

# **PUSHING BOUNDARIES: THE ROLE OF POLITICS IN DISTRICTING THE FEDERAL CIRCUIT SYSTEM**

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## I. INTRODUCTION

*The federal judiciary is a branch of the federal government and “it would be a mistake to forget that whenever governmental power is wielded, politics is present.”*<sup>1</sup>

For the better half of the last decade, many politicians have adopted rhetoric expressing their desire to reduce judicial decisions that “tear at the moral fabric of our nation, disregard the will of the people and force a corrupt ideology upon our society.”<sup>2</sup> As Congress applies this pressure, the United States’ Ninth Circuit “feels the squeeze.” In November of 2005, the Ninth Circuit survived the most successful legislative attempt at its division.<sup>3</sup> However, efforts to split the nation’s largest federal circuit continue to resurface.<sup>4</sup>

In March of 2007, before a House Financial Services Appropriations Subcommittee, Justices Kennedy and Thomas testified on splitting the Ninth Circuit.<sup>5</sup> In exploring the unique issues this circuit presents, Justice Kennedy proclaimed that “you don’t design a circuit around [politics] . . . That would be quite wrong. You design it for other objective, neutral, and efficient reasons.”<sup>6</sup> However, the history surrounding the United State’s federal judicial circuits speaks to the contrary.

Confronted with the politics surrounding the Ninth Circuit debate, Justice Kennedy declared what he and his fellow justices believe to be

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<sup>1</sup> DEBORAH J. BARROW & THOMAS G. WALKER, *A COURT DIVIDED: THE FIFTH CIRCUIT COURT OF APPEALS AND THE POLITICS OF JUDICIAL REFORM* ix (Yale University Press 1988).

<sup>2</sup> See Renzi Bill Will Remove Arizona from Jurisdiction of Ninth Circuit Court, available at <http://www.house.gov/hensarling/RSC/doc/Renzi-Porter—9th%20Circuit.pdf> (last visited November 3, 2009).

<sup>3</sup> The House passed a bill that would have split the Ninth Circuit, but Congress adjourned before the Senate considered the legislation. See Deficit Reduction Act of 2005, H.R. 4241, 109th Congress (2005).

<sup>4</sup> See e.g., Circuit Court of Appeals Restructuring and Modernization Act of 2007, S. 525, 110th Congress (2007) (proposing to split the Ninth Circuit in two; leave the Ninth Circuit composed of California, Guam, Hawaii, and Northern Mariana Islands; and create a new Twelfth Circuit, composed of Alaska, Arizona, Idaho, Montana, Nevada, Oregon, and Washington).

<sup>5</sup> See United States House of Representatives, Rehberg: Ninth Circuit’s Size Leaves Montana Out, [http://www.house.gov/list/press/mt00\\_rehberg/030907\\_9thCircuit.html](http://www.house.gov/list/press/mt00_rehberg/030907_9thCircuit.html) (March 9, 2007).

<sup>6</sup> *Id.* (quoting Justice Kennedy’s testimony from the hearing of the House Financial Services Appropriations Subcommittee).

the proper motivations for initiating change.<sup>7</sup> They fail to acknowledge, however, that throughout history, political contexts often colored changes to the circuit system.<sup>8</sup> The federal judiciary is a branch of the federal government and “it would be a mistake to forget that whenever governmental power is wielded, politics is present.”<sup>9</sup>

## I. BACKGROUND

Throughout history, the United States strived to meet the demands of a nation growing socially, politically, economically and culturally.<sup>10</sup> To do so, the federal government utilized its judicial branch, including a system of judicial circuits.<sup>11</sup> Whether on a large or small scale, changes to this circuit system have become relatively common occurrences; the proposed division of the Ninth Circuit stands as the latest example of a general historic trend to divide the circuits based on a variety of factors, including those of a political nature.<sup>12</sup>

### A. Judiciary Act of 1789

During the Constitutional Convention, as delegates debated desirable structures for a unifying government, discourse regarding a federal judiciary focused on two plans, both of which recognized and accepted the idea of a United States Supreme Court.<sup>13</sup> The point of contention between the plans was the establishment of a system of inferior (or lower) courts; delegates opposed a system of lower courts because they feared “states would ‘revolt’ at such encroachments [on their power].”<sup>14</sup> Ultimately, a desire to ensure ratification of the United States Constitution produced a final version that authorized the establishment of a Supreme Court and “deferr[ed,] to the discretion of Congress[,] the issue regarding inferior courts.”<sup>15</sup>

During its first session, the First United States Congress achieved what the Constitutional Convention failed to do directly.<sup>16</sup> Through the

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<sup>7</sup> *Id.* (Justice Thomas explaining that he thinks “the comments made by Justice Kennedy are generally shared [by members of the Supreme Court]”).

<sup>8</sup> *See infra* pp. 2–20.

<sup>9</sup> *See* BARROW & WALKER, *supra* note 1.

<sup>10</sup> *See infra* Part II.

<sup>11</sup> *See infra* Part II.

<sup>12</sup> *See infra* Part II.

<sup>13</sup> *See* ERWIN C. SURRENCY, HISTORY OF THE FEDERAL COURTS 19 (Oceana Publications, Inc. 2d ed. 2002) (1987).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *See* Judiciary Act of 1789, 1 Stat. 73 (1789).

Judiciary Act of 1789, a Federalist-controlled Congress established a system of lower federal courts.<sup>17</sup> This system encompassed two tiers of trial courts: district courts, each with its own district judge; and circuit courts, without judges of their own.<sup>18</sup> Each state comprised a single district, with the exception of Massachusetts and Virginia (each with two),<sup>19</sup> and Congress divided the country into three circuits: the Eastern Circuit,<sup>20</sup> the Middle Circuit,<sup>21</sup> and the Southern Circuit.<sup>22</sup>

Without their own judges, circuit courts “consist[ed] of two Supreme Court Justices and one of the district judges of the circuit, which was to sit twice a year in the various districts comprising the circuit.”<sup>23</sup> It was this concept of Supreme Court Justices sitting on circuit courts, referred to as circuit riding, which became emblematic of “a fierce party strife.”<sup>24</sup>

To Republicans, circuit riding brought back an all-too-familiar past. Supreme Court justices represented the national government “as the English judges on the assizes represent[ed] the King.”<sup>25</sup> With the belief that “state courts could and should decide all cases at the trial level,”<sup>26</sup> Republicans perceived the lower federal courts as “a political adjunct of the hated Federalists,”<sup>27</sup> whose ideology centered on an expansive federal government.<sup>28</sup> Now, as circuit courts became a symbol “of the new nation, which would evoke and foster the attachments of the people to the still tenuous Union,”<sup>29</sup> Republicans “saw Federalists as monarchists and consolidators.”<sup>30</sup>

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<sup>17</sup> *See id.*

<sup>18</sup> RICHARD H. FALLON, JR. ET AL., HART AND WELCHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 28 (5th ed. 2003).

<sup>19</sup> Judiciary Act of 1789, § 2, 1 Stat. 73 (1789).

<sup>20</sup> *Id.* (consisting of New Hampshire, Massachusetts, Connecticut and New York).

<sup>21</sup> *Id.* (consisting of New Jersey, Pennsylvania, Delaware, Maryland and Virginia).

<sup>22</sup> *Id.* (consisting of South Carolina and Georgia).

<sup>23</sup> *See* FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 11 (The Macmillan Company 1928).

<sup>24</sup> *Id.*

<sup>25</sup> *See* SURRENCY, *supra* note 13, at 2.

<sup>26</sup> Henry J. Bourguignon, *The Federal Key to the Judiciary Act of 1789*, 46 S.C. L. REV. 647, 655 (1995) (“Appeal[s] to the Supreme Court would suffice to assure protection of federal rights and to assure uniform interpretation of federal law . . . creating lower federal courts would only burden the Constitution with unnecessary obstacles in its path to adoption by the states.”).

<sup>27</sup> *See* FRANKFURTER & LANDIS, *supra* note 23.

<sup>28</sup> LARRY SCHEIKART & MICHAEL ALLEN, A PATRIOT’S HISTORY OF THE UNITED STATES: FROM COLUMBUS’ GREAT DISCOVERY TO THE WAR ON TERROR 145 (Sentinel 2007).

<sup>29</sup> FRANKFURTER & LANDIS, *supra* note 23, at 19. “Circuit riding ‘[kept] the Federal Judiciary in touch with the local communities,’ and ‘brought home to the people of every

*B. The Midnight Judges Act*

From 1789 to 1801, circuit riding faced increasing scrutiny from Federalists and Republicans as both inefficient and an inconvenience to the Supreme Court justices.<sup>31</sup> Changing political winds, however, clouded the need for reform; local prejudices towards the enforcement of federal laws began to challenge the expansion of the national government<sup>32</sup> and impending elections threatened Federalist control of Congress and the Presidency.<sup>33</sup> Confronted with this adversity, shifts in policy began to occur which were no longer based on objective principles of government, but on “concrete manifestation[s] of a . . . far-reaching political division.”<sup>34</sup> Federalists began to look toward protecting the judiciary from Republicans and ensuring their presence in judgeships.<sup>35</sup>

In 1801, Federalists lost control of both Congress and the Presidency,<sup>36</sup> and the judicial branch became the “party’s last bastion.”<sup>37</sup> Political expediency motivated the “lame duck” Federalist Congress to enact their expansion of the federal judiciary via the “Midnight Judges Act.”<sup>38</sup> The Act expanded the federal judiciary by redrawing the nation

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state a sense of national judicial power through the presence of the Supreme Court Justices.’ Through grand-jury charges widely reprinted in the newspapers, the justices could lecture the local citizens not only on the relevant law, but also on the nature of centralized government, the responsibility of the citizenry, and the ways in which the new government served their needs. Favorable public opinion was necessary to ensure the survival of the young Republic and the active and visible presence of the justices would help foster loyalty toward the new form of government and somewhat weaken the people’s previous allegiance to their state’s government.” Joshua Glick, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 *CARDOZO L. REV.* 1753, 1760 (2003) (citations omitted).

<sup>30</sup> DWIGHT WILEY JESSUP, *REACTION AND ACCOMMODATION: THE UNITED STATES SUPREME COURT AND POLITICAL CONFLICTS* 55 (Garland, 1987).

<sup>31</sup> FALLON, *supra* note 18, at 34; FRANKFURTER & LANDIS, *supra* note 23, at 22–24. As the country expanded, an increasing volume of Supreme Court appellate business intensified the burdens presented by circuit riding. FRANKFURTER & LANDIS, *supra* note 23, at 23.

<sup>32</sup> FRANKFURTER & LANDIS, *supra* note 23, at 23.

<sup>33</sup> *See id.* at 26.

<sup>34</sup> *Id.*

<sup>35</sup> ROBERT A. CARP & RONALD STIDHAM, *FEDERAL COURTS* 16 (3rd ed. Congressional Quarterly Inc., 1998) (1987).

<sup>36</sup> *See* SURRENCY, *supra* note 13, at 27.

<sup>37</sup> JOHN V. ORTH, *JUDICIAL POWER OF THE UNITED STATES* 31 (Oxford University Press 1987).

<sup>38</sup> THOMAS BAKER, *RATIONING JUSTICE: THE PROBLEMS OF THE U.S. COURTS OF APPEALS* 4 (West Publishing Co. 1994).

into six circuits<sup>39</sup> and eliminating circuit riding (creating circuit judgeships).<sup>40</sup> In the eyes of Republicans, the “Midnight Judges Act” was a “conspiracy;”<sup>41</sup> it nearly doubled the number of federal judges and ensured that new appointees would be Federalists.<sup>42</sup>

### C. *Judiciary Act of 1802*

In 1802, the new Republican Congress reacted to the “Midnight Judges Act,” passing the Judiciary Act of 1802,<sup>43</sup> which appeared equally as “politically tinged” to the Federalists.<sup>44</sup> Under the 1802 Act, while the number of judicial circuits remained at six, a reorganization of circuit boundaries (aimed at reducing Federalist influence) left Ohio, Tennessee, Maine and Kentucky out of the circuit system.<sup>45</sup> Furthermore, the Act reestablished circuit riding, “with one justice and one district court judge sitting on each of the six circuit courts.”<sup>46</sup> Although circuit courts did not require a justice’s attendance,<sup>47</sup> with the number of circuits equal to the number of justices, the creation of a new circuit now required the appointment of a new justice.<sup>48</sup>

### D. *Judiciary Act of 1807*

By 1807, demands on the federal judiciary increased; the expansion of Kentucky, Ohio and Tennessee necessitated the creation of a new

<sup>39</sup> The First Circuit consisted of Maine, New Hampshire, Massachusetts, and Rhode Island; the Second Circuit consisted of Connecticut, Vermont, and New York; the Third Circuit consisted of New Jersey, Pennsylvania, and Delaware; the Fourth Circuit consisted of Maryland and Virginia; the Fifth Circuit consisted of North Carolina, South Carolina, and Georgia; and the Sixth Circuit consisted of Tennessee, Kentucky, and Ohio. Judiciary Act of 1801, § 6, 2 Stat. 89 (1801) (repealed 1802).

<sup>40</sup> Judiciary Act of 1801, § 4, 2 Stat. 89 (1801) (repealed 1802).

<sup>41</sup> SURRENCY, *supra* note 13, at 30.

<sup>42</sup> BAKER, *supra* note 38, at 4.

<sup>43</sup> *Id.*; Judiciary Act of 1802, 2 Stat. 156 (1802).

<sup>44</sup> JESSUP, *supra* note 30 at 52.

<sup>45</sup> The First Circuit consisted of New Hampshire, Massachusetts, and Rhode Island; the Second Circuit consisted of Connecticut, Vermont, and New York; the Third Circuit consisted of New Jersey and Pennsylvania; the Fourth Circuit consisted of Maryland and Delaware; the Fifth Circuit consisted of Virginia and North Carolina; and the Sixth Circuit consisted of South Carolina and Georgia. Judiciary Act of 1802, § 4, 2 Stat. 156 (1802).

<sup>46</sup> BAKER, *supra* note 38, at 4.

<sup>47</sup> The Judiciary Act of 1802 authorized a single district judge to sit as a circuit court. Judiciary Act of 1802, § 4, 2 Stat. 156 (1802) (“when only one of the judges . . . directed to hold the circuit courts, shall attend, such circuit court may be held by the judge so attending”).

<sup>48</sup> BAKER, *supra* note 38, at 4.

circuit.<sup>49</sup> In response, Congress enacted the Judiciary Act of 1807.<sup>50</sup> With the size of the Supreme Court intertwined with judicial circuits, this creation of a seventh circuit triggered the appointment of a seventh justice.<sup>51</sup>

After adding a seventh circuit, Congress was unable to agree on expanding the circuit system for over twenty years.<sup>52</sup> Several states entered the Union during this period, but remained out of the circuit court system:<sup>53</sup> Louisiana in 1812,<sup>54</sup> Indiana in 1816,<sup>55</sup> Mississippi in 1817,<sup>56</sup> Illinois in 1818,<sup>57</sup> Alabama in 1819,<sup>58</sup> Missouri in 1821,<sup>59</sup> and Arkansas in 1836.<sup>60</sup> Theorizing that this stalemate was the product of political hostilities is largely “surmise;” however, one can presume this on the mere fact that all parties recognized a need for judicial reorganization, though the necessity never translated into action.<sup>61</sup>

#### E. Judiciary Act of 1837

By the mid 19th century, the South found itself devoted to (and ultimately dependent on) slave-based agricultural systems,<sup>62</sup> while

<sup>49</sup> FRANKFURTER & LANDIS, *supra* note 23, at 34.

<sup>50</sup> Judiciary Act of 1807, 2 Stat. 420 (1807).

<sup>51</sup> FRANKFURTER & LANDIS, *supra* note 23, at 34.

<sup>52</sup> BAKER, *supra* note 38, at 5.

<sup>53</sup> *Id.*

<sup>54</sup> Act of April 8, 2 Stat. 701 (1812) (Louisiana congressionally admitted into the Union); 2 Stat. 703 (1812) (Louisiana erected one judicial district with a district judge who exercised circuit court jurisdiction.)

<sup>55</sup> Act of April 19, 3 Stat. 289 (1816) (Indiana congressionally admitted into the Union); Act of March 3, 3 Stat. 390 (1817) (Indiana erected one judicial district with a district judge who exercised circuit court jurisdiction.)

<sup>56</sup> Act of March 1, 3 Stat. 348 (1817) (Mississippi congressionally admitted into the Union); Act of April 3, 3 Stat. 413 (1818) (Mississippi erected one judicial district with a district judge who exercised circuit court jurisdiction.)

<sup>57</sup> Act of April 18, 3 Stat. 428 (1818) (Illinois congressionally admitted into the Union); Act of March 3, 3 Stat. 502 (1819) (Illinois erected one judicial district with a district judge who exercised circuit court jurisdiction.)

<sup>58</sup> Act of March 2, 3 Stat. 489 (1819) (Alabama congressionally admitted into the Union); Act of April 21, 3 Stat. 564 (1820) (Alabama erected one judicial district with a district judge who exercised circuit court jurisdiction.)

<sup>59</sup> Act of March 6, 3 Stat. 645 (1820) (Missouri congressionally admitted into the Union); Act of March 16, 3 Stat. 653 (1822) (Missouri erected one judicial district with a district judge who exercised circuit court jurisdiction.)

<sup>60</sup> Act of June 15, 5 Stat. 50 (1836) (Arkansas congressionally admitted into the Union); Act of June 15, 5 Stat. 50 (1836) (Arkansas erected one judicial district with a district judge who exercised circuit court jurisdiction.)

<sup>61</sup> FRANKFURTER & LANDIS, *supra* note 23, at 42.

<sup>62</sup> HARRY V. JAFFA, *CRISIS OF THE HOUSE DIVIDED: AN INTERPRETATION OF THE ISSUES IN THE LINCOLN-DOUGLAS DEBATES* 56 (Univ. Chi. Press 1982) (1959).

Northern states embraced new economic opportunities created by the industrial revolution.<sup>63</sup> As the West expanded, the potential for an increased number of slave states in the Union threatened Northern economies that were unable to compete against the endless free labor provided by slavery.<sup>64</sup> These conflicting economies ultimately led to conflicting political interests.<sup>65</sup> As Northern states relied on the federal government for regulations to promote and protect their infant industries,<sup>66</sup> Southern states opposed such regulations, believing they would come at the expense of their agricultural economy.<sup>67</sup>

The Judiciary Act of 1837 divided the country into nine circuits.<sup>68</sup> The First, Second, Third, Fourth, Fifth, and Sixth Circuits remained unaltered from the Judiciary Act of 1802; Ohio, Indiana, Illinois, and Michigan formed the Seventh Circuit; Kentucky, Tennessee and Missouri formed the Eighth Circuit; and Louisiana Mississippi and Arkansas formed the Ninth Circuit.<sup>69</sup> The product of this new division was a disproportionate southern influence; the Fourth, Fifth, Sixth, Eighth and Ninth Circuits all consisted exclusively of slave states.<sup>70</sup> Furthermore, with the Supreme Court tied to the circuit system, what resulted was a Court increased to nine and dominated by Southern justices.<sup>71</sup> The sectional imbalance created by the Judiciary Act of 1837 was no secret<sup>72</sup> and aroused suspicions of a conspiracy to preserve southern interests.<sup>73</sup>

While legislators proposed measures of reform to restructure the circuits,<sup>74</sup> congressional representatives often hinted toward “dark,

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<sup>63</sup> See GEOFFREY WARD, *THE CIVIL WAR* 11 (Vintage Books 1994).

<sup>64</sup> See DAVID WILLIAMS, *A PEOPLES' HISTORY OF THE CIVIL WAR: STRUGGLES FOR THE MEANING OF FREEDOM* 45-46 (New Press 2006).

<sup>65</sup> *See id.*

<sup>66</sup> HARRY HANSEN, *THE CIVIL WAR: A HISTORY* 14-18 (Signet Classics 2002).

<sup>67</sup> *Id.*

<sup>68</sup> Judiciary Act of 1837, 5 Stat. 176 (1837).

<sup>69</sup> *Id.*

<sup>70</sup> STANLEY I. KUTLER, *JUDICIAL POWER AND RECONSTRUCTION POLITICS* 14-17 (Univ. of Chi. Press 1968).

<sup>71</sup> *Id.*

<sup>72</sup> *See id.* at 14-15.

<sup>73</sup> “Two months before the *Dred Scott* decision, Representative Benjamin Stanton of Ohio proposed a reorganization of the circuits, but to no avail. Stanton advocated reform primarily on practical grounds. . . . Given the vast litigation in commercial, admiralty and patent law in the Second Circuit, Stanton probably was correct.” KUTLER, *supra* note 70, at 15. “Three years later, Representative James M. Ashley, also from Ohio . . . contended that in certain instances, southern senators had blocked appointments for northern circuits when they believed the nominee [was] antagonistic to the expansion of slavery.” *Id.*

<sup>74</sup> Benjamin Stanton of Ohio proposed a reorganization of the circuits. *See id.*

conspiratorial factors . . . operat[ing] to assure a federal government favorable to slavery interests.”<sup>75</sup> In the 1857 *Dred Scott* decision, the Supreme Court denied Congress the power to prohibit slavery in new territories.<sup>76</sup> Proclaiming “a house divided against itself cannot stand,” Lincoln charged that there was a conspiracy afoot to spread slavery throughout the territories.<sup>77</sup> Lincoln labeled Southerners as “an unscrupulous group” who manipulated the federal government to advance their agenda.<sup>78</sup>

#### F. Tenth Circuit Act

The existing sectional imbalance, highlighted by the Supreme Court’s *Dred Scott* decision, signaled the need for change.<sup>79</sup> On December 3, 1861, in his first annual message to Congress, President Lincoln proposed improving the efficiency of the judicial system.<sup>80</sup> Lincoln advocated several initiatives, from eliminating circuit riding to eliminating circuit courts altogether.<sup>81</sup> However, in 1862, in the midst of the Civil War, events took place that were “filled with gloom and foreboding for the nation.”<sup>82</sup> With his wartime initiatives having “a chilling effect on political dissent” and Democrats labeling his administration as dictatorial, Lincoln was in trouble.<sup>83</sup> Against this

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<sup>75</sup> *Id.*

<sup>76</sup> *Scott v. Sandford*, 60 U.S. 393 (1857).

<sup>77</sup> MARK E. NEELY, JR., *THE LAST BEST HOPE ON EARTH: ABRAHAM LINCOLN AND THE PROMISE OF AMERICA* 48 (Harvard University Press 1995).

<sup>78</sup> See SAUL SIGELSCHEFFER, *THE AMERICAN CONSCIENCE: THE DRAMA OF THE LINCOLN-DOUGLAS DEBATES* 175 (1973).

<sup>79</sup> See KUTLER, *supra* note 70, at 161–62. Five justices of the seven-member majority in *Scott v. Sandford* were appointed from slave states: Chief Justice Taney was appointed from Maryland; Justices Wayne, from Georgia; Justice Daniel, from Virginia; Justice Campbell, from Alabama; and Justice Catron, from Tennessee. *THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES* 111, 116, 126, 136, 161 (Clare Cushman ed., Congressional Quarterly 1995).

<sup>80</sup> Abraham Lincoln, President of the United States, First Annual Message to Congress (December 3, 1861).

<sup>81</sup> “The country generally has outgrown our present judicial system. . . . Three modifications occur to me, either or which, I think, would be an improvement upon our present system. Let the Supreme Court be of convenient number in every event; then, first, let the whole country be divided into circuits of convenient size, the Supreme judges to serve in a number of them corresponding to their own number, and independent circuit judges be provided for all the rest; or, secondly, let the Supreme judges be relieved from circuit duties and circuit judge provided for all the circuits; or, thirdly, dispense with circuit courts altogether, leaving the judicial functions wholly to the district courts and an independent Supreme Court.” *Id.*

<sup>82</sup> See DAVID M. SILVER, *LINCOLN’S SUPREME COURT* 83 (Illinois Reissue 1998) (1956).

<sup>83</sup> DAVID HERBERT DONALD, *LINCOLN* 380–82 (Simon & Schuster 1995).

background, the Supreme Court was close to deciding issues involving the administration's war efforts.<sup>84</sup> With public opinion shifting against Lincoln and the Republican Party,<sup>85</sup> the administration could ill-afford a defeat by the Supreme Court, and thus looked to take the necessary steps to avoid calamity.<sup>86</sup>

Politically, for Lincoln, having ten justices at his disposal was more "convenient" than nine, providing the assurances Lincoln's administration needed.<sup>87</sup> With the circuits directly tied to the number of justices on the Supreme Court, the creation of a Tenth Circuit provided a means for appointing a tenth justice.<sup>88</sup> As a result, 1863 saw the enactment of the Tenth Circuit Act, incorporating California and Oregon into a Tenth Circuit,<sup>89</sup> which two years later also incorporated Nevada.<sup>90</sup>

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<sup>84</sup> See *id.* at 84; *Ex parte Merryman*, 17 F. Cas. 144, 147 (C.C.D. Md. 1861) (determining whether President Lincoln had the authority to suspend the writ of habeas corpus); *The Amy Warwick*, 1 F. Cas. 808, 809 (D. Mass. 1862), *aff'd*, 67 U.S. 635 (U.S. 1863) (determining the constitutionality of President Lincoln's blockade of Southern ports).

<sup>85</sup> JAFFA, *supra* note 62, at 382.

<sup>86</sup> See SILVER, *supra* note 82, at 92. In 1862, "with the [S]outh out of the Union, the dominant Republicans reconstructed the judicial system at the expense of the seceded states. In brief, they took the five judicial circuits that consisted entirely of slave states and telescoped them into three." KUTLER, *supra* note 70, at 62; Judiciary Act of 1862, 12 Stat. 576 (stating that the First, Second and Third Circuits remained the same; Maryland, Delaware, Virginia and North Carolina constituted the Fourth Circuit; Alabama, Georgia, Florida, South Carolina and Mississippi constituted the Fifth Circuit; Louisiana, Arkansas, Texas, Kentucky and Tennessee constituted the Sixth Circuit; Ohio and Indiana constituted the Seventh Circuit; Michigan, Wisconsin and Illinois constituted the Eighth Circuit; Missouri, Iowa, Kansas and Minnesota constituted the Ninth Circuit). "The assignment of the states in the circuits was important because of the tradition of placing one representative from each circuit on the court." John V. Orth, *How Many Judges Does It Take To Make A Supreme Court?*, 19 CONST. COMMENTARY 681, 683 (2002).

<sup>87</sup> See SILVER, *supra* note 82, at 84. In the *Prize Cases*, the Supreme Court determined the constitutionality of President Lincoln's seizure of several ships under the blockade of Southern ports. *Brig Amy Warwick*, 67 U.S. 635 (1863). By a small margin of five to four, the Supreme Court upheld Lincoln's actions. *Id.* This decision was of immense importance, "if the blockade was legal, then Lincoln was not only engaged in a large-scale law enforcement action, he was engaged in a war. And along with this came whatever powers accrue to a military commander in dealing with hostile or contested territory and its inhabitants." DANIEL FARBER, *LINCOLN'S CONSTITUTION* 140 (The University of Chicago Press 2003). Lincoln's small margin of victory emphasizes the tightrope his administration's policies were walking and the benefit of another favorable voice on the Supreme Court.

<sup>88</sup> See SILVER, *supra* note 82, at 84.

<sup>89</sup> Tenth Circuit Act, 12 Stat. 794 (1863).

<sup>90</sup> Act of Feb. 27, 1865, 13 Stat. 440 (1865).

*G. Judicial Circuits Act*

Although the end of the Civil War saw the reunification of the Southern and Northern states, their political interests remained at odds.<sup>91</sup> When a Southern Democrat, Andrew Johnson, took over the presidency upon Lincoln's assassination, Republicans saw a stronghold of political power pulled out from underneath them.<sup>92</sup> With a stronger political presence, Southern states instituted "black codes" in an attempt to restrict the freedoms of former slaves.<sup>93</sup> As Republicans passed federal legislation against these "black codes," constitutional challenges toward the reconstruction policies brought the federal judiciary into the conflict.<sup>94</sup>

As Supreme Court rulings questioned the constitutionality of reconstruction legislation, the threat of southern political dominance over the Court took center stage once again.<sup>95</sup> With growing skepticism toward both the Presidency and the Court,<sup>96</sup> Congress passed the Judicial Circuits Act of 1866 to reduce the membership of the Supreme Court seats from nine to seven (upon vacancies),<sup>97</sup> and the number of circuits from ten to nine.<sup>98</sup>

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<sup>91</sup> See FRANKFURTER & LANDIS, *supra* note 23, at 72–73.

<sup>92</sup> See BRUCE E. BAKER, *WHAT RECONSTRUCTION MEANT: HISTORICAL MEMORY IN THE SOUTH 13* (University of Virginia 2007) ("developments were brought to a halt when President Andrew Jackson imposed easy terms on former Confederate leaders, allowing them to regain their lost lands and political control of the state.").

<sup>93</sup> *Id.*

<sup>94</sup> See CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 419 (Rothman & Co. 1987).

<sup>95</sup> *Id.* at 429 (referring to *Ex parte Milligan*, 71 U.S. 2 (U.S. 1866)) ("The Indianapolis Journal said that the decision was 'intended only to aid the Johnson men, and is so clearly a forerunner of other decisions looking to a defeat of Republican ascendancy and to a restoration of Southern domination.'").

<sup>96</sup> "Since it was openly stated that by the President and his supporters that the validity of any...[reconstruction] legislation would be challenged, it was evident that the Court might become the final arbiter of the situation." *Id.* at 422.

<sup>97</sup> This reduction impeded Andrew Johnson's opportunity to make appointments to the Supreme Court. WARREN, *supra* note 94, at 422–23. In 1863, after the Tenth Circuit Act, "the court had consisted of six Democrats and four Republicans." *Id.* at 422. In 1864, upon the appointment of Justice Chase, "the Court had become evenly divided in political character; and after . . . [Justice] Catron had died, May 30, 1865, the Judges appointed by President Lincoln constituted a majority of the Court." *Id.* In 1866, after the death of Justice Catron, President Johnson had nominated, Henry Stanbery of Ohio, a Republican, to fill the vacancy. *Id.* "The Senate, however, was determined to curb the President in every move." *Id.* To impede his opportunities to make judicial appointment to the Bench, the Senate passed the Judicial Circuits Act, which gradually eliminated seats on the Supreme Court until there would be seven justices. *Id.* at 423.

<sup>98</sup> Judicial Circuits Act, 14 Stat. 209 (July 23, 1866).

Prior to the Judicial Circuits Act, a historic tradition of placing one representative from each circuit on the Supreme Court dictated the number of appointments to the Court; this system allowed Southern slave-owners to dominate the Supreme Court.<sup>99</sup> Abandoning this tradition “lessened the demand and need for southern representation on the Supreme Court.”<sup>100</sup> Furthermore, this reorganization was consistent with the efforts of Congressional Republicans to reduce the strong influence of southern states in the federal government, prior to the Civil War.<sup>101</sup> The Judicial Circuits Act enabled Republicans to redraw the circuits so that the Fifth Circuit remained the only circuit composed exclusively of confederate states.<sup>102</sup>

#### *H. Tenth Circuit Act of 1929*

Between 1867 and 1911, twelve states joined the Union and were incorporated into the existing nine circuits.<sup>103</sup> During this period, a steady growth in business,<sup>104</sup> coupled with increasing authority,<sup>105</sup>

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<sup>99</sup> Orth, *supra* note 86, at 683.

<sup>100</sup> KUTLER, *supra* note 70, at 62.

<sup>101</sup> See *supra* note 74.

<sup>102</sup> KUTLER, *supra* note 70, at 61–62; Judicial Circuits Act, 14 Stat. 209 (1866) (stating that the First and Second Circuits remained the same; Pennsylvania, New Jersey and Delaware constituted the Third Circuit; West Virginia, Virginia, North Carolina and South Carolina constituted the Fourth Circuit; Georgia Florida, Alabama, Mississippi, Louisiana and Texas constituted the Fifth Circuit; Ohio Michigan, Kentucky, and Tennessee constituted the Sixth Circuit; Indiana Illinois and Wisconsin constituted the Seventh Circuit; Minnesota, Iowa, Missouri, Kansas and Arkansas constituted the Eighth Circuit; California, Oregon, and Nevada constituted the Ninth Circuit).

<sup>103</sup> See Act of March 25, 1867, 15 Stat. 5 (1867) (adding Nebraska to the Eighth Circuit); Act of June 26, 1876, 19 Stat. 61 (1876) (adding Colorado to the Eighth Circuit); Act of February 22, 1889, 25 Stat. 676 (1889) (adding North Dakota and South Dakota to the Eighth Circuit, while adding Montana and Washington to the Ninth Circuit); Act of July 3, 1890, 26 Stat. 215 (1890) (adding Idaho to the Ninth Circuit); Act of July 10, 1890, 26 Stat. 222 (1890) (adding Wyoming to the Eighth Circuit); Act of July 16, 1894, 28 Stat. 107 (1894) (adding Utah to the Eighth Circuit); Act of June 16, 1906, 34 Stat. 267 (1906) (adding Oklahoma to the Eighth Circuit); Act of February 14, 1912, 37 Stat. 1729 (1912) (adding New Mexico to the Eighth Circuit and Arizona to the Ninth Circuit).

<sup>104</sup> FRANKFURTER & LANDIS, *supra* note 23, at 61–62 (“The National Banks Act of the sixties brought before the Supreme Court many new variations and applications of *McCulloch v. Maryland*. For a decade, the Bankruptcy Act of 1867 added considerably to the business of the district court and Supreme Court. War claims against the government led to the establishment of the modern Court of Claims. Soon appeals from the Court of Claims began to swell the Supreme Court docket. Finally, the political issues of the War begot legislation that for a time flooded the lower courts, and constitutional amendments that to this day are among the mains sources of the Supreme Court’s business. In the Southern federal courts, prosecutions under the Force Bills broke of their own weight; the

created circumstances where “the new tasks [of the federal judiciary] could not be absorbed by the old machinery.”<sup>106</sup> Congress responded by enacting expansive measures to address these burdens.<sup>107</sup>

By 1911, however, the Eighth Circuit encompassed thirteen states, “from Minnesota in the north to New Mexico in the south and from Iowa in the east to Utah in the west.”<sup>108</sup> With the circuit dockets still congested, discussion about reform focused on the Eighth Circuit.<sup>109</sup> In 1927, an ABA committee submitted a proposal to realign all of the existing circuit boundaries, and in the process, create a new tenth circuit court.<sup>110</sup> Opposition to this proposal came from several sectors,<sup>111</sup> and Congress ultimately abandoned the ABA proposal in favor of one that would not necessitate the redrawing of all the circuits, but just one—the Eighth Circuit.<sup>112</sup> As a result, Congress passed the Tenth Circuit Act of 1929, splitting the Eighth Circuit in two and creating a Tenth Circuit for the second time in history.<sup>113</sup>

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*Slaughter-House Cases* introduced a steady torrent of cases under the Fourteenth Amendment.”)

<sup>105</sup> See Act of March 3, 18 Stat. 470 (1875). “In the Act of March 3, 1875, Congress gave the federal courts the vast range of power which had laid dormant in the Constitution since 1789. These courts...became the primary and powerful reliance for vindicating every right given by the Constitution, the laws, and treatise of the United States.” FRANKFURTER & LANDIS, *supra* note 23, at 65.

<sup>106</sup> FRANKFURTER & LANDIS, *supra* note 23, at 69.

<sup>107</sup> See Judiciary Act of 1869, 16 Stat. 44 (Apr. 10, 1869) (establishing separate judgeships for the U.S. circuit courts, and increased the seats on the Supreme Court back to nine. Under the Act, a circuit judge, the justice appointed to the circuit or the district judge could hold a circuit court, making possible the simultaneous meeting of circuit courts within a given circuit); Judiciary Act of 1891, 26 Stat. 826 (Mar. 3, 1891) (creating nine circuits with corresponding appellate courts known as the United States Circuit Courts of Appeals, which had jurisdiction over most appeals of lower court decisions. The Act also eliminated the requirement of “circuit riding” by Supreme Court Justices).

<sup>108</sup> Thomas E. Baker, *An Assessment of Past Extramural Reforms of the U.S. Courts of Appeals*, 28 GA. L. REV. 863, 897–98 (1994).

<sup>109</sup> *Id.* at 898.

<sup>110</sup> *Id.* (identifying Arizona, California, Idaho, Montana, Nevada, Oregon, Utah and Washington as states proposed for the new Tenth Circuit).

<sup>111</sup> *Id.* (“Opponents complained chiefly about switching states from one circuit to another and the consequent changes in the law, although buttressing arguments were heard: that the workload in the Eighth Circuit did not justify a division, that the bill would not adequately address the docket problem because it failed to create new judgeships, and that the one-to-one ratio of circuits to justices on the Supreme Court should not be abandoned.”).

<sup>112</sup> *Id.*

<sup>113</sup> Act of February 28, 1929, 45 Stat. 1346 (1929). Since this division, the Eighth Circuit has grown to encompass Arkansas, Iowa, Minnesota, North Dakota, and South Dakota; and the Tenth Circuit encompasses Colorado, Kansas, New Mexico, Oklahoma,

*I. Fifth Circuit Court of Appeals Reorganization Act of 1980*

Between 1961 and 1963, as the Civil Rights Movement gained attention from the government and heightened public awareness, political pressure focused on the federal judiciary.<sup>114</sup> Civil rights activists sought to concentrate their attention on the inequality of blacks in the South by challenging segregation laws and customs.<sup>115</sup> These civil rights battles created a sharp divide in the judiciary between those who favored integration and those who opposed it.<sup>116</sup> Conservative judges believed that ideals of “the Old South” were under attack by liberal federal court rulings,<sup>117</sup> launching accusations that circuit court panels reviewing civil rights were intentionally composed of liberal judges to achieve an outcome favorable to progressive attitudes.<sup>118</sup>

As civil rights cases swamped the Fifth Circuit docket, there was a need for remedial measures.<sup>119</sup> Chief Judge Elbert Parr Tuttle of the United States Court of Appeal for the Fifth Circuit sought the assistance of Chief Justice Warren to help facilitate this needed change.<sup>120</sup> In response, Chief Justice Warren authorized the appointment of a special Committee on the Geographical Organization of the Courts (known as the “Biggs Committee,” referencing the committee head, Third Circuit Judge John Biggs).<sup>121</sup> It was the consensus of the Biggs Committee that any more than nine judges on a single court would impair efficiency.<sup>122</sup> Conversely, to meet its judicial demands, the Fifth Circuit needed at least

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Utah, and Wyoming. *An Assessment of Past Extramural Reforms of the U.S. Courts of Appeals*, 28 GA. L. REV. 863, 898 (1994).

<sup>114</sup> See BARROW & WALKER, *supra* note 1, at 32.

<sup>115</sup> See *id.* at 33.

<sup>116</sup> See *id.* at 55.

<sup>117</sup> See *id.*

<sup>118</sup> See *id.* at 55–56. According to the Fifth Circuit’s Judge Elbert Tuttle, “the accusation of judge-stacking in regular court of appeals panels was misplaced. Though he did not deny that at least two of ‘the four’ liberals were assigned to each Mississippi civil rights case, he asserted that this was largely due to special circumstances facing the court.” *Id.* at 56. Of the court’s nine members, two were in poor health, Cameron and Hutcheson, and two were serving under recess appointments, Bell and Gewin. *Id.* at 57.

<sup>119</sup> See BARROW & WALKER, *supra* note 1, at 64.

<sup>120</sup> *Id.* at 2, 7 (“[A]ny request from the Fifth Circuit was certain to receive special attention from Earl Warren. Like Warren, over half of the Fifth Circuit judges had been appointed by Dwight Eisenhower. . . . A Liberal faction on the Fifth Circuit shared Warrens’ views on civil rights and formed a majority on many panels that rendered trailblazing civil rights decisions. Warren needed the support of the Fifth Circuit if his mandate in *Brown v. Board of Education* was to be enforced in the Deep South; and the Fifth Circuit in turn, needed the reinforcement of Warren’s court when its own directives were challenged on appeal.”).

<sup>121</sup> BARROW & WALKER, *supra* note 1, at 8.

<sup>122</sup> See *id.* at 64.

fifteen judges.<sup>123</sup> The logical step was a division of the Fifth Circuit, but proposals to do so were based on more than just administrative concerns.<sup>124</sup>

The recommendation of the Biggs Committee was to split the Fifth Circuit at the Mississippi River, a geographical configuration that would effectively separate the Fifth Circuit's pro-civil rights jurists and undermine their influence;<sup>125</sup> a staunch advocate of this proposal was James Eastland, a Mississippi Senator and devoted segregationist.<sup>126</sup> Certain "liberal judges" campaigned against the division of the circuit, believing it would have adverse consequences on civil rights.<sup>127</sup> By 1964, despite concerns over efficiency, politics engulfed the division debate and impeded all proposals.<sup>128</sup>

To handle the caseload, absent a division, the Fifth Circuit's bench swelled to twenty-six judges by 1978, far above the Biggs Committee's recommended number of nine.<sup>129</sup> The increased number of judgeships did not "settle the realignment controversy; it was simply a vehicle to break the legislative standoff. It permitted both sides in the congressional battle to create the needed judgeships without conceding their respective oppositions on division."<sup>130</sup> Workload continued to increase, and by 1979, the Fifth Circuit Courts of Appeals received more than 4,200 cases per year.<sup>131</sup>

By 1980, all of the Fifth Circuit judges unanimously agreed that a division of the circuit was necessary.<sup>132</sup> However, the undisputed

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<sup>123</sup> *See id.*

<sup>124</sup> *See id.*

<sup>125</sup> *Id.* at 65. Under this recommendation, the new Fifth Circuit would contain Alabama, Florida, Georgia and Mississippi; the new Eleventh Circuit would contain Louisiana and Texas. *Id.* "At the time, to divide east and west of the Mississippi River meant that the Fifth Circuit's four staunch pro-civil rights jurists . . . [Wisdom, appointed from Louisiana; Rives, appointed from Alabama; Brown, appointed from Texas; and Tuttle, appointed from Georgia] would be separated." *Id.* at 11-14, 16-17, 22-24, 65.

<sup>126</sup> BARROW & WALKER, *supra* note 1, at 68.

<sup>127</sup> *See id.* at 65, 88.

<sup>128</sup> *See id.* at 63-68, 121.

<sup>129</sup> *Id.* at 1, 64.

<sup>130</sup> *See id.* at 219. For example, during President Jimmy Carter's administration, judges appointed to the bench were part of an initiative towards "opening up the bench to women and minorities and selecting nominees on the basis of merit." BARROW & WALKER, *supra* note 1, at 225. However, "there was some speculation, fueled by the unanimous response of the new judges and intention of the congressional leadership to keep the circuit whole, that during the confirmation process the Carter appointees had made commitment to oppose division." *Id.* at 229.

<sup>131</sup> BARROW & WALKER, *supra* note 1, at 233.

<sup>132</sup> *See id.* at 236.

agreement among judges was not enough, as civil rights remained a strong deterrent to the division of the circuit.<sup>133</sup> “Although conditions in 1980 were a far cry from those of the early 1960s, assertions alone might not be enough to convince key members of Congress that something sinister was not afoot. Simply put, too much political baggage remained from years past.”<sup>134</sup> The division ultimately necessitated another campaign by judges, but this time to alleviate the civil rights concerns, not arouse them.<sup>135</sup> The Fifth Circuit judges encouraged civil rights activists to lobby members of Congress and judges who were members of racial minorities to argue their position with Congress.<sup>136</sup> Fears finally subsided on October 14, 1980, when the Fifth Circuit Court of Appeals Reorganization Act divided the Fifth Circuit and led to the birth of a new Eleventh Circuit.<sup>137</sup>

### *J. The Ninth Circuit Dilemma*

The Ninth Circuit is currently composed of nine states and two U.S. territories: Alaska, Arizona, California, Montana, Nevada, Oregon, Washington, Idaho, Hawaii, Guam, and the Northern Mariana Islands.<sup>138</sup> Dwarfing “its fellow circuit courts in caseload, population, number of states, and number of judges,”<sup>139</sup> the sheer enormity of this circuit raises questions of efficiency and practicality. However, as reformation is proposed and debated on the national stage,<sup>140</sup> objective criteria continue to take a back seat to subjective concerns.

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<sup>133</sup> *See id.* at 237–38.

<sup>134</sup> *Id.* at 238.

<sup>135</sup> *Id.* at 238–39.

<sup>136</sup> *Id.* at 237–39.

<sup>137</sup> Fifth Circuit Court of Appeals Reorganization Act, 94 Stat. 1994 (1980).

<sup>138</sup> 28 U.S.C. § 41 (2009).

<sup>139</sup> John M. Roll, *The 115 Year-Old Ninth Circuit: Why A Split Is Necessary And Inevitable*, 7 WYO. L. REV. 109 (2007).

<sup>140</sup> *See* Ninth Circuit Court of Appeals Reorganization Act of 2003, S. 562, 108th Cong. (2003) (splitting the Ninth Circuit into two, with California and Nevada remaining in the Ninth Circuit and all other Ninth Circuit jurisdictions being assigned to a new Twelfth Circuit); Ninth Circuit Court of Appeals Judgeship and Reorganization Act of 2003, H.R. 2723, 108th Cong. (2003) (splitting the Ninth Circuit into two, with Arizona, California and Nevada remaining in the Ninth Circuit and all other Ninth Circuit jurisdictions being assigned to a new Twelfth Circuit); Ninth Circuit Judgeship and Reorganization Act of 2005, H.R. 211, 109th Cong. (2005) (creating two new circuits, the Twelfth and Thirteenth. The Ninth Circuit would consist of California, Hawaii, Guam, and the Northern Mariana Islands. The Twelfth Circuit would consist of Arizona, Nevada, Idaho, and Montana. The Thirteenth Circuit would consist of Alaska, Oregon, and Washington); Circuit Court of Appeals Restructuring and Modernization Act of 2005, S. 1845, 109th Cong. (2005) (splitting the Ninth Circuit into two, with California, Hawaii, Guam, and the Northern Mariana Islands remaining in the Ninth Circuit, and all

The size of the Ninth Circuit cannot be understated. Encompassing more states than any other, the circuit's jurisdiction extends to over 1.3 million square miles of American soil—nearly 40% of the entire country.<sup>141</sup> With a population of about 31 million, the circuit's populace is twice the size of the Sixth Circuit.<sup>142</sup> To cope with this size, the Ninth Circuit “has 28 authorized judgeships, which is 11 more than the second largest circuit.”<sup>143</sup> If the present statistics were not staggering enough, consider the fact that the United States Census Bureau projects that the Ninth Circuit “will grow even more, both in absolute terms and relative to the other circuits, between 2000 and 2030.”<sup>144</sup>

The Ninth Circuit's enormity creates several functional problems. From start to finish, an appeal in the Ninth Circuit can take four months longer than the average appeal time in other Courts of Appeals.<sup>145</sup> Due to the Circuit's vast number of judges, the Ninth Circuit abandons traditional *en banc* hearings<sup>146</sup> in favor of problematic “limited *en banc*” hearings.<sup>147</sup> Even after a final judgment, the Ninth Circuit's problems

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other Ninth Circuit jurisdictions being assigned to new Twelfth Circuit); Circuit Court of Appeals Restructuring and Modernization Act of 2007, S. 525, 110th Cong. (2007) (amending Title 28, United States Code, to provide for the appointment of additional Federal circuit judges and to divide the Ninth Judicial Circuit of the United States into two circuits: the Ninth Circuit, composed of California, Guam, Hawaii, and the Northern Mariana Islands; and the Twelfth Circuit, composed of Alaska, Arizona, Idaho, Montana, Nevada, Oregon, and Washington).

<sup>141</sup> Legislative Proposals to Split the United States Court of Appeals for the Ninth Circuit: Before the S. Comm. On the Judiciary, 109th Cong. 2 (2006) (Statement of Rachel L. Brand), available at [http://www.usdoj.gov/olp/pdf/ninth\\_circuit\\_split\\_aag\\_brand\\_testimony.pdf](http://www.usdoj.gov/olp/pdf/ninth_circuit_split_aag_brand_testimony.pdf).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 3.

<sup>144</sup> *Id.* at 2.

<sup>145</sup> *Examining the Proposal to Restructure the Ninth Circuit: Hearing on S. 1845 Before the S. Judiciary Comm.*, 109th Cong. 2 (2006) (statement of Diarmuid O'Scannlain, Circuit Judge), [http://judiciary.senate.gov/hearings/testimony.cfm?id=2071&wit\\_id=3263](http://judiciary.senate.gov/hearings/testimony.cfm?id=2071&wit_id=3263) (last visited October 10, 2009) (The Ninth Circuit's enormous size . . . creates problems for our litigants. In my court, the median time from when a party activates an appeal to when it receives resolution is over sixteen-and-a-half months—almost four months longer than the average for the rest of the Courts of Appeals.”).

<sup>146</sup> Pamela Ann Rymer, *How Big Is Too Big?*, 15 J. L. & POLITICS 383, 387 (1999) (“By statute, federal appellate courts may rehear a case, decided in the first instance by a panel of three judges, *en banc* (literally, ‘full bench’), for three purposes: to decide issues of exceptional importance, to resolve intra-circuit conflict, and to avoid inter-circuit conflict.”).

<sup>147</sup> 9TH CIR. R. 35-3 (“[A limited *en banc* hearing] shall consist of the Chief Judge of this circuit and 10 additional judges to be drawn by lot from the active judges of the Court. In the absence of the Chief Judge, an 11th active judge shall be drawn by lot, and the most senior active judge on the panel shall preside.”); see also Pamela Ann Ryme, Symposium, *The Ninth Circuit Conference: The En Banc Court: The “Limited” En*

are not over—its decisions face the highest reversal rate of any circuit.<sup>148</sup> Despite these administrative issues, as of 2005, only three of the Ninth Circuit's 24 judges favored dividing the Circuit.<sup>149</sup> Some of the judges even argue that the court's "administrative efficiency is second to none."<sup>150</sup> Nevertheless, the dilemma facing the Ninth Circuit is that while functional concerns exist, other interests are present, causing politics to penetrate the debate and galvanize both those who stand in favor of reformation, and those who oppose it.

In advocating legislation to divide the Ninth Circuit,<sup>151</sup> members of Congress have expressly stated "desire to reduce the number of 'extreme' (as opposed to 'mainstream') judicial decisions."<sup>152</sup> For example, Rep. Rick Renzi (R-AZ) stated that the Ninth Circuit's "contemptuous judgments tear at the moral fabric of our nation, disregard the will of the people and force a corrupt ideology upon our society."<sup>153</sup>

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*Banc: Half Full, or Half Empty?* 48 ARIZ. L. REV. 317, 321 (2006) ("[O]f ninety-five en bancs resolved on the merits between 1999 and 2005, there were nine cases where at least as many Ninth Circuit judges (in en banc dissents and the panel majority) signed opinions that reach the opposite result on at least one issue as signed the limited en banc majority decision. In other words, a majority of a limited en banc panel can produce a result that is contrary to the known views of the same number, or a greater number, of judges.").

<sup>148</sup> Kevin M. Scott, *Supreme Court Reversals of the Ninth Circuit*, 48 ARIZ. L. REV. 341 (2006) ("Over the past twenty-one Supreme Court terms (since the Fifth Circuit was split), the Ninth Circuit has been reversed an average of 14.48 times, with the next closest circuit (the 'new' Fifth) reversed 5.14 times per term over the same time period. This disparity grows even greater if one considers that the Supreme Court's caseload has been decreasing steadily since the late 1980s.").

<sup>149</sup> *Revisiting Proposals to Split the Ninth Circuit: An Inevitable Solution to a Growing Problem Before the S. Subcomm. on Admin. Oversight and the Courts*, 109th Cong. 1 (2005) (Testimony of Alex Kozinski, Circuit Judge) available at [http://judiciary.senate.gov/hearings/testimony.cfm?id=1635&wit\\_id=4729](http://judiciary.senate.gov/hearings/testimony.cfm?id=1635&wit_id=4729) (last visited Oct. 10, 2009).

<sup>150</sup> See *id.* (quoting a letter written by Circuit Judge Carlos Bea of San Francisco).

<sup>151</sup> Protecting the Ten Commandments and Other Expressions of Faith, <http://www.house.gov/simpson/issues-protecting.shtml> (last visited Feb 5, 2008) (Rep. Mike Simpson, R-ID, expresses his displeasure with the Ninth Circuit decisions); Ninth Circuit Court Needs To Be Split Up, <http://ensign.senate.gov/issleg/issues/record.cfm?id=261720&> (last visited Feb. 5, 2008) (Senator Ensign stating that the Ninth Circuit "consistently manifests a leftward tilt in a region of the country that is among the most conservative.").

<sup>152</sup> Brian Fitzpatrick, *Disorder in the Court*, L.A. TIMES, July 11, 2007, <http://www.latimes.com/news/opinion/la-oe-fitzpatrick11jul11,0,6274474.story?coll=la-opinion-righttrail> (last visited November 27, 2009).

<sup>153</sup> *Id.* ("The people of Arizona would be better served under the jurisdiction of a separate court, one that recognizes our family values and defends our core beliefs.").

These motivations are the product of the Ninth Circuit's reputation as one of the most liberal circuits in the country.<sup>154</sup> In *Brown v. California Department of Transportation*, the Ninth Circuit ruled that the California Department of Transportation could not allow American flags to be placed on state highway overpasses without permits unless the agency did the same for antiwar signs.<sup>155</sup> In *Newdow v. United States Congress*, the Ninth Circuit took another "liberal" stance, holding that the Pledge of Allegiance was unconstitutional under the First Amendment due to its inclusion of the phrase "under God."<sup>156</sup>

The aforementioned cases are just a sampling of decisions from the Ninth Circuit that have enraged conservative politicians.<sup>157</sup> However, legitimate concerns over the circuit date back to over a century ago.<sup>158</sup> Today, "political controversy has regenerated this issue into a large-scale debate."<sup>159</sup>

## II. THE ROLE OF POLITICS IN CIRCUIT DISTRICTING

Facing the prospect of dividing the Ninth Circuit, Justice Kennedy sets forth two rationales for restructuring federal judicial circuits: either

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<sup>154</sup> Marybeth Herald, *Reversed, Vacated, and Split: The Supreme Court, the Ninth Circuit, and the Congress*, 77 OR. L. REV. 405, 408 ("One reads about a court that is 'big, feisty and liberal,' a 'renegade court' that includes 'one of the last unabashed liberals,' and many 'colorful' judges . . ."); Roll, *supra* note 139 at 121 (citing Jonathon D. Glater, *Lawmakers Trying Again to Divide Ninth Circuit*, N.Y. TIMES, June 19, 2005, at 116) ("Chief Judge Schroeder attributed efforts to split the Ninth Circuit to 'dissatisfaction in some areas with some of our decisions.' She said: 'This has a long historic basis beginning with some fishing-rights decisions in the '60s and going forward to the Pledge of Allegiance case and . . . some of the immigration decisions.'").

<sup>155</sup> *Brown v. Cal. DOT*, 321 F.3d 1217 (9th Cir. 2003).

<sup>156</sup> *Newdow v. U.S. Cong.*, 292 F.3d 597 (9th Cir. 2002), *rev'd* 542 U.S. 1 (2004).

<sup>157</sup> See Frank Tamulonis III, Comment, *Splitting the Ninth Circuit: An Administrative Necessity or Environmental Gerrymandering?*, 112 PENN ST. L. REV. 859, 863 (2008) ("Cases involving issues such as timber harvests in the Northwest, fishing rights in Alaska, and the death penalty in California have angered many conservatives. The Ninth Circuit recently decided that the government likely lacked the power to ban medical use of marijuana.").

<sup>158</sup> See Edward A. Hartnett, *Questioning Certiorari: Some Reflection Seventy-Five Years After The Judges' Bill*, 100 COLUMBIA L. REV. 1643, 1654-55 (2000) (citing 21 Cong. Rec. 20,228 (1890)) ("In a remark demonstrating that arguments for dividing the Ninth Circuit are nothing new, Senator Dolph stated, 'I do not wish to interfere with any other locality, but I assert what every one must and does know who knows anything about the history of the country, that California, Oregon, and Washington should not be in one circuit, with all their vast coast line and with the great amount of admiralty business there is in the courts of those districts.'").

<sup>159</sup> Crystal Marchesoni, Comment, *United We Stand, Divided We Fall?: The Controversy Surrounding a Possible Division of the United States Court of Appeals for the Ninth Circuit*, 37 TEX. TECH L. REV. 1263, 1284 (2005).

objective notions of efficiency or political motivations.<sup>160</sup> Justice Kennedy contrasts these twin rationales as “right” and “wrong,” using the latter to describe political motivations.<sup>161</sup> However, the history of the circuit system does not appear to illustrate an institution isolated from political influences; instead, as a direct result of political disputes, the federal circuit system developed and progressed.<sup>162</sup>

#### A. *The Presence of Politics*

During the United States’ infancy, conflict erupted over philosophies of governance.<sup>163</sup> One of the tools utilized in this political tug-of-war was the federal judicial circuit system. For Federalists, judicial circuits, with the use of circuit riding, served as a means to promote the federal government.<sup>164</sup> As the Federalists’ control over the government diminished, the party’s expansion of the judicial circuits became an attempt to preserve their political ideology.<sup>165</sup>

For Republicans, however, Federalists threatened the very essence of the American Revolution—*independence*.<sup>166</sup> As the Republicans gained control over the federal government, judicial circuits yielded to a philosophy of state sovereignty.<sup>167</sup> While Republicans did not contract the number of judicial circuits, political hostilities remained for over twenty years as seven states entered the Union while remaining outside the judicial circuit system.<sup>168</sup>

In the mid 19th century, politics influenced judicial circuits once again.<sup>169</sup> The United States’ North and South developed into two distinct regions, diverging in social, economic, and political perspectives. As the countervailing interests of the North resulted in legislative efforts, Southern states relied on the federal judiciary to protect their interests and impede Northern initiatives.<sup>170</sup>

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<sup>160</sup> Rehberg: Ninth Circuit’s Size Leaves Montana Out, [http://www.house.gov/list/press/mt00\\_rehberg/030907\\_9thCircuit.html](http://www.house.gov/list/press/mt00_rehberg/030907_9thCircuit.html) (last visited November 27, 2009) (citing Justice Kennedy). Justice Kennedy stated in a congressional hearing, “you don’t design a circuit around [politics]. . . . That would be quite wrong. You design it for other objective, neutral, and efficient reasons.” *Id.*

<sup>161</sup> *See id.*

<sup>162</sup> *See supra* Part III.

<sup>163</sup> *Id.*

<sup>164</sup> FRANKFURTER & LANDIS, *supra* note 23, at 19.

<sup>165</sup> *See supra* notes 31–35.

<sup>166</sup> *See supra* notes 25–30.

<sup>167</sup> *See supra* notes 44–47.

<sup>168</sup> *See supra* Part I.

<sup>169</sup> *See supra* notes 63–68.

<sup>170</sup> *See* KUTLER, *supra* note 71, at 14–15.

Upon taking office, President Lincoln expressed his desire to restructure the circuit system, recognizing the inefficiencies and politics within the federal judiciary.<sup>171</sup> However, as a president confronted with civil war, once the Supreme Court threatened his administration's war efforts, neutral proposals towards improvements upon the circuit system took a backseat to President Lincoln's political agenda.<sup>172</sup> Like those before him, President Lincoln played politics with circuit boundaries; restructuring the circuits to achieve political objectives, thus preventing potential frustration to the Union's war powers.<sup>173</sup>

Even after the Civil War, politics remained in the forefront of the circuit structure.<sup>174</sup> With a Southern Democrat in office and a Supreme Court threatening the constitutionality of reconstruction legislation, old fears and hostilities generated a need for political recourse.<sup>175</sup> For Republicans, the benefit yielded by a reorganization of judicial circuits was twofold: impeding President Johnson's judicial appointments and realigning all the remaining circuits producing courts sympathetic to reconstruction programs.<sup>176</sup>

While political climates have been catalysts for changing judicial circuits, they have also served as impediments.<sup>177</sup> For decades during the 20th century, neutral objectives of efficiency mandated a division of the Fifth Circuit.<sup>178</sup> However, what unfolded was the maintenance of an inefficient Fifth Circuit to achieve political ends.<sup>179</sup> "Liberal" judges campaigned against this division not out of objective notions of functionality, but based on sympathy towards the Civil Rights Movement.<sup>180</sup> It was not until two decades later, upon the alleviation of concerns over civil rights that Congress restructured the Fifth Circuit.<sup>181</sup>

Although the various aforementioned political climates were influential in the redrawing of federal judicial circuits, it is unreasonable to generalize that politics are always a dominating factor. In 1929, Congress divided the Eighth Circuit in an attempt to remedy a bloated

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<sup>171</sup> See *supra* note 82.

<sup>172</sup> See *supra* Part II.

<sup>173</sup> See *supra* notes 86–88; PETER IRONS, A PEOPLE'S HISTORY OF THE SUPREME COURT 183 (Penguin Books 2006) (1999).

<sup>174</sup> *Id.* at 10–16.

<sup>175</sup> *Id.* at 10–12.

<sup>176</sup> *Id.* at 11–12.

<sup>177</sup> *Id.* at 13–16.

<sup>178</sup> *Id.* at 14–16.

<sup>179</sup> *Id.* at 14–15.

<sup>180</sup> See *id.* "Liberal" judges feared the potential impact of having "conservative" judges in full control of a circuit. BARROW & WALKER, *supra* note 1, at 141–45.

<sup>181</sup> BARROW & WALKER, *supra* note 1, at 244–45.

circuit's lack of efficiency.<sup>182</sup> However, while this legislative initiative did not directly implicate a political agenda, "it would be a mistake to forget that whenever governmental power is wielded, politics is present."<sup>183</sup>

The United States' legislative branch is a bicameral congress, composed of the Senate, which represents interests of each of the fifty states; and the House of Representatives, which represents the interests of each of the 435 congressional districts.<sup>184</sup> A process of compromise must inhere in a legislative system that embraces diversity of national opinions and interests. If each democratically elected official attempts to represent the interests of his or her constituency, it is difficult, if not impossible, to disallow politics from playing a role in legislative efforts.

### *B. Political Correctness*

In establishing our Constitution, the Founding Fathers left structural components, such as the creation of lower federal courts, to the will of politicians.<sup>185</sup> As illustrated by the history of circuit boundaries, encompassed in this power to create is the right to do so advantageously, within constitutional limitations. Politically motivated changes are likely viewed as "wrong" due to notions of an independent judiciary.<sup>186</sup> However, this view is shortsighted when one distinguishes between independence and judicial independence.

It might be easy to romanticize judicial independence, thinking of the concept simply in terms of a dictionary's definition of independence.<sup>187</sup> But, in actuality, the independence of the judiciary is far narrower.<sup>188</sup> The Constitution confers elected representatives several

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<sup>182</sup> See *supra* at 13.

<sup>183</sup> BARROW & WALKER, *supra* note 1.

<sup>184</sup> See generally U.S. CONST. ART. I, §§ 2-3.

<sup>185</sup> See, e.g. U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

<sup>186</sup> "The federal courts were deliberately designed as a counter-majoritarian branch of government, well-situated to enforce the counter-majoritarian Bill of Rights and other individual freedoms against what James Madison called 'the tyranny of the majority.'" Edward G. Donley Memorial Lecture and Nadine Strossen, *The Current Assault on Constitutional Rights and Civil Liberties: Origins and Approaches*, 99 W. VA. L. REV. 769, 805 (1997).

<sup>187</sup> The dictionary defines independence as "a state of being independent," i.e. "free from the control of others." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 591 (Merriam-Webster, Inc. 10th ed.1996).

<sup>188</sup> Charles G. Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts*, 78 IND. L.J. 153, 159 (2003).

powers over the Federal Judiciary,<sup>189</sup> and only in a very limited sense is the Federal Judiciary “independent.”<sup>190</sup>

Acknowledging these limitations is not to say independence is unimportant; society needs the judiciary to maintain some semblance of autonomy so judges can ignore outside influences and maintain the “rule of law.”<sup>191</sup> Yet, as a branch of government, the judiciary should remain responsive to the needs of the public it serves.<sup>192</sup> With these two principles standing on opposite ends of the spectrum, the trick is striking a balance between the two, achieving an equilibrium in which our democratic republic can function.<sup>193</sup>

To label the influence of politics simply as “wrong” is misguided.<sup>194</sup> Our government is too complex for such a simplistic characterization.<sup>195</sup>

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<sup>189</sup> See, e.g. U.S. CONST. art. II, § 4 (granting Congress the power to impeach and remove Article III judges from office); *Sheldon v. Sill*, 49 U.S. 441, 449 (1850) (upholding the power of Congress to restrict the scope of diversity jurisdiction) (“Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers. No one of them can assert a just claim to jurisdiction exclusively conferred on another, or withheld from all.”).

<sup>190</sup> See CHARLES GERDNER GEYH, *WHEN COURTS & CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA’S JUDICIAL SYSTEM* 7 (The University of Michigan Press) (2006) (“Federal judges are . . . rendered autonomous in the limited sense that they have an enforceable monopoly over ‘the judicial power’ and are insulated from two discrete forms of influence or control—threats to their tenure and salary.”).

<sup>191</sup> Judge J. Clifford Wallace, *Resolving Judicial Corruption While Preserving Judicial Independence: Comparative Perspectives*, 28 CAL. W. INT’L L.J. 341, 343 (1998) (“Maintaining an independent judiciary is essential to the attainment of the judiciary’s rule of law governance objective and the proper performance of its functions in a free society. 12 Such independence must be guaranteed by the State and enshrined in the constitution or the law so that any illegal actions by the executive or legislature can be checked. As Alexander Hamilton pointed out, limitations on government “can be preserved in practice no other way than through the medium of courts of justice. . . . Without this, all the reservations of particular rights or privileges would amount to nothing.”).

<sup>192</sup> See Stephen B. Burbank, *What Do We Mean by “Judicial Independence”?*, 64 OHIO ST. L.J. 323, 326 (2003) (“No rational politician, and probably no sensible person, would want courts to enjoy complete decisional independence, by which I mean freedom to decide a case as the court sees fit without any constraint, exogenous or endogenous, actual or prospective. Courts are institutions run by human beings. Human beings are subject to selfish and/or venal motives, and even moral paragons differ in the quality of their mental faculties and in their capacity for judgment and wisdom. In a society that did not invest judges with divine guidance (or its equivalent), the decision would not be made to submit disputes for resolution to courts that were wholly unaccountable for their decisions. One implication of this proposition is that, from a pre-modern, anthropological perspective, we need law to constrain judges rather than judges to serve the rule of law.”).

<sup>193</sup> See GEYH, *supra* note 190, at 8.

<sup>194</sup> When instituting change in the federal judiciary, distinctions between politics and neutral objectives are not as black and white. “Courts decide issues affecting the exercise

Politically motivated alterations to the circuit system may not coincide with idealizations of the federal judiciary, but they are part of a process to achieve a functional balance of power within our government.<sup>196</sup> Regardless of suspicions, today, after a history of political influences, the Federal Judiciary is not one engulfed by chaos and corruption; it is an example that the world's democracies strive to follow.<sup>197</sup>

## II. CONCLUSION

From the birth of the United States to the present day, politics has played a role in most, if not all, changes to the federal government's system of judicial circuits.<sup>198</sup> What began as a means for the Founding Fathers to end debates over the structure of the Federal Judiciary, it then produced an inherent power in the legislature that merged politics with a system of lower federal courts.<sup>199</sup> This grant of power echoed through history as political leaders, from the Civil War to the Civil Rights Movement, utilized judicial circuits as mechanisms for reform.<sup>200</sup>

As rulings from the Ninth Circuit give way to perceptions of liberal extremism, communities that do not share in the opinions of the circuit

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of political power, the extent to which civil liberties are guaranteed, and the control of vast economic assets." BARROW & WALKER, *supra* note 1, at 263. As a result, organized interests are likely to politicize the judicial system for their own gains no matter what neutral objectives exist.

<sup>195</sup> See Caprice L. Roberts, *Jurisdiction Stripping In Three Acts: A Three String Serenade*, 51 VILL. L. REV. 593, 597 (2006) ([“E]ach branch of the government possesses a set of guitar strings that it controls. Those guitar strings are all connected to one larger instrument upon which the three branches combine to create either a cacophony or a symphony. The American people are both the immediate audience and, ultimately over time, the derivative conductor. Accordingly, an essential part of the American democratic experiment is in many respects an experiment in tuning those strings to find the right pitch.”).

<sup>196</sup> See Jennifer E. Spreng, *The Icebox Cometh: A Former Clerk's View of the Proposed Ninth Circuit Split*, 73 WASH. L. REV. 875, 947 (1998) (“Everything Congress does is ‘politically motivated.’ That is the way the system works.”).

<sup>197</sup> See Senator Patrick J. Leahy, *Feature: On the Importance of an Independent Judiciary for the Vermont Association*, 24 VER. B. J. & L. DIG. 27 (1998) (“Something that sets our country apart from virtually all others in the world is the independence of our Federal Judiciary and the respect that it commands. Every nation that in this century has moved toward democracy has sent observers to the United States in their efforts to emulate our judiciary. Those working for democracy in countries still struggling to adopt democratic principles know that the one thing that is holding them back, allowing crime, corruption and break-downs in their economic systems, is the lack of a truly independent, principled judiciary.”).

<sup>198</sup> See *supra* Parts I & II.

<sup>199</sup> See *supra* Part I.

<sup>200</sup> See *supra* Part III.

are concerned.<sup>201</sup> Motivated by these concerns, members of Congress continue to propose legislation aimed at dividing the Ninth Circuit.<sup>202</sup> When confronted with the potential of witnessing the first realignment of federal judicial circuits in over twenty-five years, Justice Kennedy made his attitude clear.<sup>203</sup> He stated that, “you don’t design a circuit around [politics]. . . . That would be quite wrong. You design it for other objective, neutral, and efficient reasons.”<sup>204</sup>

The existing problem is that Justice Kennedy’s classification oversimplifies a complicated issue. The United States’ federal government is a “government of the people, by the people, for the people.”<sup>205</sup> To label “wrong” any action of an elected representative, who (within constitutional limits) seeks to carry out the will of her constituency, oversimplifies the matter. Such a label ignores not only the complexity of the federal government, but the history that embodies it.

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<sup>201</sup> See Fitzpatrick, *supra* note 153.

<sup>202</sup> See *supra* notes 141, 154.

<sup>203</sup> See *supra* notes 5–6.

<sup>204</sup> *Id.*

<sup>205</sup> President Abraham Lincoln, Gettysburg Address, (Nov. 19, 1863).