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Partner Gregg Costa Describes Fifth Circuit Approach to Assigning Motions for National Law Journal Article

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Rethinking Motions Panel Rules in Age of Trump 2.0 Litigation
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By Avalon Zoppo
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Motions panels in the U.S. Court of Appeals for the District of Columbia Circuit and other federal appellate courts have been busy over the last few months resolving a stream of emergency relief requests in challenges to President Donald Trump's policies.

"With all of these applications for emergency relief from district court injunctions or TROs in these very important, high profile, politically charged cases, you'd think [that] would be putting a strain on the resources," University of Pittsburgh law professor Arthur Hellman said, referring to temporary restraining orders. "What we're seeing here is another downstream effect of forum shopping, and that reinforces the desirability of looking for measures that would limit [the effects]."

So what can courts do if there's an abnormally high workload for rotating motions panels?

Duke University law professor Marin Levy raised the question in a BlueSky post last month, suggesting that some circuits might consider reducing the time a panel sits to offset a heavy workload.

The federal appeals courts have different procedures for motions panels, which Levy detailed in her recent book with Second Circuit Judge Jon Newman called "Written and Unwritten: The Rules, Internal Procedures, and Customs of the United States Courts of Appeals."

In the D.C. Circuit, for instance, a rotating, randomly selected three-judge special panel sits for about two months during the regular sitting term. In contrast, the Eighth Circuit has three separate three-judge panels called "administrative panels" who act on applications for stays pending appeal, with the judges randomly selected by the chief judge and changing each month, according to the book.

Becky James, a Waymaker partner who clerked on the Ninth Circuit, agreed that a stream of substantive motions could put a strain on judges.

It's typical for motions panels to grant or deny with no explanation, and oral argument is not a given. But in many motions in challenges to Trump's policies, panels are hearing arguments and at times, issuing decisions with dozens of pages of dissenting or concurring opinions attached.

Related People

Gregg J. Costa

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A D.C. Circuit motions panel's order from March that denied the Trump administration's request for a stay in a case over Alien Enemies Act deportations was accompanied with 93 pages of concurrences and dissents and only two days after oral arguments.

"Obviously just the volume and the nature of the cases is different than what motions panels usually hear," James said.

"Motions are usually fairly straightforward," she added. "It's not really worked into [judges'] calendar assignments necessarily to take on really substantive matters on their motions panel."

James said judges could pull more of their clerks into that work as opposed to relying mostly on staff attorneys who handle motions.

Hellman said circuits could tweak procedures to add "back-up motions panels" if there is an overwhelming workload. But tweaking procedures in larger circuits such as the Ninth may be easier than in other, smaller ones like the First, where work can't be spread out as easily, he added.

"The Ninth Circuit could easily ... adjust the rules to say that, if by the 15th of the month more than X number of substantive motions have been submitted, the clerk shall select judges for a second motions panel or lunch motions panel to get in," Hellman said.

Former Fifth Circuit Judge **Gregg Costa**, now a **Gibson, Dunn & Crutcher** partner, said there are benefits to the way the Fifth Circuit approaches assigning motions.

The Fifth Circuit doesn't have a single motions panel. Instead, the court clerk creates an assignment log each court year that lists the active judges in random order. As motions and emergency matters requiring judges' attention arise, they are assigned to three judges based on the order of the list, according to Levy and Newman's book.

"[The Fifth Circuit's approach] spreads out the work and prevents a single panel from being inundated with motions at a particular time," **Costa** stated via email.

"It also prevents litigants from being able to know who will be on the motions panel," he added. "In the circuits with a single motions panel each month, that allows some litigants to strategically time when they file motions. So the system the Fifth Circuit uses seems better both in terms of judicial workload and preventing gamesmanship."

Thomas Vanaskie, a former Third Circuit judge, agreed that the type of cases that motions panels are currently seeing could be putting a strain on staff attorneys handling motions.

"I can see the staff being overwhelmed because they're expected to do a pretty full workup on each motion, at least in the Third Circuit. And that can be extremely challenging," he said.

Hellman said circuits in the past have responded to influxes in cases—not necessarily motions panel work—by tweaking procedures.

He pointed to the Second Circuit in the early 2000s, when the court saw a surge in petitions challenging Board of Immigration Appeals decisions. At that time, the court responded by establishing a special 'non-argument calendar" for cases involving a challenge to the BIA's denial of an asylum claim, according to a 2008 law review article by Newman.

"[There was] a change in the way the DOJ handled immigration cases, and two circuits were hit hardest—the Second and the Ninth," Hellman said, referring to the U.S. Department of Justice. "They both used all sorts of innovative procedures to cope with the flood."

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