Proposals in the 109th Congress to Split the Ninth Circuit Court of Appeals

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Summary

Proposals to split the Ninth Circuit Court of Appeals have been before Congress for decades. Proponents of a split generally argue that the current Ninth Circuit is overburdened, and that creating two or more new circuits with reduced geography, population, and caseloads would improve judicial administration. Opponents of a split reject those claims, saying that the current Ninth Circuit functions well and that the court is a model of innovation. Opponents of a split also suggest that efforts to divide the circuit represent an attack on judicial independence, a claim supporters of a split deny.

In November 2005, the House of Representatives passed the Deficit Reduction Act of 2005 (H.R. 4241), which, among many other provisions, contained language splitting the current Ninth Circuit into a new Ninth Circuit and a Twelfth Circuit. During December 2005 House-Senate conference negotiations, language splitting the Ninth Circuit was dropped from the budget reconciliation package. Seven bills proposing to split the Ninth Circuit (H.R. 211, H.R. 212, H.R. 3125, H.R. 4093, S. 1296, S. 1301, and S. 1845) remained under consideration. Most recently in the House, on February 8, 2006, H.R. 4093 was reported by the Judiciary Committee and placed on the Union Calendar. On the Senate side, the Judiciary Committee held a hearing on S. 1845 on September 20, 2006.

This report provides information and analysis on the debate concerning proposals to split the Ninth Circuit. The debate over splitting the Ninth Circuit generally focuses on six areas: (1) geography and population, (2) judgeships and caseloads, (3) how quickly the circuit disposes of cases, (4) cost of splitting the circuit, (5) *en banc* procedures, and (6) the circuit's rulings. Splitting the Ninth Circuit would have different effects in each of these six areas.

Caseload is particularly prominent in the debate over splitting the Ninth Circuit. Proponents of a split suggest that reduced caseloads would improve judicial administration. Opponents suggest that if a split occurred, judges in a new Ninth Circuit would have higher caseloads than their counterparts in proposed Twelfth or Thirteenth Circuits. Analysis of the most recently available estimates from the Administrative Office of the U.S. Courts suggests that if the current Ninth Circuit had been reorganized in 2005, five of seven bills introduced in the 109th Congress splitting the circuit would have yielded somewhat higher caseloads (based on authorized judgeships) in a new Ninth Circuit than in the current Ninth Circuit during the same time period. Six of the bills would have yielded higher caseloads in a new Ninth Circuit than in proposed Twelfth or Thirteenth Circuits. By contrast, one bill (H.R. 3125) would have yielded a higher caseload in a Twelfth Circuit than a new Ninth Circuit. Caseload estimates can vary by source and methodology. Other factors—such as how quickly the circuit disposes of cases and complexity of cases—could also affect caseload considerations.

Neither chamber of the 109th Congress passed legislation related to splitting the Ninth Circuit. This report will not be updated.

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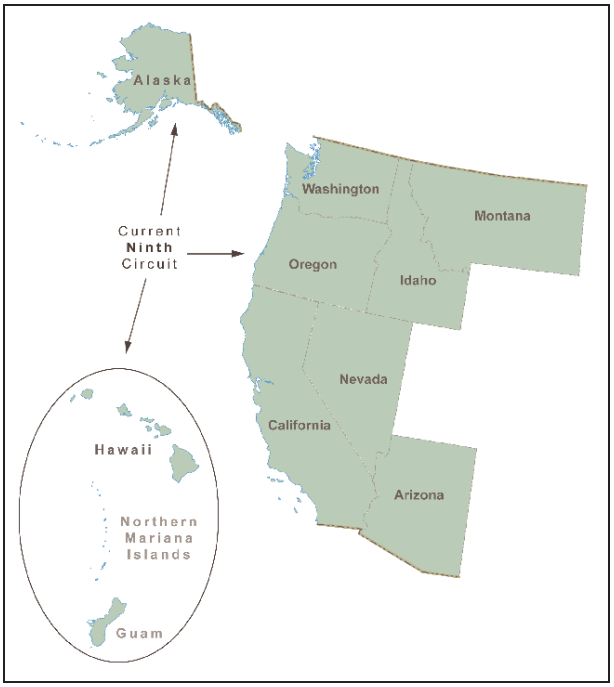
Introduction

In 1891, Congress established the U.S. Courts of Appeals—often called "circuit courts"—to hear appeals from federal district courts and, later, many agency regulations.[1] The circuit courts remain the last avenue of judicial review for all but the relatively few cases the Supreme Court considers. Establishing the appeals courts organized federal judicial business into geographic divisions (circuits). Today, there are 11 numbered circuit courts, covering federal judicial districts housed in the 50 states and U.S. territories. In addition, the Court of Appeals for the D.C. Circuit has jurisdiction over appeals for the District of Columbia, including many agency appeals.[2] Finally, the Court of Appeals for the Federal Circuit has national jurisdiction over specialized issues such as patents and trademarks.[3] The Ninth Circuit, located in the western United States, is the nation's largest circuit court in geography, population, and appeals filings. (**Figure 1** shows the boundaries of the current Ninth Circuit.) On occasion, the Ninth Circuit has been noted for its controversial rulings. These factors, and others discussed below, surround recent proposals to split the Ninth Circuit into one or more new circuits. Opponents counter that the Ninth Circuit should remain intact, and that proposals to split the circuit threaten judicial independence.

Figure 1. Ninth Circuit: Current Boundaries



Source: Map Resources. Adapted by CRS. (K. Yancey 12/30/05)

[1] See Article III of the U.S. Constitution and 28 U.S.C. 1291-1292.

[2] The First through Eleventh Circuits and the D.C. Circuit are often called the "regional circuits," which hear appeals from trial courts situated within their regional boundaries. By contrast, the Federal Circuit may hear appeals from lower court decisions from anywhere in the nation if the cases involve issues falling within the Federal Circuit's subject matter jurisdiction.

[3] The Federal Circuit's jurisdiction also includes issues such as copyrights and appeals from the Court of Veterans Appeals. For a brief overview, see Jack C. Plano and Milton Greenberg, *The American Political Dictionary*, 10th ed. (Fort Worth: Harcourt Brace, 1997), p. 257. See also CRS Report RL31703, *Patent Law and Innovation: The Creation, Operation and a Twenty-Year Assessment of the U.S. Court of Appeals for the Federal Circuit*, by (name redacted).

This report provides information and analysis on the debate concerning splitting the Ninth Circuit and compares provisions of House and Senate bills introduced during the 109th Congress that propose to split the circuit. The report also analyzes potential impacts of these proposed reorganizations. The current debate over the Ninth Circuit echoes themes present in the past and generally focuses on six areas: (1) geography and population, (2) judgeships and caseloads, (3) how quickly the circuit disposes of cases, (4) cost of splitting the circuit, (5) *en banc* procedures, and (6) the circuit's rulings. Analysis suggests that splitting the Ninth Circuit would have different effects on each of these six areas, as is summarized at the end of this report.

Splitting the Ninth Circuit: Recent Legislative Proposals

The debate over whether to split the current Ninth Circuit into two or more circuits has been before Congress for decades. Two major commissions on circuit reorganization have reached different conclusions concerning the Ninth Circuit. In 1973, the "Hruska Commission"—charged by Congress with evaluating the federal circuit courts—recommended that the Ninth Circuit be divided in two.[4] In 1998, the "White Commission"—which Congress tasked with examining the Ninth Circuit in particular—recommended against dividing the Ninth Circuit (stating that doing so would be "impractical and is unnecessary"), but also proposed creating three somewhat autonomous divisions within the circuit to improve court management.[5] Congress chose not to adopt the Hruska or White Commissions' recommendations to reorganize the Ninth Circuit.

Since the mid-1990s, several bills have been introduced that would split the Ninth Circuit. During the 108th Congress, Representative Michael Simpson sponsored House Amendment 780 to S. 878, which would have split the Ninth Circuit into three circuits. The House passed S. 878 with the amendment (by a vote of 205-194)[6] in October 2004, but the measure did not win Senate approval. In the 109th Congress, seven bills have been introduced in the House and Senate that, in whole or in part, propose to split the Ninth Circuit into two or more circuits.[7] The **Appendix** (at the end of this report) provides an overview of each bill's major provisions relating to a Ninth Circuit split.

[4] Commission on the Revision of the Federal Court Appellate System, *The Geographical Boundaries of the Several Judicial Circuits: Recommendations for Change* (Washington: GPO, 1973). The commission (widely known as the "Hruska Commission," for its chairman, Senator Roman Hruska) also recommended splitting the Fifth Circuit in two, which occurred in 1981. Under the Fifth Circuit Court of Appeals Reorganization Act, Louisiana, Mississippi, Texas, and the Canal Zone remained in the Fifth Circuit, while Alabama, Florida, and Georgia constituted the new Eleventh Circuit. See 94 Stat. 1994; and http://www.fjc.gov/public/home.nsf/hisc. The Fifth Circuit no longer retains jurisdiction over the Canal Zone.

[5] Commission on Structural Alternatives for the Federal Courts of Appeals, *Final Report*, "Submitted to the President & the Congress Pursuant to Pub. L. No. 105-119," Dec. 18, 1998, p. iii. The commission was widely known as the "White Commission" after its chairman, Associate Justice Byron White. A copy of the report is available online at http://www.library.unt.edu/gpo/csafca/final/appstruc.pdf. The three divisions would have been the Northern (including the federal judicial districts of Alaska, Idaho, Montana, Oregon, and Eastern and Western Washington), Middle (districts of Eastern and Northern California, Guam, Hawaii, Nevada, and the Northern Mariana Islands), and Southern (districts of Arizona and Central and Southern California). A proposed Circuit Division would have resolved disputes between the regional divisions. See Commission on Structural Alternatives for the Federal Courts of Appeals, *Final Report*, p. 41.

[6] Roll call vote number 492.

[7] Those bills are: H.R. 211, H.R. 212, H.R. 3125, H.R. 4093, S. 1296, S. 1301, and S. 1845.

Late in 2005, the Federal Judgeship and Administrative Efficiency Act of 2005 (H.R. 4093, sponsored by Representative James Sensenbrenner, who chairs the House Judiciary Committee) became the focus of legislative and media attention when language from the bill was inserted into the Deficit Reduction Act of 2005 (H.R. 4241), which the House passed on November 18, 2005.[8] During conference negotiations, language splitting the Ninth Circuit into proposed new Ninth and Twelfth Circuits was dropped from the budget reconciliation bill. In the Senate, three bills (S. 1296, S. 1301, and S. 1845) proposing to split the Ninth Circuit were the subject of an October 2005 Subcommittee on Administrative Oversight and the Courts hearing.[9] H.R. 4093 in the House and S. 1845 in the Senate appeared to be the bills receiving the most legislative and media attention during the first session. Most recently in the House, on February 8, 2006, H.R. 4093 was reported by the Judiciary Committee and placed on the Union Calendar. On the Senate side, S. 1845 was originally scheduled for a June 29 Judiciary Committee markup. That markup was postponed after Chairman Arlen Specter, in response to a request from Senator Dianne Feinstein, agreed to schedule a future hearing on S. 1845. The full Senate Judiciary Committee held a September 20, 2006, hearing on S. 1845.[10] The witnesses and contents of that hearing were largely reminiscent of other recent hearings on the topic. The status of that debate is discussed throughout this report.

Geographic Provisions of a Two-Way Split

The major difference among the seven bills introduced during the 109th Congress to split the Ninth Circuit concerns whether the current Ninth Circuit would be divided into two or three new circuits.[11] Four of the seven bills—H.R. 3125 (Representative Michael Simpson), H.R. 4093 (Representative James Sensenbrenner), S. 1296 (Senator Lisa Murkowski), and S. 1845 (Senator John Ensign)—would split the Ninth Circuit into two circuits: the new Ninth and the Twelfth (all bills specify the same geographic boundaries), as shown in **Figure 2**. Under these bills, the new Ninth Circuit would include California, Guam, Hawaii, and the Northern Mariana Islands. The Twelfth Circuit would include Alaska, Arizona, Idaho, Montana, Nevada, Oregon, and Washington.

[8] Charlene Carter, "House Budget Bill Would Split 9th Circuit Court, Create New 12th Circuit," *CQ Today*, Nov. 7, 2005; available at http://www.cq.com/display.do?dockey=/cqonline/prod/data/docs/html/news/109/news109-000001953313.html@allnews&metapub=CQ-NEWS&searchIndex=0&seqNum=1. H.R. 4241, containing language from H.R. 4093, passed the House by a vote of 217-215 (roll call vote number 601).

[9] U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Administrative Oversight and the Courts, *Revisiting Proposals to Split the Ninth Circuit: An Inevitable Solution to a Growing Problem*, 109th Cong., 1st sess., Oct. 26, 2005, S.Hrg. 109-90 (Washington: GPO, 2005).

[10] U.S. Congress, Senate Committee on the Judiciary, "Examining the Proposal to Restructure the Ninth Circuit," 109th Cong., 2nd sess., Sept. 20, 2006. Statements from the hearing are available at http://judiciary.senate.gov/hearing.cfm?id=2071.

[11] H.R. 4093 is unique among the 109th Congress Ninth Circuit bills because it couples splitting the Ninth Circuit with authorizing more than 60 new federal judgeships throughout the nation. H.R. 4093 also creates an Article III court in the U.S. Virgin Islands. The other bills under consideration that would split the Ninth Circuit do not address additional judgeships (except within what is currently the Ninth Circuit) or the Article III court for the Virgin Islands—topics not addressed in this report.

Figure 2. Two-Way Split Under H.R. 3125, H.R. 4093, S. 1296, and S. 1845

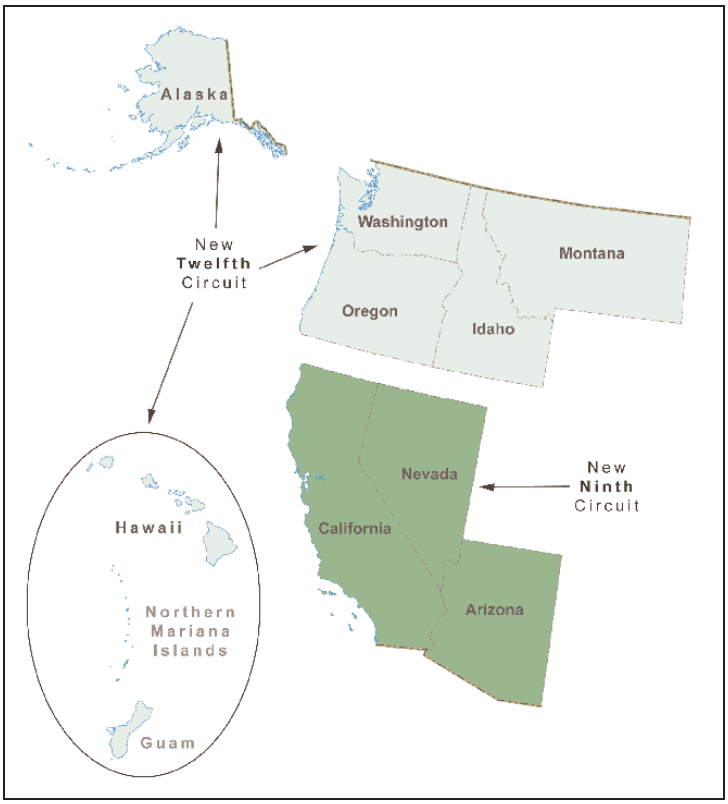
Source: Map Resources. Adapted by CRS. (K. Yancey 12/30/05)

The four bills also specify where reorganized courts would meet and, in some cases, be headquartered. Currently, the Ninth Circuit is headquartered (including the offices of the clerk and circuit executive) in San Francisco and also meets in Los Angeles, Portland, and Seattle.[12] Under H.R. 4093 and S. 1845, the new Ninth Circuit would meet in Honolulu, Pasadena, and San Francisco; the Twelfth would meet in Las Vegas, Missoula, Phoenix, Portland, and Seattle. Two other bills (H.R. 3125 and S. 1296) propose slightly different arrangements. Under S. 1296, the New Ninth Circuit would meet in Honolulu and San Francisco; a Twelfth Circuit would meet in Phoenix, Portland, and Missoula. H.R. 3125 specifies that a new Ninth Circuit meet in Honolulu, Pasadena, and San Francisco (like H.R. 4093 and S. 1845); the Twelfth Circuit would meet in Phoenix and Seattle. None of the bills requires that a new Ninth Circuit's headquarters would remain in San Francisco, although it certainly could. S. 1845 and S. 1296 specify that the Twelfth Circuit headquarters be located in Phoenix. None of the other bills proposing a two-way split specify headquarters locations for a Twelfth Circuit.

A fifth bill—H.R. 212 (Representative Michael Simpson)—also proposes a two-way split, but with different boundaries. (See **Figure 3**.) H.R. 212 would create a new Ninth Circuit including Arizona, California, and Nevada. The Twelfth Circuit would include Alaska, Guam, Hawaii, Idaho, Montana, the Northern Mariana Islands, Oregon, and Washington. Under H.R. 212, the new Ninth Circuit would meet in Pasadena, Phoenix, and San Francisco; the Twelfth Circuit would meet in Portland and Seattle. The bill does not specify headquarters locations.

[12] 28 U.S.C. §48(a).

Figure 3. Two-Way Split Under H.R. 212



Source: Map Resources. Adapted by CRS. (K. Yancey 12/30/05)

Geographic Provisions of a Three-Way Split

Two other bills introduced in the 109th Congress would take an alternate approach. Under H.R. 211 (Representative Michael Simpson), and S. 1301 (Senator John Ensign), the current Ninth Circuit would be divided into three circuits instead of two. (See **Figure 4**.) Both bills would establish a new Ninth Circuit including California, Hawaii, Guam, and the Northern Mariana Islands. The Twelfth Circuit would include Arizona, Idaho, Montana, and Nevada. The Thirteenth Circuit would include Alaska, Oregon, and Washington. Under these bills, the new Ninth Circuit would meet in Los Angeles and San Francisco. The Twelfth and Thirteenth Circuits would meet in Las Vegas and Phoenix and Portland and Seattle, respectively. Neither bill specifies headquarters locations.

Figure 4. Three-Way Split Under H.R. 211 and S. 1301

Source: Map Resources. Adapted by CRS. (K. Yancey 12/30/05)

Proposals to split the Ninth Circuit into three appellate courts were also introduced during previous Congresses. During the 109th Congress, the debate over splitting the circuit has generally focused on splitting the current Ninth Circuit into two circuits. Although Senator Ensign sponsored S. 1301, which proposes a three-way split, Senators Murkowski (S. 1845) and Ensign have also stated their support for S. 1845, which proposes a two-way split.[13] There was, however, some general discussion of a three-way split at the September 20, 2006, Senate Judiciary Committee hearing.[14]

Splitting the Ninth Circuit: Current Debates and Analysis

The debate over splitting the Ninth Circuit generally focuses on six areas: (1) geography and population, (2) judgeships and caseloads, (3) how quickly the circuit disposes of cases, (4) cost of splitting the circuit, (5) *en banc* procedures, and (6) the circuit's rulings. Proponents of splitting the Ninth Circuit argue that the court is too big and covers too many people to operate effectively. Opponents of a split generally respond that although the Ninth Circuit is big, it still delivers effective justice and provides legal continuity for the western United States. Opponents of a split

[13] Subcommittee on Administrative Oversight and the Courts, *Revisiting Proposals to Split the Ninth Circuit: An Inevitable Solution to a Growing Problem*, pp. 9-11. Although Sen. Murkowski's testimony references "S. 1824" (p. 9), this is apparently a typographical error. In the same sentence, Sen. Murkowski references the "Circuit Court of Appeals Restructuring and Modernization Act of 2005," which is S. 1845. S. 1824, as introduced in the 109th Congress, is an unrelated bill sponsored by Sen. John Kerry.

[14] This information is based on the author's observations at the hearing. For hearing statements, see U.S. Congress, Senate Committee on the Judiciary, "Examining the Proposal to Restructure the Ninth Circuit," 109th Cong., 2nd sess., Sept. 20, 2006; available online at http://judiciary.senate.gov/hearing.cfm?id=2071.

also often assert that dividing the court is a backdoor method of eliminating the current Ninth Circuit due to its reputation as the nation's most liberal appellate court. Proponents of a split deny that the Ninth Circuit is targeted for division based on its sometimes controversial rulings, saying instead that effective judicial administration is the prime concern.

Opponents of a split also say that the Ninth Circuit handles its large number of appeals well, and that professional case management helps facilitate circuit operations. For example, former Ninth Circuit Chief Judge James R. Browning has argued that the Ninth Circuit's innovations, such as computerized docketing and long-range planning, serve as models for other courts.[15] Those against a split also contend that duplicating staff and administrative functions in a reorganized circuit would be costly and unnecessary. Opponents warn that existing Ninth Circuit staff expertise—which they contend enhances the current circuit's functioning—could not necessarily be replicated in proposed Twelfth or Thirteenth Circuits.

Those supporting a split counter that the Ninth Circuit is overworked. They contend that reducing the circuit's caseload by dividing the circuit falls within Congress's responsibility to manage the federal courts, and that failing to do so jeopardizes timely access to justice. Proponents fear that judges are too busy to effectively manage the court and say that dividing the circuit and adding new judgeships would allow judges to follow cases more closely. Finally, those who support a split maintain that the Ninth Circuit's administrative innovations are ultimately a short-term solution to a long-term problem.[16]

The Ninth Circuit's efficiency is often discussed in the debate over whether Congress should split the circuit. Although "efficiency" is commonly cited on both sides of the debate, measurements for the term are rarely defined. Efficiency could be measured in a variety of ways, with varying results. Because there is no universally accepted definition of "efficiency" in the current debate over splitting the Ninth Circuit, this report discusses various Ninth Circuit outputs, such as caseloads and how quickly the circuit disposes of cases, but does not address the Ninth Circuit's efficiency per se.

Geography and Population

The Ninth Circuit's geography and population are controversial for two reasons: the large area the circuit encompasses, and a feeling among some observers that cases originating in California dominate the court's docket. In both land area and population, the Ninth Circuit surpasses all other federal circuits. In 2004, the area covered by the Ninth Circuit included more than 58 million people, almost 36 million of whom lived in California.[17] Currently, the Sixth Circuit

[15] Judge James R. Browning, "Innovations of the Ninth Circuit," *U.C. Davis Law Review*, vol. 34, no. 2 (Winter 2000), pp. 357-363. For a brief overview of the circuit's recent use of technology and staff, see Cathy Catterson, "Changes in Appellate Caseload and its Processing," *Arizona Law Review*, vol. 48, no. 1 (2006), pp. 287-299. Catterson is Clerk of Court for the Ninth Circuit.

[16] For example, in a March 2006 statement about H.R. 4093 in the *Congressional Record*, Rep. Michael Simpson argued that "No amount of technology and innovation is going to provide my constituents with the efficiency and expediency that they deserve. The current judges of the Ninth deserve a collegial atmosphere where they can spend time on case law and not case management." See Rep. Michael K. Simpson, "The Federal Judgeship and Administrative Efficiency Act of 2005," remarks in the House, *Congressional Record*, daily edition, vol. 152 (March 15, 2006), p. E368.

[17] The author calculated the Ninth Circuit's estimated population by taking the sum of the Census Bureau's 2004 population estimates (released on Aug. 11, 2005; see http://www.census.gov/popest/estimates.php) for the states included in the Ninth Circuit. To this, the author added the 2000 populations for Guam and the Northern Mariana (continued...)

(Kentucky, Michigan, Ohio, and Tennessee) is the second-most-populous circuit, with a 2004 estimated population of more than 31 million. Proponents of a split contend that decreasing the current Ninth Circuit's population could improve judicial administration and suggest that rapid population growth in the West will exacerbate the Ninth Circuit's workload challenges.[18]

Those opposing a split contend that the Ninth Circuit's large geography is essential in maintaining one legal voice for the western United States. Senator Dianne Feinstein, a member of the Judiciary Committee who opposes a split, stated during an October 2005 committee hearing that:

> [t]he uniformity of law in the West is a key advantage of the 9th Circuit, providing consistency among western states that share many common concerns. For example, splitting the circuit could result in one interpretation of a law governing trade with Mexico in California and a different one in Arizona, or in the application of environmental regulations one way on the California side of Lake Tahoe, and another way on the Nevada side.[19]

By contrast, Ninth Circuit Judge Diarmuid O'Scannlain, who supports a split, testified that the need for a unified legal voice for the West and Pacific Coast is "a red herring." He also argued that the Atlantic Coast has "five separate circuits," and that "[t]here is no corresponding 'Law of the South' nor 'Law of the East.'"[20]

Judgeships and Caseloads in the Current Ninth Circuit and Other Circuits

For the 11 numbered circuits and the D.C. Circuit, there are currently 167 authorized judgeships, which are filled with full-time, active judges. In many circuit courts, temporary judges and senior judges also help handle the judiciary's business. Temporary judgeships are filled by additional appointments to the bench, which temporarily increase the number of judgeships for a particular circuit or district. The total number of judgeships authorized for the district or circuit reverts back to the number of permanently authorized judgeships at a future point specified by statute, in this case, when the next two vacancies among authorized Ninth Circuit judges occur at least 10 years after two temporary judges are appointed (see the **Appendix**). Senior judges are those who have taken "senior status," a specialized form of judicial retirement.[21] Although many senior judges carry large caseloads and contribute significantly to the court's workforce, specific duties and volume of work for senior judges can vary substantially. Therefore, senior judges are not included in caseload estimates presented later in this report.

(...continued)

Islands, which were apparently not included in the 2004 population estimates. Using this method, the total population of the Ninth Circuit is estimated to be 58,233,206. For 2004 estimates, see the "population finder" link from the Census Bureau's home page at http://www.census.gov/. For 2000 Guam and Northern Mariana Islands populations, see http://www.census.gov/population/www/cen2000/islandareas.html.

[18] See, for example, U.S. Congress, House Committee on the Budget, *Deficit Reduction Act of 2005*, report to accompany H.R. 4093, 109th Cong., 2nd sess., H.Rept. 109-373 (Washington: GPO, 2006), p. 15.

[19] Statement of Sen. Dianne Feinstein, in U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Administrative Oversight and the Courts, *Revisiting Proposals to Split the Ninth Circuit: An Inevitable Solution to a Growing Problem*, p. 5.

[20] Testimony of Circuit Judge Diarmuid O'Scannlain, in U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Administrative Oversight and the Courts, *Revisiting Proposals to Split the Ninth Circuit: An Inevitable Solution to a Growing Problem*, p. 11.

[21] For additional information, see *Senior Status and Retirement for Article III Judges,* April 1999 (Judges Information Series, No. 4); and 28 U.S.C. §371.

As shown in **Table 1**, the Ninth Circuit has 28 authorized circuit judgeships, although two seats on the court are currently vacant. The other circuits have between six (First Circuit) and 17 (Fifth Circuit) authorized judgeships.[22] In addition to the Ninth Circuit's 26 filled, authorized circuit judgeships, 23 senior judges are assigned to the circuit. In total, 49 judges currently serve the Ninth Circuit.

Table 1. Authorized Judgeships and Vacancies in the Circuit Courts of Appeals

Circuit	Current Number of Authorized Judgeships	Current Number of Vacant Authorized Judgeships	Percentage of Authorized Judgeships Currently Vacant[a]
First	6	0	0%
Second	13	1	7.7
Third	14	4	28.6
Fourth	15	3	20.0
Fifth	17	2	11.8
Sixth	16	2	12.5
Seventh	11	1	9.1
Eighth	11	0	0
Ninth	28	2	7.1
Tenth	12	0	0
Eleventh	12	0	0
D.C.	12	2	16.7

Sources: Administrative Office of the United States Courts (AO), "U.S. Courts of Appeals, Additional Judgeships Authorized by Judgeship Acts," available online at http://www.uscourts.gov/history/authorized_appeals.pdf; and "Vacancies in the Federal Judiciary—109th Congress," available online at http://www.uscourts.gov/cfapps/webnovada/CF_FB_301/index.cfm?fuseaction=Reports.ViewVacancies. Vacancies data are current as of Nov. 1, 2006, according to the AO website.

a. Percentages were calculated by CRS and rounded to the nearest decimal.

In FY2005, the Ninth Circuit led the nation in appellate filings, with 16,037 of 68,473 nationwide, as shown in **Table 2**.[23] By contrast, the other circuits' appeals filings in FY2005 ranged from 1,912 for the First Circuit, to 9,052 for the Fifth Circuit.[24] As **Table 2** shows, data from the Administrative Office of the United States Courts (AO) indicate that the Ninth Circuit was responsible for 21-27% of the nation's appellate workload (in appeals filed, terminated, and pending) in FY2005. **Table 2** also shows that the Ninth Circuit's appeals filings increased substantially (75.3%) between FY2000 and FY2005, from 9,147 to 16,037.[25] During the same period, all *other* circuits' filings increased by a comparatively small 15.1%, from 45,550 to

[22] 28 U.S.C. §44

[23] "U.S. Court of Appeals—Judicial Caseload Profile, National Totals" Administrative Office of the United States Courts; http://www.uscourts.gov/cgi-bin/cmsa2005.pl. This figure excludes data from the Federal Circuit.

[24] This excludes data for the Federal Circuit.

[25] CRS calculated this figure, which also appears in "U.S. Court of Appeals—Judicial Caseload Profile" for the Ninth Circuit and national totals, provided to CRS by the AO.

52,436.[26] As a result, the percentage of all filings assumed by the Ninth Circuit has increased in recent years. The same is generally true with regard to appeals terminated and appeals pending. The most recently available AO data suggest that the Ninth Circuit continues to experience a large workload. For the one-year period ending March 31, 2006, 15,953 appeals were filed in the Ninth Circuit; 13,590 appeals were terminated; and 17,262 appeals were pending.[27] Those figures all represented increases over the previous year.

Table 2. Ninth Circuit and All Other Circuits' Caseloads, FY2000-FY2005

	2000	2001	2002	2003	2004	2005
Appeals filed						
Ninth Circuit	9,147	10,342	11,421	12,872	14,274	16,037
All other circuits	45,550	47,122	46,134	47,975	48,488	52,436
Percentage of all filings assumed by Ninth Circuit	16.7	18.0	19.8	21.2	22.7	23.4
Percent change in Ninth Circuit filings compared with previous year	-2.5	13.1	10.4	12.7	10.9	12.4
Percent change in all other circuits' filings compared with previous year	1.0	3.5	-2.1	4.0	1.1	8.1
Appeals terminated						
Ninth Circuit	9,216	10,372	10,042	11,220	12,151	13,399
All other circuits	47,296	47,050	46,544	45,176	44,230	48,576
Percentage of all appeals terminated by Ninth Circuit	16.3	18.1	17.7	20.0	21.6	21.6
Percent change in Ninth Circuit appeals terminated compared with previous year	9.7	12.5	-3.2	11.7	8.3	10.3
Percent change in all other circuits' appeals terminated compared with previous year	3.5	-1.0	-1.1	-2.9	-2.1	9.8
Pending appeals						
Ninth Circuit	9,219	9,160	10,226	11,277	13,417	16,074
All other circuits	31,191	31,143	30,739	33,323	37,654	41,650
Percentage of all appeals pending in Ninth Circuit	22.8	22.7	25.0	25.3	26.3	27.8
Percent change in Ninth Circuit pending appeals compared with previous year	-1.0	-0.0	11.6	10.3	19.0	19.8
Percent change in all other circuits' pending appeals compared with previous year	-5.5	-0.0	-1.3	8.4	13.0	10.6

Source: "U.S. Court of Appeals—Judicial Caseload Profile," provided to CRS by the Administrative Office of the United States Courts.

Notes: Percentages were calculated by CRS and rounded to the nearest decimal. National totals do not include appeals filed in the Court of Appeals for the Federal Circuit. Data for "All Other Circuits" rows were calculated by CRS by subtracting caseload data for the Ninth Circuit from "national totals" data from the AO (cited above).

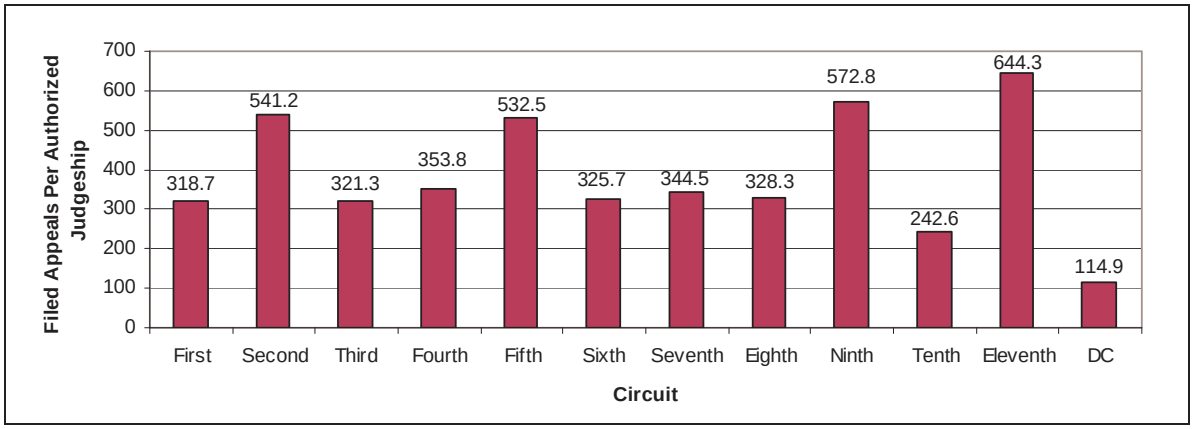
[26] CRS calculated this figure. Totals throughout this section do not include data for the Court of Appeals for the Federal Circuit.

[27] "Table B. U.S. Courts of Appeals, Appeals Commenced, Terminated, and Pending, by Circuit During the Twelve Month Periods Ending Mar. 31, 2005 and 2006," provided to CRS by the AO.

Years are based on the 12-month period ending on Sept. 30. Except where otherwise noted, this report relies on data for complete fiscal years to provide a uniform time frame for examining circuit courts' activities.

As **Figure 5** shows, the appellate courts' FY2005 caseload—measured in this report as filed appeals per authorized judgeship—falls into two groups: those circuits with fewer than 400 appeals filed per judge, and those with more than 500 appeals filed per judge. Four circuits have caseloads in the latter group. In FY2005, the Eleventh Circuit had the highest caseload in the nation: 644.3 filed appeals per authorized judgeship. The Ninth Circuit's caseload was the second-highest, with 572.8 appeals filed per authorized judgeship. Two other circuit courts trailed slightly behind the Ninth Circuit: the Second Circuit (541.2 appeals filed per authorized judgeship) and the Fifth Circuit (532.5 appeals filed per authorized judgeship). By contrast, eight other circuits' caseloads ranged from 114.9 appeals filed per authorized judgeship in the D.C. Circuit, to 353.8 cases per authorized judgeship for the Fourth Circuit.

Figure 5. FY2005 Caseloads in the Circuit Courts



Source: CRS analysis based on data in "U.S. Court of Appeals—Judicial Caseload Profile," provided to CRS by the Administrative Office of the United States Courts.

Note: Figure 5 is based on permanently authorized judgeships, and does not include temporary judgeships or senior judgeships.

Proposed Judgeships in a Reorganized Ninth Circuit

As is stated above, the Ninth Circuit currently has 28 authorized judgeships. In 2005 (the same year all the bills proposing to split the Ninth Circuit were introduced in the 109th Congress), the Judicial Conference—the judiciary's primary internal policymaking body—recommended that the Ninth Circuit receive five additional permanent judgeships (for a total of 33 authorized judgeships) and two temporary judgeships.[28] As the **Appendix** shows, all the bills introduced during the 109th Congress that propose to split the Ninth Circuit follow those recommendations. The bills differ in how those judgeships would be allocated to a new Ninth Circuit versus proposed Twelfth or Thirteenth Circuits after a split.

Of the 33 judgeships that would be authorized for the current Ninth Circuit, most bills that authorize a two-way split would place 19 of those judgeships in a new Ninth Circuit, and 14 in a Twelfth Circuit. The two temporary judgeships would go to the new Ninth Circuit and would

[28] Judicial Conference of the United States, *Judgeship Recommendations of the Judicial Conference 2005*, 2005, p. 6.

generally be housed in California. Under a three-way split proposed by H.R. 211 and S. 1301, the new Ninth Circuit would receive 19 authorized judgeships, compared with eight and six authorized judgeships, respectively, for the Twelfth and Thirteenth Circuits. Under all seven bills, senior judges would be allowed to choose the circuit to which they would be assigned.[29]

The 2005 AO Caseload Estimate for a Reorganized Ninth Circuit

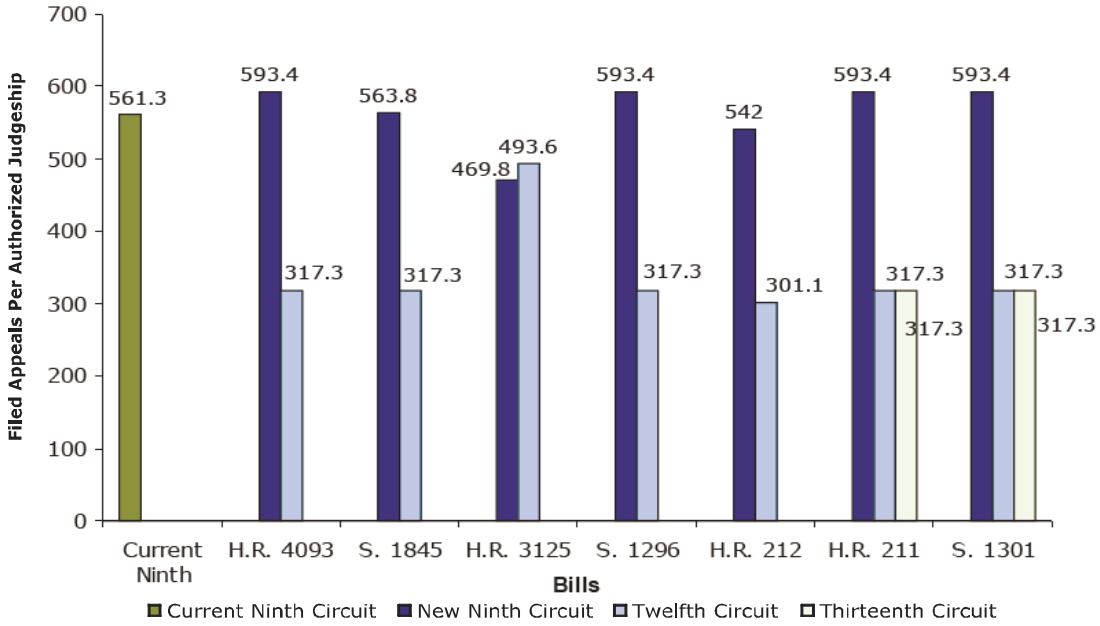
To gauge a reorganized Ninth Circuit's caseload, a representative from the AO reports that, in October 2005, the office developed an approximation of how appeals would have been divided between proposed new Ninth and Twelfth Circuits for the year ending June 30, 2005.[30] During that one-year period, the Ninth Circuit, as *currently* structured, received a total of 15,717 filed appeals. Of those, the AO estimated that a total of 11,275 appeals from district courts and federal agencies were filed in what would be the *new* Ninth Circuit (under H.R. 4093 and S. 1845, with the same boundaries established in S. 1296 and H.R. 3125) compared with 4,442 cases filed in what would be the Twelfth Circuit. This suggests that a new Ninth would have carried 71.7% of cases of the current Ninth Circuit, compared with 28.3% for a new Twelfth Circuit.[31] The following analysis extends the AO's estimates of how appeals would have been divided among circuits for the year ending June 30, 2005—the latest available AO projections—to all seven bills introduced in the 109th Congress that would split the Ninth Circuit.

[29] As explained previously, because senior judges carry different workloads comprised of different duties, they are not included in the following caseload estimates.

[30] This information is based on correspondence between the author and a representative from the Office of Legislative Affairs at the AO, March 2006. Although the AO reportedly does not anticipate producing updated caseload estimates, the proportion of cases that would be allocated to new Ninth and Twelfth Circuits is expected to remain consistent with the October 2005 estimates, provided that proposed boundaries for a two-way split also remain consistent with current proposals. This information comes from February 2006 correspondence between the author and a representative of the Office of Legislative Affairs at the AO.

[31] The author calculated these figures; see also "Ninth Circuit Legislation Overview;" tables submitted on Oct. 25, 2005, in response to a request from Honorable Dianne Feinstein by Leonidas Ralph Mecham, Director, Administrative Office of the United States Courts," prepared Oct. 24, 2005; provided to CRS by the Office of Legislative Affairs at the AO. The AO's estimates were based on H.R. 4093 and S. 1845, both of which establish the same geographic boundaries for the new circuits. As previously explained, these boundaries are the same as those established by H.R. 3125 and S. 1296, although the bills authorize different numbers of judgeships. The AO's estimate was based on H.R. 4093 and S. 1845 as of October 2005. As originally introduced in the House, H.R. 4093 authorized 20 judges for the new Ninth Circuit, as does S. 1845. The version of H.R. 4093 reported from committee and placed on the Union Calendar—the version currently pending consideration—authorizes 19 judges for a new Ninth Circuit. S. 1845 still authorizes 20 judgeships for a new Ninth Circuit.

Figure 6. Estimated Caseloads for New Ninth, Twelfth, and Thirteenth Circuits for the Year Ending June 30, 2005



Source: CRS analysis based on data in "Appellate Caseload & Number of Judges: S. 1845/H.R. 4093 Scenario," provided to CRS by the Office of Legislative Affairs at the AO. CRS calculated estimated caseloads for each proposed circuit by adding together state appeals filings (reported in Ibid.), grouped by proposed circuits, and dividing the total estimated number of cases in each proposed circuit by the number of authorized judgeships designated for each circuit across the seven bills. All figures are rounded to the nearest decimal.

Note: Figure 6 is based on permanently authorized judgeships and does not include temporary or senior judgeships. See footnotes in the text below for caseloads including temporary judgeships.

Estimated Caseloads Among Bills Introduced During the 109th Congress

As **Figure 6** shows, the seven bills introduced in the 109th Congress to split the Ninth Circuit would produce somewhat different caseload results, both compared with caseloads for the *current* Ninth Circuit, and for a new Ninth Circuit compared with proposed Twelfth or Thirteenth Circuits. Five of the bills produce a new Ninth Circuit, for the year ending June 30, 2005, that is each somewhat higher (based on authorized judgeships) than the caseload of the current Ninth Circuit during the same period. However, when the two temporary judgeships the bills designate for a new Ninth Circuit are included, estimated caseloads fall below current levels. Specifically, as **Figure 6** shows, the caseload in the current Ninth Circuit is 561.3 appeals filed per authorized judge, whereas H.R. 4093, S. 1296, H.R. 211, and S. 1301—all of which propose the same boundaries for a new Ninth Circuit—would produce an estimated 593.4 appeals for 19 authorized judges.[32] S. 1845, with the same boundaries for a new Ninth Circuit but with 20 authorized judgeships, would produce an estimated caseload of 563.8 appeals filed per judge in the new circuit—slightly higher than the current Ninth Circuit's caseload.[33]

[32] If including the two temporary judgeships allocated for the new Ninth Circuit, the estimated caseload is 536.9 appeals per judgeship (authorized plus temporary).

[33] If including the two temporary judgeships allocated for the new Ninth Circuit, the estimated caseload is 512.5 (continued...)

On the other hand, one bill (H.R. 212) is estimated to reduce a new Ninth Circuit's caseload somewhat (to 542 cases per authorized judge[34]) compared with the current Ninth Circuit's caseload for the same period. Another bill (H.R. 3125) would have reduced the Ninth Circuit's caseload substantially, producing an estimated caseload for a new Ninth Circuit of 469.8 appeals filed per authorized judge[35] for the year ending June 30, 2005. This caseload would be less than the estimated caseload for the Twelfth Circuit. By contrast, the data suggest that six of the seven bills (all except H.R. 3125) would yield higher caseloads for the new Ninth Circuit than the projected caseloads for proposed Twelfth or Thirteenth Circuits.

Caseload estimates from other sources, conducted at other times or employing different methodologies, can produce somewhat different results. In his September 20, 2006, Senate testimony, Ninth Circuit Judge Sidney R. Thomas, who opposes a split, testified "using calendar 2005 figures" that under S. 1845, caseload for judges in a new Ninth Circuit would have been 526 cases per judgeship, compared with 316 cases per judgeship for the Twelfth Circuit.[36] Judge Thomas also suggested that "allocation of cases per judgeship does not tell the real story" because new Ninth Circuit judgeships could initially be unfilled, dramatically increasing caseloads for judges who are serving immediately after a split.[37] By contrast, at the same hearing, relying on data for the year ending March 31, 2006, Chief District Judge John Roll, who supports a split, testified that under a two-way split proposed in S. 1845, a new Ninth Circuit would have yielded 518 cases per active judgeship, compared with 351 cases per active judgeship for a Twelfth Circuit.[38] Ninth Circuit Judge Richard Tallman, who supports a split, found that a new Ninth Circuit would yield 495 cases per active judge, compared with 341 for those active judges in a Twelfth Circuit.[39]

The Influence of Context on Caseloads

The quantitative data presented throughout this report provide information about how many cases each circuit—under current proposals and assuming that all judgeships are filled—would carry. Context (e.g., complexity, types of cases courts handle, and additional vacancies) could also play a role in caseload considerations. As the following section explains, immigration cases are particularly prominent in the Ninth Circuit.

(...continued)

appeals per judgeship (authorized plus temporary).

[34] If including the two temporary judgeships allocated for the new Ninth Circuit, the estimated caseload is 500.3 appeals per judgeship (authorized plus temporary).

[35] If including the two temporary judgeships allocated for the new Ninth Circuit, the estimated caseload is 433.7 appeals per judgeship (authorized plus temporary).

[36] Written testimony of Sidney R. Thomas, United States Circuit Judge, U.S. Court of Appeals for the Ninth Circuit, delivered at the hearing on "Examining the Proposal to Restructure the Ninth Circuit," Sept. 20, 2006, p. 34. The cited version of Judge Thomas's testimony was distributed at the hearing. The version of the testimony posted online at http://www.judiciary.senate.gov/testimony.cfm?id=2071&wit_id=4732 appears to be incomplete.

[37] Ibid.

[38] Written testimony of John M. Roll, Chief United States District Judge, U.S. District Court for the District of Arizona, delivered at the hearing on "Examining the Proposal to Restructure the Ninth Circuit," Sept. 20, 2006, p. 17. The cited version of Judge Roll's testimony was distributed at the hearing and is available online at http://www.judiciary.senate.gov/testimony.cfm?id=2071&wit_id=4731.

[39] Written testimony of Richard C. Tallman, United States Circuit Judge, U.S. Court of Appeals for the Ninth Circuit, Exhibit 8. delivered at the hearing on "Examining the Proposal to Restructure the Ninth Circuit," Sept. 20, 2006. This version of Judge Tallman's testimony was distributed at the hearing.

Caseload and Immigration Cases. Opponents of a split say that the Ninth Circuit's backlog of cases has been temporarily increased by the large number of administrative petitions from Board of Immigration Appeals (BIA) cases, slowing the court's overall work.[40] According to the AO, as of October 2005, 41% of Ninth Circuit filings were BIA appeals, and 88% of those were filed in California.[41] In 2005, Ninth Circuit Judge Sidney R. Thomas, who opposes a split, testified that from 2001 to 2005 (through June 30), BIA appeals for the circuit had increased 570%, but added that, "while the courts can expect continued volume [of BIA appeals] for the next several years, the volume of immigration cases should decrease as the BIA becomes current in its case processing." Judge Thomas also said that centralized circuit staff resolve "well over 80 percent" of immigration petitions before they reach judges, and added that although many BIA appeals take time to resolve, much of the delay is due to what he sees as slow government filings, not the Ninth Circuit itself.[42]

On a related note, during the spring of 2006, Congress considered proposals to transfer immigration appeals from the regional circuit courts to the Court of Appeals for the Federal Circuit or another entity. On April 3, 2006, the Senate Judiciary Committee held hearings on immigration litigation reform, which briefly addressed a proposed Ninth Circuit split. In response to a question from Senator Jeff Sessions, Ninth Circuit district judge John M. Roll stated his opinion that centralizing immigration appeals outside the regional circuits would not, on its own, alleviate the need to split the Ninth Circuit. Writing in *The National Law Journal* before the hearing, Judge Roll called for centralizing immigration appeals *and* splitting the Ninth Circuit to reduce the circuit's caseload. According to Judge Roll, if S. 1845 or H.R. 4093 were adopted, and all BIA appeals were transferred to the Federal Circuit, "the new 9th Circuit would keep 60% of the current 9th Circuit caseload and have 61% of the judges allotted to the new 9th and 12th circuits. The new 12th Circuit would have 40% of the current caseload and 39% of the allotted judges."[43] The Judicial Conference reportedly opposed centralizing immigration appeals, and some observers opposed to centralizing immigration litigation reportedly believed that the move, in part, was an attempt to reduce the Ninth Circuit's influence on immigration law.[44]

[40] The BIA is an 11-member administrative body within the Department of Justice. The BIA has nationwide jurisdiction and, according to the board's website, is "the highest administrative body for applying and interpreting immigration laws." However, its decisions may be appealed to federal courts. For a brief overview of the BIA, see http://www.usdoj.gov/eoir/biainfo.htm.

[41] Table note 3 in "Appellate Caseload & Number of Judges: S. 1845/H.R. 4093 Scenario," provided to CRS by the Office of Legislative Affairs at the AO.

[42] Testimony of Circuit Judge Sidney R. Thomas, in U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Administrative Oversight and the Courts, *Revisiting Proposals to Split the Ninth Circuit: An Inevitable Solution to a Growing Problem*, p. 179.

[43] John M. Roll, "Court is too big, too slow," *The National Law Journal*, March 13, 2006, p. 26. For additional information, see "Specter Withdraws Proposal to Send Appeals of Immigration Cases to Federal Circuit," *Daily Report for Executives*, March 30, 2006, p. A-13; Maura Reynolds, "Plan to Reroute Immigration Appeals Hits Some Red Lights," *Los Angeles Times*, April 2, 2006, p. A23; and Ralph Lindeman, "Federal Circuit Chief Judge Opposes Plan to Consolidate Immigration Appeals in Circuit," *Daily Report for Executives*, April 4, 2006; p. A-1. For background information on immigration litigation, see CRS Report RL33125, *Immigration Legislation and Issues in the 109th Congress*, by (name redacted) et al., especially pp. 16-18.

[44] Maura Reynolds, "Plan to Reroute Immigration Appeals Hits Some Red Lights," *Los Angeles Times*, p. A23.

How Quickly the Circuit Disposes of Cases

In FY2005, the Ninth Circuit disposed of cases in a median[45] of 16.1 months after filing, ranking it last among the 12 circuits (see **Table 3**).[46] Those favoring a split contend that this length of time is another indicator that the Ninth Circuit is too big and has too much work. Opponents of a split argue that the current Ninth Circuit functions well given its heavy caseload, and that its judges and large, experienced staff are essential in doing so. Potential mitigating factors, such as the type or complexity of cases filed, or the contention by many Ninth Circuit judges that the court reaches decisions quickly once judges hear cases, could also affect caseload considerations. Writing jointly in the March 2006 edition of *Engage* (a journal published by the Federalist Society), more than 30 Ninth Circuit judges argued that, although backlogs delay consideration of cases in the Ninth Circuit, "once the cases are submitted to the judges, we are the second-*fastest* among the circuits in disposing of them."[47]

Table 3. Median Time in Months from Filing Notice of Appeal to Disposition for FY2005

Ranking based on shortest time	Circuit	Median time in months
1	Fourth	8.0
2	Eleventh	9.5
3	Fifth	10.3
4	Seventh	10.6
5	Eighth	10.7
6	D.C.	11.2
7	Third	11.7
8	Tenth	12.0
9	Second	13.0
10	First	13.2
11	Sixth	14.5
12	Ninth	16.1

Source: "U.S. Court of Appeals—Judicial Caseload Profile," Administrative Office of the United States Courts; provided to CRS by the AO.

[45] The median identifies the mid-point for individual sets of ordered observations. It is often a preferred social science measure of central tendency, and is unaffected by extreme values (unlike the average or mean). For more information, see William H. Greene, *Econometric Analysis*, 5th ed. (Upper Saddle River, NJ: Prentice Hall, 2003, p. 847); and Ya-lun Chou, *Statistical Analysis for Business and Economics* (New York: Elsevier, 1989), chapter 4.

[46] See "U.S. Court of Appeals—Judicial Caseload Profile," FY2000-FY2005 data provided to the author by the AO.

[47] Mary M. Schroeder et al., "A Court United: A Statement of a Number of Ninth Circuit Judges," *Engage*, vol. 7, no. 1 (March 2006), p. 64. Emphasis in original.

Cost of Splitting the Circuit

Opponents of a split say that administrative costs associated with splitting the Ninth Circuit and establishing new headquarters, staff support, and related administrative expenses in the proposed Twelfth Circuit (or Twelfth and Thirteenth Circuits) are unnecessary and would strain limited financial resources. Those who favor a split generally concede that there will be short-term costs associated with dividing the circuit, but suggest that long-term savings and improved judicial administration will outweigh those costs.

Cost estimates for splitting the Ninth Circuit vary depending on the source and level of detail. In October 2005, the AO estimated that if a Twelfth Circuit's headquarters were located in Phoenix (as specified in S. 1296 and S. 1845), the startup cost would be more than $94 million, and annual recurring costs would be more than $10 million. If the Twelfth's headquarters were in Seattle (another site discussed as a possible headquarters), the AO estimated that the expense would be substantially less—more than $12 million in startup costs, with $7 million in annual recurring costs.[48] The Phoenix-versus-Seattle estimates reportedly vary largely because of costs associated with constructing a new headquarters facility versus renovating an existing one.

In another estimate, the Congressional Budget Office (CBO) stated that establishing a headquarters for a Twelfth Circuit "could range from about $20 million to over $80 million over the 2006-2010 period," depending on the location of the new headquarters and whether an existing facility would be renovated or a new facility constructed. CBO estimated that staff expenses for the Twelfth Circuit, such as relocation costs, severance pay for staff who did not relocate, and equipment, could require "$6 million in fiscal year 2006 and $28 million over the 2006-2010 period."[49] Research conducted for this report reveals no publicly available cost estimates for a Thirteenth Circuit.

En Banc Procedures

Proponents of a split generally argue that the Ninth Circuit is too large to hold effective *en banc* hearings. *En banc* hearings in other circuits typically involve all a court's active judges, and are normally reserved for cases in which the full court wishes to reconsider the opinion of a three-judge appellate panel. Unlike other circuits, though, the Ninth Circuit employs a "limited *en banc*" procedure, which, until January 2006, allowed 11 judges (rather than the entire court) to serve as a full *en banc* panel.[50] Proponents of a split contend the Ninth Circuit's reliance on

[48] The AO's estimates were based on the language in H.R. 4093 and S. 1845, although S. 1296 also calls for the Twelfth's headquarters to be located in Phoenix. See "Ninth Circuit Legislative Overview;" and "Ninth Circuit Legislation Cost Estimate;" tables submitted on Oct. 25, 2005, in response to a request from Honorable Dianne Feinstein by Leonidas Ralph Mecham, Director, Administrative Office of the United States Courts," prepared Oct. 24, 2005; provided to CRS by the Office of Legislative Affairs at the AO. The estimates cited above do not include the cost of the seven additional judgeships (five permanent and two temporary) prescribed for the Ninth Circuit under H.R. 4093. If the seven additional judgeships are included, start-up costs reportedly range from almost $14 million if the Twelfth Circuit's headquarters were located in Seattle, to more than $95 million if the Twelfth Circuit's headquarters were located in Phoenix. Recurring costs were estimated at almost $16 million in Phoenix, and slightly more than $13 million in Seattle. See "Incremental Costs Associated With S. 1845/H.R. 4093—HQ in Phoenix—With New Judgeships"; and "Incremental Costs Associated With S. 1845/H.R. 4093—HQ in Seattle—With New Judgeships," Ibid.

[49] Congressional Budget Office Cost Estimate "H.R. 4093: Federal Judgeship and Administrative Efficiency Act of 2005," Nov. 21, 2005, p. 1.

[50] 92 Stat. 1633 (1978), P.L. 95-486, allows a circuit with more than 15 active judges to "perform its en banc function (continued...)

limited *en banc* procedures allows a minority of judges to speak for the entire court. According to Ninth Circuit judge Andrew Kleinfeld (testifying in October 2005), who supports a split, "When the full court purports to speak, it doesn't.... A majority of an en banc panel—six judges—is not even one-fourth of the full court when fully staffed."[51] Although noting that the limited *en banc* procedure "has a number of virtues," Ninth Circuit Judge Pamela Ann Rymer wrote in March 2006 that "[T]here is a systematic flaw in the limited en banc concept that is not without consequence. The limited en banc is premised at least in part on the notion that some number of judges smaller than the whole can represent the entire court. However, the premise is in inapposite to the judiciary."[52] Some supporting a split also contend that limited *en banc* decisions might have changed if different judges had been assigned to *en banc* panels, therefore potentially producing inconsistent circuit rulings.[53]

Ninth Circuit Chief Judge Mary M. Schroeder announced on October 1, 2005, that beginning on January 1, 2006, the circuit would increase the size of *en banc* panels from 11 to 15 judges. According to Chief Judge Schroeder, although she has been satisfied with the 11-judge panels, the decision to increase panel size was "intended to respond to criticism that we should have a majority of our judges sit on each en banc [panel]."[54] According to a court staff member, the first enlarged *en banc* panels began hearing cases in March 2006.[55]

Opponents of a split contend that the *en banc* issue is not a major concern because so few of the court's cases are appealed for rehearing *en banc*. According to Judge Sidney R. Thomas, who serves as the Ninth Circuit's *en banc* coordinator and opposes a split, "Out of 5,783 cases decided in the Ninth Circuit between September 2003 and September 2004, only 13 (or .2%) were reheard en banc. This experience is consistent with the practices of other circuits." Judge Thomas challenged claims that the views of *en banc* panels are unrepresentative of the entire circuit, saying that "very few decisions made by the en banc panels involved close votes," and that the circuit's Evaluation Committee has been satisfied that *en banc* opinions are representative of the entire circuit. Judge Thomas also stated that, although *en banc* panels currently do not include the entire court, voting on whether a matter should be granted an *en banc* hearing is still open to all active judges on the circuit, and that any active or senior judge may request an *en banc* hearing.[56]

(...continued)

by such number of members of its en banc courts as may be prescribed by rule of the court of appeals."

[51] Testimony of Circuit Judge Andrew Kleinfeld, in U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Administrative Oversight and the Courts, *Revisiting Proposals to Split the Ninth Circuit: An Inevitable Solution to a Growing Problem*, p. 61. Sen. Jon Kyl, who supports a split, made a similar statement in 2005. See "Kyl Urges Serious Consideration of Proposals to Split 9th Circuit Court," press release, the Office of Sen. Jon Kyl, Oct. 26, 2005.

[52] Hon. Pamela Ann Rymer, "The 'Limited' En Banc: Half Full, or Half Empty?" *Arizona Law Review*, vol. 48, no. 1 (2006), p. 319.

[53] See, for example, Diarmuid F. O'Scannlain, "Ten Reasons Why the Ninth Circuit Should be Split," *Engage*, vol. 6, no. 2 (Oct. 2005), p. 62; see also Diarmuid F. O'Scannlain, "Ten Reasons Why the Ninth Circuit Should be Split," paper presented at The Federalist Society, Harvard Chapter, Harvard Law School, Cambridge, MA, Mar. 16, 2006.

[54] "Ninth Circuit to Increase Size of *En Banc* Courts," press release, Public Information Office, United States Courts for the Ninth Circuit, Oct. 1, 2005; http://www.ce9.uscourts.gov/Web/OCELibra.nsf/504ca249c786e20f85256284006da7ab/5140153ce86f06e38825708f0068c5c6?OpenDocument.

[55] Telephone conversation between the author and Kevin Madden, manager of the Public Information Office, Ninth Circuit Court of Appeals, San Francisco, March 21, 2006.

[56] Testimony of Circuit Judge Sidney R. Thomas, in U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Administrative Oversight and the Courts, *Revisiting Proposals to Split the Ninth Circuit: An Inevitable Solution to a Growing Problem*, pp. 170-171.

The Circuit's Rulings

Some of the Ninth Circuit's rulings have, on occasion, been controversial. Recently, the circuit's rulings on social issues (e.g., holding in 2002 that the phrase "under God" in the Pledge of Allegiance violated the Constitution) have reportedly fueled opposition to the circuit.[57] Some proponents of a split also say that some Ninth Circuit rulings do not represent the conservative political culture of much of the western United States, reflecting what some observers perceive as a division between California and much of the rest of the circuit.[58]

Proponents of splitting the Ninth Circuit also contend that the Supreme Court reverses the Ninth Circuit, often unanimously, more frequently than any other circuit court.[59] For the 2004 term (which ended in 2005), of 43 Supreme Court reversals for the circuit courts, 12 reversed the Ninth Circuit—more than any other circuit.[60] Opponents of a split respond that only a small fraction of the circuit's rulings are granted review by the Supreme Court, and that Ninth Circuit reversals are not dramatically different than reversal rates for other circuits in recent years.[61] Similarly, some opposed to splitting the Ninth Circuit also suggest that efforts to divide the circuit threaten judicial independence.[62] Supporters of splitting the circuit deny that position. For example, Ninth Circuit Judge Diarmuid O'Scannlain testified in October 2005 that "the case for the split stands on the grounds of effective judicial administration, supported by the statistics which show the ongoing caseload explosion."[63]

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[57] See *Newdow v. U.S. Congress*, 292 F.3d 597 (9th Cir. 2002); and CRS Report RS21250, *The Constitutionality of Including the Phrase "Under God" in the Pledge of Allegiance*, by (name redacted). On media coverage of reported opposition to some of the Ninth Circuit's rulings, see, for example, Emma Vaughn, "GOP Resurrects Plan to Split the 9th Circuit in Two," *Los Angeles Times*, Oct. 27, 2005, p. A16; and Alicia Mundy, "Once again, Magnuson the talk of Washington," *Seattle Times*, Nov. 26, 2005, p. B1.

[58] In Idaho, for example, a spokesperson for Idaho Chooses Life, an anti-abortion group, was quoted in 2005 by the Idaho Falls *Post Register* as being "tired of 'California liberals' having veto power over Idaho's social policies." See Corey Taule, "Splitting the 9th," *Post-Register* (Idaho), Nov. 11, 2005, p. A01.

[59] On this point, and summary and unanimous reversals, see U.S. Congress, House Committee on the Budget, *Deficit Reduction Act of 2005*, p. 719. On Ninth Circuit reversals, see also Kevin M. Scott, "Understanding Judicial Hierarchy: Reversals and the Behavior of Intermediate Appellate Judges," Law and Society Review, vol. 40, no. 1 (Jan. 2006), pp. 163-192; Kevin M. Scott, "Supreme Court Reversals of the Ninth Circuit," *Arizona Law Review*, vol. 48, no. 1 (2006), pp. 341-354; and Stephen J. Wermiel, "Exploring the Myths About the Ninth Circuit,"*Arizona Law Review*, vol. 48, no. 1 (2006), pp. 355-367.

[60] "Table II (E)," *Harvard Law Review*, vol. 119, no. 1 (Nov. 2005), p. 427.

[61] On potential reasons for the Ninth Circuit's allegedly high reversal rate and the position that the circuit's reversal rate is consistent with other circuits, see Erwin Chemerinsky, "Ninth Circuit Review: The Myth of the Liberal Ninth Circuit," *Loyola of Los Angeles Law Review*, vol. 37 (Fall 2003), pp. 1-21. See also Jeff Chorney, "9th Circuit dominates the high court's docket," *National Law Journal*, July 5, 2004, p. 6

[62] See, for example, The Office of Senator Dianne Feinstein, "Statement of Senator Feinstein on Withdrawal of 9th Circuit Split Provision," press release, Dec. 20, 2005.

[63] Testimony of Circuit Judge Diarmuid O'Scannlain, in U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Administrative Oversight and the Courts, *Revisiting Proposals to Split the Ninth Circuit: An Inevitable Solution to a Growing Problem*, p. 102.

At the September 2006 Senate Judiciary Committee hearing, former Senator and California Governor Pete Wilson suggested that a split would not necessarily create a conservative Twelfth Circuit any time in the near future, since the new circuit would presumably adopt precedents of the current Ninth Circuit. According to Governor Wilson, "[A]ny change will be so gradual and time-consuming as to not likely be noticed much in our own lifetimes."[64] Governor Wilson also noted his continued opposition to splitting the Ninth Circuit.

Judges' Opinions on a Split

Although a few Ninth Circuit judges vocally support a split, the majority of the court's active judges reportedly do not. Since late 2005, however, public statements from some judges suggested possible divisions on the split issue between most active *circuit* judges on one hand, and some retired circuit judges and *district* judges on the other. According to Ninth Circuit Chief Judge Mary Schroeder, in April 2004, Ninth Circuit judges held a retreat to discuss splitting the circuit, followed by "a mail ballot" to the judges on the court. Judges were asked to select from three options: "(1) oppose a division of the Ninth Circuit; or (2) favor a division of the Ninth Circuit; or (3) abstain from voting."[65] In a May 5, 2004, letter to members of the Senate Judiciary Committee, Judge Schroeder reported the results:

> The Court currently has a total of 47 judges serving on the court, 26 active judges and 21 senior judges, plus two vacancies. The vote concluded on April 30, 2004. Of the 47 judges, 30 judges voted in opposition to circuit division, nine voted in favor of circuit division and eight judges abstained from voting. Of the 26 active judges, only four active judges favor division, fifteen active judges oppose division, and six active judges abstained from voting. Of the 21 senior judges, fifteen senior judges oppose circuit division, five senior judges favor division, and two senior judges abstained.[66]

As was noted previously, more than 30 Ninth Circuit judges wrote a joint *Engage* article in March 2006 arguing against a split. Chief Judge Schroeder also reiterated many of her objections to a split during remarks at the July 2006 Ninth Circuit Judicial Conference—a gathering of the circuit's judges, court employees, agency representatives, and attorneys. According to Judge Schroeder, "If the United States Senate Judiciary Committee is seriously considering the subject [of a split], we deserve a full, fair and adequately noticed opportunity to explain why so many of us think it is a bad idea, to look at its real costs, the imbalance in caseload it would produce, as well as its implications for law enforcement at the border."[67]

Ninth Circuit judge Carlos Bea has also reportedly raised concerns about a split shifting all sitting Latino judges to a new Ninth Circuit. According to an *Arizona Republic* columnist who wrote in October 2006 that Judge Bea contacted him about the split, the judge was concerned "that

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[64] "Statement of Honorable Pete Wilson in Opposition to S. 1845 to the Committee on the Judiciary of the United States Senate," Sept. 20, 2006, n.p. This version of Governor Wilson's testimony was distributed at the hearing and is available online at http://www.judiciary.senate.gov/testimony.cfm?id=2071&wit_id=5756.

[65] Letter from Mary M. Schroeder, chief judge of the U.S. Ninth Circuit Court of Appeals, to Honorable Jeff Sessions and Honorable Dianne Feinstein, May 5, 2004; provided to CRS by staff at the Headquarters Library, U.S. Ninth Circuit Court of Appeals, San Francisco.

[66] Ibid.

[67] Carolyn R. Saraspi, "2006 Judicial Conference Begins," posting on the website of the Ninth Circuit Court of Appeals, Jul. 11, 2006 http://www.ca9.uscourts.gov/ca9/Documents.nsf/54dbe3fb372dcb6c88256ce50065fcb8/9fcd4aa74947ba86882571a800759def/$FILE/Openingday.pdf.

Arizona would no longer have any Latino judges on its new court. All six Latinos on the current court would probably end up in the reconfigured 9th Circuit."[68] If the President chose to do so, factors such as race, ethnicity, or gender could be used in filling the additional five seats most bills propose for a new Ninth Circuit, or for future Twelfth Circuit appointments.

Those against a split say that opposition from the majority of the circuit's judges is one of the most compelling arguments in favor of keeping the circuit intact. In addition, several state and local bar associations housed in the Ninth Circuit reportedly oppose a split.[69] The same is true for a group of more than 350 law professors,[70] a coalition of environmental organizations, coordinated by Earthjustice,[71] and other groups. (By contrast, the U.S. Chamber of Commerce is supporting S. 1845, which would split the circuit.)[72] In October 2005, the U.S. Judicial Conference "agreed not to take a position" on bills proposing to split the Ninth, but also stated that "consideration of splitting the Ninth Circuit should be independently based on the circuit split issue alone and not driven by possible linkage of that issue to a judgeship bill," an apparent reference to the judgeship provisions contained in H.R. 4093.[73]

Some who support a split suggest that *district* judges within the Ninth Circuit would not necessarily oppose a split. District Judge John M. Roll,[74] who maintains chambers in Arizona, testified in 2005 that "Notwithstanding statements to the contrary, I am aware of no overwhelming opposition to a circuit split among Ninth Circuit district judges.... My perception is that there is much support for a split of the circuit among district judges, particularly among the judges of the proposed new Twelfth Circuit."[75] On June 29, 2006, a group of 24 Ninth Circuit judges—many of whom are retired circuit judges[76] or active district judges—wrote to Senate

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[68] Richard Ruelas, "Splitting Court May Leave Latino Judges Out of Mix," *Arizona Republic*, Oct. 13, 2006; p. 12.

[69] See, for example, Statement of Sen. Dianne Feinstein, in U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Administrative Oversight and the Courts, *Revisiting Proposals to Split the Ninth Circuit: An Inevitable Solution to a Growing Problem*, p. 6; and Roxie Bacon and Don Bivens, "Rhetoric, Not 9th Circuit, Is What's Overloaded," *Arizona Republic*, Nov. 21, 2005; p. 7B.

[70] Letter from Richard L. Abel, et al., to Sens. Arlen Specter and Patrick J. Leahy, U.S. Senate Judiciary Committee, Sept. 27, 2006; available at http://www.judgingtheenvironment.org/library/letters/9th-Cir-Split-Law-Prof-Opposition-letter-Sept-18-2006.pdf.

[71] See http://www.judgingtheenvironment.org/issues/page.jsp?itemID=27579314.

[72] Letter from R. Bruce Josten, Executive Vice President, Government Affairs, Chamber of Commerce of the United States of America, to Sen. John Ensign, June 26, 2006.

[73] Titles I and II of H.R. 4093 authorize more than 60 new judgeships throughout the nation. Title III discusses splitting the Ninth Circuit. For media coverage of the bill containing both provisions (authorizing additional judgeships and splitting the Ninth Circuit), see Charlene Carter, "House Committee Approves Measure to Split 9th Circuit, Authorize Judgeships;" and Julie Kay, "Additional federal judges tied to split of 9th circuit," *Miami Daily Business Review*, Dec. 5, 2005, p. 1. On the Judicial Conference's positions, see "Judicial Conference Acknowledges Loss to Judiciary in Resolutions," *The Third Branch*, vol. 37 (10); http://www.uscourts.gov/ttb/oct05ttb/loss/index.html.

[74] For an overview of Judge Roll's arguments in favor of a split, including geographic arguments, see Hon. John M. Roll, "An Overview of Issues Relating to Splitting the Ninth Circuit: A Mandate for Division," paper presented at the Federal Bar Association, Tucson Chapter, Apr. 20, 2006.

[75] Testimony of Judge John M. Roll, in U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Administrative Oversight and the Courts, *Revisiting Proposals to Split the Ninth Circuit: An Inevitable Solution to a Growing Problem*, p. 108.

[76] Several judges who signed the letter are "senior judges." Judges who choose to continue working in part-time service during retirement are said to have taken "senior status" and are referred to as "senior judges."

Judiciary Committee chairman Arlen Specter urging hearings and "ultimate passage" of S. 1845.[77]

On a related note, at the September 20, 2006, Senate Judiciary Committee hearing, Rachel L. Brand, Assistant Attorney General for Legal Policy, testified that the U.S. Justice Department "supports legislation providing for additional federal judgeships and for a split of the [Ninth Circuit]." According to Brand, DOJ supports a split because of concerns regarding "the efficient administration of justice generally" and sometimes long delays in cases in which the federal government is a party.[78] During hearing questioning, Senator Dianne Feinstein noted that the Justice Department has previously opposed splitting the circuit, and requested additional information about DOJ's current position.

Analysis: Potential Impacts of Splitting the Ninth Circuit

Congress has, thus far, chosen to leave the Ninth Circuit intact. The impact of splitting the Ninth Circuit would likely vary depending on the final boundaries of a split and related provisions, such as changes in the number of authorized judges, or other day-to-day realities encountered by judges, staff, and litigants operating in a reorganized Ninth Circuit, that cannot be anticipated. As noted previously, the debate over splitting the Ninth Circuit generally focuses on six areas: (1) geography and population, (2) judgeships and caseloads, (3) how quickly the circuit disposes of cases, (4) cost of splitting the circuit, (5) *en banc* procedures, and (6) the circuit's rulings. Analysis suggests that splitting the Ninth Circuit would have different effects on each of these six areas.

Geography and Population

History suggests that the Ninth Circuit's population is likely to continue increasing. All seven bills introduced during the 109th Congress would reduce the number of states, geographic area, and population in proposed new Ninth, Twelfth, or Thirteenth Circuits compared with the current Ninth Circuit. As explained above, six of seven bills introduced in the 109th Congress (all except H.R. 212) would create a new Ninth Circuit including California, Guam, Hawaii, and the Northern Mariana Islands, which, in 2004, included an estimated 37 million people. Currently, the Sixth Circuit (Kentucky, Michigan, Ohio, and Tennessee) is the second-most-populous circuit, with a 2004 estimated population of more than 31 million. By contrast, the current Ninth Circuit includes approximately 58 million people.

Therefore, creating a new Ninth Circuit that included only California, Guam, Hawaii, and the Northern Mariana Islands would remove approximately 20 million people in the Mountain West and Pacific Northwest from the current Ninth Circuit and place them in proposed Twelfth or Thirteenth Circuits.[79] A new Ninth Circuit would still be the nation's most populous circuit,

[77] Letter from Richard C. Tallman, United States Circuit Judge, and 23 other Ninth Circuit active and senior district and circuit judges., to Honorable Arlen Specter, Chairman, U.S. Senate Committee on the Judiciary, June 29, 2006.

[78] Statement of Rachel L. Brand, Assistant Attorney General for Legal Policy, U.S. Department of Justice, "Concerning Legislative Proposals to Split the United States Court of Appeals for the Ninth Circuit," Sept. 20, 2006, p. 1. This version of Brand's testimony was distributed at the hearing and is available online at http://www.judiciary.senate.gov/testimony.cfm?id=2071&wit_id=3609.

[79] A new Ninth Circuit including Arizona, California, and Nevada (as proposed in H.R. 212) would house a larger population and geographic area than the other six bills.

although its population would be closer to other circuits than is the current Ninth Circuit's population. A new Ninth Circuit including only California, Guam, Hawaii, and the Northern Mariana Islands would be the only circuit including just two states (California and Hawaii), although it would house more total jurisdictions (states and territories) than some other circuits.

Judgeships and Caseloads

Those who oppose splitting the circuit generally believe that a caseload disparity between reorganized circuits would unfairly increase work for judges remaining in a new Ninth Circuit, while creating smaller caseloads for judges in proposed Twelfth or Thirteenth Circuits. Proponents of a split point out that California would receive additional permanent and temporary judgeships to aid the new Ninth's caseload, and contend that states located in the rest of the circuit should not be bogged down by the large number of cases originating in California.

Analysis of the latest available estimates (for the year ending June 30, 2005) suggests that under six of seven bills introduced during the 109th Congress, caseloads (i.e., filed appeals per authorized judgeship) in proposed Twelfth or Thirteenth Circuits would have been lower than caseloads in a new Ninth Circuit (as shown in **Figure 6**), although two bills (H.R. 212 and H.R. 3125) would have also produced lower caseload estimates (based on authorized judgeships) for a new Ninth Circuit than for the current Ninth Circuit. If two temporary judgeships designated for a new Ninth Circuit are included, all seven bills would have yielded caseload estimates below current levels. One bill (H.R. 3125) would have produced a higher estimated caseload in a Twelfth Circuit than in a new Ninth Circuit. Unlike the other six bills introduced during the 109th Congress to split the Ninth Circuit, H.R. 3125 would provide rough caseload parity between proposed new Ninth and Twelfth Circuits. Qualitative factors, such as the complexity of cases circuits handle, types of cases, and other factors, could also affect caseloads and, as the next section discusses, how quickly circuits dispose of cases.[80]

How Quickly the Circuits Would Dispose of Cases

Although the Ninth Circuit took a median of more than 16 months to dispose of cases in FY2005, it also faced the second-highest per-judge caseload in the nation. By contrast, the Sixth Circuit in FY2005 carried a comparatively small 325.7 filed appeals for each of its 16 authorized judges, but took almost as long as the Ninth Circuit—a median of 14.5 months—to dispose of those cases. At the same time, the Eleventh and Fifth Circuits—created in 1981 from the old Fifth Circuit—both had high caseloads in FY2005, but disposed of those cases faster than virtually any other circuit court (see **Table 3**). These findings suggest that there is not necessarily a uniform relationship between the number of filed appeals per authorized judgeship and the speed with which those cases are resolved. It is unclear whether a new Ninth, Twelfth, or Thirteenth Circuit would necessarily dispose of cases faster than the current Ninth Circuit.

[80] Qualitative data are often obtained through open-ended survey questions, interviews, focus groups, case studies, and field observations. Particularly in modern political science, the appropriateness of qualitative and quantitative methods is often debated. For a general discussion of choosing between—or combining—the two approaches, see Todd D. Jick, "Mixing Qualitative and Quantitative Methods: Triangulation in Action," *Administrative Science Quarterly*, vol. 24, no. 4 (Dec. 1979), pp. 602-611; and Gary King, Robert O. Keohane, and Sidney Verba, *Designing Social Inquiry: Scientific Inquiry in Qualitative Research* (Princeton: Princeton University Press, 1994).

Cost of Splitting the Circuit

As explained previously, depending on source and level of detail, estimated costs for splitting the Ninth Circuit vary widely. AO and CBO cost estimates suggest that start-up costs for a split could range between $20 million and $94 million, plus annual recurring costs and costs related to additional judgeships. Those estimates also suggest that renovating existing courthouses, rather than constructing new facilities, could be a way to limit costs. In addition to facilities, administrative expenses are likely to influence cost estimates.

En Banc Procedures

None of the legislation currently before Congress proposing to split the Ninth Circuit would alter *en banc* procedures. Under P.L. 95-486, any circuit with more than 15 active judges may devise rules to sit *en banc* without all the circuit's active judges. A Twelfth Circuit (and Thirteenth Circuit under H.R. 211 and S. 1301) would presumably sit *en banc* with all authorized judges because none of the bills splitting the Ninth Circuit authorizes more than 14 judges for the Twelfth Circuit (or Thirteenth Circuit). By contrast, all bills introduced during the 109th Congress that would split the Ninth Circuit authorize at least 19 judges for a new Ninth Circuit, meaning that a new Ninth would still be allowed to employ a limited *en banc* procedure if the court chose to do so. If Congress wanted to curtail the use of limited *en banc* procedures, or require minimum numbers of judges to sit on *en banc* panels, legislative action would be necessary. On March 2, 2005, Representative Michael Simpson introduced H.R. 1064, which would prohibit the Ninth Circuit from employing the limited *en banc* procedure. The bill was referred to committee on April 4, 2005, but has not been acted upon since.

The Circuit's Rulings

The degree to which the current Ninth Circuit's rulings motivate calls for a split is hotly debated. Those opposed to a split generally contend that attempts to divide the circuit threaten judicial independence[81] by separating conservative areas of the Mountain West or Pacific Northwest into their own circuit or circuits. Supporters of a split reject that argument, saying that their efforts to split the circuit are based on administrative concerns.[82]

If the current Ninth Circuit were split, three-judge appellate panels, whose members would be drawn from around the circuit, would still hear most cases (all except those heard *en banc*). If the circuit were split before January 2009, President George W. Bush would be authorized to make nominations for the additional judgeships each bill specifies, although the appointing president is not necessarily an indication of how particular judges might rule. Some observers caution that a new Ninth would be more "liberal" than the current court allegedly is, because there would be little geographic diversity in a reorganized Ninth Circuit compared with the current Ninth Circuit.[83] Overall, it is unclear how splitting the Ninth Circuit would impact rulings in a new Ninth, Twelfth, or Thirteenth Circuits.

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[81] See, for example, The Office of Senator Dianne Feinstein, "Statement of Senator Feinstein on Withdrawal of 9th Circuit Split Provision," press release, Dec. 20, 2005.

[82] See, for example, Rep. Michael K. Simpson, "The Federal Judgeship and Administrative Efficiency Act of 2005," p. E368.

[83] "Splitting the 9th would leave the wackiest judges on the Left Coast," *Orange County Register*, Nov. 27, (continued...)

Concluding Comments

Proposals to split the Ninth Circuit introduced during the 109th Congress are the latest in a decades-long debate over the circuit's future. Recent events suggest that the debate continues today, making the future of current legislative proposals uncertain. During the first session of the 109th Congress, language splitting the circuit (incorporated into H.R. 4241 from H.R. 4093) passed the House as part of the budget reconciliation process, but was dropped in the Senate. Senate Judiciary Committee Chairman Arlen Specter and Ranking Member Patrick Leahy objected to first-session attempts to split the circuit as part of the budget reconciliation process.[84] Senator Dianne Feinstein also stated prior to December 2005 conference negotiations on the Deficit Reduction Act—which, as passed by the House, would have split the Ninth Circuit—that she would object to the language by invoking the Senate's "Byrd rule," which can be used to strike "extraneous matter in reconciliation matters."[85] During the second session, there has been no official legislative action on H.R. 4093 in the House beyond reporting the bill from committee, and placing it on the Union Calendar. The FY2007 budget resolution agreed to by the House (H.Con.Res. 376) reportedly "assumes the 9th U.S. Circuit Court of Appeals will be reorganized and additional judgeships created—reviving a battle from last year's budget."[86] The Senate Judiciary Committee held a hearing on S. 1845 on September 20, 2006. That hearing echoed many of the same themes, and featured some of the same witnesses, as other recent hearings on splitting the Ninth Circuit. As of this writing, there has been no additional legislative action on proposals to split the Ninth Circuit.

In the 109th Congress, these two bills—H.R. 4093 in the House, and S. 1845 in the Senate—have received the most legislative and media attention. H.R. 4093 was the focus of first-session attention, while Senate action on S. 1845 has commanded more attention during the second session. As **Table 1** shows, both bills offer substantially similar revisions of the Ninth Circuit. The major difference between the bills is that H.R. 4093 does more than simply reorganize the Ninth Circuit. The bill also authorizes more than 60 additional judgeships throughout the nation, and creates an Article III court in the U.S. Virgin Islands (a topic not addressed in this report). By contrast, S. 1845 concentrates solely on splitting the Ninth Circuit, adding judgeships only in a new Ninth Circuit.

History suggests that if Congress maintains the status quo for the Ninth Circuit, the issue will likely remain active. Several Members of Congress reportedly remain interested in splitting the circuit, and proponents of a split argue that rapid population growth in the current Ninth Circuit

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(...continued)

2005(available from www.nexis.com by subscription only); Zachary Coile, "A quiet move in the House to split the 9th Circuit," *San Francisco Chronicle*, Nov. 30, 2005, p. A1; and Steven Greenhut, "Split decision," *Orange County Register*, Dec. 18, 2005 (available from www.nexis.com by subscription only). On the potential impact on rulings resulting from a split, see also Kevin M. Scott, "Time for a Divorce? Splitting the Ninth Circuit Court of Appeals."

[84] Letter to Honorable Judd Gregg and Honorable Kent Conrad from Senators Arlen Specter and Patrick Leahy; Nov. 9, 2005.

[85] Senator Dianne Feinstein, "Senator Feinstein Seeks to Prevent Ninth Circuit Split on Budget Reconciliation Bill," press release, Nov. 2, 2005; http://feinstein.senate.gov/05releases/r-9thcircuitsplit-ltr.pdf. For a brief overview of the Byrd rule, see CRS Report 97-695, *The Senate's Byrd Rule Against Extraneous Matter in Reconciliation Measures: A Fact Sheet*, by (name redacted).

[86] David Clarke and Chuck Conlon, "Leaders Prepare Budget for House Floor," *CQ Budget Tracker News*, April 3, 2006; see also U.S. Congress, House Committee on the Budget, *Concurrent Resolution on the Budget—Fiscal Year 2007*, report to accompany H.Con.Res. 376, 109th Cong., 2nd sess., H.Rept. 109-402, p. 46.

will only exacerbate the court's alleged management challenges. Many proponents of a split view dividing the circuit as "inevitable," with only the timing of a division and some details remaining uncertain.[87] Others are equally determined to oppose dividing the circuit, asserting that a split is not a solution to perceived problems, and that the Ninth Circuit continues to function effectively.

The data and analysis presented throughout this report suggest that splitting the Ninth Circuit would have different impacts in different areas common to the debate over the circuit's future, such as caseload, cost, and *en banc* procedures. In some cases, the impact of splitting the circuit is unclear. In every case, the impact of splitting the Ninth Circuit would vary with context. Each dimension of the debate over splitting the Ninth Circuit offers Congress potential benchmarks to consider in deciding whether to split the Ninth Circuit or maintain the status quo. Different measures of the concepts discussed here, or different variables altogether, might produce alternative findings to the analysis presented in this report.

[87] For example, as noted previously throughout this report, an October 2005 Senate Subcommittee on Administrative Oversight and the Courts hearing was entitled, *Revisiting Proposals to Split the Ninth Circuit: An Inevitable Solution to a Growing Problem*.

Appendix. Major Provisions of Legislation Introduced During the 109th Congress That Would Split the Ninth Circuit Court of Appeals

Provision	H.R. 4093[a] last major action: 02/08/2006 (reported and placed on Union Calendar)	S. 1845 last major action: 09/20/2006 (hearing)	S. 1296 last major action: 10/26/2005 (hearing)	H.R. 3125 last major action: 06/29/2005 (referral to committee)	H.R. 211 last major action: 03/02/2005 (referral to committee)	H.R. 212 last major action: 03/02/2005 (referral to committee)	S. 1301 last major action: 10/26/2005 (hearing)
States/Territories Included in New Ninth Circuit	California, Hawaii, Guam, Northern Mariana Islands [sec. 303]	Same as bill to left [sec. 3]	Same as bills to left [sec. 3]	Same as bills to left [sec. 3]	Same as bills to left [sec. 4]	Arizona, California, Nevada [sec. 3]	Same as H.R. 211 [sec. 3]
States/Territories Included in Twelfth Circuit	Alaska, Arizona, Idaho, Montana, Nevada, Oregon, Washington [sec. 303]	Same as bill to left [sec. 3]	Same as bills to left [sec. 3]	Same as bills to left [sec. 3]	Arizona, Idaho, Montana, Nevada [sec. 4]	Alaska, Guam, Hawaii, Idaho, Montana, Northern Mariana Islands, Oregon, Washington [sec. 3]	Same as H.R. 211 [sec. 3]
States Included in Thirteenth Circuit	No Thirteenth Circuit	No Thirteenth Circuit	No Thirteenth Circuit	No Thirteenth Circuit	Alaska, Oregon, Washington [sec. 4]	No Thirteenth Circuit	Same as H.R. 211 [sec. 3]
New Ninth Circuit: "Places of the Court"	Honolulu, Pasadena, San Francisco [sec. 305]	Same as bill to left [sec. 6]	Honolulu, San Francisco [sec. 6]	Same as H.R. 4093, S. 1845 [sec. 6]	Los Angeles, San Francisco [sec. 4]	Pasadena, Phoenix, San Francisco [sec. 6]	Same as H.R. 211 [sec. 6]
Twelfth Circuit: "Places of the Court"/ Headquarters Locations	Twelfth Circuit: Las Vegas, Missoula, Phoenix, Portland, Seattle [sec. 305] Headquarters location not specified	Same as bill to left [sec. 6] Headquarters: Phoenix [sec. 7]	Twelfth Circuit: Phoenix, Portland, Missoula [sec. 6] Headquarters: Phoenix [sec. 7]	Twelfth Circuit: Phoenix, Seattle [sec. 6] Headquarters location not specified	Las Vegas, Phoenix [sec. 4] Headquarters location not specified	Portland, Seattle [sec. 6] Headquarters location not specified	Same as H.R. 211 [sec. 6]

Provision	H.R. 4093[a] last major action: 02/08/2006 (reported and placed on Union Calendar)	S. 1845 last major action: 09/20/2006 (hearing)	S. 1296 last major action: 10/26/2005 (hearing)	H.R. 3125 last major action: 06/29/2005 (referral to committee)	H.R. 211 last major action: 03/02/2005 (referral to committee)	H.R. 212 last major action: 03/02/2005 (referral to committee)	S. 1301 last major action: 10/26/2005 (hearing)
Thirteenth Circuit: "Places of the Court"/ Headquarters Locations	No Thirteenth Circuit	No Thirteenth Circuit	No Thirteenth Circuit	No Thirteenth Circuit	Portland, Seattle [sec. 4] Headquarters location not specified	No Thirteenth Circuit	Same as H.R. 211 [sec. 6]
Additional Authorized Circuit Judgeships [Current Ninth Circuit has 28 authorized circuit judgeships; see next page for total authorized judgeships after split]	Authorizes 5 additional circuit judges for the Ninth Circuit, with official duty stations in California [sec. 102]	Authorizes 5 additional circuit judges for the new Ninth, with official duty stations in California [sec. 4]	Same as S. 1845 [sec. 4]	Authorizes 2 additional circuit judges for the Ninth Circuit, with official duty stations in Arizona, California, or Nevada; authorizes 3 additional circuit judgeships for the new Ninth Circuit [sec. 4]	Same as H.R. 4093 [sec. 3]	Same as H.R. 3125 [secs. 4, 5]	Same as H.R. 211 [secs. 4, 5]
Temporary Judgeships	Authorizes 2 additional temporary circuit judges for the Ninth Circuit, with official duty stations in California [sec. 102]	Same as bill to left [sec. 4]	Same as bills to left [sec. 4]	Authorizes 2 additional temporary circuit judges for the current Ninth Circuit, with official duty stations in Arizona, California, or Nevada [sec. 4]	Same as H.R. 4093, S. 1296, S. 1301, S. 1845 [sec. 3]	Same as H.R. 3125 [sec. 4]	Same as H.R. 211, H.R. 4093, S. 1296, S. 1845 [sec. 4]
New Ninth Circuit: Total Authorized Circuit Judgeships after a Split of Current Ninth Circuit	19 [sec. 304]	20 [sec. 5]	Same as H.R. 4093 [sec. 5]	24 [sec. 5]	Same as H.R. 4093, S. 1296 [sec. 5]	Same as H.R. 3125 [secs. 4, 5]	Same as H.R. 211, H.R. 4093, S. 1296 [secs. 4, 5]

Provision	H.R. 4093[a] last major action: 02/08/2006 (reported and placed on Union Calendar)	S. 1845 last major action: 09/20/2006 (hearing)	S. 1296 last major action: 10/26/2005 (hearing)	H.R. 3125 last major action: 06/29/2005 (referral to committee)	H.R. 211 last major action: 03/02/2005 (referral to committee)	H.R. 212 last major action: 03/02/2005 (referral to committee)	S. 1301 last major action: 10/26/2005 (hearing)
Twelfth Circuit: Total Authorized Circuit Judgeships after a Split of Current Ninth Circuit	14 [sec. 304]	Same as bill to left [sec. 5]	Same as bills to left [sec. 5]	9 [sec. 5]	8 [sec. 5]	Same as H.R. 3125 [secs. 4, 5]	Same as H.R. 211 [secs. 4, 5]
Thirteenth Circuit: Total Authorized Circuit Judgeships after a Split of Current Ninth Circuit	No Thirteenth Circuit	No Thirteenth Circuit	No Thirteenth Circuit	No Thirteenth Circuit	6 [sec. 5]	No Thirteenth Circuit	Same as H.R. 211 [secs. 4, 5]
Assignment of Active Circuit Judges	Judges are assigned to the circuit in which their duty station was located the day before the act became effective (i.e., California in new Ninth Circuit; Montana in Twelfth) [sec. 306]	Same as bill to left [sec. 8]	Same as bills to left [sec. 8]	Same as bills to left [sec. 7]	Same as bills to left [sec. 4]	Same as bills to left [sec. 7]	Same as bills to left [sec. 7]
Assignment of Senior Judges	Senior judges in the current Ninth Circuit the day before the act becomes effective may elect to be assigned to either the new Ninth Circuit or the Twelfth Circuit. [sec. 307]	Same as bill to left [sec. 10]	Same as bills to left [secs. 8, 9]	Same as bills to left [sec. 8]	Same as bills to left [sec. 4]	Same as bills to left [sec. 8]	Same as bills to left [sec. 8]

Provision	H.R. 4093[a] last major action: 02/08/2006 (reported and placed on Union Calendar)	S. 1845 last major action: 09/20/2006 (hearing)	S. 1296 last major action: 10/26/2005 (hearing)	H.R. 3125 last major action: 06/29/2005 (referral to committee)	H.R. 211 last major action: 03/02/2005 (referral to committee)	H.R. 212 last major action: 03/02/2005 (referral to committee)	S. 1301 last major action: 10/26/2005 (hearing)
Seniority of Judges	Based on commissioning in current Ninth Circuit [sec. 308]	Same as bill to left [sec. 9]	Same as bills to left [sec. 10]	Same as bills to left [sec. 9]	Same as bills to left [sec. 4]	Same as bills to left [sec. 9]	Same as bills to left [sec. 9]
Judicial Vacancies	First 2 vacancies in Ninth Circuit judgeships occurring 10 or more years after appointment of temporary judgeships noted above shall not be filled [sec. 102]	Same as bill to left [sec. 4]	Same as bills to left [sec. 4]	Same as bills to left [sec. 4]	Same as bills to left [sec. 3]	Same as bills to left [sec. 4]	Same as bills to left [sec. 4]
Temporary Assignment of Circuit Judges	Allows the Chief Judge of the Ninth or Twelfth Circuits, by request from the other Chief Judge, to temporarily assign circuit judges to either circuit [sec. 310]	Same as bill to left [sec. 12]	Same as bills to left [sec. 12]	Same as bills to left [sec. 11]	Same as bills to left, except applicable to Ninth, Twelfth, and Thirteenth Circuits [sec. 4]	Same as bills to left [sec. 11]	Same as bills to left, except applicable to Ninth, Twelfth, and Thirteenth Circuits [sec. 11]

Provision	H.R. 4093[a] last major action: 02/08/2006 (reported and placed on Union Calendar)	S. 1845 last major action: 09/20/2006 (hearing)	S. 1296 last major action: 10/26/2005 (hearing)	H.R. 3125 last major action: 06/29/2005 (referral to committee)	H.R. 211 last major action: 03/02/2005 (referral to committee)	H.R. 212 last major action: 03/02/2005 (referral to committee)	S. 1301 last major action: 10/26/2005 (hearing)
Temporary Assignment of District Judges	1. Allows the Chief Judge of the Ninth or Twelfth circuits, by request from the other Chief Judge, to temporarily assign district court judges within the Ninth or Twelfth circuits to sit on either circuit court of appeals when required to facilitate the business of the court 2. Allows the Chief Judge of the Ninth or Twelfth circuits, by request from the other Chief Judge, to temporarily assign district court judges within the Ninth or Twelfth circuits to sit on district courts within either circuit when required to facilitate the business of the court [sec. 311]	Same as bill to left [sec. 13]	Same as bills to left [sec. 13]	Same as bills to left [sec. 12]	Same as bills to left, except applicable to Ninth, Twelfth, and Thirteenth Circuits [sec. 4]	Same as bills to left [sec. 11]	Same as bills to left, except applicable to Ninth, Twelfth, and Thirteenth Circuits [sec. 12]

Provision	H.R. 4093[a] last major action: 02/08/2006 (reported and placed on Union Calendar)	S. 1845 last major action: 09/20/2006 (hearing)	S. 1296 last major action: 10/26/2005 (hearing)	H.R. 3125 last major action: 06/29/2005 (referral to committee)	H.R. 211 last major action: 03/02/2005 (referral to committee)	H.R. 212 last major action: 03/02/2005 (referral to committee)	S. 1301 last major action: 10/26/2005 (hearing)
Application to Cases *(continued on next page)*	1. If a matter has been submitted for a decision in the current Ninth Circuit, further proceedings will occur in Ninth Circuit, except in cases of pending *en banc* hearings (see item 3). 2. If a matter has not been submitted for a decision, the appeal or proceeding, with appropriate documentation, will be forwarded to the court in which the matter would have been submitted if the act had been in effect.	Same as bill to left [sec. 11]	Same as bills to left [sec. 11]	1. Same as bills to left 2. Same as bills to left [sec. 10]	1. Same as bills to left 2. Same as bills to left.	1. Same as bills to left 2. Same as bills to left	1. Same as bills to left 2. Same as bills to left

Provision	H.R. 4093[a] last major action: 02/08/2006 (reported and placed on Union Calendar)	S. 1845 last major action: 09/20/2006 (hearing)	S. 1296 last major action: 10/26/2005 (hearing)	H.R. 3125 last major action: 06/29/2005 (referral to committee)	H.R. 211 last major action: 03/02/2005 (referral to committee)	H.R. 212 last major action: 03/02/2005 (referral to committee)	S. 1301 last major action: 10/26/2005 (hearing)
Application to Cases *(continued from previous page)*	3. If a petition for rehearing *en banc* is pending on or after the effective date of the act, the petition will be considered by the court of appeals to which it would have been submitted if the act had been in effect at the time the appeal or proceeding was filed. [sec. 309]	Same as bill to left [sec. 11]	Same as bills to left [sec. 11]	3. A petition for rehearing or rehearing *en banc* submitted or decided before the effective date of the act shall be treated in the same manner as though the act had not been enacted. If a petition for rehearing *en banc* is granted, the matter shall be reheard by a court comprised as though the act had not been enacted. [sec. 10]	3. Same as H.R. 3125 [sec. 4]	3. Same as H.R. 3125, H.R. 211 [sec. 10]	3. Same as H.R. 3125, H.R. 211, H.R. 212 [sec. 10]
Administration	1. The Court of Appeals for the current Ninth Circuit may take administrative action to carry out the provisions of the act. 2. For administrative purposes, the current Ninth Circuit ceases to exist two years after date of enactment of the act reorganizing the Ninth Circuit. [sec. 312]	Same as bill to left [sec. 14]	Same as bills to left [sec. 14]	Same as bills to left [sec. 14] *and* Any two circuits may jointly carry out admin. functions the judicial councils of the two circuits believe would be beneficial. [sec. 13]	Same as H.R. 3125 [sec. 4]	Same as H.R. 211, H.R. 212, and H.R. 3125 [secs. 13, 14]	Same as H.R. 211, H.R. 212, and H.R. 3125 [secs. 13, 14]

Provision	H.R. 4093[a] last major action: 02/08/2006 (reported and placed on Union Calendar)	S. 1845 last major action: 09/20/2006 (hearing)	S. 1296 last major action: 10/26/2005 (hearing)	H.R. 3125 last major action: 06/29/2005 (referral to committee)	H.R. 211 last major action: 03/02/2005 (referral to committee)	H.R. 212 last major action: 03/02/2005 (referral to committee)	S. 1301 last major action: 10/26/2005 (hearing)
Effective Date	No later than Dec. 31, 2006; see also, item 2 under "Administration" above. [sec. 313]	12 months after the date of enactment [sec. 16]	Same as S. 1845 [sec. 15]	On the first day of the first fiscal year that begins at least nine months after five of the judges authorized in the act [sec. 4] have been confirmed by the Senate [sec. 15]	Same as H.R. 3125 [sec. 6]	Same as H.R. 211, H.R. 3125 [sec. 15]	On the first Oct. 1 occurring on or after nine months after the date on which all five judges described in item 1 above under "Authorized Judgeships" have been confirmed by the Senate [sec. 15]
Authorization of Appropriations	"[S]uch sums as are necessary" to carry out the act, including for space and facilities, are authorized to be appropriated for FY2006-FY2009. [sec. 401]	Not addressed	Not addressed	Not addressed	Not addressed	Necessary sums are authorized to be appropriated to carry out the act, including for additional court facilities. [sec. 16]	Not addressed

Source: CRS comparison of bill texts.

Note: Provisions in these bills *not* related to splitting the Ninth Circuit are excluded, unless otherwise noted.

a. This table relies on the version of H.R. 4093 reported from the House Judiciary Committee on Feb. 8, 2006, which is slightly different from the version of the bill originally introduced. The language on Ninth Circuit reorganization is substantially similar in both versions of the bill, although some language appears in different sections of the two bills.

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