

**Hearing before the
U.S. House of Representatives
Committee on the Judiciary**

“ARE MORE JUDGES ALWAYS THE ANSWER?”

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Statement of Amb. C. Boyden Gray

I am honored to have been invited to testify before the Judiciary Committee on the subject of federal judgeships. Having clerked for Chief Justice Earl Warren early in my career, worked on judicial selection in the White House, and practiced in the federal courts throughout decades of private practice, I am keenly aware of the challenges facing the federal judiciary and the importance to the nation of enabling our courts to operate to their maximum potential. In particular, my work as a regulatory lawyer both in the government (in the White House and in Brussels) and in private practice has frequently brought me into contact with the judges and decisions of the United States Court of Appeals for the D.C. Circuit. Though I don't always agree with its opinions, my appreciation for that court and its unique character and docket is unflagging.

It was therefore with some concern that I learned of President Obama's sudden decision in his second term to simultaneously nominate three new judges to the D.C. Circuit.¹ If those nominations were to be confirmed, President Obama would inflate the court to 138% of its current roster of active judges. Such a radical remake of the court might be justified if the court's workload were increasing, but the opposite is true. I can only conclude that President Obama, who did not pay much attention in his first term to the D.C. Circuit, has made tilting the court's political balance a high priority for his second term.

¹ See Press Release, Remarks by the President on the Nominations to the U.S. Court of Appeals for the District of Columbia Circuit, June 4, 2013, *available at* <http://www.whitehouse.gov/the-press-office/2013/06/04/remarks-president-nominations-us-court-appeals-district-columbia-circuit>.

It's an unfortunate strategy for several reasons. First, the D.C. Circuit (smaller than all but one of its twelve sister circuits) doesn't need any more judges. In response to a survey by Senator Grassley, one judge on the court wrote that "[i]f any more judges were added now, there wouldn't be enough work to go around."² Another concluded that

the Court does not need additional judges for several reasons. For starters, our docket has been stable or decreasing, as the public record manifests. Similarly, as the public record also reflects, each judge's work product has decreased from thirty-some opinions each year in the 1990s, to twenty-some, and even fewer than twenty, opinions each year since then.³

These statements by sitting D.C. Circuit judges are confirmed by statistics provided by the court's Chief Judge, Merrick Garland, who was appointed to the court by President Clinton. Over the past decade the number of argued cases per active judge has fallen, and the court's six senior judges do more to lighten that already light burden than their counterparts on other courts, who tend to be older and hear fewer cases.⁴

The President's recent nomination spree risks politicizing an institution that is—and should be—above politics. The D.C. Circuit hears some of the most important and least glamorous cases in the federal judiciary.⁵ In addition to the ordinary civil and criminal appeals it hears from decisions of the district court, the D.C. Circuit more than any other court considers petitions for review of federal agency actions—administrative rules and orders that

² Press Release, D.C Circuit Court Caseload Doesn't Merit Filling Seats, Senator Chuck Grassley of Iowa, July 24, 2013, *available at* http://www.grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=47016.

³ *Id.*

⁴ *Id.* (“According to one of the judges on the court, the senior judges ‘will more than likely serve for another decade based on their respective ages and health.’ ¶ Likewise, another judge noted that the D.C. Circuit has ‘an extraordinary number of sitting senior judges (six) who are actually younger than the average age of U.S. senior judges.’ ¶ Based on this, it is clear that the senior judges on the court are contributing a significant amount of work, and will continue to do so for the foreseeable future. They serve because they want to, not because they have to.”).

⁵ Regarding the D.C. Circuit's unglamorous regulatory docket, Judge Henry Friendly famously remarked, that the D.C. Circuit is a “court of special importance for administrative law,” and “has attracted—*doubtless to the delight of the other circuits*—the largest share of environmental litigation and review of orders of the Federal Power Commission fixing natural gas rates.” Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1311 (1975) (emphasis added).

affect the lives and businesses of all Americans. To its great credit, the D.C. Circuit has, for the past two decades at least, fulfilled this important role thoughtfully, quietly, and without political rancor—in short, with collegiality, an institutional trait that manifests itself, D.C. Circuit Judge Harry Edwards has written, when “judges have a common interest, as members of the judiciary, in getting the law right, and . . . as a result . . . are willing to listen, persuade, and be persuaded, all in an atmosphere of civility and respect.”⁶ Thus, “collegiality mitigates judges’ ideological preferences and enables us to find common ground and reach better decisions. In other words, the more collegial the court, the more likely it is that the cases that come before it will be determined on their legal merits.”⁷ The collection of qualities that give rise to collegiality on an appellate court may be difficult to define, and its precise effects on decisionmaking may be hard to quantify, but judges themselves universally acknowledge collegiality to be an important ingredient in the judicial process.

This has been stressed by the Fourth Circuit’s Judge Wilkinson, who noted that although “[c]ollegiality is one of those soft, intangible words which may ring hollow upon the congressional ear,” “[j]udges . . . have a deep conviction that a collegial court does a better job.”⁸

Collegiality of this sort does not happen by accident; sadly it does not characterize all of our courts of appeals. Indeed, it has not always characterized the D.C. Circuit, which Justice

⁶ Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1645 (2003).

⁷ *Id.* at 1640-41.

⁸ J. Harvie Wilkinson III, *The Drawbacks of Growth in the Federal Judiciary*, 43 EMORY L.J. 1147, 1173 (1994) (citing Jon O. Newman, *1,000 Judges—The Limit for an Effective Federal Judiciary*, 188 JUDICATURE 187, 188 (1993); Gerald Bard Tjoflat, *More Judges, Less Justice*, A.B.A. J., July 1993, at 70, 70); see also *Responding to the Growing Need for Federal Judgeships: The Federal Judgeship Act of 2009* (Sept. 30, 2009) (statement of the Hon. Gerald Bard Tjoflat, Circuit Judge, United States Court of Appeals for the Eleventh Circuit), at 4 (“Close interpersonal relationships facilitate the creation of higher-quality judicial opinions. Those relationships also form the basis for interaction and continued functioning when a court faces the most emotional and divisive issues of the day.”).

Felix Frankfurter once called “a collectivity of fighting cats.”⁹ Judge Edwards, who was nominated to the court by President Carter in 1979 and confirmed in 1980, reports that in those days the court was divided into “ideological camps,” and “judges of similar political persuasions too often sided with one another . . . merely out of partisan loyalty, not on the merits of the case.”¹⁰ Judge Edwards reports that one liberal judge’s first words to him were “Can I count on your vote?”¹¹

Not surprisingly, Judge Edwards found that judges working in this atmosphere “become distrustful of one another’s motivations; they are less receptive to ideas about pending cases and to comments on circulating opinions; and they stubbornly cling to their first impressions of an issue”—all tendencies that “do damage to the rule of law.”¹²

Harry Edwards assumed the D.C. Circuit’s chief judgeship in 1994 at a time when “collegiality was at a low point.”¹³ He led a reform of the court and its rules and procedures that prioritized collegiality.¹⁴ The cultural shift that Judge Edwards brought about on the court has persisted through the intervening years thanks in large part to the Chief Judges who succeeded him in that role—Douglas Ginsburg, David Sentelle, and now Merrick Garland. Judge David Tatel, a Clinton appointee, said of Chief Judge Sentelle, a Reagan appointee, that “[i]n his five years as our Chief Judge, Dave has protected our proudly nurtured tradition of collegiality,

⁹ JEFFREY BRANDON MORRIS, *CALMLY TO POISE THE SCALES OF JUSTICE: A HISTORY OF THE COURTS OF THE DISTRICT OF COLUMBIA CIRCUIT 197* (2001) (quoting Letter from Felix Frankfurter to Philip B. Kurland, Professor, University of Chicago Law School (1962)), *quoted in* Edwards, *supra* note 6.

¹⁰ Edwards, *supra* note 6, at 1648.

¹¹ *Id.*

¹² *Id.* at 1649.

¹³ *Id.* at 1665.

¹⁴ Judicial Conference of the Second Circuit, 243 F.R.D. 492, 564 (2006) (R.B. Ginsburg, J.) (“I can give as a bright example the Court of Appeals on which I served for 13 years, the D.C. Circuit, which was once a fairly divided circuit. Nowadays there’s barely ever a dissent. Harry Edwards, as Chief Judge, turned that court around. It is today a very collegial court.”). *See generally* Aaron Zelinsky, “Collegiality, Judging, and the D.C. Circuit,” *CONCURRING OPINIONS* (May 13, 2013), <http://www.concurringopinions.com/archives/2013/05/collegiality-judging-and-the-d-c-circuit.html>.

navigating sometimes sensitive waters with a firm but gentle oar.”¹⁵ Following Judge Edwards’s lead, each successive chief judge made the collegiality of the court a priority. In a speech delivered in 2011 and published last year, Judge Ginsburg agreed that “the level of collegiality has increased steadily over the years and continues to be a robust and pleasant feature of service on the court.”¹⁶

The collegiality that the D.C. Circuit’s judges—appointed by presidents of both parties—have labored so hard to achieve would be threatened if the President succeeds in his effort to force three unneeded judges through the confirmation process. First, judges who sense they are appointed to prop up the President’s regulatory agenda, may be more likely to do so out of loyalty to the President who appointed them. In his early years on the court, Judge Edwards “witnessed occasions when ideology took over and effectively destroyed collegiality, because the confirmation process ‘promoted’ ideological commitment.”¹⁷ As proponents of the nominations have pointed out, it is no accident that Obama’s judicial nomination barrage followed his State of the Union promise that “if Congress won’t act” on climate change, “I will.”¹⁸ And whereas “a single new judge has no real standing or authority to undo the norms of collegiality,” three judges nominated contemporaneously with a single political agenda in mind may feel pressure to fulfill that agenda at the expense of the institution’s collegial character, as

¹⁵ Judge David S. Tatel, *Remarks on the Occasion of the Portrait Hanging Ceremony for the Honorable David B. Sentelle* (Apr. 5, 2013), available at http://www.concurringopinions.com/wp-content/uploads/2013/05/Sentelle_Portrait-Remarks-11.pdf.

¹⁶ Hon. Douglas H. Ginsburg, *Remarks Upon Receiving the Lifetime Service Award of the Georgetown Federalist Society Chapter*, 10 *Georgetown J. of L. & Pub. Pol’y* 1 (2012).

¹⁷ Edwards, *supra* note 6, at 1677-78; *see also id.* at 1678 (“In other words, if an appointee joins the court feeling committed to the political party that ensured the appointment, the judge’s instinct may be to vote in a block with other perceived conservatives or liberals. Even worse, a judge who has been put through an ideologically driven confirmation ordeal may take the bench feeling animosity toward the party that attempted to torpedo the appointment on ideological grounds.”).

¹⁸ *See* Doug Kendall & Simon Lazarus, *Broken Circuit*, *THE ENVTL. FORUM* 36 (May/June 2013), available at <http://theconstitution.org/sites/default/files/briefs/The%20Environmental%20Forum%20-%20Broken%20Circuit.pdf>.

Judge Edwards has observed. (Notably, President Obama’s first successful nominee to the D.C. Circuit, Judge Srinivasan, was confirmed without a single ‘no’ vote in either the Judiciary Committee or the full Senate.)

Finally, bloating the bench would undermine the close working relationship that contributes to collegiality on a small court. Judge Edwards has noted that “smaller courts tend to be more collegial,” because “smaller groups have the potential to interact more efficiently, making close and continual collaboration more likely.”¹⁹

“It stands to reason,” wrote Judge Edwards, “that the larger the court, the less frequently any two judges sit together and interact with each other. . . . [I]t is easier to achieve collegiality on a court with twelve members than on one with twenty or thirty. It is easier for judges to keep up and become familiar with each other.”²⁰ Thus, “[t]he appointment of more judges to handle growing caseloads does not come without substantial costs.”²¹

Of course, the same principle applies on the other side of the Potomac. As Harvie Wilkinson put it when he was Chief Judge of the Fourth Circuit, “[c]ollegiality may be the first casualty of expansion on the federal appellate courts”²²:

[O]ne engages in more fruitful interchanges with colleagues whom one deals with day after day than with judges who are simply faces in the crowd Smaller courts by and large encourage more substantial investments in relationships and in the reciprocal respect for differing views that lie at the heart of what appellate justice is about.²³

¹⁹ Edwards, *supra* note 6, at 1675; *see also id.* (“I have always believed that it is easier to achieve collegiality on a court with twelve members than on one with twenty or thirty. It is easier for judges to keep up and become familiar with each other. Smaller groups have the potential to interact more efficiently, making close and continual collaboration more likely.”).

²⁰ *Id.*

²¹ *Id.*

²² Wilkinson, *supra* note 8, at 1173, *quoted in* Edwards, *supra* note 6, at 1675.

²³ *Id.* at 1173-74; *accord* Tjoflat, *supra* note 8, at 2-3 (“[J]udges in small circuits are able to interact with their colleagues in a much more expedient and efficient manner than judges on jumbo courts.”). Judge Wilkinson

Other judges have voiced similar concerns about the inverse relationship between court size and collegiality. Judge Gerald Tjoflat served on the old Fifth Circuit before it was split into the new Fifth Circuit and the Eleventh Circuit on which he now sits. Judge Tjoflat’s testimony before the Senate Judiciary Committee’s Subcommittee on Administrative Oversight and the Courts confirms the risks inherent in large courts. By comparison to a larger court, he found that “the close ties that can be forged on a smaller court allow you to build trust in your colleagues.”²⁴ The impaired collegiality of a large court, Judge Tjoflat found, affects its work:

Having served on both the former Fifth Circuit and now the Eleventh Circuit, that I can definitively attest that the entire judicial process—opinion writing, en banc discussions, emergency motions, circuit administration, and internal court matters—runs much more smoothly on a smaller court.²⁵

A 1993 report commissioned by the Federal Judicial Center agreed that “[a]bove a certain size, collegial appellate courts do not operate effectively.”²⁶ And in 1964, the same Judicial Conference committee that recommended splitting the old Fifth Circuit concluded that “nine is the maximum number of active judgeship positions which can be allotted to a court of appeals without impairing the efficiency of its operation and its unity as a judicial institution.”²⁷ The D.C. Circuit, with eight active judges is dangerously close to the line.

The threat to collegiality that is posed by bench bloat are not merely hypothetical.

Some argue that we see its effects in larger courts like the Sixth Circuit with its 28 active and

discusses other side effects of bench bloat that are worthy of this body’s attention. These include federal jurisdiction creep and corresponding encroachment into the traditional jurisdiction of the states, *see id.* at 1165 (“The more judges there are, the more jurisdiction will be assigned them and the more federal rulings will be handed down. The sphere of federal law will gradually but inevitably expand at the expense of the law of the states.”), and reduction of judicial quality, *id.* at 1167-68.

²⁴ Tjoflat, *supra* note 8, at 4; *see also* Judge Gerald Bard Tjoflat, *More Judges, Less Justice*, 79 A.B.A.J. 70, 70 (July 1993).

²⁵ Tjoflat, *supra* note 8, at 5.

²⁶ GORDON BERMANT, ET AL., FEDERAL JUDICIAL CENTER, IMPOSING A MORATORIUM ON THE NUMBER OF FEDERAL JUDGES: ANALYSIS OF ARGUMENTS AND IMPLICATIONS (1993).

²⁷ REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 14-15 (1964).

senior judges.²⁸ At least one member of that court attributed in part its “decline in collegiality” to “increase in numbers.”²⁹ Similarly, many have called for the Ninth Circuit to be split into two circuits, precisely because of the negative effects that such a large bench (*i.e.*, 29 seats) has on collegiality. As the Ninth Circuit’s Judge Diarmuid O’Scannlain testified a few years ago before a subcommittee of this Committee:

The sheer magnitude of our court and its responsibilities negatively affects all aspects of our business, including our celerity, our consistency, our clarity, *and even our collegiality*. Simply put, the Ninth Circuit is too big. It is time now to take the prudent, well-established course and restructure this circuit. Restructuring large circuits is the natural evolution of judicial organization. Restructuring has worked in the past. Restructuring will work again.³⁰

Simply put, without a growing caseload to justify new appointments, there is no reason to invite the risk of factionalism inherent in larger courts.

Closely related to bench bloat’s effect on collegiality is its harmful effect on the coherence of circuit law. In our system, an appellate decision is binding not only on district courts within the circuit, but on future panels of the circuit court. It is a simple rule to state, but often a challenging one to follow, especially when the precedent a panel is bound to follow is one it would have decided differently in the first instance. The en banc process impose some measure of discipline on judges who might otherwise violate the principle of *stare decisis*, but courts can only rehear so many cases en banc. The consistency of circuit law depends primarily upon each judge’s loyalty to the institution of the court and his respect for his fellow judges.

²⁸ See, e.g., Adam Liptak, *Weighing the Place of a Judge in a Club of 600 White Men*, N.Y. TIMES (May 16, 2011) (“[T]he United States Court of Appeals for the Sixth Circuit . . . is surely the most dysfunctional federal appeals court in the nation.”); Approval of the Minutes of the June 14, 2001 Executive Session of the Second Circuit, 221 F.R.D. 38, 229 (2002) (“We have all read about the problems with collegiality in the Sixth Circuit.”). *But see* Ronald Lee Gilman, *Rookie Year on the Federal Bench*, 60 OHIO ST. L.J. 1085, 1093 (1999) (“I am happy to report that a high degree of collegiality in fact exists on the Sixth Circuit Court of Appeals. All members of the court have been uniformly courteous and respectful.”).

²⁹ Lauren K. Robel, *Private Justice and the Federal Bench*, 68 IND. L.J. 891, 906 n.60 (1993).

³⁰ *Ninth Circuit Court of Appeals Judgeship and Reorganization Act of 2003: Hearing on H.R. 2723 Before the Subcomm. On Courts, the Internet, and Intellectual Property of the H. Comm. On the Judiciary* (Oct. 21, 2003) (statement of Judge Diarmuid F. O’Scannlain), at 2, available at <http://judiciary.house.gov/legacy/oscanlain102103.pdf>.

And, as we have seen, mutual respect is characteristic of small courts. “Simply as a matter of probability, there is a much greater chance on a smaller circuit that a sitting panel will contain at least one judge who sat on a prior case that is under discussion, and is familiar with that case and committed to it.” As a court grows, individual members sit together on panels less frequently and are less likely to have been involved in the precedent they are bound to follow.

Again, Judge Wilkinson:

As the number of judges rolls ever upward, the law of the circuit will become more nebulous and less distinct. Indeed, it is likely that the law of the circuit will be replaced by the law of the panel. Judicial decisions may come to be viewed as resolving only that day's dispute. Litigation will become more a game of chance and less a process with predictable outcomes.³¹

This tendency is self-perpetuating. “Under the law of the panel—as opposed to the law of the circuit—trial judges lack clear guidance from the circuit bench, and appellate dispositions may begin to assume for those judges a haphazard and ad hoc quality.”³² As the law of the circuit becomes less predictable, its precedents less firmly rooted, and its roster of potential panelists longer, litigants will more likely to roll the dice on appeals that formerly would not have stood a chance.

The erosion of a consistent law of the circuit is no mere academic problem. Judge Tjoflat has observed that “[a]s the law becomes unclear and unstable, our citizens—whether individuals or entities like corporations—lose the freedom that inheres in a predictable and

³¹ Wilkinson, *supra* note 8, at 1176; *see also* Tjoflat, *supra* note 8, at 1-2 (“In increasing the size of a court of appeals, the Congress must consider the effect the increase has on (1) the court’s efficiency, and (2) the stability of the rule of law in the circuit. My experience—and that of others who have given the subject considerable study and thought—is that the increase in circuit court judgeships negatively affects both these areas.”).

³² *Id.*

stable rule of law.”³³ Thus, “[t]he demand for more judges, if satisfied, will inexorably lead—little by little—to the erosion of the freedoms we cherish.”³⁴

The effect of inconsistent circuit law would be especially pernicious on the D.C. Circuit. The D.C. Circuit is the nation’s premier administrative law court, and the other courts of appeals frequently rely on its expertise in the regulatory arena. If the D.C. Circuit cannot speak with one voice, our entire system of administrative law will be in jeopardy.

It is clear that many proponents of the President’s suddenly aggressive nominations effort see this as nothing more than an opportunity to stack the court with nominees of the President’s choosing, in an attempt to substantially change the ideological composition of the court. As my fellow panelist, Carrie Severino, has reported, Senator Schumer recently listed D.C. Circuit cases he disliked at a fundraising dinner and promised the assembled donors, “[w]e will fill up the D.C. Circuit one way or another.”³⁵ Such a strategy risks undermining the collegiality that has been the court’s trademark for decades, as I’ve explained.

But just as importantly, that strategy rests on a false premise. The D.C. Circuit has not treated the current Administration any more negatively than it has prior Administrations. While the court has received substantial criticism in the *New York Times* and *Washington Post* after ruling against federal agencies in a small handful of hot-button cases,³⁶ such criticism is wildly overstated. According to the federal courts’ statistics, the D.C. Circuit reversed administrative agencies in 16.7 percent of cases it decided during the 2009–2012 reporting

³³ Tjoflat, *supra* note 8, at 11.

³⁴ *Id.*

³⁵ *Is the Administration Trying to Stack the D.C. Circuit*, CHARLESTON DAILY MAIL, Oct. 25, 2013, <http://www.dailymail.com/Opinion/Commentary/201310240127>.

³⁶ *See, e.g.*, Floyd Norris, *Circuit Court Needs to Let the S.E.C. Do Its Job*, N.Y. TIMES, Sept. 21, 2012, at B1; Ben Protess, *As Wall Street Fights Regulation, It Has Backup on the Bench*, N.Y. TIMES, Sept. 25, 2012, at F2; Steven Pearlstein, *Regulatory failure? Blame the D.C. Circuit*, WASH. POST, Apr. 9, 2010. *But see* Eugene Scalia, *Why Dodd-Frank Rules Keep Losing In Court*, WALL ST. J., Oct. 3, 2012.

years. From 2001-2008, it reversed the administrative agencies in 18.8% of the cases it decided.³⁷ The court continues its work, steadily and nonideologically, from one administration to the next. It would be a tragic mistake to risk upsetting this record by shooting for a single digit or near-zero reversal rate.

³⁷ The underlying statistics are available at <http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics.aspx>. Specifically, they are drawn from Table B-5 of each annual report. Note that as of 2012, these statistics "now present data on cases disposed by consolidation. Prior to 2012, these tables did not provide such data." <http://www.uscourts.gov/Statistics/JudicialBusiness/2012/us-courts-of-appeals.aspx>.