninth Circuit.

If that happened, the circuit would seat 35 active judges; another 20 or so are on senior status.

That's not a court. It's a convention.

All those voices lead the court to wildly inconsistent decisions, since it takes just two judges to set the law of the circuit in any one case. And the court's limited *en banc* procedure -- a random draw of 11 judges -- can't be expected to keep up.

Of course, calls to split the Ninth Circuit are nothing new. For years, senators from the northwest wanted their constituents freed from what they saw as rulings from afar favoring environment over industry.

In the 1990s, the White Commission -- headed by former Supreme Court Justice Byron White -- was convened to study court structure and the wisdom of a split. Anti-circuit splitters took great comfort from [its conclusion](#), in a 1998 report, that a split wasn't warranted.

But since 1998, filings from the circuit's nine Western states and far-flung U.S. territories have grown 29 percent. Filings from California alone have grown 35 percent.

Judges say the workload has become crushing. It has doubled since the last time Congress gave the Ninth Circuit a new judgeship, in 1984. So there's no question new judges are needed.

But before Congress sets about creating those new judgeships, it should carve the circuit in two. A separate circuit for California, Nevada and Arizona might be best, but there are a few sound options. What there aren't are sound objections.

It's understandable that Chief Judge Mary Schroeder would continue to carry the torch for an intact circuit. And when the Pledge of Allegiance ruling led to renewed calls for a split during the summer, Schroeder was right to defend the circuit's integrity from political attack.

However, the other arguments she made in her testimony to Congress, relying as they do on the White Commission's report, simply aren't persuasive. For example, the report noted that dividing the circuit would "deprive the West and the Pacific seaboard of a means of maintaining uniform federal law in that area."

But as Judge Diarmuid O'Scannlain, a split proponent, notes, "there are five circuits for the Atlantic and Gulf States. I don't think freighters are colliding more frequently off Cape Cod than they are off the Marin headlands." Nor, he added in a [Q-and-A with appellate blogger Howard Bashman](#), has the development of the South's law been hampered by the fact that its territory falls into three separate circuits.

It may be true, as Schroeder argued, that a new circuit would cost upwards of \$100 million for new facilities and related infrastructure. And no doubt the creation of a new circuit would bring logistical, and even legal, headaches.

These aren't insurmountable obstacles. Instead, they are the kind of boring work-a-day problems that our elected officials sometimes put off in favor of scoring cheap political points.

So Schroeder has a choice. She can accept that a split is inevitable and then work with Congress on a plan acceptable to the court.

Or she can wait until the Ninth Circuit outlaws apple pie, and let Congress act on its own.