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

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Summary

The composition of the United States Court of Appeals for the Ninth Circuit has been controversial for decades. The nation's largest circuit court in geography, population, and caseload, the Ninth Circuit on occasion has been noted for its controversial rulings. Twice since 1970, major government commissions have considered whether to split the Ninth Circuit into two or more circuits. Since the mid-1990s, Congress has also considered legislation to split the Ninth Circuit. Proponents of a split generally argue that the current Ninth Circuit is overburdened and inefficient, and that creating two or more new circuits with reduced geography, population, and caseload would improve judicial administration. Opponents of a split reject those claims, saying that the current Ninth Circuit functions efficiently, despite its large geography, population, and caseload. 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.

Efforts to split the Ninth Circuit appeared to be bolstered on November 18, 2005, when the House of Representatives passed the Deficit Reduction Act of 2005 (H.R. 4241). Among many other provisions, the bill contains a provision to split the current Ninth Circuit into two circuits — the “new Ninth” and Twelfth Circuit Courts of Appeals. The Senate's version of the budget reconciliation bill (S. 1932) does not contain language splitting the Ninth Circuit. The question of splitting the Ninth Circuit is expected to be considered by a conference committee appointed to resolve differences between the House and Senate versions of the reconciliation measures.

This report compares relevant provisions of the House version of the Deficit Reduction Act with Senate proposals introduced during the 109th Congress which propose to split the circuit. Despite differences, these House and Senate proposals are largely similar. The report also provides background information on the debate concerning splitting the Ninth Circuit and analyzes the outlook for doing so.

The current debate echoes themes present in the past. Disagreement generally focuses on three areas: (1) geography and population; (2) efficiency; and (3) the circuit's rulings. Although the House version of the budget reconciliation bill potentially increases the likelihood of dividing the circuit, the measure could also face substantial obstacles. Further, history suggests that should Congress not adopt the provision splitting the Ninth Circuit, the issue will continue to be active.

This report will be updated in the event of legislative action on proposals to split the Ninth Circuit.

Contents

Introduction	1
Splitting the Ninth Circuit: Legislative Proposals	1
Splitting the Ninth Circuit: Current Debates and Analysis	3
Geography and Population	4
Efficiency	5
The Circuit's Rulings	11
Judges' Opinions on a Split	11
Outlook for Splitting the Ninth Circuit	12

List of Tables

Table 1. Major Provisions of Legislation Introduced During the 109 th Congress Which Would Split the Ninth Circuit Court of Appeals . . .	15
Table 2. Authorized Judgeships and Vacancies in the Circuit Courts of Appeals	24
Table 3. Ninth Circuit and National Caseloads, FY1999-FY2004	25
Table 4. Median Time in Months from Filing Notice of Appeal to Disposition for FY2004	26

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

Introduction

On November 18, 2005, the House of Representatives passed the Deficit Reduction Act of 2005 (H.R. 4241). Among many other provisions, the bill contains a provision to split the United States Court of Appeals for the Ninth Circuit into two circuits — the “new Ninth” and Twelfth Circuit Courts of Appeals. Currently, the Ninth Circuit includes 11 jurisdictions: Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, the Northern Mariana Islands, Oregon, and Washington.¹ In this bill, a new Ninth Circuit would include four of the 11 jurisdictions: California, Guam, Hawaii, and the Northern Mariana Islands. A Twelfth Circuit would include the remaining seven jurisdictions: Alaska, Arizona, Idaho, Montana, Nevada, Oregon, and Washington. The Senate’s budget reconciliation bill (S. 1932) does not contain a provision to split the Ninth Circuit. The question of splitting the Ninth Circuit is expected to be considered by a conference committee appointed to resolve differences between the House and Senate versions of the reconciliation measures.

This report compares the provisions of the Deficit Reduction Act of 2005 passed by the House which would split the Ninth Circuit,² with Senate proposals introduced during the 109th Congress which propose to split the circuit. The report also provides background information and analysis on the current debate concerning splitting the Ninth Circuit, which tends to focus on three areas: (1) geography and population; (2) efficiency; and (3) the circuit’s rulings. Proponents of a split generally argue that the current Ninth Circuit is overburdened and inefficient, and that creating two new circuits from the existing one with reduced geography, population, and caseload would improve judicial administration. Opponents of a split reject those claims, saying that the current Ninth Circuit functions efficiently despite its large geography, population, and caseload.

Splitting the Ninth Circuit: 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 so-called “Hruska Commission” recommended that the Ninth Circuit be

¹ 28 U.S.C. §41. On the Northern Mariana Islands, see P.L. 95-157, Sec. 1(a); 91 Stat. 1265 (1977), which provides that the Northern Mariana Islands be included with the same circuit as Guam (the Ninth Circuit).

² Unless otherwise noted, this report does not address provisions in H.R. 4241 or other bills unrelated to splitting the Ninth Circuit.

divided in two.³ In 1998, however, the so-called “White Commission” recommended against dividing the Ninth Circuit, stating that doing so would be “impractical and is unnecessary.”⁴ Nonetheless, since the mid-1990s, several bills have been introduced which 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 measure passed the House but did not win Senate approval.

During the 109th Congress, seven bills have been introduced in the House and Senate which propose to split the Ninth Circuit into two or more circuits.⁵ **Table 1** (at the end of this report) provides an overview of each bill’s major provisions. Although there are differences among the bills, they all would take largely similar approaches to splitting the current Ninth Circuit. During the FY2006 budget reconciliation process in the House, language from one of the bills — the Federal Judgeship and Administrative Efficiency Act of 2005 (H.R. 4093, sponsored by Representative F. James Sensenbrenner Jr.) — was inserted into the Deficit Reduction Act of 2005 (H.R. 4241).⁶ When the House passed H.R. 4241 on November 18, 2005, with that language, the bill became the focal point for legislative and media attention regarding splitting the Ninth Circuit.

Although the Senate’s budget reconciliation bill (S. 1932) does not include language splitting the Ninth Circuit, two of the Senate bills introduced for that purpose — S. 1296, sponsored by Senator Lisa Murkowski, and S. 1845, sponsored by Senator John Ensign — contain language similar to the relevant provisions in H.R. 4241. Therefore, S. 1296 and S. 1845, and the language inserted from H.R. 4093 into H.R. 4241, take a similar approach to splitting the Ninth Circuit.⁷

³ 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 Hruska Commission 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>].

⁴ 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. A copy of the report is available online at [<http://www.library.unt.edu/gpo/csafca/final/appstruc.pdf>].

⁵ The seven bills are: H.R. 211, H.R. 212, H.R. 3125, H.R. 4093, S. 1296, S. 1301, and S. 1845. Language from H.R. 4093 was inserted into the House version of the Deficit Reduction Act (H.R. 4241).

⁶ 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>].

⁷ H.R. 3125 adopts the same geographic boundaries for the new Ninth and Twelfth Circuits but authorizes judges among the circuits differently than the other bills. See **Table 1** for details.

Of the legislation introduced in the 109th Congress, one set of bills would split the current Ninth Circuit in two, while a second set of bills would divide the current circuit into three circuits. The relevant provisions of H.R. 4241, H.R. 3125, S. 1296, and S. 1845 would all split the Ninth Circuit into two circuits, the new Ninth and the Twelfth, with the same geographic boundaries.⁸ 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. S. 1845 and S. 1296 specify that the offices of the Chief Executive and Clerk of Court for the Twelfth Circuit be located in Phoenix, while H.R. 4241 and other bills do not specify a location for those offices. Currently, the Ninth Circuit is headquartered in San Francisco and also meets in Los Angeles, Portland, and Seattle.⁹ Under H.R. 4241 and S. 1845, the new Ninth would meet in Honolulu, Pasadena, and San Francisco; the Twelfth would meet in Las Vegas, Missoula, Phoenix, Portland, and Seattle. S. 1296 designates only Missoula, Phoenix, and Portland as meeting places for the Twelfth Circuit. In their provisions to split the Ninth Circuit, the three bills — H.R. 4241, S. 1296, and S. 1845 — are otherwise identical, except for slight differences in the number of active judges allocated to the circuits and the dates on which the legislation dividing the current Ninth Circuit would become effective.

A second set of bills would take an alternate approach to dividing the current Ninth Circuit. Under H.R. 211, sponsored by Representative Michael Simpson, and S. 1301, sponsored by Senator John Ensign, the current Ninth Circuit would be divided into three circuits instead of two. 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, while the Thirteenth Circuit would include Alaska, Oregon and Washington.

Aside from different allocations of judges for the new circuits and designating different geographical boundaries and cities in which the circuits would meet, both sets of bills take largely similar approaches to splitting the current Ninth Circuit. **Table 1** provides additional details. Nonetheless, the choice immediately facing Congress is whether to split the Ninth Circuit into the new Ninth and Twelfth Circuits, as outlined in the House version of the Deficit Reduction Act (H.R. 4241), which is the focus of this report.

Splitting the Ninth Circuit: Current Debates and Analysis

The debate over splitting the Ninth Circuit tends to focus on three areas: (1) geography and population; (2) efficiency (including caseload, how quickly the circuit disposes of cases, and cost); and (3) the circuit's rulings. Proponents of splitting the Ninth Circuit argue that the court is too big and covers too many people to operate efficiently. Opponents of a split generally respond that although the Ninth Circuit is

⁸ A fourth bill, H.R. 212, sponsored by Representative Michael Simpson, would create a new Ninth Circuit consisting of Arizona, California, and Nevada. The Twelfth Circuit would include Alaska, Guam, Hawaii, Idaho, Montana, the Northern Mariana Islands, Oregon, and Washington.

⁹ 28 U.S.C. §48(a).

big, it still delivers effective justice and provides legal continuity for the western United States. Opponents of a split 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 efficiency is the prime concern.

Geography and Population. The Ninth Circuit's geography is 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 caseload.¹⁰ 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 were in California.¹¹ The 2004 estimated population of the area covered by what would be the new Ninth Circuit under H.R. 4241, H.R. 3125, S. 1296, and S. 1845 was more than 37 million, while the population covered by what would be the Twelfth Circuit was estimated at almost 21 million.¹² Currently, the Sixth Circuit (Kentucky, Michigan, Ohio, and Tennessee) is the second-most-populous circuit jurisdiction, with a 2004 estimated population of more than 31 million.¹³ Therefore, even after a split, a new Ninth Circuit would still be the nation's most populous circuit.

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, recently stated 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

¹⁰ As is explained below in the discussion of the Ninth Circuit's rulings, the debate over geography and population also has tacit connections to how congruent those rulings are with the West's diverse political culture.

¹¹ The Ninth Circuit's estimated population was computed by CRS 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, CRS added the 2000 populations for Guam and the Northern Mariana 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>].

¹² Precise estimates are 37,380,665 and 20,852,541 respectively. These estimates were computed by CRS using the method described above.

¹³ The precise estimate is 31,618,515, using the method described above.

the application of environmental regulations one way on the California side of Lake Tahoe, and another way on the Nevada side.¹⁴

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.’”¹⁵

Efficiency. The debate over the Ninth Circuit’s efficiency generally includes three issues: (1) judges and caseload; (2) how quickly the circuit disposes of cases; and (3) cost. On a related note, proponents of a split generally say that the Ninth Circuit is too large to hold effective *en banc* hearings.

Judges and Caseload. Opponents of a split argue that the Ninth Circuit handles its large workload well, and that professional case management limits potential inefficiencies. Furthermore, those opposed to a split contend that dividing the circuit would create new inefficiencies because of having to duplicate case-management systems in the new circuits, perhaps without the substantial staff expertise many opponents of a split believe the Ninth Circuit currently possesses. In the view of supporters of a split, the Ninth Circuit is overworked, with too many cases to handle efficiently. Those favoring a split say that Congress has a responsibility to reduce the circuit’s caseload by dividing the circuit, and that failing to do so jeopardizes timely access to justice. Further, proponents say that the circuit’s work is too important to leave major decisions to staff, and that lighter caseloads made possible by dividing the circuit and adding new judgeships would allow judges to follow their own cases, and those of their colleagues, more closely.

As **Table 2** (at the end of this report) shows, there are 28 authorized judgeships in the current Ninth Circuit, about 16% of the total circuit judgeships nationwide. Twenty-four of those judgeships are currently filled.¹⁶ H.R. 4241 would authorize

¹⁴ Statement of Senator 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*, 109th Cong., 1st sess., Oct. 26, 2005; [http://judiciary.senate.gov/member_statement.cfm?id=1635&wit_id=2626].

¹⁵ 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*, 109th Cong., 1st sess., Oct. 26, 2005; [http://judiciary.senate.gov/testimony.cfm?id=1635&wit_id=4726].

¹⁶ Twenty-three senior judges are also assigned to the circuit. In total, 47 judges currently serve the circuit. Senior judges have taken “senior status,” a specialized form of judicial retirement. Many senior judges maintain busy part-time work schedules, and are considered an important element in covering the judiciary’s caseload. See Administrative Office of the United States Courts (AO), *Senior Status and Retirement for Article III Judges*, Apr. 1999 (Judges Information Series, No. 4); and 28 U.S.C. §371. The figure of 23 senior judges comes from the judiciary portion of the House Budget Committee report (109-276) accompanying H.R. 4241, p. 721. The report is available online at

19 judges for the new Ninth Circuit and 14 judges to the Twelfth Circuit, an increase of five judges compared with the current Ninth Circuit.¹⁷ (Other sections of the bill also authorize additional federal judgeships throughout the nation.) H.R. 4241 would allow the chief judges of either the new Ninth or Twelfth Circuits to temporarily assign district or appellate judges to the other circuit¹⁸ to provide for increased judicial capacity when needed.

As **Table 3** (at the end of this report) shows, data from the Administrative Office of the United States Courts (AO) indicate that the Ninth Circuit was responsible for 20-25% of the nation's appellate caseload in 2004 (in filings and appeals terminated).¹⁹ The table also shows that the Ninth Circuit's caseload increased during the five years between 1999 and 2004. During that period, the number of Ninth Circuit appeals filings increased 52.1%, from 9,383 to 14,274.²⁰ During the same period, all *other* circuits' filings increased by a comparatively small 7.0%, from 45,310 to 48,488.²¹ In 2004, the Ninth Circuit led the nation in appellate filings, with 14,274. Other circuits' appeals filings in 2004 ranged from 1,390 for the Court of Appeals for the District of Columbia, and 1,723 for the First Circuit, to 8,509 for the Fifth Circuit.

Based on the Ninth Circuit's 14,274 appeals filed in 2004, each authorized active judge (when the current circuit is fully staffed) would carry an average

¹⁶ (...continued)

[<http://a257.g.akamaitech.net/7/257/2422/10nov20051200/www.access.gpo.gov/congress/house/pdf/109hr/hr276.pdf>]. However, data for the year ending Sept. 30, 2004, from the AO, list 22 senior judges on the Ninth Circuit. See "U.S. Court of Appeals - Judicial Caseload Profile" for the Ninth Circuit, Administrative Office of the United States Courts; see [<http://www.uscourts.gov/cgi-bin/cmsa2004.pl>].

¹⁷ See section 5404 of H.R. 4241 for the number of judges authorized to each circuit after reorganizing the current Ninth Circuit. H.R. 4241 also authorizes two temporary judgeships for the Ninth Circuit. See section 5202 of the bill. The bill specifies that "official duty station[s]" for all seven judges (the five additional judges plus the two temporary judges) "shall be in California."

¹⁸ *Ibid.*, sec. 5411.

¹⁹ Based on the data in **Table 3**, the Ninth Circuit received 22.7% of the nation's appellate filings in 2004. This percentage was calculated by CRS.

²⁰ This figure was computed by CRS and also appears in "U.S. Court of Appeals - Judicial Caseload Profile" for the Ninth Circuit and national totals, Administrative Office of the United States Courts; see [<http://www.uscourts.gov/cgi-bin/cmsa2004.pl>]. Throughout this report, unless otherwise noted, caseload data appear in a database entitled, "Federal Court Management Statistics, 2004, Courts of Appeals," published by the AO; available at [<http://www.uscourts.gov/cgi-bin/cmsa2004.pl>]. For that database, calendar years end on Sept. 30 of each year. Some other sources involved in the debate over splitting the Ninth Circuit cite data for the year ending June 30, 2005, as noted elsewhere in this report. However, comprehensive 2005 statistics are not yet posted on the AO's website.

²¹ Totals throughout this section do not include data for the Court of Appeals for the Federal Circuit. As is noted in **Table 2**, Federal Circuit data regarding caseload are not posted by the AO with other circuits' caseload data.

caseload of almost 510 filed appeals.²² However, in 2004, the Ninth Circuit was outpaced by the Second Circuit, which led the nation with an average caseload of more than 539 appeals filed for each of the circuit's 13 authorized judgeships. The Fifth Circuit closely followed the Ninth Circuit, with almost 501 filed appeals per each of its 17 authorized judgeships. By contrast, the Court of Appeals for the District of Columbia received an average of 116 appeals for each of its 12 authorized judgeships, and the Third Circuit received an average of 277 appeals for each of its 14 authorized judgeships.²³

According to data provided by the AO, for the year ending June 30, 2005, 11,275 cases were filed in what would be the new Ninth Circuit (under H.R. 4241, H.R. 3125, S. 1296 and S. 1845) compared with 4,442 cases filed in what would be the Twelfth Circuit;²⁴ the new Ninth would have carried 72% of cases of the current Ninth Circuit, compared with 28% for the new Twelfth Circuit. The 19 authorized judges provided for the new Ninth in H.R. 4241 would have carried an average caseload of 593 appeals filed. By contrast, the 14 authorized judges provided for the Twelfth Circuit in H.R. 4241 would have carried an average caseload of 317 appeals filed in the Twelfth Circuit.²⁵

How Quickly the Circuit Disposes of Cases. Another potential measure of the Ninth Circuit's efficiency is how quickly it disposes of cases. According to data from the AO, for the year ending September 30, 2004, the Ninth Circuit disposed of cases in a median of 14.0 months after filing, ranking 11th among the 12 circuits (see **Table 4** at the end of this report). Only the Sixth Circuit had a slower process. Nationwide, the median time for disposing of cases ranged from 7.5 months for the Fourth Circuit to 16.8 months for the Sixth Circuit. Those favoring a split contend that a period of more than a year for disposal 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 to maintaining that efficiency.²⁶

²² This figure was computed by CRS by dividing 14,274 cases by 28 authorized judgeships. The actual number is 509.8 cases, which assumes that all 28 authorized judgeships are filled, but does not include visiting or senior judges who handle cases. However, as explained below, the Ninth Circuit currently has four vacancies on the bench. Based on 24 filled positions, the average caseload is 594.8 filed appeals. In the text above, figures in this section are rounded to the nearest whole number.

²³ These figures were calculated by CRS using caseload data provided by the Administrative Office of the United States Courts, cited elsewhere in this report.

²⁴ The AO's estimates are 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. See "Appellate Caseload & Number of Judges: S. 1845/H.R. 4093 Scenario," table submitted on Oct. 25, 2005, in response to a request from the 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.

²⁵ These figures were computed by CRS.

²⁶ See, for example, Statement of Circuit Judge Alex Kozinski, in U.S. Congress, Senate, (continued...)

Opponents of a split also 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), slowing the court's overall work.²⁷ Many of these cases originate in California. Therefore, the Ninth Circuit (along with the Second Circuit, which covers Connecticut, New York, and Vermont), must assume a large immigration-appeals workload. According to the AO, as of October 2005, 41% of Ninth Circuit filings were BIA appeals, and 88% of those were filed in California.²⁸

Ninth Circuit Judge Sidney R. Thomas, who opposes a split, recently testified that from 2001 to 2005 (through June 30), BIA appeals for the circuit had increased 570%. However, Judge Thomas maintained that the backlog of BIA cases is temporary and declining, which will decrease some of the Ninth Circuit's caseload in coming years. 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.²⁹

Cost. Cost is another major issue associated with the debate over the Ninth Circuit's efficiency. Opponents of a split say that administrative costs associated with splitting the Ninth Circuit and establishing a new headquarters, staff support, and similar requirements are unnecessary and would be an inefficient use of the judiciary's 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 efficiency will outweigh those costs.

Cost estimates of 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 headquarters were in Seattle (another site discussed as a possible headquarters), the AO estimated startup costs at more than \$12 million,

²⁶ (...continued)

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; [http://judiciary.senate.gov/testimony.cfm?id=1635&wit_id=4729].

²⁷ 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>].

²⁸ 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.

²⁹ See, for example, Testimony of Circuit Judge Sidney R. Thomas; [http://judiciary.senate.gov/testimony.cfm?id=1635&wit_id=4732].

with \$7 million in annual recurring costs.³⁰ 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.”³¹

***En Banc* Procedures.** Finally, another aspect of the Ninth Circuit’s efficiency relates to judicial 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 circuit courts typically involve all of a court’s active judges, and are normally reserved for particularly important cases, or those in which the full court wishes to reconsider the opinion of a three-judge appellate panel. However, the Ninth Circuit employs a “limited *en banc*” procedure, allowing 11 judges (rather than the entire court) to represent a full *en banc* panel.³² Proponents of a split contend the Ninth’s reliance on limited *en banc* procedures allows a minority of the court to speak for the entire court. According to Ninth Circuit Judge Andrew Kleinfeld, “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.”³³ However, Ninth

³⁰ The AO’s estimates were based on the language in H.R. 4093 (inserted into H.R. 4241) 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 the 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 Phoenix versus Seattle estimates vary largely because of costs entailed with constructing a new facility or renovating an existing one. 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. 4241. If the seven additional judgeships are included, start-up costs 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*.

³¹ Congressional Budget Office Cost Estimate “H.R. 4093: Federal Judgeship and Administrative Efficiency Act of 2005,” Nov. 21, 2005, p. 1.

³² 92 Stat. 1633 (1978), P.L. 95-486, allows circuits with more than 15 active judges to “perform its *en banc* function by such number of members of its *en banc* courts as may be prescribed by rule of the court of appeals.”

³³ 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*, 109th Cong., 1st sess., Oct. 26, 2005; [http://judiciary.senate.gov/testimony.cfm?id=1635&wit_id=4730]. Senator Jon Kyl, who supports a split, recently made a similar statement. See “Kyl Urges Serious Consideration of Proposals to Split 9th Circuit Court,”

(continued...)

Circuit Chief Judge Mary M. Schroeder announced on October 1, 2005, that beginning on January 1, 2006, the circuit will increase the size of *en banc* panels to 15 judges. According to Judge Schroeder, although she has been satisfied with the 11-judge panels, the decision to increase the number of judges on *en banc* panels to 15 was “intended to respond to criticism that we should have a majority of our judges sit on each *en banc* [panel].”³⁴

Opponents of a split also argue that the *en banc* issue is not a major concern, as 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.³⁵

None of the legislation currently before Congress proposing to split the Ninth Circuit would alter *en banc* procedures.³⁶ Despite what Congress decides on splitting the circuit, controversy over *en banc* procedures may remain. For example, although the Twelfth Circuit would presumably sit *en banc* with all 14 active judges proposed by H.R. 4241, the new Ninth would not be required to sit *en banc* with all 19 active judges. 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. Therefore, because the new Ninth would have more than 15 judges, it could employ the same limited *en banc* procedure the Ninth Circuit uses today. 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 required.

³³ (...continued)

press release, the Office of Senator Jon Kyl, Oct. 26, 2005.

³⁴ “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>].

³⁵ 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*, 109th Cong., 1st sess., Oct. 26, 2005; [http://judiciary.senate.gov/testimony.cfm?id=1635&wit_id=4732].

³⁶ A separate bill, H.R. 1064, sponsored by Representative Michael Simpson, was introduced on March 2, 2005, which would prohibit the Ninth Circuit from using the limited *en banc* procedure.

The Circuit's Rulings. Some of the Ninth Circuit's rulings have 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.³⁷ Some proponents of a split say that some Ninth Circuit rulings do not represent the conservative political culture of much of the western United States, reflecting the perceived division between California and much of the rest of the circuit.³⁸ However, some opponents of a split warn that diverse perspectives from judges across the West are vital to ensuring balance on the court. Some observers say that the new Ninth would be more "liberal" than the current Ninth Circuit allegedly is, because there would be little geographic diversity in the new Ninth Circuit.³⁹

Proponents of splitting the Ninth Circuit also contend that the Supreme Court reverses the current Ninth Circuit more frequently than any other circuit court. Opponents of a split respond that only a small fraction of the circuit's rulings are granted review by the Supreme Court.⁴⁰ Some opposed to splitting the Ninth Circuit also suggest that efforts to divide the circuit are an attempt to limit judicial independence. Supporters of splitting the circuit deny such allegations. For example, Ninth Circuit Judge Diarmuid O'Scannlain refuted the claim that splitting the Ninth Circuit is a threat to judicial independence, saying that "the case for the split stands on the grounds of effective judicial administration, supported by the statistics which show the ongoing caseload explosion."⁴¹

Judges' Opinions on a Split. Although a few judges vocally support a split, the majority of the Ninth's judges reportedly opposes a split. According to Senator Patrick Leahy, ranking member of the Judiciary Committee, in 2004 balloting conducted by Ninth Circuit Chief Judge Mary Schroeder, "Only 9 of the Court's 47

³⁷ *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 Angie A. Welborn. On media coverage of purported 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.

³⁸ In Idaho, for example, a spokesperson for Idaho Chooses Life, an anti-abortion group, was recently quoted by the Idaho Falls *Post Register* as being "tired of 'California liberals' having veto power over Idaho's social policies," such as abortion regulation. See Corey Taule, "Splitting the 9th," *Post-Register* (Idaho), Nov. 11, 2005, p. A01.

³⁹ "Splitting the 9th would leave the wackiest judges on the Left Coast," *Orange County Register*, Nov. 27, 2005; [http://www.nexis.com/research/pnews/emailAlert?_pnewsAlert=0x0014b53b-0x00050252%2f0x0014b53b%2f20051130%2f11%3a25%3a27]; and Zachary Coile, "A quiet move in the House to split the 9th Circuit," *San Francisco Chronicle*, Nov. 30, 2005, p. A1.

⁴⁰ For example, 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* 37 (Fall 2003), pp. 1-21.

⁴¹ See Testimony of Circuit Judge Diarmuid O'Scannlain; [http://judiciary.senate.gov/testimony.cfm?id=1635&wit_id=4726]

judges favored a split, and only 3 of the 24 active judges favor a split.”⁴² Those opposed to 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 current Ninth Circuit reportedly oppose a split.⁴³ The U.S. Judicial Conference recently “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.” In addition to splitting the Ninth Circuit, portions of H.R. 4241 would authorize more than 60 additional federal judgeships nationwide.⁴⁴

Some who support a split suggest that *district* judges within the Ninth Circuit would not necessarily be opposed to a split if one were to occur. For example, District Judge John M. Roll, who maintains chambers in Arizona, recently testified 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.”⁴⁵

Outlook for Splitting the Ninth Circuit

In November 2005, the Justice Department went on record in favor of dividing the Ninth Circuit, saying that splitting the circuit and authorizing additional judgeships “would improve the administration of justice.”⁴⁶ Some major western

⁴² Statement of Senator Patrick Leahy, 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*, 109th Cong., 1st sess., Oct. 26, 2005 [http://judiciary.senate.gov/member_statement.cfm?id=1635&wit_id=2629].

⁴³ Roxie Bacon and Don Bivens, “Rhetoric, Not 9th Circuit, Is What’s Overloaded,” *Arizona Republic*, Nov. 21, 2005; p. 7B.

⁴⁴ “Judicial Conference Acknowledges Loss to Judiciary in Resolutions,” *The Third Branch*, vol. 37 (10); [<http://www.uscourts.gov/ttb/oct05ttb/loss/index.html>]. Title V, subtitles A-C of H.R. 4241 authorize more than 60 new judgeships throughout the nation. Splitting the Ninth Circuit is discussed in subtitle III of the bill. For recent 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,” *CQ Today*, Oct. 27, 2005, available at [<http://www.cq.com/display.do?dockkey=/cqonline/prod/data/docs/html/news/109/news109-000001935914.html@allnews&metapub=CQ-NEWS&searchIndex=3&seqNum=8>]; and Julie Kay, “Additional federal judges tied to split of 9th circuit,” *Miami Daily Business Review*, Dec. 5, 2005, p. 1.

⁴⁵ 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*, 109th Cong., 1st sess., Oct. 26, 2005; [http://judiciary.senate.gov/testimony.cfm?id=1635&wit_id=4731].

⁴⁶ Letter to the Honorable F. James Sensenbrenner Jr. from Assistant Attorney General (continued...)

newspapers have published editorials favoring a split (although other papers are on record opposing a split).⁴⁷ Professor Steve Candrillo, who teaches law at the Washington School of Law and Seattle University, reportedly said that supporters of a split are “more aggressive and are more likely to succeed” this year than in the past. Another observer, University of Pittsburgh law professor Arthur Hellman, was recently quoted as saying that “[t]he Ninth Circuit is in the fight for its life.”⁴⁸

Attaching language splitting the Ninth Circuit to the budget reconciliation bill could either help or hinder efforts to split the circuit. On one hand, the provision could face an easier path to success than as a stand-alone measure, due to the pressure to pass the budget reconciliation bill. On the other hand, language splitting the circuit faces potential procedural hurdles if it remains part of a budget reconciliation bill. Senator Dianne Feinstein recently stated 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.”⁴⁹ Others might also oppose the split if they object to start-up costs associated with dividing the circuit, or if they believe that a split is not central to the budget reconciliation process. In this regard, Senators Arlen Specter and Patrick Leahy, the chairman and ranking member, respectively, of the Senate Judiciary Committee, both publicly oppose legislating a split as part of the budget reconciliation process. On November 9, 2005, both Senators wrote to Senator Judd Gregg, Budget Committee chairman, and Senator Kent Conrad, its ranking member, stating that, “[t]he issue [of dividing the Ninth Circuit] is squarely under the jurisdiction of the Judiciary Committee and any budgetary issues are merely incidental. Accordingly, we oppose including such measures in any reconciliation package.”⁵⁰

History suggests that even if Congress maintains the status quo, the issue will likely be active in the future. Proponents of a split argue that rapid population growth within the current Ninth Circuit will only exacerbate the circuit’s alleged management challenges. Many proponents of a split view dividing the circuit as

⁴⁶ (...continued)

William E. Moschella, Nov. 14, 2005.

⁴⁷ See, for example, “Voice of the Times: Splitting 9th Circuit is a natural progression,” *Anchorage Daily News*, Oct. 31, 2005, p. B5; “Break up the 9th,” *Las Vegas Review-Journal*, Oct. 17, 2005, p. 6B; Howard Mintz, “Breaking Up the ‘Nuttty 9th,” *Seattle Times*, Nov. 8, 2005, p. A3; “Short-circuited,” *Sacramento Bee*, Nov. 11, 2005, p. B8; and “Don’t Split the Ninth Circuit,” *San Francisco Chronicle*, Nov. 20, 2005, p. E4.

⁴⁸ Mundy, “Once again, Magnuson the talk of Washington”; and Les Blumenthal, “‘Nuttty 9th’ Circuit Court could be bound for breakup; Judicial experts say Congress might succeed in dividing the 9th U.S. Circuit Court of Appeals. Critics say it’s too big, too unwieldy and too liberal,” *News Tribune* (Tacoma, Wash.), Nov. 14, 2005, p. A01.

⁴⁹ 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 Robert Keith.

⁵⁰ Letter to the Honorable Judd Gregg and the Honorable Kent Conrad from Senators Arlen Specter and Patrick Leahy; Nov. 9, 2005.

“inevitable,” with only the timing of a division and some details remaining uncertain.⁵¹ However, others are equally determined to oppose splitting the circuit, asserting that a split is not a solution to perceived problems.

⁵¹ For example, an Oct. 2005 Senate Subcommittee on Administrative Oversight and the Courts hearings was recently entitled, “Revisiting Proposals to Split the Ninth Circuit: An Inevitable Solution to a Growing Problem.”

Table 1. Major Provisions of Legislation Introduced During the 109th Congress Which Would Split the Ninth Circuit Court of Appeals

Provision	H.R. 4241/H.R. 4093 last major action: 11/17/2005 (passed the House)	S. 1845 last major action: 10/26/2005 (hearings)	S. 1296 last major action: 10/26/2005 (hearings)	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 (hearings)
<i>Circuits Created/Altered</i>	1. Current Ninth Circuit ^a ceases to exist. 2. "New Ninth" Circuit created: California, Hawaii, Guam, Northern Mariana Islands 3. New Twelfth Circuit created: Alaska, Arizona, Idaho, Montana, Nevada, Oregon, Washington [sec. 5403]	Same as bills to left [sec. 3]	Same as bills to left [sec. 3]	Same as bills to left [sec. 3]	1. Current Ninth Circuit ceases to exist. 2. "New Ninth" Circuit created: California, Hawaii, Guam, Northern Mariana Islands 3. New Twelfth Circuit created: Arizona, Idaho, Montana, Nevada 4. New Thirteenth Circuit created: Alaska, Oregon, Washington [sec. 4]	1. Current Ninth Circuit ceases to exist. 2. "New Ninth" Circuit created: Arizona, California, Nevada 3. New Twelfth Circuit: Alaska, Guam, Hawaii, Idaho, Montana, Northern Mariana Islands, Oregon, Washington [sec. 3]	Same as H.R. 211 [sec. 3]

Provision	H.R. 4241/H.R. 4093 last major action: 11/17/2005 (passed the House)	S. 1845 last major action: 10/26/2005 (hearings)	S. 1296 last major action: 10/26/2005 (hearings)	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 (hearings)
<i>Places of the Court</i>	1. New Ninth Circuit: Honolulu, Pasadena, San Francisco 2. Twelfth Circuit: Las Vegas, Missoula, Phoenix, Portland, Seattle	1. Same as H.R. 4241/H.R. 4093 2. Same as H.R. 4241/H.R. 4093 [sec. 6] 3. Chief executive and clerk of court offices for Twelfth Circuit located in Phoenix [sec. 7]	1. New Ninth Circuit: Honolulu, San Francisco 2. Twelfth Circuit: Phoenix, Portland, Missoula [sec. 6] 3. Chief executive and clerk of court offices for Twelfth Circuit located in Phoenix [sec. 7]	1. Same as H.R. 4241/H.R. 4093, S. 1845 2. Twelfth Circuit: Phoenix, Seattle [sec. 6]	1. New Ninth Circuit: San Francisco, Los Angeles 2. Twelfth Circuit: Las Vegas, Phoenix 3. Thirteenth Circuit: Portland, Seattle [sec. 4]	1. New Ninth Circuit: Pasadena, Phoenix, San Francisco [sec. 6] 2. Twelfth Circuit: Portland, Seattle	Same as H.R. 211

Provision	H.R. 4241/H.R. 4093 last major action: 11/17/2005 (passed the House)	S. 1845 last major action: 10/26/2005 (hearings)	S. 1296 last major action: 10/26/2005 (hearings)	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 (hearings)
<i>Authorized Judgeships</i>	<p>1. Authorizes 5 additional judgeships for the Ninth, with official duty stations in California</p> <p>2. Judges authorized for New Ninth Circuit: 19</p> <p>Judges authorized for Twelfth Circuit: 14 [sec. 5202]</p>	<p>1. Authorizes 5 additional judgeships for the New Ninth, with official duty stations in California</p> <p>2. Judges authorized for New Ninth Circuit: 20</p> <p>Judges authorized for Twelfth Circuit: 14 [sec. 4]</p>	<p>1. Authorizes 5 additional judgeships for the New Ninth, with official duty stations in California, not to be appointed before Jan. 21, 2006. [sec. 4]</p> <p>2. Same as H.R. 4241 [sec. 5]</p>	<p>1. Authorizes 2 additional judgeships for the current Ninth Circuit, with official duty stations in Arizona, California, or Nevada</p> <p>2. Authorizes 3 additional judgeships for the New Ninth Circuit, not to be appointed before Jan. 21, 2006. [sec. 4]</p> <p>3. Judges authorized for New Ninth Circuit: 24</p> <p>Judges authorized for Twelfth Circuit: 9 [sec. 5]</p>	<p>1. Same as H.R. 4241/H.R. 4093</p> <p>2. Judges authorized for New Ninth Circuit: 19</p> <p>Judges authorized for Twelfth Circuit: 8</p> <p>Judges authorized for Thirteenth Circuit: 6 [sec. 5]</p>	<p>Same as H.R. 3125 [secs. 4, 5]</p>	<p>Same as H.R. 211 [sec. 5]</p>

Provision	H.R. 4241/H.R. 4093 last major action: 11/17/2005 (passed the House)	S. 1845 last major action: 10/26/2005 (hearings)	S. 1296 last major action: 10/26/2005 (hearings)	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 (hearings)
<i>Temporary Judgeships</i>	Authorizes 2 additional temporary circuit judgeships for the Ninth Circuit, with official duty stations in California [sec. 5202]	Authorizes 2 additional temporary circuit judgeships for the current Ninth Circuit, with official duty stations in California [sec. 4]	Same as S. 1301, S. 1845, and H.R. 211 [sec. 4]	Authorizes 2 additional temporary circuit judges for the Ninth Circuit, with official duty stations in Arizona, California, or Nevada [sec. 4]	Same as S. 1296, S. 1301, S. 1845 [sec. 3]	Same as H.R. 3125 [sec. 4]	Same as S. 1296, S. 1845, H.R. 211 [sec. 4]
<i>Assignment of Active Judges</i>	Judges are assigned to the circuit in which their duty station was located the day before the act became effective, as if the act had been effective (i.e., California in New Ninth Circuit; Montana in Twelfth) [sec. 5406]	Same as bills 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]
<i>Assignment of Senior Judges</i>	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. 5407]	Same as bills to left [sec. 9]	Same as bills to left [sec. 8]	Same as bills to left	Same as bills to left [sec. 4]	Same as bills to left [sec. 8]	Same as bills to left [sec. 8]

Provision	H.R. 4241/H.R. 4093 last major action: 11/17/2005 (passed the House)	S. 1845 last major action: 10/26/2005 (hearings)	S. 1296 last major action: 10/26/2005 (hearings)	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 (hearings)
<i>Seniority of Judges</i>	Based on commissioning in current Ninth Circuit [sec. 5408]	Same as bills 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]
<i>Judicial Vacancies</i>	First 2 vacancies in Ninth Circuit judgeships confirmed to fill the temporary judgeships noted above occurring 10 or more years after initial appointment shall not be filled [sec. 5202]	First 2 vacancies in New Ninth Circuit judgeships confirmed to fill the temporary judgeships noted above occurring 10 or more years after initial appointment shall not be filled [sec. 4]	Same as S. 1845 [sec. 4]	Same as S. 1845 [sec. 4]	Same as S. 1845 [sec. 3]	Same as S. 1845 [sec. 4]	Same as S. 1845 [sec. 4]
<i>Temporary Assignment of Circuit Judges</i>	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. 5410]	Same as bills 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. 4241/H.R. 4093 last major action: 11/17/2005 (passed the House)	S. 1845 last major action: 10/26/2005 (hearings)	S. 1296 last major action: 10/26/2005 (hearings)	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 (hearings)
<i>Temporary Assignment of District Judges</i>	<p>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</p> <p>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. 5411]</p>	<p>Same as bills to left [sec. 13]</p>	<p>Same as bills to left [sec. 13]</p>	<p>Same as bills to left [sec. 12]</p>	<p>Same as bills to left, except applicable to Ninth, Twelfth, and Thirteenth Circuits [sec. 4]</p>	<p>Same as bills to left [sec. 11]</p>	<p>Same as bills to left, except applicable to Ninth, Twelfth, and Thirteenth Circuits [sec. 12]</p>

Provision	H.R. 4241/H.R. 4093 last major action: 11/17/2005 (passed the House)	S. 1845 last major action: 10/26/2005 (hearings)	S. 1296 last major action: 10/26/2005 (hearings)	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 (hearings)
<i>Application to Cases</i>	<p>1. If a matter has been submitted for a decision in the current Ninth Circuit, further proceedings will occur as if no reorganization of the Ninth Circuit had occurred.</p> <p>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.</p> <p>3. If a petition for rehearing <i>en banc</i> 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. 5409]</p>	Same as bills to left [sec. 11]	Same as bills to left [sec. 11]	<p>1. Same as bills to left</p> <p>2. Same as bills to left</p> <p>3. A petition for rehearing or rehearing <i>en banc</i> in a matter 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 <i>en banc</i> is granted, the matter shall be reheard by a court comprised as though the act had not been enacted. [sec. 10]</p>	<p>1. Same as bills to left</p> <p>2. Same as bills to left.</p> <p>3. Same as H.R. 3125 [sec. 4]</p>	<p>1. Same as bills to left</p> <p>2. Same as bills to left</p> <p>3. Same as H.R. 3125, H.R. 211 [sec. 10]</p>	<p>1. Same as bills to left</p> <p>2. Same as bills to left.</p> <p>3. Same as H.R. 3125, H.R. 211, H.R. 212 [sec. 10]</p>

Provision	H.R. 4241/H.R. 4093 last major action: 11/17/2005 (passed the House)	S. 1845 last major action: 10/26/2005 (hearings)	S. 1296 last major action: 10/26/2005 (hearings)	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 (hearings)
<i>Administration</i>	<p>1. The Court of Appeals for the current Ninth Circuit shall be responsible for administering the Ninth Circuit split.</p> <p>2. For administrative purposes, the current Ninth Circuit ceases to exist 2 years after date of enactment of the act reorganizing the Ninth Circuit. [sec. 5412]</p>	Same as bills to left [sec. 14]	Same as bills to left [sec. 14]	<p>Same as bills to left [sec. 14]</p> <p><i>and</i></p> <p>Any two circuits may jointly carry out administrative functions the judicial councils of the two circuits believe would be beneficial [sec. 13]</p>	Same as H.R. 3125 [sec. 4]	Same as H.R. 211, H.R. 212, and H.R. 3125	Same as H.R. 211, H.R. 212, and H.R. 3125
<i>Effective Date</i>	No later than Dec. 31, 2006; see also, item 2 under “Administration” above. [sec. 5413]	Same as S. 1296	12 months after the date of enactment [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 October 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]

Source/Note: CRS comparison of bill texts. This table includes only provisions in the cited bills which propose to split the Ninth Circuit. Provisions in these bills *not* related to splitting the Ninth Circuit are excluded, unless otherwise noted.

a. For the purposes of this table, “current Ninth Circuit” refers to the Ninth Circuit as it exists without any reorganization.

Table 2. 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	0	0
Third	14	2	14.3
Fourth	15	2	13.3
Fifth	17	1	5.9
Sixth	16	1	6.3
Seventh	11	0	0
Eighth	11	0	0
Ninth	28	4	14.3
Tenth	12	1	8.3
Eleventh	12	0	0
DC	12	3	25.0
Federal	12	N/A ^b	N/A

Sources: Administrative Office of the United States Courts, “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/archived/judgevac12_01_05.html]. Vacancies data are current as of Dec. 2005, according to the AO website.

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

b. Data on vacancies in the Court of Appeals for the Federal Circuit are not included in the source cited above from the AO. However, the Federal Circuit is a special case, as it has national jurisdiction based on issue, not geography. The Federal Circuit’s jurisdiction includes issues such as patents, trademarks, and 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.

Table 3. Ninth Circuit and National Caseloads, FY1999-FY2004

	1999	2000	2001	2002	2003	2004
Appeals Filed						
Ninth Circuit	9,383	9,147	10,342	11,421	12,872	14,274
All Other Circuits	45,310	45,550	47,122	46,134	47,975	48,488
Percentage of National Filings Assumed by Ninth Circuit	17.2	16.7	18.0	19.8	21.2	22.7
Percent Change in Ninth Circuit Filings Compared With Previous Year	—	-2.5	13.1	10.4	12.7	10.9
Percent Change in All Other Circuits' Filings Compared With Previous Year	—	1.0	3.5	-2.1	4.0	1.1
Appeals Terminated						
Ninth Circuit	8,402	9,216	10,372	10,042	11,220	12,151
All Other Circuits	45,686	47,296	47,050	46,544	45,176	44,230
Percentage of All National Appeals Terminated by Ninth Circuit	15.4	16.3	18.1	17.7	20.0	21.6
Percent Change in Ninth Circuit Appeals Terminated Compared With Previous Year	—	9.7	12.5	-3.2	11.7	8.3
Percent Change in All Other Circuits' Appeals Terminated Compared With Previous Year	—	3.5	-1.0	-1.1	-2.9	-2.1
Pending Appeals						
Ninth Circuit	9,274	9,219	9,160	10,226	11,277	13,417
All Other Circuits	32,997	31,191	31,143	30,739	33,323	37,654
Percentage of All National Appeals Pending in Ninth Circuit	21.9	22.8	22.7	25.0	25.3	26.3
Percent Change in Ninth Circuit Pending Appeals Compared With Previous Year	—	-1.0	-1.0	11.6	10.3	19.0
Percent Change in All Other Circuits' Pending Appeals Compared With Previous Year	—	-5.5	-0.0	-1.3	8.4	13.0

Source: "U.S. Court of Appeals - Judicial Caseload Profile," Administrative Office of the United States Courts; [<http://www.uscourts.gov/cgi-bin/cmsa2004.pl>]. Percentages computed by CRS and rounded to the nearest decimal. National totals apparently do not include appeals filed before the Court of Appeals for the Federal Circuit. Data for "All Other Circuits" rows computed by CRS by subtracting caseload data for the Ninth Circuit from "national totals" data from the AO (cited above).

Note: Years are based on the 12-month period ending on Sept. 30, the methodology employed in the AO data.

Table 4. Median Time in Months from Filing Notice of Appeal to Disposition for FY2004

Ranking Based on Shortest Time	Circuit	Median Time in Months
1	Fourth	7.5
2	Fifth	8.5
3	Eleventh	8.8
4	Eighth	9.8
5	Seventh	10.3
6	District of Columbia	10.5
7	Second	11.0
8	First	11.2
9	Third	11.6
10	Tenth	11.7
11	Ninth	14.0
12	Sixth	16.8

Source: "U.S. Court of Appeals - Judicial Caseload Profile," Administrative Office of the United States Courts; see [<http://www.uscourts.gov/cgi-bin/cmsa2004.pl>].

Note: Data are for the year ending Sept. 30, 2004.