

An Epochal Shift at the Ninth Circuit

Ben Feuer, The Recorder

January 21, 2016 | 0 Comments



Ben Feuer, California Appellate Law Group

Victoria Smith

The U.S. Court of Appeals for the Ninth Circuit is every conservative's favorite *bête noire*. Famously, almost mythically liberal, the court goes by the "Ninth Circus" on talk radio and the "Nutty Ninth" among the conservative blogging set. It is, according to one right-wing presidential candidate, the "poster child for rogue courts," while the late Reverend Jerry Falwell once called it "the number one court of wackos and idiots in the land." Perennial efforts to break up the circuit have met with so little success that another right-wing presidential candidate has called for abolishing the circuit outright—states and people within it be damned.

To be sure, it's hard to argue that the Ninth Circuit's red-diaper reputation is wholly undeserved. After all, this is the court that held the Pledge of Allegiance unconstitutional, at least for a bit (the Supreme Court reversed on standing grounds, and a different Ninth Circuit panel reached the opposite conclusion on remand). It's the court that tossed out California's "three strikes" law before the Supreme Court

revived it, and that thrice set aside the death sentence of convicted murderer Fernando Belmontes, each time again reversed by the high court. It's the court that inspired the modern children's Christmas-rights classic, "Help! Mom! The 9th Circuit Nabbed the Nativity," available on Amazon.

The Ninth Circuit's far-left reputation results from more than its headquarters' digs in San Francisco. It really goes back to late 1978, when President Jimmy Carter and a Democratically controlled Congress passed a bill expanding the federal judiciary that added ten new judgeships to the 13-member court, nearly doubling its size overnight.

Over the course of his one-term presidency, Carter managed to appoint 15 of the Ninth Circuit's 23 judges, or 65 percent—a statistic that would dramatically shape the court for the next 30 years. With a friendly Congress behind him, Carter had his pick of appointees. That led to some notable appointments, especially in the Ninth Circuit. In late 1979, Carter appointed Jerome Farris and Cecil Poole, the first African American judges on the court. Arthur Alarcón, the court's first Latino-American judge, came on the circuit around the same time, and

Thomas Tang, the first Chinese-American judge in the entire federal judiciary, joined the court in 1977. Carter also appointed three women to the court, including Mary Schroeder, who later became the court's first female chief judge.

More critical to the Ninth Circuit's reputation than the diversity of its judges, however, was that Carter's appointees tended to share his stridently left-leaning beliefs. Congressional support allowed Carter to appoint "some of the most liberal judges ever, to any court," observed Chief Judge Emeritus Alex Kozinski to *The New York Times* in 2010.

One of Carter's most famously liberal appointees to the Ninth Circuit is Stephen Reinhardt, the court's "liberal lion" and the author of decisions finding a constitutional right to physician-assisted suicide (reversed by the Supreme Court), no constitutional right to bear arms (overruled by the Supreme Court), and that California's Proposition 8 violated equal protection (vacated by the Supreme Court). Reinhardt holds near-mythical status as an antagonist of the right; he's the judge Fox News pundits tell spooky stories about to their misbehaving kids: "You'd better eat your vegetables, or Stephen Reinhardt will get you!"

Less well-known than Reinhardt, but even more liberal—perhaps the most liberal of the Carter appointees—is Harry Pregerson. Pregerson is a war hero: He earned a Purple Heart medal for wounds received as a Marine in the battle of Okinawa. The mettle that got him through the Pacific Campaign has carried across to his judicial approach; more than any other Ninth Circuit judge, Pregerson proudly decides cases with the goal of achieving what he believes is the just result in any given dispute. That means Pregerson is concerned less with the law or precedent than his belief in right and wrong. "My conscience is a product of the Ten Commandments, the Bill of Rights, the Boy Scout oath, and the Marine Corps Hymn," he told the Senate during his confirmation hearings in 1979. "If I had to follow my conscience or the law, I would follow my conscience."

Pregerson's conscience regards justice through the prism of the relative power of the parties—Who was really harmed? Who can really afford to pay? What's ultimately *fair*?—as much as what statutes and case law require. "I can't think of anything more important than to try to help as many people as you can," he told the *Los Angeles Times* in December. "Sometimes the law is not very compassionate."

His biggest opinions reveal that judicial philosophy in action. After the Supreme Court held California's "three strikes" law passed constitutional muster, for example, Pregerson still refused to sign on to an opinion enforcing the penalty against a minor criminal, protesting that his understanding of the Constitution prohibited him from doing so "in good conscience." Pregerson wrote the Ninth Circuit ruling that found federal laws banning state-approved medical marijuana unconstitutional (the Supreme Court reversed), and the ruling that briefly postponed California's recall vote of Gov. Gray Davis because voting machine deficiencies threatened to disenfranchise minority voters (the full circuit took it en banc and went the other way).

He's also written opinions protecting the spotted owl from Oregon loggers; finding Humboldt County police violated the constitutional rights of environmental activists by swabbing their eyes with pepper spray; and holding California's use of the gas chamber for capital punishment violated the Eighth Amendment's prohibition on cruel and unusual punishment. Another judge on the court told the *Los Angeles Times* that, in immigration cases, Pregerson "won't break up a family and deport one member," no matter what the law requires. "He just won't do that," the judge said.

The notion that the role of a judge is to ensure justice is done by conscience as much as law, with the imbalance of real-world power disparities in mind, is perhaps the defining characteristic of the Carter appointees, and it's exemplified by Pregerson most of all. Judges appointed later, even judges appointed by other Democratic presidents, tend to view their roles as *following* the law, as they understand it, even to an unjust result, as opposed to *pushing* the law forward (or, if necessary, maneuvering around it) to achieve a result that is ultimately just.

That is not to say that Pregerson's approach is somehow "wrong," only that the strident liberalism behind it is much less common among more recently appointed circuit judges. Indeed, at least one of President Bill Clinton's appointees to the court was a card-carrying Republican, while four of President Barack Obama's appointments to the court are former assistant United States attorneys, a generally establishment-respecting bunch. No post-Carter judges spring to mind who have a judicial approach similar to Pregerson's.

That's why Pregerson's announcement in late 2015 that he'd decided to take senior status at age 92 signals an epochal shift on the Ninth Circuit. He has very good reasons for it: Aside from his well-into-retirement-range age and never-fully-healed war wounds, Pregerson's 65-year old son, Dean, himself a U.S. district judge, announced his own decision to take senior status last year. And by no means is senior status the end of Pregerson's career; senior circuit judges lose the right to vote on en banc matters, but otherwise participate in decision making to the degree they deem appropriate. Nor is it the end of Carter's influence on the court; five other Carter appointees are senior judges, and one, Reinhardt, remains an active judge (though at age 85, that won't last forever, either).

Even so, Pregerson's decision to leave active judicial service is something of a milestone for the Ninth Circuit. It is a clear sign that Carter's hold on the circuit—manifested in the unapologetically conscience-focused judges who gave the court its far-left reputation and who are now, one by one, exiting the public sphere—is finally lifting. Already, the Sixth Circuit has passed the Ninth to become the circuit most reversed by the Supreme Court, at least as a percentage of cases heard.

These trends will keep up, and Carter's influence on the court will soon pass from denouement to closing credits. Pregerson's decision signals that a few years from now, for better or for worse, conservative commentators won't have the Ninth Circus to kick around anymore.

The Recorder *welcomes submissions to Viewpoint. Contact Laurel Newby at lnewby@alm.com.*

