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Oversight of the Structure of the Federal Courts

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Written Testimony of:

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Mr. Chairman and Members of the Committee: it is an honor to appear before you today. My name is Brian Fitzpatrick and I am a Professor of Law at Vanderbilt Law School in Nashville, TN.¹ Before I became a professor, I worked on Capitol Hill for one of your colleagues, Senator John Cornyn of Texas.

Over the years, I have worked in, researched, and taught about the federal judiciary. After law school, I served as law clerks to Judge Diarmuid O’Scannlain of the United States Court of Appeals for the Ninth Circuit and Justice Antonin Scalia on the United States Supreme Court. After my clerkships, I practiced law for several years in Washington, D.C. at the law firm of Sidley Austin LLP, during which time I represented litigants who had cases in all three levels of the federal judiciary: the United States District Courts, the United States Courts of Appeals, and the United States Supreme Court. Since I joined the faculty at Vanderbilt in 2007, my research and teaching have focused on the federal judiciary, including the issues I address today.

In this testimony, I wish to address three “hot” topics regarding the federal judiciary:

- First, is it desirable to create specialized courts of appeals that have exclusive jurisdiction over certain subject matters?
- Second, is it desirable for district court judges to have the power to enter so-called “nationwide injunctions”?
- Third, when does a United States Court of Appeals become too big?

As I will explain, each of these matters raises a similar question: when is it a good idea to concentrate or centralize judicial power? Although each context provides different benefits and costs to centralization, there are two principal considerations that run through all three of these questions.

The first consideration is uniformity in the law. Consolidation of judicial power can increase uniformity in the law. The more people governed by a circuit, the more matters handled exclusively by a circuit, the more power one district court judge has to control conduct nationwide, the more uniform the law will be for your constituents. This is a good thing because, ideally, the same federal law should mean the same thing all across America.

¹ I speak only for myself and not for Vanderbilt Law School or Vanderbilt University.

But uniformity comes at a price: error magnification. This is the second consideration. Consolidation of judicial power can both lead to more errors as well as to broader negative consequences when the errors occur. Yes, bigger circuits, more specialized circuits, and vesting more power in a single district court judge may make the law uniform over a larger group of people, but what happens when these judges make bad decisions? Too much uniformity can increase the probability of bad decisions and saddle more people with bad decisions when they are made. In other words, the law may be more uniform, but uniformly bad.

As a general matter, I am skeptical that the benefits of concentrating much judicial power in the hands of lower court judges are worth the cost. We already have a court with the authority to make uniform decisions on federal law for the entire nation. It is called the United States Supreme Court. In light of the existence of the Supreme Court, I am skeptical how much concentration is needed in the lower courts. Rather, there is great benefit to allowing a diversity of courts to consider a legal question before we answer that question for the entire nation or large portions of it. Our courts learn from one another through the common-law process sometimes called “percolation.” The more circuits and district courts we allow to answer a question before we adopt a nationwide answer, the better that answer is likely to be.

The Federal Judiciary

But let me begin with a brief summary of the current structure of the federal judiciary. As you know, the federal judiciary is divided into a hierarchy with three levels. Cases are filed in the district courts. Here, the case is usually presided over by one judge who can resolve the case either on a motion by one of the parties, or, if relevant facts are contested, by conducting a trial. The litigant that does not prevail in the district court can then file an appeal to the court of appeals. Usually the appeal goes to the court that hears appeals from the district court’s geographic area, but sometimes the appeal goes to a court of appeals that has exclusive jurisdiction over certain subject matters. For example, the United States Court of Appeals for the Federal Circuit has exclusive jurisdiction to hear appeals in patent cases.

The courts of appeal vary in size from six judges to 29 judges, with many additional “senior judges” helping to hear cases part-time on each

court. But a court of appeals usually decides appeals not with its full complement of judges, but by a randomly-selected panel of three of its judges. This means that almost all appeals that come to a court of appeals are decided by a majority vote of only three judges.

The litigant that does not prevail before the three-judge panel has the option of asking the court of appeals for a so-called “en banc” rehearing: all of the active judges on the court vote on whether to rehear the case, and, if a majority vote yes, the court rehears the case. In all of the courts of appeals except one, that means all of the active judges on the court sit and rehear the appeal. The biggest court of appeals—the one for the Ninth Circuit—is so large, however, that it does not sit en banc with the full court; instead, it rehears cases in randomly-selected panels of ten judges plus its Chief Judge.

Instead of seeking en banc rehearing or after losing an en banc rehearing, a litigant can appeal to the third level of the hierarchy: the United States Supreme Court. The Supreme Court hears all appeals “en banc,” with all nine of the Justices. Unlike the appeal to the court of appeals, however, the appeal to the Supreme Court is not automatic. The Supreme Court gets to decide whether to take the appeal. The Supreme Court takes very few appeals every year—less than one hundred. But thousands of requests are made to the Supreme Court and thousands of other cases are resolved each year by the courts of appeal without any request for Supreme Court review. This means that, for the vast majority of litigants, the court of appeals is the last court that might hear their cases. This makes the courts of appeal very important to our system of justice.

Specialized Courts of Appeals

Let me turn now to the question of specialized courts of appeals. These are courts of appeal that have exclusive jurisdiction over certain subject matters. That means all appeals across the entire country raising those subject matters are channeled to one court. Various manifestations of these courts have been with us for over one hundred years, but, today, we have four courts of appeal that include at least some exclusive subject matter jurisdiction within their purview: the United States Court of Appeals for the Federal Circuit, the United States Court of Appeals for the Armed Forces, the Foreign Intelligence Surveillance Court of Review (which is created from district court

judges), and the United States Court of Appeals for the D.C. Circuit. In Table 1, I list these courts next to their special jurisdictions.²

**Table 1: Federal Courts of Appeal
with Exclusive Subject Matter Jurisdiction**

Court	Jurisdiction	Judges
Court of Appeals for the Federal Circuit	Appeals from Court of Federal Claims, Court of International Trade, Court of Appeals for Veterans Claims; administrative appeals involving government employees and contracts, patents and trademarks, and international trade; appeals from district courts in patent cases and claims against the federal government.	Article III
Court of Appeals for the Armed Forces	Appeals in military justice cases.	Article I
Foreign Intelligence Surveillance Court of Review	Appeals of denials of warrants for electronic surveillance of foreign intelligence information.	Article III (11 district court judges designated by the Chief Justice)
Court of Appeals for the D.C. Circuit	Appeals of applications for removal of aliens from the U.S. as terrorists; certain challenges to orders of administrative agencies.	Article III

Source: Lawrence Baum, SPECIALIZING THE COURTS 14-15 tbl. 1.2 (2011); 28 U.S.C. §§ 1291, 1294 (Historical Notes and Revisions).

Specialized courts of appeal centralize judicial power to a very large degree because they have exclusive jurisdiction over certain subject matters. Thus, for certain subject matters, only one appellate court can consider a legal issue. Returning to the two considerations I

² This table is largely reproduced from Lawrence Baum’s book SPECIALIZING THE COURTS (2011).

identified at the outset, this exacerbates both the benefits of uniformity in the law and the costs of error magnification that come from consolidating judicial power.

Consider first the benefit of uniformity. There is benefit to having one court make decisions for the entire country. Ideally, the same federal law should mean the same thing everywhere in the United States. When one court decides federal law for everyone, federal law means the same thing for everyone. This might make it easier for large companies and others who travel to conduct their affairs. It also furthers equal treatment under the law if people don't have to comply with different interpretations of the same federal law. Moreover, specialized courts repeatedly hear cases involving the same subject matters and thereby arguably develop more expertise in those areas of the law than generalist judges would develop.³ Thus, not only are legal decisions within their jurisdiction uniform, but the decisions may be of better quality because the judges have more expertise in those areas.

But consider next the cost of error magnification. Because one specialized court has exclusive jurisdiction over a subject matter, the common law process of "percolation" that occurs when different courts examine the same legal question is undermined.⁴ In this process, it is thought that, over time, different courts can learn from each other's decisions and consensus can often build on the best answers to legal questions.⁵ When this process is lost among courts of appeal, it could

³ See Rochelle Dreyfuss, *The Federal Circuit: A Continuing Experiment in Specialization*, 54 CASE W. RES. L. REV. 769, 770 (2004); Federal Judicial Center, *Structural and Other Alternatives for the Federal Courts of Appeals: Report to the United States Congress and the Judicial Conference of the United States* (1993) at 3, available at <https://www.fjc.gov/sites/default/files/2012/StrucAlt.pdf>; Rochelle Dreyfuss, *Specialized Adjudication*, 1990 BYU L. REV. 377, 377 (1990); Lynda J. Oswald, *Improving Federal Circuit Doctrine Through Increased Cross-Pollination*, 54 AM. BUS. L.J. 247, 252-53 (2017).

⁴ See Rochelle Dreyfuss, *Percolation, Uniformity, and Coherent Adjudication: The Federal Circuit Experience*, 66 SMU L. REV. 505, 507 (2013); Richard A. Posner, *Will the Federal Courts of Appeals Survive Until 1984? An Essay on Delegation and Specialization of the Judicial Function*, 56 S. CAL. L. REV. 761, 787 (1983).

⁵ See Dreyfuss, *supra* note 3, at 829 ("Eventually, experience demonstrates which rules work best. At that point, either the regional courts reach consensus or the Supreme Court intervenes and settles the law throughout the nation. However, once adjudication is centralized in a single court, that form of evolution is no longer possible."); Posner, *supra* note 4, at 786 ("The circuits as well as the states are

lead to worse not better quality legal decisions—i.e., a greater probability of errors.

It is difficult to assess how the benefits and costs of specialized courts compare in the abstract. There may be situations where the benefits of specialized courts of appeal outweigh the costs. As a general matter, however, I am skeptical of specialization. To the extent we need nationwide uniformity in the law, we already have the Supreme Court to provide it. Although the Supreme Court can review only a limited number of cases every year, it is not clear to me why we need uniformity more quickly in some areas of the law than in others. Moreover, there are benefits to delaying uniformity: we improve legal decisions by letting issues percolate in many different courts before deciding to make a decision uniform across the nation. In my view, the increased likelihood of poor decisionmaking combined with the nationwide suffering that ensues when a mistake is made is reason enough to minimize the use of specialized courts of appeals.

Nationwide Injunctions

Let me turn to so-called “nationwide injunctions.” Although “nationwide injunctions” is the more common name, many scholars prefer the term “universal injunctions.”⁶ This is the case because the controversial form of these injunctions occurs when a single district court judge enjoins a defendant from engaging in behavior against the plaintiffs *as well as persons that are not before the court*, not when a district court merely enjoins a defendant from engaging in behavior against the plaintiffs nationwide.⁷ As such, I will use the term “universal injunction” instead of “nationwide injunction.”

laboratories for social, including judicial, experimentation, and a judicial monopoly of a field of federal law eliminates competition in that field.”).

⁶ See Michael T. Morley, *Nationwide Injunctions, Rule 23(B)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. REV. 611, 616 (2017).

⁷ See, e.g., *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 n. 1 (2018) (Thomas, J., concurring) (“‘Nationwide injunctions’ is perhaps the more common term. But I use the term ‘universal injunctions’ in this opinion because it is more precise. These injunctions are distinctive because they prohibit the Government from enforcing a policy with respect to anyone, including nonparties—not because they have wide geographic breadth.”).

Universal injunctions have been entered by district court judges in this country for at least 60 years,⁸ but they pose perhaps the most extreme example of consolidated judicial power of the three issues I address today. This is the case because a single district court judge decides federal law for the entire country. At its best, this means one judge picked at random from a pool of 700 decides federal law for 300 million Americans. Although an appeal is possible, if the defendant loses the appeal, it has little choice but to seek Supreme Court review, and the Supreme Court may feel compelled to take the case because this may be the only chance it gets; the injunction may prevent the issue from arising again.⁹ Thus, like specialized courts, universal injunctions undermine the common-law process of percolation.

But universal injunctions are often not at their best: the judges who enter universal injunctions are often not selected at random; they are selected by the plaintiffs because they are predisposed to rule in the plaintiffs' favor—i.e., universal injunctions lead to rampant forum shopping.¹⁰ Thus, during the Obama administration, plaintiffs sought out Republican-appointed judges they believed were favorably disposed to their arguments to halt the President's policies; during the Trump administration precisely the opposite judges have been sought out.¹¹ The forum shopping caused by universal injunctions therefore exacerbates even further the likelihood of erroneous decisionmaking because the single judge who decides the case is not selected for lack of bias, but *because of* bias. Thus, universal injunctions exacerbate the error magnification that comes from consolidating judicial power even

⁸ See Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417, 428 (2017).

⁹ See *id.* at 461 (“The district court's injunction may halt federal enforcement everywhere. There may be no opportunity, then, for more circuits to express their views, because parties in other circuits might no longer bring their own challenges to the statute, regulation, or order.”).

¹⁰ See Getzel Berger, *Nationwide Injunctions Against the Federal Government: A Structural Approach*, 92 N.Y.U. L. Rev. 1068, 1092 (2017) (“[Forum shopping] is more acute in the nationwide injunction context because the federal government is subject to suit anywhere in the country, giving plaintiffs a rich menu of fora to choose from.”); Bray, *supra* note 8, at 460 (calling it “[s]hop ‘til the statute drops”).

¹¹ See Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. Rev. (forthcoming 2018) at 25 (draft available at <https://ssrn.com/abstract=3112776>).

beyond that of specialized courts where at least forum shopping is not possible.

Moreover, universal injunctions impose entirely new costs.¹² For example, there is concern about the due process rights of the persons who are not parties to the case but nonetheless affected by the injunction.¹³ Some Americans may benefit from the policies enjoined by a universal injunction, but, if they are not before the court, they cannot be heard before their interests are affected.¹⁴ As many commentators have pointed out, there is a process in place for adjudicating the interests of persons who are not before a court: it is called a “class action.”¹⁵ The class action rules require courts to consider whether absent persons are adequately represented by the plaintiff and his or her lawyers, as well as whether there are conflicts of interest among the absent persons that would make class-wide relief inappropriate.¹⁶ These inquiries are designed to protect the due process rights of absent persons. Judges who enter universal injunctions evade these inquiries.

¹² These include asymmetric rules of res judicata, *see* Berger, *supra* note 10, at 1090 (“Nationwide injunctions create a one-way ratchet in which the law can change only against the government, not for it.”); Morley, *supra* note 6, at 494 (“If courts may award Defendant-Oriented Injunctions in non-class, individual-plaintiff cases, then when a plaintiff in such a case prevails, all rightholders throughout the state or nation stand to have their rights enforced by the judgment. If the plaintiff loses, however, other rightholders are not bound by res judicata or collateral estoppel; the court’s ruling does not prevent them from bringing their own challenges to the legal provision at issue, either in the same court or different courts.”), as well as the danger of conflicting injunctions, *see* Berger, *supra* note 10, at 1088 (“An expansive injunction...creates a risk of competing injunctions, which make it harder for the government to abide by the law.”); Bray, *supra* note 8, at 462-63 (discussing two separate lawsuits that were filed by undocumented immigrants challenging the scope of the district court injunction in *Texas v. United States*).

¹³ *See* Brief Amicus Curiae of the Foundation for Moral Law in Support of Petitioners, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), 2018 WL 1156648 at *25; Bray, *supra* note 8, at 472 (“In short, Article III gives the judiciary authority to resolve the disputes of the litigants, not the disputes of others.”); Morley, *supra* note 6, at 525-26.

¹⁴ *See* Frost, *supra* note 11, at 31; Morley, *supra* note 6, at 517 (“Government defendants may be enjoined from enforcing a law against people who support the measure, would prefer or even benefit from its enforcement, and would gladly refrain from enforcing their rights against it.”).

¹⁵ *See generally* Morley, *supra*, note 6.

¹⁶ *See* Fed. R. Civ. P. 23.

Some commentators believe that universal injunctions come with special benefits beyond uniformity in the law: they are sometimes needed to provide complete relief¹⁷ or to prevent imminent, irreparable harm to persons who cannot quickly join a lawsuit.¹⁸ To be sure, sometimes any injunction against a defendant in a particular lawsuit will affect other people; one example is a lawsuit seeking to redraw election districts. But universal injunctions enjoin defendants even when relief can be made divisible between the parties to the lawsuit and absent persons; it is when the injunction enjoins the defendant against nonparties even when it is not inevitable to do so that the practice is most controversial—and harder to justify.

Some commentators favor keeping universal injunctions but channeling the lawsuits to a special court, whether one with exclusive jurisdiction to hear lawsuits seeking universal injunctions¹⁹ or to a three-judge panel that is randomly selected like those who hear challenges to election districts.²⁰ Although these proposals might improve the status quo by eliminating forum shopping and increasing the number of judges who must sign off on one of these injunctions, for the reasons stated previously, I am skeptical that specialized courts strike the best balance between uniformity and error magnification. I suspect it would be better to forbid non-inevitable universal injunctions

¹⁷ See Berger, *supra* note 10, at 1084-85 (“The complete relief rationale is especially salient in an age where so many administrative law challenges are brought by groups of states or large industry associations, since a plaintiff-focused injunction might not completely redress these institutional actors’ harms.”); Frost, *supra* note 11, at 13; Morley, *supra* note 6, at 491 (“In certain cases, it would be impossible to fully enforce a plaintiff’s rights without completely invalidating a statute or regulation as it applies to everyone. Unconstitutional or otherwise improper redistricting presents perhaps the most obvious example of this concept in the election law context.”).

¹⁸ See Frost, *supra* note 11, at 17 (noting that President Trump’s travel-ban order went into effect upon issuance and barred entry even by those who were en route to the United States).

¹⁹ See *id.* (defending universal injunctions and listing the following proposed reforms: amending the venue statutes, channeling universal injunctions to a single forum, assigning judges to these cases via lottery, and assigning three-judge panels to these cases).

²⁰ See Gregg Costa, *An Old Solution to the Nationwide Injunction Problem*, Harv. L. Rev. Blog (Jan. 25, 2018), <https://blog.harvardlawreview.org/an-old-solution-to-the-nationwide-injunction-problem/>.

altogether and force these lawsuits either into the class action device or into multiple suits before different judges where the normal common-law process of percolation can take place.

The Maximum Size of a Court of Appeals

Let me turn last to the question of when a federal court of appeals becomes too big. This is a question this body has addressed from time to time as the population of the nation shifted and the Circuit map had to be reconfigured. Although I think it is hard to identify with mathematical precision when a Circuit becomes too big, I think there are signs that one of our Circuits, the Ninth Circuit, is well past that point.

Why? To begin with, the Ninth Circuit is now the largest Circuit in American history, with 29 active judges and many more part-time senior judges. It towers over every other Circuit in the country: our smallest Circuit is the First Circuit with six judges and our next largest Circuit is the Fifth Circuit with 17 judges. The Ninth Circuit is almost double the size of the next biggest circuit.

To see why this is not optimal, let me return again to the principal benefits and costs of the concentration of judicial power that I mentioned at the outset: uniformity versus error magnification. As I explain, the Ninth Circuit has become so big that it 1) no longer captures all of the benefits of uniformity yet 2) poses all of the costs of magnification of errors that comes with concentrated judicial power.

First, again, we might think there is some benefit in having one court make decisions for 20% of the country—60 million people—like the Ninth Circuit does. When one court decides federal law for 60 million people, federal law means the same thing for all those people. If we had more circuits, federal law would sometimes be interpreted differently in those circuits, and more people might live under different federal standards than they do now.

There is reason to believe, however, that the Ninth Circuit has become so big that it no longer delivers on this promise of uniformity. This is because three-judge panels on the Ninth Circuit issue so many decisions that the other judges on the court cannot keep up with them all. This has led to many complaints that different three-judge panels within the Ninth Circuit confront the same legal issue and decide it

differently because they are unaware that another panel is confronting or has confronted the same issue.²¹

When two panels of the Ninth Circuit issue conflicting decisions about what the law means, it not only disrupts uniformity; it disrupts coherence. It is one thing for different courts in different places to interpret the law differently. It is another thing for the same court in the same place to interpret the law differently. In the former scenario, at least the people who live within the jurisdiction of each court know which decision must be followed: the one issued by their court. In the latter scenario, how can people know which panel decision of the same court should be followed and which one should be ignored? They can't.

I have never seen any data collected on how often conflicting decisions occur in the Ninth Circuit compared to other Circuits. But I searched for the phrases "intra-circuit split" and "intracircuit split" in Westlaw, and I found that these phrases appear over twice as often in opinions of the Ninth Circuit than in any other Circuit. Although this data is hardly conclusive, it is consistent with the anecdotal evidence: the complaints I have heard about this problem over the years almost always come from the Ninth Circuit. Thus, I would be stunned if the Ninth Circuit did not lead the country in internally inconsistent decisions. If I am correct, it means the Ninth Circuit has become so big it is no longer capturing the full benefit of uniformity that can come from concentrating judicial power.

By contrast, the Ninth Circuit fully delivers on the cost of error magnification that comes with concentrated judicial power. For example, when we concentrate judicial power in bigger circuit courts, mistakes are transmitted over a larger population. Because our courts of appeal decide cases by majority vote of three-judge panels, two Ninth Circuit judges can decide what federal law means for 60 million people. What if those judges are wrong? What if those judges do not hold mainstream legal views? Then 60 million people suffer. If we had more circuits, fewer people would suffer in these circumstances.

But the Ninth Circuit's size leads not only to more people suffering when mistakes are made but to a greater probability of error to begin with. As I explained above, usually the concentration of judicial power leads to more erroneous decisionmaking because we have fewer courts

²¹ See, e.g., Diarmuid F. O'Scannlain, *Ten Reasons Why the Ninth Circuit Should be Split*, 6 Engage 58 (2005).

considering a legal question before we adopt the solution nationwide; as I noted above, we miss out on learning from the trial-and-error of the common-law process when we have fewer courts consider a question before we answer the question for everyone. But when it comes to the optimal size of a circuit court, there is a special reason why size leads to more erroneous decisions: as I have explained in prior work, a circuit can get so big that the probability that two judges who do not hold mainstream views will be randomly selected for the same three-judge panel is greater than it would be if the circuit were smaller.²² The Ninth Circuit's size puts it in that "unsweet" spot.²³

Unlike the problem with internally inconsistent decisions I described above, there is data suggesting that the Ninth Circuit indeed makes more errors than smaller Circuits. The data comes from the fact that the Ninth Circuit has long had the highest percentage of its decisions reversed by the Supreme Court of any Circuit. I show this in Table 2, which ranks the Circuits on how often they were reversed per 1000 appeals they terminated on the merits in the twelve months preceding the Supreme Court Terms from October 1994 to October 2015.²⁴ The Ninth Circuit has been reversed more than 2.5 times as often as the least reversed Circuits and 44% more often than the next closest Circuit (the Sixth).²⁵

²² See, e.g., Brian T. Fitzpatrick, *9th Circuit Split: What's the math say?*, Daily Journal (Mar. 21, 2017). The probability can be derived from the combination function in discrete mathematics. The function calculates the number of ways to pick a set of objects from a larger set of objects. In this case, the formula is $(\text{COMBIN}(F,3) + (\text{COMBIN}(F,2)*\text{COMBIN}(C-F,1)))/\text{COMBIN}(C,3)$, where F is the number of judges on the court with outlier views and C is the number of total judges on the court.

²³ For example, everything else being equal, the probability of selecting a three-judge panel with two outliers increases by one percentage point from a court of 14 judges to a court of 28 judges. If a court decides over 10,000 appeals a year as the Ninth Circuit does, that amounts to 100 more three-judge panels with a majority of outlier judges.

²⁴ I include as reversals in this chart cases that the Supreme Court reversed or vacated on the merits even in part. I include only the regional circuits; the Federal Circuit and the D.C. Circuit have non-comparable specialized dockets, an issue I address separately below.

²⁵ Although I do not report them separately here, the numbers have been similar if one looks at only unanimous reversals—which may be an even better measure of Circuit performance: the Ninth Circuit was unanimously reversed more than three

Table 2: Number of Supreme Court reversals per 1,000 circuit appeals terminated on the merits, OT 1994 to OT 2015

9 th Circuit	2.501
6 th Circuit	1.732
7 th Circuit	1.641
8 th Circuit	1.418
2 nd Circuit	1.319
10 th Circuit	1.272
1 st Circuit	1.109
3 rd Circuit	1.014
4 th Circuit	1.000
11 th Circuit	0.996
5 th Circuit	0.993

Source: U.S. Courts of Appeals-Cases Terminated on the Merits After Oral Arguments or Submission on Briefs, Table B-10, 1994-2015; SCOTUSBlog; Harvard Law Review.

I should also stress that these are aggregate statistics. The Ninth Circuit did not have the highest reversal rate every single year (although it did in many, many of them). Moreover, the Ninth Circuit's reversal rate has fallen some during this period; things looked worse twenty years ago than they do today—but they still look bad today. Finally, reversal rate is not a perfect proxy for errors made by a court of appeals. The Supreme Court takes cases for all sorts of purposes, only one of which is to correct errors. But there is no reason why those other purposes—such as to resolve splits between the Circuits—would affect the reversal rate in one regional circuit more than another. Thus, the data on the Ninth Circuit's reversal rate is indeed consistent with the theory: not only do errors affect more people in bigger circuits, but there is a greater probability that randomly-selected three-judge panels will make more errors to begin with in bigger circuits.²⁶

times as often as the least reversed Circuits and over 20% more often than the next closest Circuit.

²⁶ I do not mean to suggest that size is the only reason the Ninth Circuit's reversal rate is so high. There are many causes. One of the biggest is no doubt the ideological makeup of the circuit. Unlike any other circuit, the Ninth Circuit has been comprised of more Democratic appointees than Republican appointees during the entirety of the last 20 years. During the same time, the Supreme Court has

There is a solution to the problem of errors made by randomly-selected three-judge panels: en banc review. If non-representative judges make up a majority of a three-judge panel, then the full court can take the case en banc and set the panel straight. But the Ninth Circuit's size prevents it from using this solution, too. The Ninth Circuit is too big to hear cases en banc with a full court; it hears cases en banc by randomly selecting ten judges and adding its Chief Judge. That is, the Ninth Circuit rehears cases with only 11 of 29 judges. As such, it only takes six judges to comprise a majority of the Ninth Circuit's en banc panels. This means that only six judges out of 29 can decide the law for 60 million people. This is better than two out of 29, but not much better: the so-called "limited" en banc process is susceptible to the same occasional non-representativeness as the randomly-selected three-judge panels that cause the need for en banc review in the first place. For example, I distinctly remember one en banc panel on the Ninth Circuit during my clerkship year that was comprised of 10 Democratic appointees and only one Republican appointee.²⁷ Needless to say, that panel was not representative of the full Circuit.

You do not have to take my word for it that the Ninth Circuit's size has contributed to its high Supreme Court reversal rate. There have been a number of empirical studies that try to assess whether larger circuits are reversed more often than smaller circuits.²⁸ The takeaway from these studies is the following: size does not lead to a higher reversal rate until a court of appeals becomes so big that it can no longer sit en banc as a full court any more. That is where the Ninth Circuit now finds itself. Indeed, the best of these studies estimates that *the Ninth Circuit is reversed an extra ten times every year by the Supreme Court simply because it is unable to sit en banc as a full court.*²⁹

always had more Republican appointees. We know that judges of different ideological persuasions tend to interpret the law differently. This has surely contributed to the Ninth Circuit's reversal rate. But the best empirical studies control for this and still find the Ninth Circuit's size is a factor. *See* source cited in note 29, *infra*.

²⁷ *See Cramer v. Consol. Freightways, Inc.*, 255 F.3d 683 (9th Cir. 2001).

²⁸ *See, e.g.*, Richard Posner, *Is the Ninth Circuit Too Large? A Statistical Study*, 29 J. Legal Stud. 711 (2000); Kevin M. Scott, *Supreme Court Reversals of the Ninth Circuit*, 48 Ariz. L. Rev. 341 (2006).

²⁹ *See* Scott, *supra*, at 353.

In short, the Ninth Circuit's size leads it to make more errors and for those errors to affect more people. At the same time, it does not fully capture the benefits of size because it is now so big it cannot even deliver uniformity in the law. Although it is hard to say with mathematical precision when a court of appeals becomes too big, I think the Ninth Circuit is well beyond that point. When a court becomes too big to sit en banc with all its active members, it is time to reconfigure it into smaller courts.

Thank you for allowing me to testify before you today.