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Breaking Up (The 9th) Is Hard To Do

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Law360, New York (July 31, 2017, 8:03 PM EDT) -- The considerable growth in the size of the federal judiciary has spurred numerous calls for structural changes. Over the past few decades, various bills have been introduced in the United States Senate to divide the Ninth Circuit Court of Appeals, the largest of the federal courts of appeals in terms of judges, population, total appeals, and geographic jurisdiction. The court is authorized to have 29 active judges. The population of the states and territories within the Ninth Circuit, based on 2010 United States Census figures, is 61,742,908. Last year, the court received 11,405 new appeals. The circuit covers nine western states and two territories, including California, Oregon, Washington, Montana, Idaho, Nevada, Arizona, Alaska, Hawaii, Guam and Northern Mariana Islands. By contrast, the smallest regional circuit — the D.C. Circuit — is authorized to have 11 active judges, received 1,158 new appeals last year, and has a population of 601,723 based on the same census figures. But the proposals put forth to divide the Ninth Circuit raise as many problems as they resolve.

Proposals to split the circuit are often advanced as a solution to problems with judicial efficiency and the size of the circuit. To be sure, the Ninth Circuit's size has led to some unique practices, such as en banc panels comprising less than the entire court. However, any proposed division of the Ninth Circuit must consider two important and immutable facts. First, any circuit that encompasses California will be the largest circuit in terms of case load in the country. Second, dividing California to make equal-sized circuits and increase judicial efficiency by reducing case loads will create undesirable consequences because two competing circuits would have the power to decide issues of both federal and California law on important issues, possibly in conflict with each other. Accordingly, as the majority of Ninth Circuit judges have recognized, breaking up the Ninth Circuit into two different sizes in terms of case load and territory is essentially impossible. Splitting the Ninth Circuit therefore presents different practical limitations that did not hinder Congress the prior two times it redrew circuit lines — first when it divided the Eighth Circuit and created the Tenth Circuit in 1929 and again when it split off the Eleventh Circuit from the Fifth Circuit in 1981.

Even if California becomes a stand-alone circuit, it would be the largest in the country. With more than one-tenth of the United States residing in California, it is the most populous state in the country. And, as California's population grows, it will continue to generate more appeals. Indeed, district courts within the Ninth Circuit decide over 20 percent of the total trial decisions in the United States. A split leaving California within one circuit would create a disproportionate division of workload between the judges of the new circuit and the judges of the restructured California-dominated circuit. Even if California became a single-state circuit, it would become the new overworked circuit and might even increase the case loads of appellate judges currently within the state. Thus, whether the Ninth circuit is split or not, Congress will need to create more judicial positions and provide funding for more staff attorneys to accommodate increasing case loads. In other words, a split that leaves California within one circuit will not improve judicial efficiency on the West Coast.

The alternative solution — dividing California to make equal-sized circuits — will fare no better. It could create a host of jurisprudential conflicts in the interpretation of federal and California state law and forum-shopping opportunities without changing the ideological balance of the court. For example, if the new circuit takes a slightly different approach to the Class Action Fairness Act than the original Ninth Circuit, class actions that could be removed to federal court in San Francisco would have to remain in state court in Los Angeles. Not only would forum-shopping be rampant, but companies doing business in both halves of the state could find themselves subject to different law. As another example, litigants challenging the enactment of a new California constitutional initiative might find themselves choosing which circuit — even racing to the preferred courthouse — is perceived to be more receptive to their position.

The other reason some propose to split the Ninth Circuit, sometimes stated and sometimes implied, is a hope that splitting the Ninth Circuit will change the political or ideological alignment of the resulting circuits. However, unless the current administration fills a large number of newly created judicial seats, the ideological balance of the court — whether divided or not — will not change. First of all, because the rate of attrition for federal appellate judges is slow, it will take many years before a significant number of existing seats are assigned to new judges — and during those years, the political party of the president, who selects the replacement judges, is likely to vacillate.

Second, breaking up the circuit will not directly affect the jurisprudence of the Ninth Circuit, because the newly created circuit would not start on a fresh slate. The new circuit, just like the remaining Ninth Circuit, would be bound by prior Ninth Circuit precedent and would require an en banc panel to overrule existing precedent. On average, the Ninth Circuit hears between 15 and 25 en banc cases a year. At that rate, it would take years for the new circuit's law to diverge meaningfully from that of the Ninth Circuit.

The Eleventh Circuit came to the same conclusion in Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981), the first opinion published by the new Eleventh Circuit when it was created from the old Fifth Circuit. The new court rejected its own procedural rulemaking power as a vehicle for establishing a new body of precedent. It expressed concern about having to relitigate "every relevant proposition in every case." Id. at 1209. Instead, the court chose "to begin on a stable, fixed, and identifiable base while maintaining the capacity for change." Id. at 1211.

It is also worth noting that the majority of Ninth Circuit judges do not support a split either. For example, Judge Alex Kozinski, former chief judge of the Ninth Circuit, has stated "[w]e've taken votes of our judges regularly," and "we always overwhelmingly vote against the split. And these are the folks that know the work of the court." Judge Mary M. Schroeder, who preceded Judge Kozinski as chief judge, also strongly opposes a split. She has urged the Senate to focus its efforts elsewhere, explaining the circuit would be better served if the Senate turned its attention to filling vacancies and Congress created new judgeships.

Improving the administration and delivery of justice must be the paramount motivation for any effort to reconfigure circuit boundaries that have existed for over 100 years. Until the riddle of the California-dominated Ninth Circuit can be solved, it is unclear that splitting up the circuit will improve efficiency or meaningfully reduce the size of one of the new circuits as compared to the existing Ninth Circuit.

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