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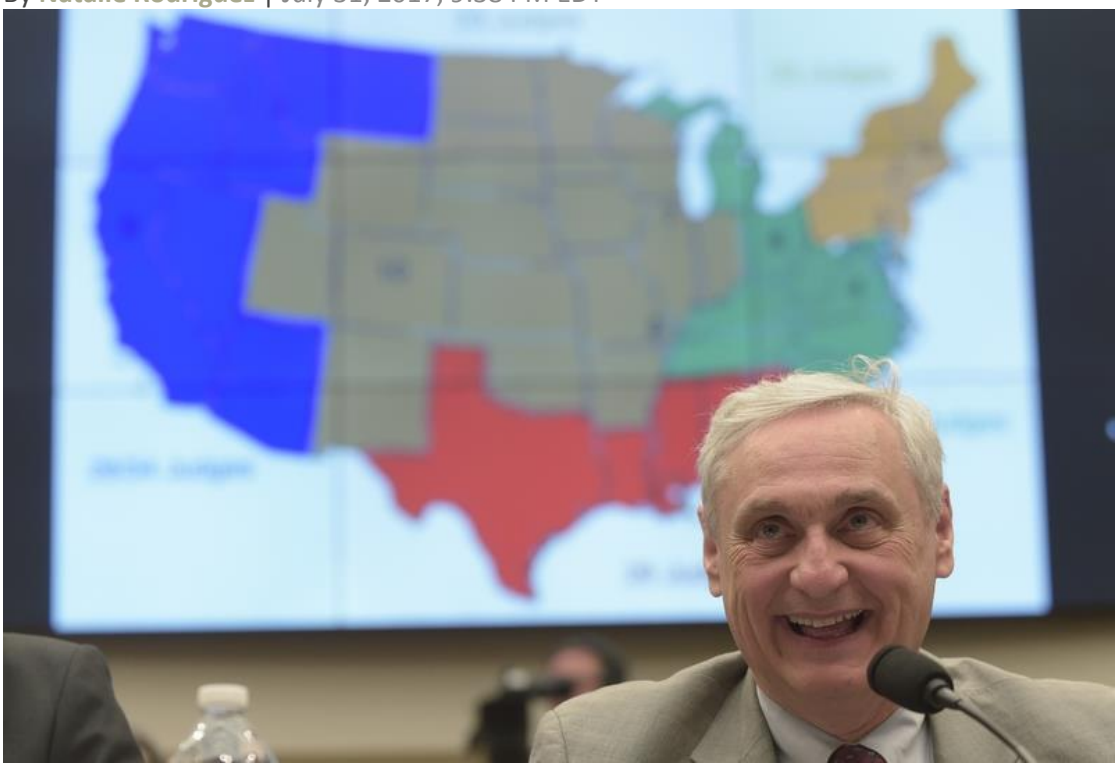
Corporate Lawyers Wary Of Bids To Break Up 9th Circ.

By Natalie Rodriguez | July 31, 2017, 9:38 PM EDT



Ninth Circuit Judge Alex Kozinski testifies on Capitol Hill in March at a House Subcommittee on Courts, Intellectual Property and the Internet hearing on restructuring the court. (AP)

Across the West, appellate litigators and corporate counsel of various stripes are quietly — sometimes anxiously — watching a spate of federal bills proposing to divide the Ninth Circuit.

Five of the bills have been introduced since the start of the year, launched from the offices of such top GOP brass as Arizona Sen. John McCain and Idaho Congressman Mike Simpson.

It's a move that's been trotted out by federal lawmakers nearly every year for the past three decades, without getting very far. But this time, it could be different.

Long the champions of the pro-split movement, Republicans control both houses of Congress, and President Donald Trump has publicly attacked the court in the wake of its ruling to block parts of his immigration executive order.

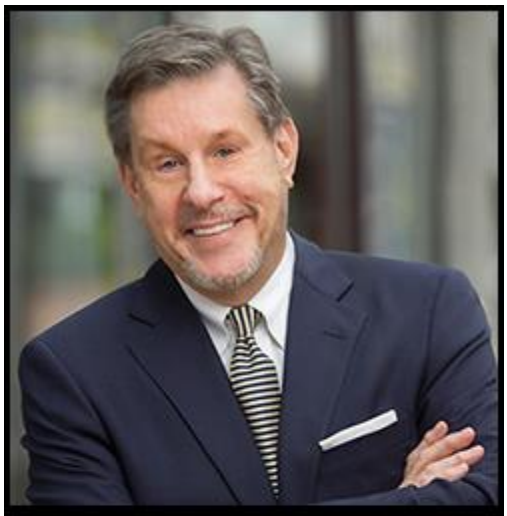
While partisan anger over controversial rulings on social issues like immigration and abortion is seen as largely fueling the movement, proponents of a split say the court's sprawling, unwieldy docket in both criminal and civil cases is the primary concern.

A downsized Ninth Circuit and new Twelfth Circuit would help erase the notorious time delays and intracircuit conflicts that are rampant in the current appeals court, they say. Few business lawyers in the region are outwardly rooting for the split, however.

While much of the Ninth Circuit's precedent isn't necessarily business-friendly, some say the prospect of carving out a Twelfth Circuit raises the specter of budget-busting waves of litigation.

A new circuit means new legal avenues to defend, and some worry that an immediate split-up could set off a free-for-all from plaintiffs lawyers as the Twelfth Circuit's boundaries are tested — particularly under a proposal that would block the new appeals court from taking on Ninth Circuit precedent as binding.

"It's hard to even fathom the costs at this point," said Ben Feuer, an attorney with California Appellate Law Group.



Robert C. Weaver Jr.
GARVEY SCHUBERT

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Problem or Perk?

With a geographic area of nine states, plus the territories of Guam and the Northern Mariana Islands, the Ninth Circuit's 29 authorized judgeships serve nearly 20 percent of the country's population. That's almost double the population in the next largest circuits, the Fifth, Sixth and Eleventh, which each serve just over 10 percent, according to census data.

Ever since the 1970s — when President Jimmy Carter flooded the Ninth Circuit with appointees who were viewed by some as overly liberal — efforts to break up the court have been tinged by partisan politics.

Over time, what little Democratic support that existed for a split has faded, and every such bid since

1993 has been led by GOP legislators. The movement hit a peak from 2003-06, when Republicans pushed out a dozen pro-split proposals. In the background was the Ninth Circuit's 2002 ruling in Newdow v. U.S. Congress, which found the phrase "under God" in the Pledge of Allegiance unconstitutional as an endorsement of religion.

But while a new Twelfth Circuit might have a different take on things like medical marijuana, experts believe it is less likely that the new court would rule differently on, say, interpretations of the Clean Water Act that affect businesses.

"I don't think the business issues are open to the same kinds of attacks that the social issues are," said Robert C. Weaver Jr., a Portland, Oregon-based litigator with Garvey Schubert Barer.

And where some may see a problem in a liberal-leaning court with outsize reach, many business lawyers see a perk in having a uniform interpretation of business law across a vast region. These lawyers note that the current Ninth Circuit provides one set of law for Silicon Valley and Seattle's tech companies, for Arizona and Montana's mining veins, and for Oregon and Idaho's timber towns.

The size of the court means the entire U.S. coastline bordering the Pacific Ocean is under the same interpretation of the Jones Act, a 1920s law that still is the lynchpin of protection for American workers injured at sea. From Okanogan County in Washington to Tucson, Arizona, mining companies operate with the same precedent in mind — such as the Ninth Circuit's 2012 ruling that the Endangered Species Act trumps the 1872 Mining Law.

The Ninth Circuit is well-steeped in copyright and intellectual property licensing from overseeing high-profile cases involving tech giants like Apple Inc., Sun Microsystems Inc. and Motorola. Lawyers say this benefits companies caught up in complex litigation, as there is a steep learning curve for understanding the nuances of arguments in these technical cases.

Brian Goldman, a San Francisco-based appellate litigator with Orrick Herrington & Sutcliffe LLP, noted the court has been increasingly called on to deal with "knotty questions" on how the 30-year-old Electronic Communications Privacy Act and Computer Fraud and Abuse Act apply to new technologies in cybersecurity and data privacy suits.

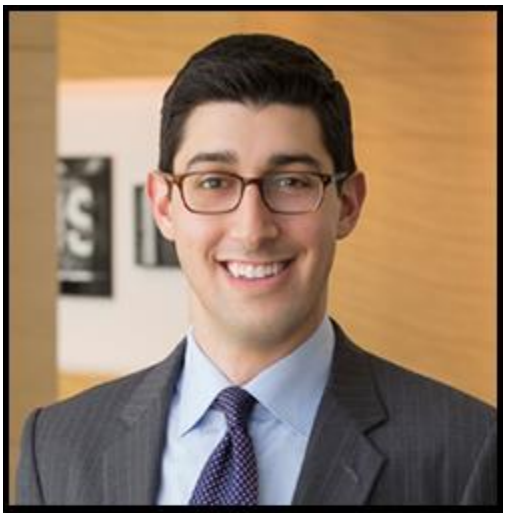
"It's not that everybody in the country is governed by the same precise interpretations right now, but at least there is one major hub that tends to often set the standards for the rest of the country," Goldman said. "If that were broken up, there would be no one standard bearer the way the Ninth Circuit is on questions of copyright and trademark disputes."

Of course, such a diverse landscape begets a diversity of opinion, and for businesses whose jurisdictions are largely in one specific state or in the greater Mountain State region, there is more openness to a Twelfth Circuit.

The Arizona Chamber of Commerce, for example, supports proposals to place Arizona in a new Twelfth

Circuit on the basis that it should help alleviate delays for local businesses caught up in litigation before the Ninth Circuit, which takes longer to resolve a case than any other circuit.

"There has just been a general dissatisfaction with Arizona being in the Ninth Circuit, which is typically described by court watchers as overburdened," said Garrick Taylor, a spokesman for the Arizona chamber.



Brian Goldman
ORRICK

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But while business lawyers often express exasperation with the Ninth Circuit's delays in dealing with cases, many say in the next breath that the court's efficiencies of scale have helped it find innovative ways to deal with the backlog.

These innovations include a cutting-edge electronic case management system, an appellate commissioner who handles nondispositive motions and other administrative work for the judges, and a special staff attorney unit that presents pro se requests to a panel of Article III judges, keeping the vast majority from clogging up the circuit docket.

Despite these innovations, the Ninth Circuit has been the slowest court in recent years. But some attorneys argue the court is still no less efficient than any of the other circuit courts on business appeals.

"Is it because it's big? Or is it because Congress simply hasn't provided enough judges?" said Rex Heinke, co-head of Akin Gump Strauss Hauer & Feld LLP's appellate practice.

The Ninth Circuit currently has four vacancies, the most of any circuit. The Seventh, Fifth and Third are next with three vacancies each, though the vacancies there represent a more significant shortfall because each of those circuits has fewer judges overall than the Ninth Circuit.

In addition, the Ninth Circuit was the only federal appeals court to receive a recommendation for additional judgeships by the Judicial Conference of the United States, the policymaking body for the federal courts, in March. It recommended five.

Starting From Scratch?

There are only two historical road maps for a circuit split-up: In 1929, the Tenth Circuit split from the Eighth Circuit, and in 1981, the Eleventh Circuit was carved out of the Fifth Circuit. Both times, the new circuits took as binding their former circuit's precedent.

Stuart Plunkett
BAKER BOTTS

"Everything will become a little more complicated at the margins. It may be more expensive to produce that legal opinion.

Historically, legislative attempts to break up the Ninth Circuit have either outright called for the new Twelfth Circuit to adopt Ninth Circuit precedent or have stayed mum on the matter — with the idea that the new court would decide for itself, as the Eleventh Circuit did when it took on Fifth Circuit precedent in a 1981 en banc opinion in Bonner v. City of Pritchard.

But one of the five pending proposals to break up the Ninth Circuit — a Senate bill put forward by McCain and Jeff Flake, both Arizona Republicans — would change course on this issue.

The lawmakers say blocking a Twelfth Circuit from adopting Ninth Circuit precedent would help ensure that a new circuit properly represents the Mountain States. If you leave in place the precedent from the California-dominated Ninth Circuit, they argue, you've changed only the geography and not the law.

"The new circuit should get a fresh start in crafting its precedent," Jason Samuels, a spokesman for Flake, told Law360.

But many onlookers, some of whom question the constitutionality of telling a court what precedent it cannot adopt, believe the clean slate would ultimately fuel uncertainty for businesses — and uncertainty means big legal bills.

"For the first many years of the existence of a new Twelfth Circuit, questions from the mundane — like what appellate standard of review applies — to the fundamental — about what the meaning of a particular provision of copyright law is — would be a question of first impression," said Goldman, the Orrick lawyer.

Some also predict that the presence of a new circuit would entice plaintiffs lawyers to lob a slew of claims, rehashing issues that companies thought were settled in the region. Dividing the Ninth Circuit in this manner could also force companies to ask legal questions that had previously been well-settled.

In such a scenario, general counsel could be paying outside attorneys to create lengthy briefs to relitigate issues, and they'd need law firm help to re-evaluate litigation strategies and potential corporate policy changes in light of the new court, experts say.

"Everything will become a little more complicated at the margins," said Stuart Plunkett, a San Francisco-based Baker Botts LLPpartner. "It may be more expensive to produce that legal opinion."

That's not to say companies always agree with the Ninth Circuit. In recent years, the court has been at the epicenter of many hot-button issues, particularly in employment law, and it has frequently sided with workers in those cases.

In Morris v. Ernst & Young, the Ninth Circuit ruled that class action waivers in employment contracts violate the National Labor Relations Act, and in Syed v. M-I LLC, it found liability waivers in pre-employment disclosure forms to be unlawful.

Its recent Supreme Court reversals in the area include Wal-Mart v. Dukes, in which the high court said a proposed class of 1.6 million workers could not be certified in a sex-discrimination case.

But even when a ruling is unfavorable, standing precedent still provides important guideposts for companies operating in the area, lawyers say. And even if you disagree with a holding, there is no assurance that a new Twelfth Circuit would offer a markedly better alternative.

"Even if the law in some way may not be the ultimate law you want, once you set your factory to comply with one type of law, you've invested a lot," said Feuer, the California Appellate Law Group attorney. "If you eliminate all precedent so anything is kind of a guess, who knows what the judges will do? Really, you are in a tough spot as a company."

--Natalie Rodriguez is a feature reporter for Law360. She last wrote about the best law firms for female equity partners. Additional reporting by Erin Coe. Editing by Jeremy Barker and Christine Chun.