Extended Remarks to the
Subcommittee on Courts, Intellectual Property, and the Internet
House Judiciary Committee
United States House of Representatives
by

Andrew J. Kleinfeld
Circuit Judge
United States Court of Appeals for the Ninth Circuit

March 13, 2017

250 Cushman, Suite 3-A
Fairbanks, AK 99701
(907) 456-0564
fax (907) 456-0284

Our existing Ninth Circuit has many of the best appellate judges in the United States. We have had a succession of superb chief judges. We are also big, really big, with forty percent of the United States land mass and twenty percent of its population within our jurisdiction. We serve almost three times the average population of the other circuits. However, this size has severe negative consequences. Our size causes errors, and gives us too much power. When we make a mistake, the impact is colossal, and we do make mistakes. We have so many judges that we cannot read each other's opinions, and we cannot correct our errors by effectively rehearing cases en banc.

In every organization, there has to be some size limit, at the bottom end and the top end, such that if the organization was smaller or bigger, it would be less efficient. That is why dentists' offices do not grow to the size of General Motors, and General Motors is not operated out of a small garage. Justice Brandeis wrote, in The Curse of Bigness, "In every business concern there must be a size limit of greatest efficiency. What the limit is will differ in different businesses and under varying conditions in the same business. But whatever the business or organization, there is a point where it would become too large for efficiency and economic management, just as there is a point where it would be too small to be an efficient instrument. The limit of efficient size occurs when the disadvantages attendant on the size outweigh the advantages, and for large size, when the centrifugal force exceeds the centripetal." Louis Brandeis, The Curse of Bigness, 116 (1934).

Economists often conceptualize the difficulties of size as information costs and agency costs. These costs limit economies of scale that may be obtained by larger size. The concepts are helpful in analyzing large courts of appeal. Information costs are those costs attendant upon gathering the necessary information on which to act. The relevant information cost for our purposes is the

time it takes for appellate judges to learn what the law of their own court is. Agency costs are the costs of getting those who serve the organization to carry out their tasks correctly. The relevant agency costs are the information cost of finding out what other judges are writing, and the additional time it takes to bring mistaken decisions into compliance with the law.

The Size of the Court

First, I would like to explain further what I mean when I say the Ninth Circuit is "big." We currently have 29 active seats on the court, 25 of which are currently filled. The next biggest circuit, the Fifth, has 17. The esteemed First Circuit has 6 seats. We have more than twice the average number of judges on other circuits.

Beyond the 29 active seats, we also have senior judges. They bring our total to 44 judges altogether. Senior judges generally do not retire. Their seats become open for appointment, but the senior judges, though entitled to quit working and to draw full pay for life, customarily keep coming to work, participating on panels, and deciding cases, sometimes carrying the same caseload as judges in regular active service. Thus, when a judge takes senior status, it effectively adds a judge to

the court rather than replacing one with another. The senior judge continues to serve, and a new judge is added to take his active seat.

Not only do we have an extraordinary number of judges, we also have a high number of cases. 11,870 cases were filed in the Ninth Circuit in 2015. Commensurate with our population, that is more than triple the average for the regional circuits. It also represents more than 20% of the national total.

If all this was just a problem of too many cases, we could cure it by adding judges. That is how we got up to 29. But while more judges help with the number of cases, it makes the other problems of excessive size worse, by increasing the excessiveness.

Reading Each Other's Decisions

Judges on the same court should read each other's decisions. We are so big that we cannot and do not. That has the practical effect that we do not know what judges on other panels are deciding. It is odd word usage to call a public body a "court," in the singular, if its judges do not ever sit together as one body, and do

not even read each other's opinions. We may get the quotes right from other panels' decisions, but there is no way anyone can get a feel for our court, as all attorneys do for smaller courts.

The Ninth Circuit terminated 6,898 cases on the merits in 2015. Assuming 200 work days available for reading decisions (most of us cannot do routine reading while on calendar, and do not work seven days out of every week of the year), that would require each of us to read 34 decisions a day, in order to keep up. That is impossible, if enough time is given to each to understand it, especially if any other work is to be done. If we ignore the unpublished decisions (as most of us are forced to do, allowing for much error to go uncorrected in them), there were still 557 published dispositions, each with precedential force. Keeping up would require us to read around three per day, manageable if one is not on calendar, but generating a pile of about 15 plus the new ones that come in on Monday after a week on calendar. At that point, the opinions can only be glanced at to see if they affect pending cases or resolve matters in which the judge happens to have a particularly strong interest.

This high cost of information because of size affects not only us, but also district courts, practicing lawyers, and the general public. The great scholar of the common law tradition, Karl Llewellyn, characterized the chief virtue of appellate opinions as providing "reckonability of result." Professor Llewellyn said "spend a single thoughtful weekend with a couple of recent volumes of reports from your own supreme court, . . . and you can never again, with fervor or despair, make that remark about never knowing where an appellate court will hang its hat. Spend five such weekends, and you will be getting a workable idea of the local geography of hat racks." Karl N. Llewellyn, The Common Law Tradition: Deciding Appeals, 179 (1960). That is what I mean by a "feel for the court."

When I was a practicing lawyer, I was generally able to predict with great accuracy what the Supreme Court of my state would do, even where there was no case on point. I read its decisions as they came down, and as Llewellyn suggests, I knew what the thinking process of each of the five justices would be when faced with a new problem. All the justices sat on every case, as is typical of state supreme courts, so there were no unpredictabilities generated by not knowing who would be on a panel. Of course, there were occasional surprises, but not very many, to me or to other lawyers. Our clients benefitted from advice based on this

high degree of reckonability. They could learn from their lawyers what the law was, and did not have to spend money or go through the misery of litigation to find out.

The Ninth Circuit, because of its size, is not and cannot be a reckonable court. No district judge and no lawyer can, by reading even a few hundred of our decisions, predict what our court will do in the next case. Even if the decisions could be read, there are over 3,000 combinations of judges who may wind up on panels, so the exercise would not be worth the time. At best, the bar can predict that we will restate our clear holdings as controlling law, though different panels may apply the same holdings to similar facts in different ways. The disparateness will naturally be higher in unpublished dispositions.

A court that is not reckonable is of far less use than one that can be predicted. People sometimes talk of the expense of the judiciary as salaries, buildings, air fares, and so forth. Those are a tiny fraction of the expenses occasioned by cases in courts. The expense of counsel to litigate, and the expense of uncertainty and time for the parties engaged in litigation, is far greater than the out of pocket expense of the court system to the taxpayers. There is no expense caused by the

law that can be so great as the expense of not being able to know what the law is without having to litigate.

Nor is this problem a new one. Speaking of his days on the old Fifth Circuit before it split, Judge Tjoflat explained that "If you have three judges on a court of appeals, the law is stable. . . . When you add the fourth judge to that court, you add some instability to the rule of law in that circuit because another point of view is added to the decision making. When you add the fifth judge, the sixth judge, when you get as large as the old Fifth Circuit was, with twenty-six judges, the law becomes extremely unstable. One of several thousand different panel combinations will decide the case, will interpret the law. Even if the court has a rule, as we did in the old Fifth, that one panel cannot overrule another, a court of twenty-six will still produce irreconcilable statements of the law." Irving R. Kaufman, New Remedies for the Next Century of Judicial Reform: Time as the Greatest Innovator, 57 Fordham L. Rev. 253, 259 (1988) (quoting Interview with Judge Gerald Bard Tjoflat, reprinted in 15 The Third Branch, Apr., 1983, at 1, 3-4).

En banc

The other fundamental problem of an overly large court such as ours is with its en banc process. The practical upper limit on the size of an efficient appellate court is that number of judges who can effectively sit together en banc. Sitting together effectively requires three things: (1) an oral argument in which the unstructured give and take between counsel and the judges can accommodate the practical needs of all the judges to ask questions about difficult issues; (2) a conference in which reasoned deliberation rather than mere voting can take place; (3) an opinion writing process that can work the views of those judges into a majority opinion rather than a plurality opinion. Other circuits sit together en banc with as many as 17 judges. The Fifth Circuit, before it split, decided that it could not effectively sit as a full court, with fewer judges than the 29 we have on the Ninth. And the Ninth Circuit has decided by circuit rule to limit its en banc court to 11 judges. Traditionally "en banc" meant the entire court. To the best of my knowledge, we are the only appellate court in English common law tradition that calls less than the entire court "en banc."

The word "collegiality" in its traditional meaning is critical to the en banc process. The word is often used in contemporary speech to mean some combination of civility and bonhomie. The traditional definition, though, is "shared authority among colleagues." The American Heritage Dictionary, 291 (2nd College Edition, 1985). The word is derived from "the doctrine that bishops collectively share collegiate authority." Id.

Judges betray their trust if they do not act with shared authority. We were not put in office to be 29 individuals each imposing our idiosyncratic individual will on 60 million people. The en banc process is what an appellate court uses to speak as a single unified organ of authority. Because of our size, that is impossible.

On a small court, the en banc process often works so well as a possibility, even when it is rarely used, that few en bancs rehearings are needed. On our court, the random draw for an en banc is a crap shoot because the potential six judge majority depends on the random selection. On a smaller court, all the judges sit, so there is no random element that may affect the outcome. And because the judges can read opinions as they come down, their feel for the court is likely to avoid the need for an en banc.

Benefits of a Smaller Circuit

A smaller circuit would not merely reduce the serious problems described above. It would afford positive benefits. The judges could maintain much better familiarity with the law, procedure, customs of the bar, and social and economic conditions in the different states within the circuit.

Much federal law is not national in scope. Quite a lot of federal litigation arises out of federal laws of only local applicability, such as the Bonneville Power Administration laws, the laws regarding Hopi and Navaho relations, the Alaska National Interest Lands Conservation Act, and the Alaska Native Claims Settlement Act. It is easy to make a mistake construing these laws when unfamiliar with them, as we often are, or not interpreting them regularly, as we never do.

It is also very helpful for judges to know how releases, attorney's fees contracts, agreements relating to real estate, and other documents for common transactions, are typically written in a state, so that they know when something is suspicious and when it is ordinary. In diversity cases, we are required to apply

state law in federal court. Yet on our court, ordinarily no judge on the panel has intimate familiarity with the law and practices of the state in which the case arose, unless that state is California. A judge on my court sits in Alaska perhaps once in ten years, and ordinarily never sits in Montana, Idaho, Nevada, or Arizona.

Social conditions also vary, in ways that can color judges' reactions to facts, and disable them from understanding the factual settings of cases not arising in California. For example, the first word a California judge may associate with "gun" may be "criminal," while for an Alaska, Idaho, or Montana judge it me be "hunter" or the phrase "bear protection." Native Americans have reservations in most states in our circuit, but in Alaska reservations have generally been abolished. It is quite possible for Alaska lawyers not to point this out in a brief because it is so obvious to them and well known, and for Ninth Circuit judges and their law clerks not to know it.

Opponents of a split generally argue that we should not "Balkanize" federal law, because the west coast needs uniformity for commercial purposes, and federal law is inherently national in scope. This argument is mistaken. Much federal law, as explained above, is not national in scope. The east coast maintains commercial

vigor despite having five federal circuits running down the Atlantic coast, or six if you count the D.C. Circuit. Moreover, for most citizens served by our legal system, and the lawyers who serve them, it is not very important whether the circuit they are in takes a different view of some issue of federal law than another circuit, in which they do not live. They just need to know the law where they live. What causes expense, unpredicability, and complexity is differences of opinion within the circuit and between the federal and state courts in the same jurisdiction, not divergence between the circuit where a litigant lives and another where he does not. Anyway, many intercircuit splits are avoided because an opinion is always more persuasive within a circuit when it includes the phrase, "we agree with our sister circuits."

For over 200 years we have seen the administrative benefits of dividing most of our national governance among the states, and allocating power to the separate states. That division of power has given us the benefits of experimentation, as when a few states pioneered workers' compensation laws. Judicial administration does not differ from other public administration in this respect. What Justice Brandeis said of the benefits of dividing up public administration by state also applies to our circuit courts. "It is one of the happy incidents of the federal system

that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting). We judges on the Ninth Circuit have too much power over too many people. When we err, the consequences of error can be very great, and the Supreme Court cannot catch all the errors. Much governmental power in our country is confined by distributing it among fifty states. Our court's excess power can benefit from division into two or three intermediate appellate courts.

Thank you.