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One of the most cherished conservative shibboleths is the notion that the 9th U.S. Circuit Court of Appeals is a liberal court, a den of outlaw judicial activists that the U.S. Supreme Court must regularly smack into submission. Adherents of this view obsessively revisit a few highly publicized cases, like the recent panel decision that the phrase "under God" in the Pledge of Allegiance violates the First Amendment, or the 1996 en banc determination that the terminally ill have a constitutional right to physician-assisted suicide. The Supreme Court quickly reversed the assisted-suicide opinion. Should the Pledge opinion even survive en banc review (motions were filed in early August), the same fate doubtless awaits that decision.

Critics of the 9th Circuit generally offer two explanations for its frequent reversal: The court is too large, and it is too liberal.

Both of these explanations are wrong. The 9th Circuit's problem is neither its size nor its politics. The 9th Circuit's problem is the Supreme Court, and the speed with which the high court is remaking much of American law.

TOO BIG?

As an initial matter, no one really cares about the size of the 9th Circuit. During the Clinton administration, conservatives invented the argument that the reason the 9th Circuit was frequently reversed was that it was "too big." Republican politicians, hoping to split the 9th into two or more smaller circuits, appointed a commission chaired by retired Justice Byron White to investigate the matter. While the White Commission made some suggestions for improvement, it found that the Circuit generally functioned well.

In response to the White Commission, the 9th Circuit established its own blue-ribbon committee made up of judges, lawyers, economists and academic experts, who conducted numerous statistical analyses of the court's performance and concluded that its size did not present a problem. Conservative jurist and public intellectual Richard Posner also attempted, unsuccessfully, to establish that the 9th Circuit's Supreme Court reversal rate is a function of its size. In sum, no hard evidence has ever emerged that would even tend to support the proposition that the 9th Circuit is too large to function properly.

This utter lack of proof didn't matter, however, because everyone on both sides of the fight over circuit splitting knew that it was really a thinly disguised political effort to dilute the voting strength of any liberal jurists that President Bill Clinton might have appointed. Conservatives sought to counteract the risk that three California liberals might land on a panel deciding an issue from a conservative state like Idaho. As then-Senior Judge Charles Wiggins, a staunchly conservative member of the 9th Circuit, testified before a House Judiciary subcommittee in 1999, the attack on the Circuit's size was motivated by "provincialism" and by political efforts to tamper with the court, both of which he decried as

"illegitimate." Then the Supreme Court made sure that there wouldn't be a Democratic president making any appointments to the 9th Circuit for a while, and that was the last we heard about what Justice Antonin Scalia had called the "oversized" court.

TOO LIBERAL?

As it turned out, the conservatives needn't have worried. President Clinton filled a number of the court's vacant billets with moderate to conservative jurists who were approved in advance by the Republican leadership. These appointees have voted consistently with the court's large right-wing bloc.

In fact, while it is frequently reported that 17 of the 24 active judges were appointed by Democrats, this sly insinuation about the politics of the court is simply mistaken. Of the 24 active judges, 12 are clearly conservatives, six are moderates, and only six could fairly be characterized as liberals.

In practical terms, this means that in order to defend a "liberal" opinion reversing a death sentence due to serious constitutional infirmities against an effort to reconsider the case en banc, the defense must hold all the votes of the liberals and garner all the votes of the moderates -- most of whom favor the use of capital punishment. Conversely, reconsideration of a "conservative" opinion requires the votes of all the liberals, all the moderates, and a defection by one conservative. These nearly insurmountable odds ensure that the 9th Circuit is no liberal court.

Moreover, those few remaining liberals on the 9th Circuit are no more likely to be reversed than their conservative colleagues. For example, in the Supreme Court term just ended, the unrepentant liberal Judge Stephen Reinhardt was reversed twice, but so was über-conservative Judge Alex Kozinski. In the 1999-2000 term, the Supreme Court granted certiorari in 10 of the 9th Circuit's cases, half of them authored by conservatives, and reversed in nine. The only judge to be reversed twice during that term was conservative Judge Diarmuid O'Scannlain, who was, ironically, one of the leading proponents of breaking up the Circuit to reduce its reversal rate.

TOO CAUTIOUS?

Neither the size nor the illusory "liberal bias" of the 9th Circuit explain its frequent reversal. Indeed, we can stop searching for the reason that the 9th Circuit is so often "wrong," because the problem is not that the 9th Circuit is "wrong" and the Supreme Court "right."

The problem is that we are living in a time when the constitutional terrain is rapidly shifting. The Supreme Court is discarding many landmark precedents that have enjoyed decades of adherence. To name but a few examples, in recent years the Court has curtailed the ability of Congress to legislate pursuant to the commerce clause, has dramatically expanded the doctrine of sovereign immunity, has torn down the wall between church and state, and has waged a relentless -- and largely unanimous -- campaign to eviscerate the Fourth Amendment. Conservatives would not disagree that this Court has abandoned much of its earlier jurisprudence. On the contrary, that abandonment is one of the proudest achievements of the Reagan revolution.

But the 9th Circuit is an intermediate court of appeals that must continue to make a good-faith effort to apply Supreme Court precedents as they now stand to the cases and controversies that come before it, as it

did in the Pledge case. What the job of an intermediate court does not entail is trying to divine what the current members of the Supreme Court might do if and when they get the case.

In a recent example, a 9th Circuit panel held in *United States v. Knights* that a California policy requiring probationers to consent to warrant less searches, even if unrelated to any probationary purpose, violated the Fourth Amendment. The opinion, written by the same ultra-conservative Judge Ferdinand Fernandez who dissented in the Pledge case, made it clear that its holding was required by "a long line of cases" from both the Supreme Court and the 9th Circuit. Nevertheless, the government urged the panel to render a decision contrary to that long-established law because the current Supreme Court would be likely to alter the law given its recent Fourth Amendment jurisprudence: "In fact, says the government, our jurisprudence is so weakened that this panel should give it the slight tap that will send it crashing to the ground." The panel refused, in part for reasons of "pure principle": It is the Supreme Court's job to change the law, should it choose to do so. It did so, and the panel's opinion was unanimously reversed by the high court during the last term.

TOO LAW-ABIDING

Unlike the 9th Circuit, some courts, such as the 4th and 5th Circuits, have wholeheartedly embraced the strategy of anticipating the high court's next move. Usually judges who engage in this guessing game get it right. For instance, in *Brzonkala v. Morrison*, a panel of the 4th Circuit refused to follow long-established Supreme Court precedent and struck down a key provision of the Violence Against Women Act. The panel rightly guessed that the five-member Supreme Court majority would seize the opportunity to restrict Congress' power to regulate activities that it has found to have an effect on interstate commerce. More rarely, judges guess wrong, as when the 4th Circuit brazenly declared that *Miranda v. Arizona* was no longer good law, and the Supreme Court disagreed.

Whether the lower court guesses right or wrong, however, it acts lawlessly when it disregards existing precedent. Unfortunately, Chief Justice William Rehnquist has repeatedly lauded the 4th Circuit as the "best circuit" for doing precisely that.

As the chief justice's praise suggests, the Supreme Court itself bears a large measure of blame for this practice. It has invited lower courts to produce circuit splits, thereby blazing a trail for the high court to follow. Such splits, based less on honest disagreements over the current law than on headlong efforts to change it, give the high court a fig leaf to cover its own activism: The Court can claim that it is merely "resolving" an area of "unsettled law," rather than admitting that it is engaged in a wholesale constitutional revolution.

Thus, Yale law professor Akhil Amar was right when he recently told *The New York Times* that there is "something screwy" about the 9th Circuit's high number of Supreme Court reversals, particularly unanimous reversals. But what is "screwy," is not that the 9th Circuit is getting the law wrong. It is that the Rehnquist Court is changing the law so swiftly and on such a broad range of issues and doctrines that it must reverse a multitude of decisions faithful to existing law in order to achieve its ends.

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