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Erratum

Footnote 19 of this Article was updated on Dec. 14, 2017.

THE SENATE BLUE-SLIP PROCESS AS IT BEARS ON PROPOSALS TO SPLIT THE NINTH CIRCUIT

Wyatt Kozinski[†]

The Ninth Circuit is by far the largest of the twelve regional circuits.¹ This is true whether measured by the number of cases, the geographical reach, the size of the population, or the number of judges.² On a number of occasions, going back to at least 1941,³ there have been calls to split the circuit—usually into two parts, but sometimes three.⁴ Serious split proposals invariably occur when Republicans are in control of at least one house of Congress and the White House is occupied by a Republican, and they subside when the White House and both houses of Congress are controlled by Democrats.⁵

It is thus fair to conclude that proposals to split the Ninth Circuit are driven by politics rather than concerns about efficiency, collegiality, the limited en banc process, or other such “good government” factors that are trotted out as the ostensible reasons justifying the proposed split.⁶ With the recent capture of the White House

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¹ The regional circuits consist of the eleven numbered circuits plus the D.C. Circuit, and their jurisdiction is commensurate. In 2016, the Ninth Circuit had 11,405 case filings, compared to 8,470 for the circuit with the next-highest filings (the Fifth). The Ninth circuit thus handles about a fifth of the total caseload of the regional courts of appeals. See *Table N/A—U.S. Courts of Appeals Federal Court Management Statistics (December 31, 2016)*, ADMIN OFF. U.S. CTS, http://www.uscourts.gov/sites/default/files/data_tables/fcms_na_appcp1231.2016.pdf (last visited Nov. 6, 2017). In terms of geography only the Federal Circuit is larger, as it has nationwide jurisdiction, but that circuit holds all of its hearings in Washington, so in terms of judicial travel time, the Ninth Circuit is by far the most challenging as it has regular places of sitting in San Francisco, Pasadena, Portland, Seattle, Anchorage, and Honolulu, while its judges live in far-flung locations such as Billings, Fairbanks, Pocatello, and Phoenix. *The Judges of this Court in Order of Seniority*, U.S. CTS FOR THE 9TH CIR., https://www.ca9.uscourts.gov/content/view_seniority_list.php?pk_id=0000000035 (last visited Dec. 1, 2017).

² See, e.g., Debra J. Saunders, *Bill to Remove Nevada, 5 Other States from ‘Nuttty 9th’ Circuit Court May Be Gaining Favor*, L.V. REV. J. (Feb. 7, 2017), <https://www.reviewjournal.com/news/politics-and-government/nevada/bill-to-remove-nevada-5-other-states-from-nuttty-9th-circuit-court-may-be-gaining-favor/>.

³ *Id.*

⁴ See Alex Kozinski & Sidney Thomas, *Don’t Split the Ninth Circuit*, WALL ST. J. (Nov. 14, 2001), <https://www.wsj.com/articles/SB110005241073369758> (discussing a bill passed in the House of Representatives at the behest of Rep. Mike Simpson of Idaho that would have split the circuit into three parts).

⁵ By way of example, there were very serious split proposals during the time of the H.W. Bush Administration in the early 2000s but no split activity during the 8 years of the Obama Administration.

⁶ Senators John McCain and Jeff Flake of Arizona refer to the “oversized and overworked” Ninth circuit, as well as its slowness in deciding cases. See, e.g., Suevon Lee, *Sens. McCain, Flake Introduce Bill to Split 9th Circ.*, LAW 360 (Feb. 2, 2017, 11:06 PM), <https://www.law360.com/articles/888068>; Diarmuid O’Scannlain, *A Ninth Circuit Split is Inevitable but Not Imminent*, 56 OHIO ST. L.J. 947 (1995).

and both houses of Congress by Republicans, proposals to split the circuit have, inevitably, sprung up like mushrooms after a rainfall.

Although, on the surface, the split debate centers on efficiency, timeliness, reversal rates, and other such objective considerations,⁷ these arguments are largely window dressing for what is *really* going on, which is a battle of ideologies. Republicans believe that the Ninth Circuit is too liberal and, as such, out of alignment with the Supreme Court, which has to step in and correct the “Nutty Ninth.”⁸ The split effort seems to be driven by the desire to stop the Ninth Circuit and its huge caseload from serving as a generator of liberal, Supreme Court-defying law. Other Republicans, on the Hill as well as in the Executive Branch, may simply see splitting the circuit as a spanking—a way to retaliate against those liberal judges who create troublesome law.⁹ The judges of the circuit do nothing to defuse the claim that it is a liberal outpost, issuing controversial rulings over the years, including holding that the Pledge of Allegiance is unconstitutional,¹⁰ that there is a constitutional right to assisted suicide¹¹ and, most recently, upholding the injunction against President Trump’s travel ban.¹² Even rulings by district judges within the Ninth Circuit precipitate calls for breaking up the circuit. Just earlier this year, President Trump reacted to an injunction entered by a judge in the Northern District of California enjoining the Executive Order cutting off funding for so-called “sanctuary cities,”¹³ by threatening to break up the circuit:

President Trump said Wednesday that he has ‘absolutely’ considered proposals that would split up the [Ninth] Circuit Court of Appeals, where judges have blocked two of his executive actions.

. . . .

‘Everybody immediately runs to the 9th Circuit. And we have a big country. We have lots of other locations. But they immediately run to the 9th Circuit. Because they know that’s like, semi-automatic,’ Trump said.¹⁴

7 Kevin Daley, *SPLIT IT: Congress Considers Splitting the 9th Circuit*, THE DAILY CALLER (Mar. 16, 2017), <http://dailycaller.com/2017/03/16/split-it-congress-considers-splitting-the-9th-circuit/#ixzz4cYTouj1D>.

8 See, e.g. Barnini Chakraborty, *Republicans Push Bill to Split up ‘Nutty 9th Circuit,’* FOX NEWS (Feb. 9, 2017), <http://www.foxnews.com/politics/2017/02/09/bill-to-split-nutty-9th-circuit-gains-momentum.html>.

9 Daley, *supra* note 7 (“Like clockwork we see proposals to split the 9th Circuit whenever it hands down decisions with which conservatives disagree.”) (quoting House Judiciary Committee Ranking Member Rep. Jerry Nadler).

10 *Newdow v. Elk Grove Unified Sch. Dist.*, 328 F.3d 466 (9th Cir. 2002).

11 *Compassion in Dying v. Washington*, 122 F.3d 1262 (9th Cir. 1997).

12 *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017).

13 *Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d (N.D. Cal. 2017). See also Sadie Gurman & Julie Bykowicz, *Judge Cites Trump’s Comment in ‘Sanctuary City’ Ruling*, FOX NEWS (Apr. 26, 2017), <http://www.foxnews.com/us/2017/04/26/judge-cites-trump-comment-in-sanctuary-city-ruling.html> (“White House chief of staff Reince Priebus described the ruling as another example of the ‘9th Circuit going bananas.’”).

14 Sarah Westwood, *Exclusive Interview: Trump ‘Absolutely’ Looking at Breaking up 9th Circuit*, WASH. EXAMINER (Apr 26, 2017), <http://www.washingtonexaminer.com/exclusive-interview-trump-absolutely-looking-at-breaking-up-9th-circuit-court-of-appeals/article/2621379>.

While efforts to split the circuit have failed so far, it is possible that they will eventually succeed. Certainly, those who are pursuing split legislation are taking the matter very seriously. For example, Chairman Goodlatte of the House Judiciary Committee has indicated that litigation reform, which includes splitting the circuit, is “a priority.”¹⁵ And the Senators from Arizona, both Republicans, seem poised to pursue a split effort vigorously.¹⁶ There are, I believe, many sound arguments against splitting the Ninth Circuit, ably advanced by the three judges who testified at the recent hearings before the Subcommittee on Courts, Intellectual Property, and the Internet of the House Judiciary Committee.¹⁷ But, as previously mentioned, the battle is not likely to be won or lost on the merits of the proposal; if members of Congress were truly interested in speeding up how quickly cases are decided and other defects they see in the way the Ninth Circuit operates, they could simply vote for the additional five judgeships that the Judicial Conference of the United States has requested for decades.¹⁸ And if Republicans want a more conservative Ninth Circuit, President Trump could start by filling the four existing vacancies—for three of which there are no nominees pending.¹⁹

The real question is whether the political gains the Republicans are likely to derive from a split are going to be worth the inevitable fight it will generate so that

15 Lydia Wheeler, *GOP Eyes New Push to Break up California Court*, THE HILL (Jan. 22, 2017), <http://thehill.com/regulation/court-battles/315354-gop-eyes-new-push-to-break-up-california-court>; see also Press Release, House Judiciary Comm., Statement of House Judiciary Committee Chairman Bob Goodlatte at Hearing on Restructuring the Ninth Circuit, (March 16, 2017), <https://judiciary.house.gov/press-release/statement-house-judiciary-committee-chairman-bob-goodlatte-hearing-restructuring-ninth-circuit/>. See, also *infra* note 44 and accompanying text.

16 Associated Press, *Arizona Lawmakers Again Push for Split of 9th Circuit Court*, SEATTLE TIMES (Feb. 3, 2017), <https://www.seattletimes.com/nation-world/arizona-lawmakers-again-push-for-split-of-9th-circuit-court/>. The junior senator from Arizona seems so vested in the effort that he reacted angrily to a comment suggesting that the circuit judges strongly oppose the split. Ronald J. Hansen, *Sen. Jeff Flake Hits 9th Circuit for Opposing Court Split*, THE ARIZ. REPUBLIC (Feb. 9, 2017) <http://www.azcentral.com/story/news/politics/azdc/2017/02/10/jeff-flake-9th-circuit-court-of-appeals-split/97720952/>.

17 *Bringing Justice Closer to the People: Examining Ideas for Restructuring the 9th Circuit: Hearing Before the Subcomm. on Courts, Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 115th Cong. (2017), available at <https://judiciary.house.gov/hearing/bringing-justice-closer-people-examining-ideas-restructuring-9th-circuit/> [hereinafter *Bringing Justice Closer Hearings*]. What one finds most persuasive is that the overwhelming number of Ninth Circuit judges—Republicans and Democrats, conservatives and liberals, men and women—oppose the split after thoughtful consideration of the issue. See, e.g., *Hon. Mary M. Schroeder et al., A Court United: A Statement of a Number of Ninth Circuit Judges*, 6 ENGAGE 1 (2006) (co-authored by 33 Ninth Circuit Judges).

18 *Judicial Conference Asks Congress to Create New Judgeships*, U.S. CTS. (Mar. 14, 2017), <http://www.uscourts.gov/news/2017/03/14/judicial-conference-asks-congress-create-new-judgeships> (“If an omnibus judgeship bill is enacted into law, it would be first new comprehensive judgeship legislation to take effect in more than 26 years.”).

19 Ross Todd, *As Trump Rails at Ninth Circuit, White House Eyes Vacancies*, THE RECORDER (April 27, 2016), <http://www.legaltechnews.com/id=1202784772859/As-Trump-Rails-at-Ninth-Circuit-White-House-Eyes-Vacancies?mcode=1202617583589&curindex=1&slreturn=20170911234753>. President Trump has nominated Ryan Wesley Bounds to fill one vacancy. See Karoun Demirjian, *Grassley Schedules Contentious Judicial Nominees for Hearing*, WASH. POST (Nov. 16, 2017), https://www.washingtonpost.com/powerpost/grassley-schedules-contentious-judicial-nominees-for-hearing/2017/11/16/2e6071fc-cb1c-11e7-8321-481fd63f174d_story.html?utm_term=.7d47c288dc39.

the benefits outweigh the opportunity and other costs.²⁰ If it does, then perhaps the battle is worth waging, whether or not splitting is a good idea in some sort of abstract “good government” sense. But if the political gains are not as great as anticipated, or are in fact negative, then Republicans might be wiser to spend their limited time and energy pursuing other political goals. Politics is, after all, not only the art of the possible, but also the art of the feasible. If a successful effort is likely to result in marginal or negative gains, then perhaps the fight should be averted.

It is the purpose of this paper to examine the political implications of a split and try to gauge whether it’s likely to result in substantial benefits from a Republican or conservative point of view. This note will consider only the Republican point of view because they are the ones who are in control of both houses of Congress and the White House, and thus are in a position to set the agenda. And they are the ones pushing for change.

Before turning to this task, I offer two observations or caveats. First, I see nothing incongruous about applying political criteria to evaluating legislation involving courts. While the process of judging is—or is supposed to be—non-political, the process of passing laws, determining jurisdiction of courts, creating judicial positions, and appointing judges to fill them are all political acts that inherently call for political judgments. Such political judgments sometimes take into account questions of efficiency, equity, and similar objective factors, but even such factors usually resolve themselves into political questions.²¹ Ultimately, therefore, the decision will be made based on political considerations, so any argument that is likely to persuade any of the key players must be couched in political terms.

Second, any attempt to split the Ninth Circuit faces some formidable demographic obstacles that did not exist when Congress split the Fifth Circuit some thirty-five years ago.²² These demographic factors will not only make it more difficult to come up with a satisfactory split, but bear directly on the political considerations that drive the split effort. The subject is sufficiently significant that it deserves a brief detour away from politics.

THE DEMOGRAPHIC PROBLEM

When Congress went about splitting the old Fifth Circuit in the late 1970s, it had no difficulty in figuring out *how* to do it. The circuit consisted of two mega-states—Texas and Florida—that were fortuitously located at opposite ends of the circuit. More or less in-between were four smaller states: Georgia and Alabama closest to

20 There is no doubt that there will be substantial costs, given the strong opposition of the Democrats in Congress, as expressed at the recent hearings on the subject, *see supra* note 15 and accompanying text, and the fact that the split will inevitably reduce the influence of California, which is very likely to attract the determined opposition of Senator Feinstein who has already shown herself to be a fierce opponent of splitting the Ninth Circuit. *See, e.g.*, Press Release, Off. of Sen. Diane Feinstein, Senator Feinstein Fights Back Effort to Split Ninth Circuit Court of Appeals, (April 19, 2007), <https://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=0BA37422-F9AF-C888-C132-66DB0833DD80/>.

21 This is exemplified by reference to the adage: “Justice delayed is justice denied,” which is true if you’re a plaintiff in a civil case. Defense lawyers turn the adage on its head: “Justice denied is justice.”

22 Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994 (1980) (codified in relevant part at 28 U.S.C. §§ 1, 41 (2012)).

Florida, and Louisiana and Mississippi closest to Texas. This permitted an elegant split which maintained what was thought to be the minimum number of states in a circuit, namely three, and divided the caseload more or less evenly. This followed the recommendation of the so-called Hruska Commission,²³ which had been tasked by Congress in 1973 to study what were then the two largest circuits, the Fifth and the Ninth, and make recommendations for their re-structuring.

As the Hruska Commission soon found out, however, the Ninth Circuit was a much tougher nut to crack, and the principal problem could be summarized in a single word: California. California generated then, as it does now, more than half of the circuit's caseload;²⁴ it has more than half the circuit's population;²⁵ and, because it has the circuit's two largest commercial centers, Los Angeles and San Francisco, it gets a disproportionate number of important cases. The bottom line is that there is no elegant way to split the Ninth Circuit while keeping California intact. Moreover, some of the other problems that a split was supposed to solve simply could not be solved: for example, any circuit that has Alaska and/or Hawaii in it is going to require judges to travel vast distances.

The innovative solution adopted by the Hruska Commission was to split California into two parts, north and south, and leave Northern California in the Ninth Circuit (along with Oregon, Washington, Idaho, Montana, Alaska and Hawaii); Southern California, along with Arizona and Nevada, would become the Twelfth Circuit. Here is what the two circuits would have looked like²⁶:



23 See COMM'N ON REVISION OF THE FED. COURT APPELLATE SYS., *THE GEOGRAPHICAL BOUNDARIES OF THE SEVERAL JUDICIAL CIRCUITS: RECOMMENDATIONS FOR CHANGE* (1973), reprinted in 62 F.R.D. 223 (1973) [hereinafter HRUSKA REPORT]; see also *Featured Series: Redistrict the U.S. Court of Appeals* (Hruska), CONST. PARTY OF IDAHO (Nov. 22, 2015), <http://www.cpidaho.org/archives/featured-series-redistrict-the-u-s-court-of-appeals-hruska/> [hereinafter *Featured Series*].

24 In 2016, California's four districts had a total of 7,321 case filings out of a total of 11,305 for the circuit, or sixty-five percent. *Ninth Circuit FY 2016 Filings*, U.S. CTS. FOR THE 9TH CIR., <http://cdn.ca9.uscourts.gov/datastore/general/2017/04/19/FY16%20filings%20by%20State.pdf> (last visited Nov. 6, 2017).

25 There are 65 million people in the Ninth Circuit, 39 million (or fifty-seven percent) of which are in California. U.S. CENSUS BUREAU, *ANNUAL ESTIMATES OF THE RESIDENT POPULATION FOR THE UNITED STATES, REGIONS, STATES, AND PUERTO RICO: APRIL 1, 2010 TO JULY 1, 2016* (2016).

26 HRUSKA REPORT, *supra* note 23, at 28.

The idea of dividing a state into two federal circuits “proved to be the [Hruska Commission’s] redistricting effort’s undoing. After all, legitimate concerns existed regarding a state’s uniform legal code under interpretation by two different federal circuit courts.”²⁷ Although commentators occasionally continue to propose splitting California into two circuits as the only viable solution for dividing the Ninth Circuit,²⁸ the idea has largely been discredited and abandoned as creating too many insuperable problems.

None of the current split proposals pending in the House or the Senate call for dividing California among two circuits. Which, of course, leaves the problem of California, a state that generates 65 percent of the Ninth Circuit’s caseload; a state which, if it were a circuit by itself, would be the third largest. California already dominates the huge circuit it’s in, with more of everything—cases, judges oral arguments— than the rest of the states in the circuit combined. But the presence of eight other states at least provides a reasonable balance.²⁹ Removing six or seven of the states will leave California so dominant that practically every three-judge panel will be controlled by California Judges. Thus, if the proposals advanced by Senator Daines³⁰ or Congressman Simpson³¹ were adopted, the new Ninth Circuit would consist only of California and Hawaii, which would mean there would be sixteen California judges and just one non-California judge from Hawaii.³² Even as a theoretical matter, it would be impossible to get a three-judge panel controlled by non-California circuit judges. If, on the other hand, Senator Flake’s proposal were adopted,³³ the new Ninth Circuit would consist of California, Hawaii, and Oregon.³⁴

27 *Featured Series*, *supra* note 23.

28 *See, e.g.*, Eric J. Gribbin, Note, *California Split: A Plan to Divide the Ninth Circuit*, 47 DUKE L.J. 351 (1997). However, this view was recently reiterated by Prof. Fitzpatrick, testifying before the House Judiciary committee. *Bringing Justice Closer Hearings*, *supra* note 17, at 14 (Statement of Prof. Brian T. Fitzpatrick).

29 For example, there are sixteen judicial positions located in California, which leaves thirteen positions (of the circuit’s 29 authorized positions) spread out over the remaining eight states. Moving judicial positions from one state to another is virtually impossible, as was demonstrated when Idaho tried to lay claim to the seat vacated by the retirement of Judge Steven Trott in 2004. Trott was originally from California but set up chambers in Idaho shortly after his appointment in 1988. When he took senior status sixteen years later, Idaho claimed the seat as its own but Senator Feinstein opposed any and all candidates not from California. *See* Pamela MacLean, *Sole Remaining Circuit Vacancy Open Eight Years*, TRIAL INSIDER (Jun. 13, 2012), <http://www.trialinsider.com/?p=1804>. The seat remained vacant for ten years, until the Idaho senators backed down and President Obama appointed John Owens of California. *See* Maura Dolan, *Two Lawyers from the Same California Firm Nominated for Ninth Circuit*, L.A. TIMES (Aug. 1, 2013), <http://articles.latimes.com/2013/aug/01/local/la-me-ln-9th-circuit-appointees-20130801>.

30 Circuit Court of Appeals Restructuring and Modernization Act, S. 295, 115th Congress (2017).

31 Ninth Circuit Court of Appeals Judgeship and Reorganization Act of 2017, H.R. 196, 115th Congress (2017).

32 Pursuant to 28 U.S.C. § 44(c) (2016), each state in the circuit is entitled to at least one resident active circuit judge.

33 Judicial Administration and Improvement Act of 2017, S. 276, 115th Congress (2017), *available at* <https://www.congress.gov/bill/115th-congress/senate-bill/276?r=13>.

34 There are two other proposals in the legislative hopper, but I will not discuss them because they are considered outliers and far less likely to pass than the proposals discussed in text. One is the Ninth Circuit Court Modernization and Twelfth Circuit Court Creation Act of 2017, H.R. 1598, 115th Cong. (2017–2018), introduced Mar. 17, 2017, by Rep. Gohmert. This bill would leave California in a circuit by itself. The other one is the Judicial Administration and Improvement Act of 2016, H.R. 250, 115th Cong. (2017), introduced Jan. 4, 2017, by Rep. Biggs. This bill would leave Washington in the Ninth Circuit, in addition to California, Hawaii, and Oregon. In any event, these proposals would not change the analysis significantly because both

There are two active judicial positions in Oregon, one filled by a Democratic appointee and the other one vacant, which means that, once the vacancy is filled, only five percent of all panels will be controlled by non-Californians.³⁵ It's thus fair to say that any split of the Ninth Circuit will result in what will still be a very large circuit, one that is overwhelmingly dominated by judges from California, almost all of them living in one of the large urban centers—San Francisco, Los Angeles, and San Diego.³⁶

THE ATTITUDINAL MODEL AND PANEL EFFECTS

Much of the available literature on attitudinal decision-making concerns matters which comport with common sense and about which, I believe, there can be no reasonable dispute. By saying this I don't mean to criticize authors for undertaking studies and reporting their findings. As Einstein proved, common sense is not infallible,³⁷ and it is often useful to test empirically what we believe we know intuitively. Nevertheless, it is not surprising to learn that judges do, indeed, have policy preferences; that they like results in cases when they are consistent with their policy preferences; that they will craft their opinions so as to protect, as best as possible, the result they reach; and that they will be more likely to write broadly when they believe there is a relatively low probability of being reversed by forces internal or external to their court.³⁸ Nor should it be surprising—or even troubling—that the

Washington Senators are Democrats. I have also omitted discussion of the fact that some of the bills, such as that proposed by Sen. Daines, would add five new positions to the Ninth Circuit. If this were to happen, it would only exacerbate the effects discussed later in the paper because all of the new seats would have to be allocated to the circuit containing California, but it is considered unlikely that Congress would add positions to the Ninth Circuit and not to any of the other circuits. Any bill purporting to add positions to the Ninth Circuit would face objections from legislators elsewhere that *their* local circuits also deserve additional judgeships. That alone would make these proposals legislative non-starters.

³⁵ Assuming nineteen active judges, randomly assigned in panels of three, there would be 969 possible panels, using the formula $n!/(r!(n-r)!)$. Then, according to a permutation/combination calculator, there would be forty-nine panels where the non-California judges occupy either two or three positions. $49/969 = 5.056759545\%$. MATH IS FUN, <https://www.mathsisfun.com/combinatorics/combinations-permutations-calculator.html> (last visited Oct. 9, 2017). In real life, the odds may be even slimmer because of the existence of senior circuit judges, who will overwhelmingly be from California and thus likely to skew the numbers even farther in favor of California-controlled panels. And there is also the incidence of visiting judges who will consist in part of district judges from inside the circuit (again, skewed heavily in favor of California) and senior circuit and district judges from outside the circuit, who would provide a non-California counterbalance. I have left senior and visiting judges out of the calculus because their number varies significantly over time and is very difficult to predict.

³⁶ The lone exception is Judge Callahan who has her office in Sacramento but lives in Stockton. See Jeff Chorney, *Judicial Profile: Consuelo Callahan*, THE RECORDER (Jan. 18, 2005), <https://www.law.com/therecorder/almID/900005421841/>.

³⁷ Einstein is credited with saying that “common sense is nothing more than a deposit of prejudices laid down in the mind before age eighteen,” but he may not have actually said it. QUOTE INVESTIGATOR, <http://quoteinvestigator.com/2014/04/29/common-sense/> (last visited Oct. 9, 2017). Nevertheless, his theories of Special and General Relativity prove the adage.

³⁸ See, e.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002); Michael J. Gerhardt, *Attitudes About Attitudes*, 101 MICH. L. REV. 1733 (2003); Herman Pritchett, *Divisions of Opinion Among Justices of the U.S. Supreme Court, 1939–1941*, 35 AM. POL. SCI. REV. 890 (1941) (all discussing the attitudinal theory of judicial decision making); see also CASS SUNSTEIN ET AL., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (2006); Frank Cross &

policy preference of judges will generally reflect their political views which, in turn, will reflect the political views of the President who appoints them and, to a lesser degree, the Senate that confirms them. Judging, after all, is not an entirely objective enterprise like the strike zone in baseball. Rather, it involves the exercise of *judgment* and the weighing of policy considerations. In close cases not controlled by precedent, judges must rely on their own values in making decisions, and those values, not surprisingly, often mirror the values of the President who appoints them.

Nor should we be surprised that judges' votes in cases are affected by the colleagues with whom they share the bench. Appellate decisions are by their design collegial, and it would be astonishing and disappointing if we were to learn that appellate judges made decisions wholly independent of each other. Indeed, if the studies are to be faulted, it is for treating the judges as insular decision-makers rather than as an integral part of a decision-making group. As Judge Edwards explains, judges on appellate panels read the same cases, briefs and record materials, and they deliberate as a group rather than making independent decisions and then casting votes without knowing the views of the other members of the panel.³⁹ Appellate decisions thus are less an arithmetic addition of three independent views and more of a confluence of rationales that seek, whenever possible, to reach agreement.

There are thus many reasons judges would be prone to moderate their policy views when faced with two colleagues both of whose views are different from their own, than when all three judges are in agreement: (1) that two colleagues disagree may cause the third judge to doubt his views and change his mind; (2) the third judge may not be entirely persuaded by the majority but feel that certainty in the law is an independent value which would be undermined by a dissent; (3) the third judge may not feel very strongly about the issue and decide not to risk an unpleasant confrontation with colleagues over what the judge may consider a trivial difference of opinion; (4) the judge may be overburdened with work and feel it isn't worth increasing his own workload and that of his colleagues by engaging in what may be a protracted back-and-forth that a dissent may call for; and (5) the third judge may feel that writing a dissent may actually make the situation worse because it would underscore that the majority considered and rejected the arguments raised by the dissent, whereas some points may otherwise remain vague and be subject to "reinterpretation" by a later panel. Finally, (6) when a judge sits on a panel with two other judges whose policy views are simpatico, they may encourage each other to give vent to their policy views and be less careful about dotting the I's and crossing the T's in terms of legal doctrine. And, of course, these reasons are not mutually exclusive; one or more may apply to any one case but not to another. Taken together, they add up to what Professor Fischman calls "a strong norm of consensus" in the federal courts of appeals.⁴⁰ Moreover, as Fischman and others have shown, this

Emerson Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155 (1998).

³⁹ Harry Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335, 1360–61 (1998).

⁴⁰ Joshua B. Fischman, *Interpreting Circuit Court Voting Patterns: A Social Interactions Framework*, 31 J.L. ECON. & ORG. 808, 808 (2013).

tendency towards conformity is not limited to ideology. Rather, “judges’ votes are similarly affected by their colleagues’ race, gender, or prior work experience.”⁴¹

What common sense tells us, then, and scholarship seems to prove, is the unremarkable proposition that when it comes to close cases, there is usually no objectively right answer, and judges’ votes are informed by their personal characteristics (which include ideology, sex, race, life experience, etc.) and the votes cast by the other judges on the panel. What this suggests is that a court consisting of a diverse body of judges is likely to be more moderate in its views than a court that is homogenous. This is because judges who are alike in various characteristics are likely to reinforce each other in their views, whereas judges who are diverse are likely to moderate each other’s views, in accordance with the aforesaid “strong norm of consensus.” This has important implications for the likely behavior of the judges of any post-split Ninth Circuit, a subject that will be taken up in the next section.

MODERN CONFIRMATION POLITICS AND THE POST-SPLIT NINTH CIRCUIT

Because any post-split Ninth Circuit will have California in it, it will have at least sixty-five percent of the caseload of the current Ninth Circuit.⁴² Adding Hawaii would raise the percentage to sixty-six, adding Oregon brings it to seventy-one percent. Thus, one way or the other, the bulk of the old Ninth Circuit’s cases would be transferred to the new Ninth Circuit, but the demographics of the court of appeals judges would be significantly different: the overwhelming number of judges of the new circuit would come from the two mega-metropolitan areas of Los Angeles and San Francisco. Gone would be judges from small towns or rural areas like Boise, Anchorage, Pocatello, Reno, Fairbanks, and Billings. The effect their small-town outlook has on their participation on panels would be lost. The new Ninth Circuit would thus become a court not only dominated by California judges, but also by judges with a big-city perspective. This could make a difference in many cases ranging from the environment to immigration where the outlook of big-city dwellers may be quite different from that of judges living in less densely populated areas. It would also mean that, as a practical matter, cases would almost always be decided by a panel controlled by judges from California.⁴³

But the demographic effects of any split would be dwarfed when compared to the political effects. In short, any of the proposed splits of the Ninth Circuit would result in a circuit that still had a substantial majority of the old Ninth Circuit’s cases but would be considerably more liberal than the current Ninth Circuit, thus defeating the principal objectives of those Republican legislators who support the split.⁴⁴ One

41 *Id.* at 809.

42 In 2016, the last year for which whole-year statistics are available, 11,305 cases were filed that were reviewable by the Ninth Circuit Court of Appeals; 7,321 of those were out of California; 174 out of Hawaii; 500 out of Oregon. *See Ninth Circuit FY 2016 Filings*, *supra* note 24.

43 *See* 28 U.S.C. § 44(c) (2012).

44 *See, e.g., Bringing Justice Closer Hearings*, *supra* note 17, at 26 (Statement of Rep. Chaffet) (“And I’ve got to tell you, there is a great deal of frustration with the Ninth Circuit. There are people that are absolutely fed up with some of these things. As a Member of Congress, I’ve got to tell you, the rulings that we’ve had coming out against President Trump to protect our borders and secure this nation . . . is infuriating to us, to look to the Ninth Circuit, to see people say: well there’s, you know, 70 people here that we’ve got to protect and 80

might think that splitting the circuit would have no effect on the political outlook of the judges because the judges will reflect the political outlook of the President who appoints them. This, indeed, has been the working assumption of various studies of panel effects such as Revesz, Cross and, Sunstein. And this may have been a valid assumption until the last quarter of the Twentieth Century when Presidents largely had a free hand in selecting judges for the inferior federal courts, virtually without interference from the Senate.⁴⁵

The situation today is quite different. Starting in the 1980s, senators began to use the confirmation process to deny Presidents a free hand in the appointment of judges to the circuit and district courts. In 1984, thirty-nine senators voted against the confirmation of J. Harvie Wilkinson to the Fourth Circuit⁴⁶ and in 1985, forty-three Senators voted against the confirmation of my father, Alex Kozinski, to the Ninth Circuit.⁴⁷ And in 1986, Daniel Manion, whom President Reagan nominated to the Seventh Circuit, squeaked by on a vote of 50–49.⁴⁸

The story of how the confirmation fire dance has evolved over the last three decades is far beyond the scope of this paper. Suffice to say that numerous qualified

people here. What about protecting the United States of America? And it's the Ninth Circuit that is causing these problems and taking away the duties that the Judiciary Committee, the Congress has given to the President of the United States to protect our borders. There *are* people that are outraged about this . . . but I've got to tell you, according to some others that I hear on this panel say, where is the outrage? There are a lot of us that are outraged."); *see also id.* at 30 (Statement of Rep. Desantis) ("[H]ere's why I think I'm concerned, because I think that some of the courts in your circuit are playing a dangerous game here. I mean, when you talked about analyzing an executive action that's taken directly pursuant to a very broad congressional statute and you basically say: If the President was somebody else it would be lawful, but because this President campaigned and said things that we disagree with, oh no, call it off it's illegal But my concern is, is that when that's being done and you're invoking these campaign statements, I don't see a principled way where that's going to wind up making sense through the long term. And I understand there is antipathy in our country that is reflected in some of your courts for the current President, but that is not enough of a reason to wade into some of these sensitive matters involving national security. And so I think the courts, you know, while they think they're saving the day from some people's perspectives, I think they maybe—end up in the long run undermining their proper role.").

45 The confirmation hearings of Judge Harry Pregerson to the Ninth Circuit in 1979, exemplify the situation, when questioned by Senator Alan Simpson:

Simpson: If a decision in a particular case was required by case law or statute, as interpreted according to the intent that you would perceive as legislative intent, and yet that offended your own conscience, what might you do in that situation?

Pregerson: . . . I have to be honest with you. If I was faced with a situation like that and it ran against my conscience, I would follow my conscience.

Simpson: I didn't hear, sir.

Pregerson: I said, if I were faced with a situation like that, that ran against my conscience, disturbed my conscience, I would try and find a way to follow my conscience and do what I perceived to be right and just.

Hugh Hewitt, *The Law's Conscience*, THE WKLY. STANDARD (Sept. 8, 2003 11:00 PM), <http://www.weeklystandard.com/the-laws-conscience/article/4372> (quoting *Hearings Before the Comm. on the Judiciary*, 96th Cong. (1979)) (emphasis in original) (quotations omitted). Today, of course, a nominee who expressed such views would be swiftly withdrawn by the White House and ridden out of town on a rail.

46 PAUL KENGOR AND PETER SCHWEIZER, *THE REAGAN PRESIDENCY: ASSESSING THE MAN AND HIS LEGACY* 104 (2005).

47 *Id.*

48 Philip Shenon, *Senate, Ending Judicial Fight, Gives Manion Final Approval*, N.Y. TIMES, July 24, 1986, at B9, available at <http://www.nytimes.com/1986/07/24/us/senate-ending-judicial-fight-gives-manion-final-approval.html>.

nominees were denied confirmation, often without the benefit of an up-or-down vote on the Senate floor or even in committee,⁴⁹ while other qualified candidates were never nominated because of anticipated objections from the Senate.⁵⁰

Senators have numerous procedural devices they can deploy to block or seriously slow down the confirmation of a judicial candidate they consider unacceptable, principal among them the filibuster,⁵¹ the hold,⁵² and the blue slip.⁵³ And, if the Senate is controlled by a different party than the White House, the Senate can simply refuse to schedule a hearing on a pending judicial nomination, thereby denying the President his appointment without even a vote. While this happened famously with the nomination of Merrick Garland to the Supreme Court, it happens with surprising frequency in the inferior federal courts.⁵⁴ Most recently, the two Republican Senators from Texas appear to have leveraged their control over the confirmation process to effectively co-opt the President's authority to select judicial nominees,⁵⁵ and maintain three Fifth Circuit vacancies for President Trump to fill, one of them dating back to 2012.⁵⁶ Just recently, Senator Feinstein appears to have followed this model

49 Included in this group are Miguel Estrada and Peter Keisler, nominated to the D.C. Circuit. See Dana Bush, *Estrada Withdraws as Judicial Nominee*, CNN (Sept. 5, 2003), <http://edition.cnn.com/2003/ALLPOLITICS/09/04/estrada.withdraws/>; *Peter Keisler*, THE WHITE HOUSE, <https://georgewbush-whitehouse.archives.gov/infocus/judicialnominees/keisler.html> (last visited Nov. 7, 2017); Carolyn Kuhl to the Ninth, see *Judicial Nominee Battles Intensify*, CQ ALMANAC 2003, 59TH ED., 13–19 (2004); and James Lyons and Christine Arguello to the Tenth Circuit, see Maria Echaveste, *Brown to Black: The Politics of Judicial Appointments for Latinos*, 13 LA RAZA L. J. 39, 39 (2015).

50 There are numerous examples in this category, many of them not publicly documented because such consultations between the White House and the Senate are often conducted prior to any public announcement. But one well-documented example is Peter Edelman, never nominated to the D.C. Circuit in response to objections from Senate Judiciary Committee Chairman Orrin Hatch. Neil Lewis, *Clinton, Fearing Fight, Shuns Bid to Name Friend as Judge*, N.Y. TIMES, Sep. 1, 1995, available at <http://www.nytimes.com/1995/09/01/us/clinton-fearing-fight-shuns-bid-to-name-friend-as-judge.html>. See also *infra* note 60 and accompanying text.

51 *Filibuster*, JUD. NOMINATIONS, <http://judicialnominations.org/wp-content/uploads/2010/06/Filibuster.pdf> (last visited Dec. 1, 2017).

52 “*Holds*”, JUD. NOMINATIONS, <http://judicialnominations.org/wp-content/uploads/2010/06/Holds.pdf> (last visited Dec. 1, 2017).

53 *Blue Slips*, JUD. NOMINATIONS, <http://judicialnominations.org/wp-content/uploads/2010/06/Blue-Slips.pdf> (last visited Dec. 1, 2017).

54 In 1991, Carlos T. Bea was nominated by President George H.W. Bush for a seat on the Northern District of California, but he never received a vote and his nomination expired at the end of the Term in 1992. He was eventually nominated and confirmed to the Ninth Circuit in 2003. *San Francisco Superior Court Judge Carlos Bea Nominated to the Ninth Circuit Court of Appeals*, METROPOLITAN NEWS-ENTERPRISE (April 16, 2003), <http://www.metnews.com/articles/beax041603.htm>. The Ninth Circuit seat eventually filled by Bea in 2003 had been vacant since 1996 and President Clinton had thrice nominated attorney (now state judge) Barry Goode to that position, but the Republican-controlled Senate refused to schedule a hearing. Matthew Hirsch, *Barry Goode*, THE RECORDER (Mar. 24, 2008), <https://www.law.com/therecorder/almID/900005504830/>; *Bush Dumps Clinton Nominees*, CBS NEWS (March 20, 2001, 10:27 PM), <https://www.cbsnews.com/news/bush-dumps-clinton-nominees/>. There are dozens such examples over the last three decades.

55 Maria Recio, *Cruz, Cornyn Slow-Play Texas Judicial Vacancies after Trump Election*, MY STATESMAN (Feb. 17, 2017, 12:43 PM), <http://www.mystatesman.com/news/state—regional-govt—politics/cruz-cornyn-slow-play-texas-judicial-vacancies-after-trump-election/ETwhHdMR4BzypVRHtvRmjJ/>.

56 *Current Judicial Vacancies*, U.S. CTS., <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/current-judicial-vacancies> (last visited Dec. 1, 2017).

by inviting applicants for judicial and other positions that require Senate confirmation, apparently without any involvement from the White House.⁵⁷

I believe therefore that it is a mistake to presume that judicial nominees will reflect the political views of the President who appoints them; a more nuanced approach is appropriate, where both the political orientation and the *intensity* of the nominee's political leanings is taken into account. And this will turn on two factors: (1) whether the President and the majority of the Senate are from the same party; and (2) whether the President and both senators from the nominee's state are of the same party. It can be presumed nowadays that Presidents will seek to appoint judicial candidates that most closely mirror the President's views. The President is most likely to achieve this where both of these conditions are satisfied, for obvious reasons: where the President and the Senate are of the same party, it is very likely that the Senate will seek to accommodate the President by scheduling hearings and a floor vote promptly; there will be no reason for delay, and certainly not on grounds of ideology. The invocation of the "nuclear option" by Senate Majority Leader Reid in 2013, which removes the filibuster for lower-court judicial nominees,⁵⁸ will only make it easier for a President and Senate to override objections by the opposite-party minority.

But a President will not have a truly free hand in selecting his court of appeals nominees⁵⁹ unless the second condition above is satisfied: both senators from the nominee's home district must be of the same party as the President. This is because, under the Senate's Blue Slip rule, the Senate Judiciary Committee will not normally take a vote on a judicial nominee who does not obtain the approval ("Blue Slip") of his home-state senators. While the Blue Slip rule is not iron-clad, it has proven effective on numerous occasions to block qualified nominees to the federal bench.⁶⁰

Thus, the President will have a free hand in appointing judges only where he has the same party affiliation as the Senate majority *and* both senators from the state where the judgeship is located. In that situation he can appoint judges as ideologically aligned with him as he wishes without the fear of serious pushback from

57 *Judiciary Applications*, OFF. OF SEN. DIANNE FEINSTEIN, <https://www.feinstein.senate.gov/public/index.cfm/applications-jud> (last visited Dec. 1, 2017).

58 Paul Kane, *Reid, Democrats Trigger 'Nuclear' Option; Eliminate Most Filibusters on Nominees*, WASH. POST (Nov. 21, 2013), https://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c_story.html?utm_term=.5b8f7a50beed.

59 Because of Senatorial Courtesy and the Blue Slip rule, a president *never* has a totally free hand in selecting nominees to the district courts these days. Attorney General Robert F. Kennedy is said to have described the process as follows: "Basically, it's senatorial appointment with the advice and consent of the president." DAVID M. O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 40 (8th ed. 2008).

60 For example, in 2001 President George W. Bush intended to nominate former Member of Congress and former SEC Chairman Christopher Cox to the Ninth Circuit, but "Cox withdr[ew] from consideration . . . even before he was formally nominated. [He] said he was unwilling to endure a difficult confirmation battle." Neil Lewis, *Washington Talk: Road to Federal Bench Gets Bumpier in Senate*, N.Y. TIMES, June 26, 2001, available at <http://www.nytimes.com/2001/06/26/us/washington-talk-road-to-federal-bench-gets-bumpier-in-senate.html>; see also Jonathan Turley, *Seeing Red on Blue Slips*, L. A. TIMES (May 16, 2001), <http://articles.latimes.com/2001/may/16/local/me-64023> (discussing Sens. Boxer and Feinstein's role in blocking Cox's nomination).

the Senate. But where one of these two conditions is not met, the President's appointment will be delayed or blocked, and he will be forced to select candidates that are more centrist and thus less likely to attract opposition from the other side of the political aisle. Depending on conditions in the Senate, the President may be forced to nominate and appoint judges whose policy views are antithetical to his own.⁶¹

Which brings us back to California and the proposed split of the Ninth Circuit. As demonstrated above, there is no doubt that whatever remains of the Ninth Circuit after a split will be dominated by California far more than is the current Ninth Circuit. Nor can there be any doubt that California is, and for the foreseeable future will be, firmly in Democratic hands. There is currently not a single Republican state-wide official, and Californians voted for the Democratic candidate in at least the last five presidential elections, usually with margins of sixty percent or more.⁶² The last time California had a Republican Senator was 1992 when Governor Wilson appointed John Seymour to succeed him in the Senate after Wilson was elected governor. Seymour then had to stand for election in 1992 and lost to Diane Feinstein, who is a formidable force in the Senate to this day. Because of California's odd primary voting system, in the last election for senator, on the retirement of Senator Boxer, Californians voting in the general election had a choice of the liberal Democrat Kamala Harris and the very liberal Democrat Loretta Sanchez.⁶³

Thus there can be little doubt that, for the foreseeable future, the power of the Blue Slip as to Ninth Circuit appointments from California will lie firmly in Democratic hands.⁶⁴ The addition of Hawaii and/or Oregon would not make much difference, first because they count for so few judgeships, and second because they too have no Republican senators.⁶⁵ And if a bill is passed that adds judicial positions as part of the split process, this will only make matters worse for Republicans, because *all* of those positions will have to be added to the Ninth Circuit, and not to

61 For example, President Clinton appointed Richard Tallman, a conservative Republican, to the Ninth Circuit in exchange for Senator Slade Gorton's agreement to withdraw his objection to the confirmation of William Fletcher to the same court. Fletcher was the son of Ninth Circuit Judge Betty Binns Fletcher of Seattle, who was forced to take senior status so that Gorton could have his chosen candidate fill the seat. Neil A. Lewis, *A Nomination is Withdrawn, and a Deal is Threatened*, N.Y. TIMES, May 28, 1999, available at <http://www.nytimes.com/1999/05/28/us/a-nomination-is-withdrawn-and-a-deal-is-threatened.html>; Tallman, Richard C., FED. JUD. CTR., <https://www.fjc.gov/history/judges/tallman-richard-c> (last visited Dec. 1, 2017).

62 *Presidential Election in California, 2016*, BALLOTPEDIA, https://ballotpedia.org/Presidential_election_in_California,_2016, (last visited Oct. 10, 2017).

63 Sarah D. Wire, *California Senate Candidates Loretta Sanchez and Kamala Harris on Policy Politics and the State of Their Race*, L.A. TIMES (Oct. 14, 2016), <http://www.latimes.com/politics/la-pol-ca-harris-sanchez-california-senate-questions-20161014-snap-htlstory.html>.

64 There are occasional calls for doing away with the blue slip, much as the Senate did away with the filibuster for judicial nominees. Editorial, *Giving Nominees the Blue Slip*, WALL STR. J. (May 10, 2017), <https://www.wsj.com/articles/giving-nominees-the-blue-slip-1494458613>. ("Blue slips aren't a Senate or committee rule, and if Democrats abuse the tradition they should be dispensed with."). The difficulty is that the blue slip is a personal privilege enjoyed by every senator and giving it up risks every senator having the President appoint political enemies within their state. This is going to be much harder to give up than the filibuster.

65 See *List of United States Senators from Hawaii*, Ballotpedia, https://ballotpedia.org/List_of_United_States_Senators_from_Hawaii (last visited Dec. 1, 2017); *List of United States Senators from Oregon*, Ballotpedia., https://ballotpedia.org/List_of_United_States_Senators_from_Oregon (last visited Dec. 1, 2017).

the new Twelfth. This is because, despite the profusion of judges in California, the state is actually *under*-represented in terms of judicial manpower. We can see this using case statistics for 2016. If California had been a circuit by itself, it would have had sixteen active judges and 7,321 appeals, or 458 cases per judge.⁶⁶ This would have left 3,984 cases for the thirteen non-California judges, or 305 cases per judge. Even if five new positions were added in California, the number of cases per judge (348) would still be substantially higher than for the rest of the circuit. The little-appreciated reality is that the outlying states actually subsidize California in terms of judicial manpower, and also import the leavening effect of judges appointed from states with rural communities and Republican senators.

The net effect of a split will therefore very likely be a Ninth Circuit that is far more liberal than the current Ninth Circuit. Over time, judicial vacancies will be created by retirement, death, or addition of judicial positions by Congress. When the occupant of the White House is a Democrat and the Senate is Democratic, the President will have a free hand to appoint judges that match his political leanings. But when the President is a Republican, he will at the very least be constrained by the Blue Slip process to appoint judges of a more moderate mold so as to eliminate senatorial opposition. And if the Senate is in Democratic hands, a Republican president may well be blocked or significantly delayed in making appointments to the Ninth Circuit, as the two Senators from Texas delayed or blocked appointments to the Fifth Circuit.⁶⁷

With Democratic presidents having a relatively free hand to appoint liberals and Republican presidents being blocked, delayed, or constrained by the Senate to appoint moderates, the California Ninth Circuit will inevitably move to reflect the demographics and politics of California. The beneficial effects of demographic and political diversity will be lost. From a political perspective, a court composed of liberal and moderate judges, with fewer and fewer conservative voices, will inexorably move to the left, constrained only imperfectly by the Supreme Court. And, as Sunstein predicts, there will be frequent instances “in which deliberation has a pathological effect when judges are like-minded and causes them to take extreme positions.”⁶⁸

The effect of any split, then, is likely to be an even more liberal Ninth Circuit, a situation reminiscent of the late ‘70s and early ‘80s, when President Carter filled (with no push-back from the Senate) more than half of the twenty-three judicial positions that then constituted the full Ninth Circuit. This new court will control seventy percent of the current Ninth Circuit’s caseload, and likely the lion’s share of the most important cases, generated by the large commercial and cultural centers around Los Angeles and San Francisco. And, of course, it will become a magnet for litigation, as those who have a choice of venue will seek to increase their chances of success by filing their cases in the circuit with the most liberal judges.

66 See *supra* note 42 and accompanying text.

67 See Recio, *supra* note 55.

68 Fischman, *supra* note 40, at 809 (citing Sunstein et. al, at 71–78).

CONCLUSION

The Republican lawmakers pursuing a split of the Ninth Circuit are not going to be happy with the result they achieve if they succeed in their efforts. The outer states of the circuit not only provide judicial manpower for the cases generated in California, they provide breadth of perspective and balance to what would otherwise be an even more liberal court. If some or all of those state are removed, and California is left alone, or only in the company of Hawaii and Oregon, the resulting circuit will bring conservative politicians even more unhappiness than they suffer today. This is not an effort worth undertaking; they would be well advised to leave well enough alone.

SIDEBAR: ARTICLE III JUDGES WITH SCOTUS CLERKSHIPS

An interesting question is whether the confirmation battles over the last three decades have had an adverse effect on people willing to accept appointments to the federal courts. It is argued by some that the intrusiveness, delay and uncertainty of the confirmation process has deterred qualified applicants from subjecting themselves to the nomination process and that the quality of judicial appointments has therefore suffered.

To test this proposition, I examined a single criterion: the number of appointees to the federal bench who have previously served as Supreme Court law clerks. While there are other criteria I might have used, this one is easy to document because this information can be extracted from the Federal Judicial Center website.⁶⁹

This database discloses that, aside from two appointments in 1939 (Francis Biddle to the Third Circuit and Calvert Magruder to the First Circuit), presidents started appointing SCOTUS law clerks to the federal bench starting in 1959 with Henry Friendly, appointed to the Second Circuit by President Eisenhower. President Johnson appointed Harold Leventhal to the DC Circuit in 1965 and President Nixon appointed John Paul Stevens to the Seventh Circuit in 1970. For the subsequent presidents, the record is as follows:

	CARTER	REAGAN	BUSH 41	CLINTON	BUSH 43	OBAMA
Total	41	50	20	47	47	35
SCOTUS clerks	4	6	4	10	9	10
Percent	10%	12%	20%	21%	19%	29%

⁶⁹ Biographical Directory of Article III Federal Judges: Export, Fed. Jud. Ctr., <https://www.fjc.gov/history/judges/biographical-directory-article-iii-federal-judges-export> (last visited Dec. 1, 2017).

The percentage of SCOTUS clerks among Court of Appeals appointees is actually increasing. When you add to this the fact that *both* President Obama's and President Trump's nominees to the Scalia seat on the Supreme Court had SCOTUS clerkships, it seems to suggest that the quality of appointees to the Courts of Appeals is not deteriorating as a result of the confirmation battles.