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AT LAW

Don't Split the Ninth Circuit

We judge a congressional proposal to be unappealing.

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In a surprise move before the Nov. 2 election, a closely divided House approved a floor amendment offered by Rep. Mike Simpson of Idaho that would split the Ninth U.S. Circuit Court of Appeals into three smaller circuits. The new Ninth would consist of California and Hawaii, plus Guam and the Northern Mariana Islands. A new 12th Circuit would comprise Arizona, Nevada, Idaho and Montana, and a new 13th Circuit would consist of Washington, Oregon and Alaska. All these states and territories make up the current Ninth Circuit. We are reliably informed that the Senate may take up the bill in its rump session, scheduled to start Tuesday.

Splitting a federal judicial circuit is exceedingly rare--it has happened only twice since the appellate circuits were created in 1891. It is a complex process that risks seriously disrupting the administration of justice. Contrary to popular belief, judicial circuits are much more than just courts of appeals; they comprise numerous lower courts and administrative units--thousands of people in all. While these units have some autonomy, they are centrally administered and share many important functions.

Dividing the Ninth and setting up administrative structures for the two new circuits would be enormously disruptive and expensive--initial cost estimates run to $130 million. Worse, the new circuits would keep throwing away an estimated $22 million every year, duplicating each other's core functions. This is a luxury that the federal courts, now facing their direst budget crisis in memory, can't afford. Federal courts are making plans for cutting back key services and laying off numerous staff members who serve the public. Splitting the circuit will require further layoffs of experienced staff so that the new circuits can hire inexperienced replacements at different locales. It will necessitate construction of new courthouses, leaving present buildings underused. Three circuits, with their triplicate headquarters, clerk's offices, procurement divisions and other administrative functions, will force judges to spend much more time feeding the administrative beast rather than deciding cases. Litigants will have to wait even longer for their cases to be resolved.

Splitting the circuit would hurt the public in other ways. People and businesses make decisions with an eye toward legal consequences, so they need a clearly established body of law. Today, a Ninth Circuit decision is binding in nine Western states. After the split, a decision of the new Ninth Circuit would leave the law unclear in the seven states of the 12th and 13th Circuits. To get the law settled for all these states, the same issue would have to be decided by the two new circuits, which could take years. More circuits also means more conflicts in the law, increasing the burden on the Supreme Court to set matters straight.

Those most familiar with the workings of the Ninth Circuit--its circuit judges--have consistently voted to oppose a split, most recently by a 3-to-1 margin. A congressionally ordered study conducted by retired (now deceased) Justice Byron White thoroughly considered and rejected the idea that the Ninth should be split, finding it unnecessary and impractical. Gov. Arnold Schwarzenegger of California strongly opposes the split, as do Govs. Gary Locke of Washington and Janet Napolitano of Arizona. So do the American Bar Association and the Federal Bar Association, as well as the bars of many states.

The argument that the Ninth Circuit should nonetheless be split relies almost entirely on its size--and, indeed, the Ninth is the largest of the federal circuits, as it has been for almost a century. But big doesn't mean inefficient, as we know from the performance of giant corporations such as Microsoft and Wal-Mart. Indeed, size brings into play economies of scale, so the Ninth offers innovative and valuable services to the public that smaller circuits cannot afford.

Admittedly, some judges would benefit from a split: They would have less territory to cover and, in the two new circuits, the number of cases per judge would be cut just about in half. But a split can only reallocate cases, not eliminate them, so these judges' leisure will be paid for by added costs and delay to litigants left behind in an overburdened Ninth Circuit. The increased convenience of a few judges does not justify the colossal expenditure of public funds, nor the inconvenience, cost, delay and disruption to the administration of justice that a split would inevitably bring with it.

Issues of size, cost and efficiency should be carefully considered using the normal processes of congressional deliberation. House and Senate subcommittees have already started building a record that could be used as a basis for meaningful floor debate. But this process was cut short by the Simpson Amendment, which came to the floor on less than 24 hours' notice and without a committee record. Not surprisingly, many of the floor comments reflected a sad lack of understanding of the complex machinery of the Ninth Circuit and the implications of the proposed legislation. A decision that will drastically alter the way justice is administered in nine Western states, and affect the access to justice of 56 million Americans, deserves to be made openly, calmly and after due deliberation--not by stealth and procedural manipulation.

Judges Kozinski and Thomas were appointed to the Ninth Circuit in 1985 (by President Reagan) and 1996 (by President Clinton), respectively. If their circuit is split, the former, a Californian, would remain in the Ninth, while the latter, from Montana, would move to the 12th.