PREPARED STATEMENT OF

THE HONORABLE GERALD BARD TJOFLAT

CIRCUIT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

BEFORE

THE SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS

OF THE COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

"RESPONDING TO THE GROWING NEED FOR FEDERAL JUDGESHIPS: THE FEDERAL JUDGESHIP ACT OF 2009"

WEDNESDAY, SEPTEMBER 30, 2009

Introduction

Mr. Chairman and members of the Committee, I am Gerald Bard Tjoflat of the United States Court of Appeals for the Eleventh Circuit. I am here today at your invitation to testify about the proposed Federal Judgeship Act of 2009. I do not approach the wisdom of creating the additional judgeships the Act provides with a political or personal agenda. Rather, I approach the creation of judgeships from my experience on the former Fifth Circuit and from my analysis of circuit realignment beginning with the circuit split proposed by the White Commission in 1997. My concern is principally with increasing the size of the courts of appeals, as opposed to the district courts.[1] I was a member of the Fifth Circuit when, in 1979, it was increased from 15 to 26 active judges, and I experienced first hand the considerable disadvantages the increase produced. That same year, the Ninth Circuit was increased from 13 to 23 active judges, and now has 29 active judges.[2] The proposed Act would increase the size of that court to 34 active judges. The problems created by increasing the Fifth Circuit to 26 active judges would have expanded exponentially had the Fifth been expanded to a court of 33 active judges.

In increasing the size of a court of appeals, the Congress must consider the

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[1] The size of a circuit's district courts is necessarily limited by the size of the circuit's court of appeals.

[2] I use the term "active judges" to refer to the number of currently authorized judgeships, not the number of judges currently sitting on the court.

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. Moreover, as the consistency in the rule of law diminishes, the demand for more district judgeships increases for the obvious reason that an unstable rule of law leads to more litigation.

I. Efficiency

The chief argument for increasing the number of appellate judges is to reduce the workload per judge. This seems simple enough, but, from my experience, increasing the number of judges actually creates *more* work. Adding judges decreases a court's efficiency by diminishing the trust and collegiality that are essential to collective decision-making.

One of the most important factors that determines the efficiency with which a court can operate, as well as the quality of its ultimate product, is the degree to which the judges on that court know each other and enjoy a high degree of collegiality. I explained the importance of collegiality in my A.B.A. Journal article entitled *More Judges, Less Justice*: "In a small town, folks have to get along with one another. In a big city, many people do not even know, much less understand, their neighbors. Similarly, judges in small circuits are able to interact with their

colleagues in a much more expedient and efficient manner than judges on jumbo courts."[3] Because appellate judges sit in panels of three, it is critically important that a judge writing an opinion be able to "mind-read" his colleagues. The process of crafting opinions can be greatly expedited if a judge is aware of the perspectives of the other judges on the panel so that he can draft an opinion likely to be amenable to all of them. In a small circuit, where the judges know each other—and each other's judicial philosophy and predispositions—the process of drafting opinions likely to attract the votes of the other judges on the panel is much simpler.

In a circuit the size of the former Fifth Circuit or the current Ninth Circuit, in contrast, the odds are good that you may be sitting on a panel with two strangers (particularly once senior judges, visiting judges, and district judges sitting by designation are taken into account). As Professor Spreng observed in commenting on the situation in the Ninth Circuit, "[B]ecause there are so many Ninth Circuit judges, it is conceivable that years could go by between the time when Judge A had last sat on a calendar or screening panel with Judge B. A number of senior and

[3] Judge Gerald Bard Tjoflat, *More Judges, Less Justice*, 79 A.B.A.J. 70, 70 (July 1993). As former Attorney General Griffin Bell pointed out, "[W]hen a court becomes too large, it tends to destroy the collegiality among its members . . . ." Letter from Former Attorney General Griffin Bell to Senator Jeff Sessions (June 6, 1997) (on file with author). As the Senate Judiciary Committee has recognized, "The more judges that sit on a circuit, the less frequent a particular judge is likely to encounter any other judge on a three-judge panel. Breakdown in collegiality can lead to a diminished quality of decisionmaking." *Report of the S. Comm. On the Judiciary*

active judges may never have sat on a regular or screening panel with the junior judges appointed in the 1990s."[4] Becoming acclimated to the personalities, views, and writing styles of an unending succession of strangers is much less efficient than working with a smaller group of colleagues who are better known to you.

Additionally, as Judge Wilkinson has pointed out, collegiality leads to better group decision-making.

> [A]t heart the appellate process is a deliberative process, and . . . one engages in more fruitful interchanges with colleagues whom one deals with day after day than with judges who are simply faces in the crowd. Collegiality personalizes the judicial process. It contributes to the dialogue and to the mutual accommodations that underlie sound judicial decisions.[5]

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.

Furthermore, the close ties that can be forged on a smaller court allow you to build trust in your colleagues. For example, in a small circuit where the judges

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on the Ninth Circuit Court of Appeals Reorganization Act, S. REP. NO. 104-197, pt. III (1995).

[4] Jennifer E. Spreng, *Proposed Ninth Circuit Split: The Icebox Cometh: A Former Clerk's View of the Proposed Ninth Circuit Split*, 73 WASH. L. REV. 875, 924 (1998); *see also id.* at 893 ("The Ninth Circuit contains more states, covers more territory, boasts more judges, and dispenses justice to more people than any other circuit. If just one of its nine states were a separate circuit, that state would be the third largest circuit in the nation.").

[5] J. Harvie Wilkinson III, *The Drawbacks of Growth in the Federal Judiciary*, 43 EMORY L.J. 1147, 1173-74 (1994).

know each other well, if one judge declares that he reviewed the record in a particular case and feels that an error is (or is not) harmless under the circumstances, another judge might feel entirely justified in relying upon that assessment, rather than going through the immensely time-consuming task of reviewing thousands of pages of trial transcript and dozens of boxes of pleadings and exhibits in order to come to the same conclusion himself. If two judges do not know each other and are unfamiliar with each others' judgment, work habits, or style, they are not likely to exhibit such reliance and would be prone to needlessly reproducing each others' efforts.

The benefits of a small court are perhaps most evident when dealing with emergency applications for relief, such as when a litigant seeks an emergency stay of a district court order. Although such applications are considered by a three judge panel, typically only one judge is able to have access to the full record at a time. Because the record tends to be voluminous, there is not always time for all three judges to fully review it. Additionally, because emergency motions can arise at any time, all three judges may not be in a position to immediately review it. In such cases, the rapport and trust that come from working together in a small court allow you to place great stock in the judgment and assessments of your colleagues, thereby allowing the court to handle such emergency matters expeditiously.

Moreover, when you work with another judge repeatedly, you get to know his particular inclinations. You are able to identify arguments he may systematically overlook and are aware of his interpretations of particular doctrines with which you might disagree. Thus, panel judges faced with an emergency petition are familiar with the types of errors their colleagues are most likely to make. This allows judges to prevent mistakes that might otherwise go unrecognized by judges unfamiliar with each others' work.

My concerns with large courts are drawn from personal experience. Having served on both the former Fifth Circuit and now the Eleventh Circuit, 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. The Eleventh Circuit has steadfastly opposed efforts to increase the size of the court[6] precisely to maintain an efficient operation.

II. Stability of the Rule of Law

Another regrettable effect of increasing the number of judges is that it leads to inconsistencies within, and uncertainty about, courts' case law. Each judge

[6] Based on the Judicial Conference's threshold factor for determining the need for additional court of appeals judgeships (500 adjusted panel filings), the Administrative Office data for the year ending June 30, 2009, indicate that the adjusted filings for the Eleventh Circuit

brings to the bench his own predispositions and judicial philosophy, and exerts his own "gravitational pull" on the law of the circuit. With 26 judges, the former Fifth Circuit was pulled in 26 different directions. The same would be true with the Ninth Circuit at 34 judges. Both situations make litigants uncertain how matters not squarely addressed by precedent will be handled. It also creates what Justice Kennedy has termed an "unacceptably large risk of intra-circuit conflicts or, at the least, unnecessary ambiguities."[7] With so many panels and judges handling similar issues, the potential for inconsistent dispositions skyrockets.[8] Justice Kennedy explained, "The risk and uncertainty increase exponentially with the number of cases decided and the number of judges deciding those cases. Thus, if Circuit A is three times the size of Circuit B, one would expect the possibility of an intra-circuit conflict in the former to be far more than three times as great as in the latter."[9]

The sheer number of possible panel combinations on the former Fifth Circuit

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would justify a court of 27 judges, rather than 12.

[7] Letter from Justice Anthony Kennedy to Justice Byron White 2 (Aug. 17, 1998), *available at* http://www.library.unt.edu/gpo/csafca/hearings/submitted/pdf/kennedy.pdf [hereinafter Kennedy Letter].

[8] Spreng, *supra* note 4, at 906 ("In other words, the more judges, the more panel combinations; the more panel combinations, the greater likelihood that any two panels will produce irreconcilable interpretations of the law.").

[9] Kennedy Letter, *supra* note 7, at 3; *see also* Paul D. Carrington, *An Unknown Court: Appellate Caseload and the "Reckonability" of the Law of the Circuit*, *in* RESTRUCTURING JUSTICE: THE INNOVATIONS OF THE NINTH CIRCUIT AND THE FUTURE OF THE FEDERAL COURTS

and the current Ninth Circuit is a good indication of the uncertainty and potential for inconsistent rulings in a large circuit. Even putting aside the circuit's senior judges and visiting judges sitting by designation, in the former Fifth Circuit with 26 active judges, there were 2,600 possible three-judge panel combinations. In the Ninth Circuit with 29 active judges, there are 3,654 possible three-judge panel combinations. With 34 active judges, the number would dramatically increase to 5,984 possible three-judge combinations. Whether the same three-judge panel could reconvene in oral argument during the judges' tenures on the court was, and would be, highly unlikely. It is virtually impossible for a court to maintain any degree of coherence or predictability in its caselaw when it speaks with that many voices.

Moreover, while a "case on point" is the gold standard for attorneys, a circuit's law can also become quite confusing and overwhelming when there are simply too many cases on point. Having so many judges produce so many opinions that make similar points in slightly different ways undermines certainty, "creating incentives to litigate that do not exist in jurisdictions with small courts. . . . Individuals find it more difficult to conform their conduct to increasingly indeterminate circuit law and suffer higher litigation costs to vindicate the few

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206, 210 (Arthur Hellman ed., 1990).

remaining clear rights to which they may cling."[10]

One of the most obvious deficiencies with increasing a court to the size of 26, 29, or 34 judges, is that it essentially precludes *en banc* review. An *en banc* hearing is one in which all the judges of a circuit come together to speak definitively about a point of law for that circuit. An *en banc* hearing occurs primarily after multiple panels issue conflicting opinions, a longstanding precedent needs to be reconsidered in light of changed circumstances, or a present-day panel simply errs.

Because of the crucial role *en banc* hearings play in maintaining uniform, coherent circuit law, it is important that each judge of the circuit have a voice in the proceedings. In the Ninth Circuit, due to its size, the majority of its judges are denied the opportunity to participate in most *en banc* hearings. Instead, the court has been forced to resort to "limited" or "mini" *en banc* sessions, in which a panel of 11 judges speaks for the circuit. Due to these "mini" *en bancs*, a minority of judges "definitively" determines the law for the Ninth Circuit. As one writer observed in 1997, "[t]echnically, a mini en banc decision may be reheard by all

[10] Tjoflat, *supra* note 3, at 70; *see also* Wilkinson, *supra* note 5, at 1174-76 (predicting "a loss in the coherence of circuit law if the size of circuit courts continues to expand. . . . As the number of judges rolls ever upward, the law of the circuit will become more nebulous and less distinct. . . . Litigation will become more a game of chance and less a process with predictable outcomes.").

twenty-eight judges . . . but such a full hearing has not been granted since the mini en banc was authorized in 1978."[11]

The use of limited *en banc* panels has been roundly criticized. Justice O'Connor wrote "[s]uch panels, representing less than one-half of the authorized number of judges, cannot serve the purposes of en banc hearings as effectively as do the en banc panels consisting of all active judges that are used in the other circuits."[12] She also observed that, in 1997, while the Ninth Circuit reviewed only 8 cases *en banc*, the Supreme Court granted oral arguments on 25 Ninth Circuit cases and summarily decided 20 additional ones. "These numbers suggest that the present system in CA9 is not meeting the goals of en banc review."[13] Furthermore, the sheer number of judges on the Ninth Circuit means that such a large number of judicial opinions is produced that it is impossible for judges to grant *en banc* review to correct all important errors once they are found.

Conclusion

The courts of appeals must be limited in size if the law is to possess the clarity and stability the nation requires. As the law becomes unclear and unstable,

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[11] Eric J. Gibbin, Note, *California Split: A Plan to Divide the Ninth Circuit*, 47 DUKE L.J. 351, 378 (1997).

[12] Letter from Justice Sandra Day O'Connor to Justice Byron White 2 (June 23, 1998), *available at* http://www.library.unt.edu/gpo/csafca/hearings/submitted/pdf/oconnor.pdf.

[13] *Id.*

our citizens—whether individuals or entities like corporations—lose the freedom that inheres in a predictable and stable rule of law. The demand for more judges, if satisfied, will inexorably lead—little by little—to the erosion of the freedoms we cherish. Article III courts are a scarce dispute-resolution resource; rather than expanding the number of judges, Congress should consider limiting those courts' jurisdiction to cases or controversies implicating those cherished liberties.

Thank you very much for your kind attention.

I would be more than happy to answer any questions the Committee might have.