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***Regulatory Oversight Podcast – S02Ep09: A Conversation With Judge Lawrence VanDyke of the US Court of Appeals for the Ninth Circuit***

**Hosts: Stephen Piepgrass**

**Guests: Judge Lawrence VanDyke, Ketan Bhirud, and Mike Yaghi**

**Stephen Piepgrass:**

Welcome to another episode of *Regulatory Oversight*, a podcast that focuses on providing expert perspective on trends that drive regulatory enforcement activity. I'm Stephen Piepgrass, one of the hosts of the podcast and the leader of the firm's Regulatory Investigations Strategy + Enforcement practice group.

This podcast features insights from members of our practice group, including its nationally ranked state Attorneys General practice, as well as guest commentary from business leaders, regulatory experts and current and former government officials. We cover a wide range of topics affecting businesses operating in highly regulated areas.

Before we get started today, I want to remind all of our listeners to visit and subscribe to our blog at [RegulatoryOversight.com](https://www.regulatoryoversight.com) so you can stay up to date on developments and changes in the regulatory landscape.

Today, I am joined by my colleagues Mike Yaghi and Ketan Bhirud, and we are honored to have a very special guest, Judge Lawrence VanDyke. Judge VanDyke is currently serving as a circuit judge on the U.S. Court of Appeals for the Ninth Circuit. Before being appointed in January 2020, Judge VanDyke served as a Deputy Assistant Attorney General in the Environment and Natural Resources Division of the United States Department of Justice. Prior to that, he served as the solicitor General of two western states – Nevada and Montana. Judge VanDyke received his law degree from Harvard Law School, where he was editor of the Harvard Law Review. He has undergraduate degrees in engineering and theology and a master's degree in engineering management.

**Ketan Bhirud:**

Stephen, thank you for that introduction. That was really nice. We appreciate that. I'm really excited today to be on with my colleague Mike Yaghi and with our special guest Lawrence Van Dyke, who's been a friend of mine for about a decade now. We worked together at the Nevada AG's office and not just one of my favorite lawyers or judges, but one of my favorite people and one of the kindest, nicest people I've met. And so the way we're going to do this today is quickly talk to Judge Van Dyke about his background and how he got to be a lawyer, how he got to be on the Ninth Circuit, and then switch over to talk about some things that some people are probably interested with learning about the Ninth Circuit and how his background helps him there. Does that work for you, Lawrence?

**Judge Lawrence Van Dyke:**

That sounds great, Ketan, and I just thank you for having me on. It's wonderful to get to see you again even if virtually and looking forward to be able to do this.

**Ketan Bhirud:**

Any excuse to hang out with you is a good excuse. A lot of people probably know this if they're listening, they might know something about you, but you weren't one of these people that went straight to law school. You had a career before that, and you went to law school a little bit later in your career. You had multiple engineering degrees, worked in construction. Can you tell us a little about that and what made you decide to go to law school and pivot from what you were doing?

**Judge Lawrence Van Dyke:**

I grew up in Montana and my dad had an irrigation and construction company in Montana, and so when I went to college, I just took engineering. My dad had an engineering degree and figured I would sort of follow in the family footsteps, which is what I did. Worked for the company for, I don't know, about a half a decade, and as I was working in that, really enjoyed that, but because of some changes in what was going on with the company and such, I decided that I, well the other thing too was we had disputes as almost every construction company does, and so I would work with lawyers in our disputes.

We weren't really big enough to afford to litigate, but we had lawyers that would try to avoid litigation. So worked with lawyers in working up what would be like a white paper or things like that, and I really enjoyed that and so became enamored with this idea of going to law school, but I didn't know much about that and just decided to take the LSAT on sort of a whim and apply to law schools, and ended up going off to law school thinking at the time that I would do contracts because we were a contractor.

I knew nothing much at all about constitutional law, I didn't know much about the court system, much about litigation even, but I knew something about contracting or with my engineering background, I thought like vaguely I might do patent law, but I was disabused of that very quickly after getting to law school. I actually thought I might do government contracting all the way until finishing law school and really went the path I went more just because, as we all know, things that happen in your career end up sending you down one path rather than another.

**Ketan Bhirud:**

That makes a lot of sense. This isn't a video and those of you who haven't seen Judge VanDyke, he's about six foot eight, so I would suggest you not get in a dispute with him. He's a big, intimidating guy, apart from having a big brain and being a big lawyer. But Lawrence, you talked a little bit about being in law school and the plans changing from doing contracts and patent work. Was working at an Attorney General's Office on your radar at all? Did you even know what an Attorney General was? Because I didn't.

**Judge Lawrence Van Dyke:**

So I had a really funny experience. I had taken the LSAT and I realized I might be able to get into a good law school. I didn't know much about even what a good law school was, but I looked up the US News rankings. So I talked to our family lawyer who was a really well-regarded lawyer in Montana and said, "Hey, I, where should I go to law school," et cetera, "I could go here, I could go in Montana, I could go maybe to a different law school," and he put me in touch. He said, "Well, there's a guy who was the former solicitor of Montana," and I was like, "Solicitor, that sounds like, does he wear a wig? What is that?" That tells you how little I knew. And at that

time, he was, maybe he was actually the solicitor at the time. But anyway, I ended up talking to him.

Now he's a colleague of mine. He's on the federal bench as a district court judge in Montana, Brian Morris, but that was sort of my first introduction. I couldn't have told you what the Attorney General's Office did. I think I knew there was an Attorney General's Office, but I couldn't have told you anything more about that. I definitely didn't know anything about solicitor generals. That was the first time I heard the term and I thought it was a funny term at the time. I think if you'd have said working in government, I probably had an anti-government bias because of being a government contractor, right? So I would've thought, "No, I'm never going to do that," at the time probably.

**Ketan Bhirud:**

Well, we're all hoping you do a better job of keeping down this job and you're on the Ninth Circuit for a long time, rather than hopping from Solicitor General's Office to Solicitor General's Office like you were in three. You said that you didn't know what an Attorney General's Office was, let alone a Solicitor General's Office. You ended up thinking you were doing government contracting or IP law. You got down this path, you're in private practice. I think you were at Gibson Dunn, you're doing a big firm, you're very successful. What made you decide to leave private practice? I think you went to the Texas AG's Office, right? So what made you decide to do that?

**Judge Lawrence VanDyke:**

Right.

**Ketan Bhirud:**

So what made you decide to do that?

**Judge Lawrence VanDyke:**

While I was in law school, I ended up fortuitously on law review and it was being on law review that sort of first made me interested. It was a combination of being on law review and being very interested in religious liberty. So religious liberty issues, tend to sort of, the way you hear about them as a law student is on appeal, right? So the combination of being interested in religious liberty and civil rights type stuff and being on law review made me more interested in the appellate legal issues route. So by the time I actually went to Gibson Dunn, I was very interested in that and that's sort of what shifted my focus. And while I was at Gibson Dunn, I went to Gibson Dunn straight out of law school in DC and worked for a year, but during that year I worked very heavily with Gene Scalia doing labor stuff, but mostly admin law and of course clerking on the DC circuit, so all of that stuff made me very interested in legal issues.

Gene Scalia is a phenomenal lawyer, as you might imagine, and just got me really interested in legal issues. And so I worked at Gibson Dunn, then I went down and worked at Gibson Dunn after clerking for Janice Rogers Brown on the DC circuit for a year. Moved to Dallas to work with Jim Ho, who's now Judge Ho on the Fifth Circuit. I went down to work with him and then he got appointed to be the Texas Solicitor General, I can't remember, six months to eight months in. So he was like, "You know, we were going to do this great thing together, but I got this great opportunity," but he left me in a really good spot. He actually left me with about a year's worth of appellate work that he had put together that I got.

I ended up getting my first argument because Jim had left, and so I as a baby associate got to inherit the argument, and then he came back after being gone for a couple years and I worked with him a whole bunch more and he really taught me a lot. So I hadn't really gone to a law firm thinking I would stay and become a partner there necessarily. I had always wanted to do government service, but I don't know, back in 2009, '10, I thought I would do what a lot of my friends had done, which was go to work as an AUSA and hopefully there in Dallas because we were pretty settled in Dallas. But the problem was there was a hiring freeze and nobody was hiring. Nobody was hiring, so at that point, of course now I was more enamored with the idea of doing government service. I understood the value of that, et cetera, but I could not get in.

I think I had a bias, and we could talk about this more, but I had a little bit of a bias towards the federal government, which a lot of law students do. And frankly, that's where I probably would've ended up if I had been able to get that job, but there was a freeze. So a buddy of mine said, "You should go work in the Texas AG's Office," and I said, "I don't want to work in Austin," and he said, "I don't care. You should go work in the Texas AG's Office." So I interviewed. My interviewer was Andy Oldham, now Judge Oldham, who was a good friend of mine and I thought very highly of him since law school. We went to law school together. He hired me probably as an act of mercy or something like that, and I ended up working for him.

But very shortly after getting that job, Jim Fox was elected in Montana and he offered me the opportunity to be the Montana Solicitor. So I was an assistant solicitor in Texas, Andy and the then solicitor general in Texas, Andy was the deputy, were very kind and very supportive of me going to be the Montana Solicitor. And so pretty quickly, packed up the whole family and moved to Montana. I think Judge Duncan, Kyle Duncan did a similar thing but had more staying power. He was in the Texas Solicitor General's Office as an assistant solicitor for a while before he went and served in a role that was effectively the Louisiana Solicitor General. So I think the Texas Solicitor General's office has a thing where they send people off to be solicitor generals in other states. It's the training ground for solicitor generals, maybe.

#### **Ketan Bhirud:**

No, that's great. I was going to say as someone whose practice focuses quite a bit on state attorneys general work and state work, I know some people have a bias for the federal government law students and lawyers, but here's the pitch I'll give. While Judge VanDyke was saying all that, he mentioned that he worked with Kyle Duncan and Andy Oldham and Jim Ho, and now here's Judge VanDyke, all are federal court of appeals judges. So...

#### **Judge Lawrence VanDyke:**

No, that's absolutely right. I remember the last job I had was at DOJ Main Justice, in leadership there. But I remember talking to other people of leadership, particularly at the point where I was going through my nomination/confirmation process and them saying to me, "Man, maybe we should have went back to our home states you know and worked in our state government offices because that seems to be a good path," and I absolutely agree with that, and I could name a lot more people. I'll spring off of that to say why I would make a pitch for people to work in their state AG's offices. Having worked in both, I only worked for about a year in the Federal Main Justice, which is awesome. The lawyers are phenomenal, the opportunities are amazing, all the reasons, but everybody kind of knows that.

But in federal government, it is so big, and maybe this is true of the very biggest states, right? California, New York, Texas, but even so I would say there's a difference almost in kind, the federal government is so big that everything is so siloed. Even the Federal Solicitor General's

office, which is the crown jewel you know for somebody like me who thinks it's really awesome, it's very siloed. It's really awesome. They're arguing all the time in front of the Supreme Court and they're also reviewing some federal court of appeals stuff, but all those jobs are very siloed by their nature just because the government's so big.

Whereas in state AG's offices, the diversity of work you get in both federal and state courts as far as subject matter, I mean there's some subjects that you're never going to probably visit on, federal immigration or federal criminal law, but you get such a breadth of experience. The cases I think about that I argued, especially in state court, ran the gamut from tax issues to Dormant Commerce Clause to a lot of state constitutional issues, employment issues, and in a federal court, habeas 1983 actions. You just get a great diversity and if you have the right position in state government, you get to sort of have this national practice. Like, if you're a solicitor general or you work in a solicitor general's office or in other roles like Ketan, you worked as a general counselor and you make friends.

We were just talking about these friends of mine, many of them I was friends with before this, but we could have a whole litany of people that have gone on to do great things that we could talk about that you and I know because of our roles in the Nevada AG's Office and the Montana AG's Office. Because you get to be, I like being in a small town. So you get to be in Carson City or in your case you're in Vegas or in small town in Montana or in Reno, but you build the relationships and the friends with people all over the country. And then a lot of those people often end up moving into the federal government when there's a change in administration, so it's just a great way to build relationships, meaningful relationships. The practice is amazing, and so I'm sort of evangelistic about go work in state government. Maybe I would recommend working at a law firm, getting that kind of experience and then transitioning into state government in a more senior position because a lot of things I'm talking about are benefits that come with a more senior position, not just like a starting position in state government.

**Ketan Bhirud:**

No, I think there's a lot of benefit to everything you say and sometimes even starting in government, going into private practice, get some training, going back. It doesn't have to be in it one time, out at the other. Thanks for talking about all that. I think that's a good time for me to transition over to my colleague Mike Yaghi, who's going to talk a little bit more about substantive stuff with an AG practice and practice in front of the Ninth Circuit. Take it away, Mike.

**Mike Yaghi:**

Thank you very much, Ketan. Hello again, Judge VanDyke. Nice to be with you today. Appreciate you sharing your time and insights with us. It's very interesting stuff. A lot of people think judges just sit up on a bench and wear a robe, but I think there's a lot more to it than that. So we're curious if you could share with our listeners after becoming a judge, both some of the expected and unexpected things you've experienced being on the bench.

**Judge Lawrence VanDyke:**

Yeah, one thing Ketan and I didn't quite get into, but maybe you could intuit it, I guess, is that in my job as the Montana Solicitor, it was really my two years as the Montana Solicitor and four years as the Nevada Solicitor, that I really started to litigate a lot in the Ninth Circuit because both those states are the Ninth Circuit, so I was doing a lot of litigation in front of the court I now serve on as well as state courts. And so it wasn't like I was coming to a court that I didn't have a lot of experience of practicing in front of, but obviously there's some very different things once



you sort of step behind the curtain and got on the other side of the bench. In a lot of ways, a lot of it was what I expected. You know, when I used to argue cases.

This is even more impressive to me now, now that I know how busy our court is. Without fail, in all the cases I ever argued, the Ninth Circuit judges were always exceptionally prepared. And you know, I wasn't always arguing the biggest case, I'm sure, that they were hearing or anywhere near that, but they always understood my case completely. I didn't have to explain the case to them. They'd obviously read all the briefing; they knew the key issues and they were laser focused on those. And so I expected my colleagues to be very gifted, very intelligent, very hardworking, and all of that's proven to be true. I admire every single one of my colleagues, and anybody that knows my short tenure on the Ninth Circuit, I could be a little bit fierce and criticizing them on the substance on some opinions, but I hope nobody thinks that means that I don't admire my colleagues deeply.

They're very, very, very impressive people and they're also just wonderful colleagues.

We're such a big court that you could go a whole year and never sit with one of your colleagues, so we get together once or twice a year, just to what would be the equivalent of CLE for judges, I guess. But a large part of that is just rubbing shoulders with your colleagues, so I always look forward to that. But yeah, I'm super impressed with every single one of my colleagues and the subject matter that we would work on, you know, I had a window into a lot of that working in states, but not all of it. Like a huge part of our docket is immigration, not necessarily a huge part, but we have federal criminal law. Those are two areas that working in state AG's offices that I had very little visibility.

So the breadth of stuff that we do on the Ninth Circuit, it doesn't surprise me, but it's fun because in that sense, it's like being in the state AG's offices in the right role because I mean you could be on this court for 10 lifetimes and you'd never feel like, "Oh, I'm getting bored." The amount, the diversity of subject matter is amazing. I mean, I'm sitting on cases next week and I can't talk to you about them, I'm sure, but like I can't believe I'm studying this thing. Who knew I'd ever be looking at some of these things I'm looking at? So that's been fantastic. One thing that I did not expect because I clerked on the DC circuit, so the DC circuit is sort of known for having a lighter caseload. You know, the idea is a lot less cases but bigger, beefier cases. That's probably true that on average, their cases have more issues and are more complicated, admin, big records, et cetera.

But holy cow, I did not realize the caseload that we have on the Ninth Circuit. I'm not a big chess player, but I think it's like playing speed chess. You know, in speed chess, you have these really consequential decisions you have to make, but you don't have any time to make them, right? And so that's what it feels like. I don't know what the numbers are, it's got to be above 300 cases a year that I'm actually one of the three judges deciding, and that probably doesn't count the screening docket we have and other. So you think about that, that's less than one working day per case and that doesn't count all the other stuff, the en bancs, all that. That is a challenge, and part of that is just we're a massive court. We have 29 active judges. Thankfully our senior judges.

My predecessor Judge Bybee whose seat I filled, he is a senior judge. I don't know how many days he's sitting a year, but it's a lot. Like it's close to a full judge load, so he went senior and he is basically working for America for free. So props to him and all my other colleagues because he could completely retire and make the same money, so it's really impressive. And then we have a lot of judges come and sit by designation. I believe at least in the last couple years it's been one sixth of the seat, so every second time you're sitting, you're essentially sitting with an Article Three judge from out of the circuit. So the odd thing about that is I've actually sat multiple

times in different sittings with judges from some other circuit, district court or court of appeals or international trade, something, and still have not sat with a few of my active colleagues on the Ninth Circuit.

So it's really crazy, but it's very impressive the way my colleagues and this court gets the work done. Every case does get reviewed carefully and they do a lot of hard work, but it is challenging. I've never worked harder than I'm working in this job, and I think that's maybe my colleagues are just being nice to me at court meetings and pretending like they work really hard too. It's like law school you know. In law school, everybody pretends they're not working hard, I guess you know, so they're brilliant and not working hard, but I think everybody's working really hard on this court.

**Mike Yaghi:**

As a practitioner and appearing before Ninth Circuit judges, we agree that the judges are very prepared. We're very impressed with the work they put in. As a new judge, you mentioned the workload and you know 300 cases a year, et cetera. Do they ease you into that workload or do they just sort of throw you into the fire, so to speak?

**Judge Lawrence VanDyke:**

So, it's a combination. It doesn't feel like they're easing you in, I think I had 25 days my first year because I started literally January 2nd. I basically was exactly a calendar year and I think I had 25 sitting days, so they do I think ease you in. The funny thing was they gave me five days of sitting separated by two weeks and then five more days of sitting, which at the time I was like, "Wow, that's okay," but that's suicide. And so thankfully, Judge O'Scannlain and Judge Bybee, they appoint you a mentor and one of them called me and were like, "I noticed that you have this crazy sitting schedule," and I'm like, "Oh, okay." They're like, "That's suicide. You should not do that," and I'm like, "I didn't know I had a choice."

**Judge Lawrence VanDyke:**

Which I love, I'm not complaining. As I would tell my children, these are all first world problems, right? I have no basis to complain. I love all of this; it's just I sometimes tell people I've learned that you can have too much of a good thing. Part of it is I probably have to learn to say no a little more when somebody says, "Hey, do you want to come speak at our law school?" Or something like that.

**Ketan Bhirud:**

Not when we ask, when other people asked.

**Judge Lawrence VanDyke:**

Not when Ketan asks.

**Mike Yaghi:**

Earlier, you did mention the en banc process, which is quite interesting. Could you kind of explain how that process works for our listeners to sort of give them a little bit of insight there?

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**Judge Lawrence VanDyke:**

Yes. I think there's several things that I wish I'd known when I was litigating in front of the Ninth Circuit, so sometimes I feel like it's a public service to like tell these things that aren't secrets, but people don't know. The en banc process I believe, I'm only on the Ninth Circuit and I clerked on the DC circuit, but I don't remember, I think they had a couple en bancs. I don't remember there being a lot of en banc activity. I think it's sort of by tradition or whatever on that court, just less en bancs. But the Ninth Circuit's en banc process is fairly formalized, which as you imagine probably has to be the case in a court our size. So essentially, when you file an en banc petition, the panel can say, "We want to get a response to the en banc petition," but what normally leads to that is some off panel judge noticing the case and we call a 5.4 (b) notice, and that will lead to asking for a response.

And then after that you can call the case, and once you call the case, that starts a very formal process of memos that go back and forth between the calling judge and any other judges that want to weigh in, call them the Amici judges or whatever if you want, and then you've got the panel that's defending its decision. And it is really hardly any different than when I was in private practice and you take on a case other than you don't have oral argument, you know we don't get up and present, but it's essentially you fully brief a case. And because we're judges and nobody can tell us no, you could keep on filing these memos back and forth until finally somebody says all that can be said and we're ready to vote, right? And so oftentimes, I would say the norm is probably you file a call memo and then there'll be a response memo and then there'll be a reply memo, and then a sir reply memo and that often is where it ends.

And then maybe like emails back and forth. It's probably like a litigator's dream. If there's anything left to say, you get to say it. It's a litigator's dream in a judge's nightmare, right? But that process, and this is me I guess fishing for compliments or something, but just realize if a judge calls your case, they are essentially taking on as extra work a full case brief. And it'd be like in private practice when you get hired, they're essentially taking that on. The public can see we have a lot of en banc activity I think compared to other courts. Part of it's just because we're a huge court, but that's all a lot of extra work on everybody's part. I think some of our colleagues think that it's ridiculous and we shouldn't be doing that. Others and myself, obviously I've called a fair number of cases, and so probably more of the view that it should be done.

And so that's sort of how the process works. I will say one thing I didn't know, I probably should have known, it's probably embarrassing I didn't know, getting your case taken en banc if your decision was a mem dispo, a memorandum disposition, an unpublished opinion, is a really heavy lift because why would judges go to all that work when they may completely disagree with the panel's decision, but it's not even precedent in the circuit, right? And so advocates maybe should tell their clients a little more often, "You know, we can seek en banc, but it's a really, it's always a long shot." I don't know what the statistics are. It's always a long shot, but it's particularly a long shot even if it's a bad decision if it's not a published opinion. And we issue a lot of unpublished opinions because frankly just because of our massive caseload. When we don't think it's actually setting new law, we issue an unpublished opinion.

**Mike Yaghi:**

That's all great insight. I never knew that about the memorandum briefing back and forth. Hopefully you have some internal rules to limit the pagination of all of that.



**Judge Lawrence VanDyke:**

No, we don't. We don't have any of that. It's like the wild west. All of my colleagues are phenomenal advocates before they were ever judges. I mean it's some of the best briefing you ever read, right? It's sad that the public doesn't get to read this stuff. It's collegial, and it's very...but no, there's no page limits. But I mean it's funny because you have to have page limits as a court, but we don't really need page limits because you want your colleagues to read what you wrote, right? So you have, you sort of have this like, if you write a 400-page memo, good luck getting them to read it, right, you know so I keep trying to keep tell my clerks, "Narrow it down, narrow it down."

You also, some of these advocacy best practices like only make your best arguments. One of the things is you don't have to always have the kitchen sink in there because as Ketan and I used to tell people in the AG's Office, "Do you really think if the court rejects argument A, B, and C that they're going to rule for you on your argument D?" Well, if not, I mean there's instances like in habeas and stuff where you don't want to waive an argument, right? You have to go kitchen sink approach, but oftentimes you should just drop that. And so I would say that happens fairly often. You know, in the call process, you're really only going to focus on...you're going to say, "I think this decision is strong and egregiously wrong and merits en banc review because of A and maybe B."

**Mike Yaghi:**

The internal workings, it's nice to hear, and thank you for sharing all that with us.

**Judge Lawrence VanDyke:**

You know, the other thing I'll add to that, Mike, the interesting thing is I kind of thought when I became a judge, you know the days of advocacy are over, and there's a sense in which the days of advocacy are over. I try to approach each case as impartial and to put my own personal views aside and decide what I think is the right answer in a case, right? But there's several things in our court that I think actually means that your days of advocacy are not over when you become a judge, at least on the Ninth Circuit. One is this en banc process, right? To the extent you participate, and not all the judges are very active in the en banc process, but to the extent you participate in that, it's essentially advocacy, right? Like you have a position that you've decided you think this case is wrong and you're trying to convince your colleagues of that.

So, to the extent people out there are like you know, "I would try to become a judge, but I just enjoy advocacy too much," well, come to the Ninth Circuit. You get a little bit of that. And then just trying to convince your colleagues on a three-judge panel sometimes, that's a mix. People ask me sometimes in conference, "How much are we sitting there you know, trying to convince the other judge to our side?" But because we're dealing with very experienced lawyer judges that have lots of experience and aren't shrinking violets, it's usually not worthwhile to sit there. And we're so busy and we've been sitting, oftentimes we've been sitting for a week, oftentimes we just give our position, count the votes, figure out where everybody stands, assign writing.

There isn't usually a ton of back and forth amongst the judges in that process in what would be the more oral, because you're sitting together actually physically. So there's more back and forth in this en banc process. There is back and forth sometimes in memos. We divide up the cases and each chambers will circulate a bench memo, and if one chambers doesn't agree with the bench memo, maybe the judge in the other chambers will circulate a comment memo on that bench memo. So there is some of that. Not a ton, partly because we're just so busy I think, and

we figure we'll just cross that bridge when we get to conference, but there's some of that. It's been a fun mix because there's a lot more trying to convince other people of your position than I would've thought.

**Mike Yaghi:**

Well, and that internal sort of I guess advocacy, we'll call it, you're really fleshing out I think better well-reasoned decisions, ultimate decisions. Right?

**Judge Lawrence VanDyke:**

Absolutely.

**Mike Yaghi:**

You're having that internal absolutely discussion, I won't say debate, but discussion and you're flushing out the finer points of the law under the facts and what the issues are, and it helps sort of inform everyone and reinforce what the ultimate decision should be, and I think that's better. That's a better way to go about ruling on these things.

**Judge Lawrence VanDyke:**

Absolutely. The other area where you have a lot of back and forth is obviously if you have a dissent, especially if it's a published opinion where you know...And I would say people debate about even the usefulness of dissents, you know. There's some courts that have not really issued dissents, right? The idea is you lost, so we're just going to issue the view of the law. But I will say that the dissent process, one side effect that people sometimes don't think about, it really sharpens the majority opinion because you know, you have these back and forth and you're like, "Oh, that's a good point," and you will see the argument. It's very rare to actually have somebody, it does happen, to have somebody flip sides because judges have already thought a lot about it, but it will sharpen their positions. And it's part of the reason why by the time you get to the Supreme Court, I think you've already had that process happen and everything's gotten sharpened, that percolation thing that is often talked about.

So yes, I absolutely think that back and forth process is very valuable. It's very good. When you become a court of appeals judge, you're like, "Oh wow, I'm a court of appeals judge and I'm a higher level than the trial court judges." But then you realize like as a court of appeals judge, you never get to do ever. You never get to do anything on your own. You always have to convince somebody else if you want to do anything except write a dissent. That's why dissents are fun, because you can write a dissent on your own. But I've learned that trial court judges, man, they're like kings of their domain, right? Sure, they get reviewed on appeal, but boy, they're the boss of their domain. So sometimes I'm a little jealous of them, but not jealous enough to go sit. I could sit by designation as a trial court judge, but it terrifies me.

**Ketan Bhirud:**

So I said I was going to let Mike have this section, but I did have a question, Lawrence. When you say, and I think that's right, that it's rare for a judge on a panel to change his or her opinion through the process of somebody writing a dissent, how often do you think though it meaningfully changes the contours of the decision in a way that impacts the parties or the precedent?

**Judge Lawrence VanDyke:**

I think it does fairly often. You know that's why I mean it's a really good thing we have multiple engaged judges on these panels because I'll tell a secret that won't make lawyers very happy, I liked arguing cases. I enjoyed it. At first, I thought I wouldn't enjoy it, then I did some of it because it's not really my strong suit, and then I really enjoyed it, but I never really thought that it makes much difference in cases. The oral argument part. The briefing obviously, yes, but the oral argument. And in fact, I kind of think that to the extent it does make a difference, it probably means you didn't brief it correct. Some would say you could lose a case at oral argument but you can't win it, those sort of things, and I still kind of believe that. That's sort of my personal view.

I will say I don't think that's the majority view of judges that I've worked with. I think many of them really value and get a lot from oral argument, but that process, I don't find the oral argument does that as much for me, Ketan, what you were just getting at, it actually like refines issues a ton, but the process of the judges going back and forth absolutely does. I have actually seen, in my short time, I have seen judges completely switch sides even after they've written an opinion, even in the en banc process. They've already published an opinion, so think about that. I myself had a case that was possibly calling it en banc, and I changed something significant in that case because there's an issue that we had missed.

So you see that in the en banc process you see that. The public will never see what happened, but you'll see that the en banc call failed, but you'll see that the opinion was changed. And a lot of times what's going on behind the scenes is that the process is working to make that opinion better. Oftentimes the result doesn't change and that probably doesn't make the parties happy, but maybe something important that would've affected the law in a bad way in the future has been fixed. Unfortunately, the actual like going from losing a case to winning a case is not going to happen very often, but that's not all that matters if you're a court that's constantly doing cases.

And then on three judge panels, people change fairly frequently. My changes I would say usually happen like I'll read a case and I'll read a bench memo and oh, okay, and I might change before argument. I wouldn't say I changed very often. Occasionally I've changed at conference or at argument, and they even change when you circulate that draft majority opinion. Sometimes judges will be like, "Oh, it's going to dissent, but I think he won me over," or they circulate a dissent and somebody flips to the other side. So it's happened. It's really annoying when you're think you're in the majority and it happens, but that's probably a very good process.

**Mike Yaghi:**

Yeah, all very interesting stuff. Getting back to your experience as solicitor general and in AG offices, can you tell us a little bit about how your experience working in AG offices may guide your work as a judge?

**Judge Lawrence VanDyke:**

Yeah, so a couple things about that. One is the advocacy, obviously, and this would be true of any litigator, right? But the advocacy turns out to have been an important skill. It's also important not just because you're doing some advocacy still as a judge and trying to convince your colleagues of the position you think is correct, but also because that is what we get. We get advocacy, so having done it causes you to see arguments. You know, if people say obviously it doesn't, then obviously it's not obvious, right? That's why they've had to put the word obvious in

there. There's things like that, these little things you learn. And you know judges are by nature very skeptical beings I suppose, right, and you get that in part from those years of advocacy. As far as the state-specific advocacy, one thing is I probably have a really healthy respect for states, which I think is, I'm not trying to say my other colleagues don't have any respect for states, and many of them have probably similar to what I have, and all of them have a healthy respect for state.

But it's easy if what you've done is just the federal government to maybe not recognize the important role, federalism, the important role that states play. This comes to play in habeas, for instance, you know where the system is actually built to be very deferential to the states, but it comes to play in a lot of areas. The other thing that working in a state or just working in government helps, it kind of works two ways. One is obviously you have a respect for the government because you worked for them and on the other hand, anybody that's worked in government for very much time realizes they do a lot of stuff that's like. I was defending stuff as the state's solicitor general that I'm like, "I don't agree with this," or I think maybe I even agree with it, but it's a crazy law. It's badly done, all this stuff, but you have to defend it.

So when you get over on the bench, I think some people would be like, "Well, look at this person's background. Like he or she worked for a government for 10 years before becoming a judge. They're going to have a strong pro-government bias." I'm not sure that totally is true. I think in some ways you'll have a respect for the governmental process presumably, but you also will recognize the government makes mistakes, right? And so I have noticed that. Some of my colleagues were former federal prosecutors, for instance. They're hard graders when it comes to prosecutorial mistakes, right? I think every new judge comes on and there's going to be new stuff.

Like for me, federal criminal law, I'm like, "Oh my goodness, I never did any of that." You're never going to do any of that if you weren't on the defense side in private practice or a federal prosecutor, which I was not. And so that stuff I have to learn from scratch and there's plenty of that, but a lot of this admin law, all these issues, states have a muscular, strong role in policing the federal government, right, nowadays. And you know, when the administrations change, nothing changes other than everything just flips to the other way, and that's a good thing. That's a good thing. I have a healthy respect for that, both directions, that it works. Those are all things that kind of come from having that background.

#### **Judge Lawrence VanDyke:**

I guess the other thing that Ketan alluded to earlier is just by the virtue that so many of the folks that were in state government have ended up on the federal bench, right? I was sitting by designation with Judge Mike Liburdi, who was Arizona Governor's General Counsel when we were at state, so we had gotten to know him. So I was sitting with him, he was sitting by designation, did a fantastic job on Ninth Circuit, but you know here's a guy I know because of the state service and I could just sit here and name lots of people like that.

#### **Mike Yaghi:**

Yeah, you actually walked right into my next question because I was going to ask, what advice would you have for people in a state office like an attorneys general office who want to become a judge? Is there any sort of advice you would share with them on that path and what they should be doing?

**Judge Lawrence VanDyke:**

Well, the first thing I would say, do really good work. That reputation will follow you. Not everybody gets to be the solicitor general or the general counsel or the chief deputy, right? A lot of times you're in a position earlier in your career where you're not maybe where you want to be even, but the quality of the work you do, which for most of us mere human beings mean we just have to work really hard, right? I mean, you have to work to make sure it's really good, so that's important. Another thing is recognize that those relationships that you build, I tell this to students too because somebody like Andy Oldham was a very brief colleague of mine, but I really know Andy Oldham best from law school, right? So it's true for law school too, but these relationships that you are making, these people are probably going somewhere.

And so there's an inappropriate way where you're just trying to get to know people for what they can do for you, but you can also just realize wow, this is somebody that even if they don't seem like you know I have a good reason to develop a relationship with them, it's always a good idea that... I like people, right? I like people, and throughout my career when I was in law school on law review, when I was in Nevada, you know Ketan and I got to be friends, but he was in Vegas and I was in the north, but we still got to be friends just because we both wanted to be friends. It wasn't even like our work overlapped a ton because I got all the fun stuff as a solicitor general and Ketan had to do all the hard work as a general counsel, right? He had to do...'

**Ketan Bhirud:**

Stole the fun stuff. Stole.

**Judge Lawrence VanDyke:**

Well, he may be able to use that word sometimes. It's true. But Ketan and I got the work together quite a bit. In fact, he saved my bacon in one case when my bar license got taken away, so I owe him for that. But the relationships are tremendously important, the quality of work that you do. You will probably be arguing in front of the courts that maybe you would hope to be on someday. And you want to have... Early on in my career, I remember, I think I was a pretty conscientious associate, but I had not put 'reversed on other grounds' before a cite. And we got called out by the other party in a case and they were misrepresenting that the case didn't stand for the proposition we'd cited it for because it had been overturned, but it hadn't been overturned on that issue.

But because we hadn't put 'reversed on other grounds', Gene Scalia, who was a great mentor, he kind of lit into me and he was like, "You need to," and I was like, "Well, but it doesn't matter," and he was like, "It doesn't matter. What matters is how we are viewed by the court. Does the court think when they read what we write, they can take that to the bank, it will never be wrong? It will never be wrong." So having that integrity, all those things, you can't get away from that later in your career, so it's really important to focus on that.

And one piece of advice I'd give people is, I'm sure this is true, you guys could say the same thing, when you're going to be at places in your career where you don't want to necessarily be, just do a good job where you're at. You can look for other opportunities obviously, but realize that your career is not going to be just one constant, heavenly trajectory of awesomeness, right? You're going to have to grind some stuff out. But when I look back, there were always people, whether it was Jim Ho, Gene Scalia, Andy Oldham, Adam Laxalt, there were always people that I was working for that it was a good thing I was trying to do good work, right, because these were people that were really influential on my career later on.



**Mike Yaghi:**

I was just curious if there's anything else coming from Solicitor General or State AG's Office that's also helped sort of inform you becoming a judge and informing your work as a judge?

**Judge Lawrence VanDyke:**

A couple things. One is I worked for almost a year just before this job in the federal government, so I'm glad I did that because it was a really interesting comparison to me. The federal government is so big and maybe this is just small Montana, Nevada AG's office guy, you know but holy cow, like it is just so big. It just seemed like this massive behemoth. I already talked a little bit about the siloing sort of effect. So I was in the Environment & Natural Resources Division, which was awesome division and great work. But like in Nevada, I would be exposed to that kind of work. I was exposed environmental work, but I'd also be doing something in tax, I'd be doing something in employment, so employment labor. I'd be doing something constitutional.

I'd be working from trying to get the Supreme Court to grant cases or filing amicus briefs, and when I say Supreme Court, I mean US Supreme Court, all the way down to litigating the most important cases that we had that were in district court that were like legal issues, like where they were challenging some really important state statute or something, so I'd be involved in that. I'm really glad I had the juxtaposition of working in the federal government and I learned a lot there. I will say I was very impressed with the quality of the lawyers. I had a staff of close to 80 lawyers that worked for me and they were really impressive and kind of had a thankless job because basically, the Natural Resources Division of ENRD defends the federal government when it gets attacked on environmental grounds. So when it's a Republican administration, it's usually being challenged by environmental groups. When it's a Democrat administration, they're being challenged by business groups, right, and these same lawyers, they have to be very like intellectually agile... you know they're defending the government.

**Mike Yaghi:**

Is there anything else you'd like to share with our listeners?

**Judge Lawrence VanDyke:**

I think probably, one of the big takeaways. And this is not really different in kind, but a little more addition to something I've already said. One of the big takeaways hopefully that people have gotten is I'm pretty evangelistic about working in state government and the role that state AG's offices and even state governor's offices play. I will add, I think it's catching. When I first started, it was very rare for a state, say, solicitor general to not be from that state, right? The federal government is pulling in people from all diverse backgrounds, et cetera, but at the state level it wasn't happening so much. But now I think it's happening much more. For instance, state SG, state chief deputy, it's more of a free market system where they're just trying to draw the best talent.

To give a couple examples, Scott Stewart is the Solicitor General in Mississippi. I don't know if he's from Mississippi, I don't think he is from Mississippi originally, but he worked in the federal government in a leadership role in the last administration and I think just saw the value of being a state solicitor general and Mississippi saw the value of having a really high-quality individual like him. You've got more of that. When I was in Nevada, I wasn't originally from Nevada, but I'd come to Nevada to work for Adam Laxalt, which was amazing. My former clerk, Dave Dewhirst,

wasn't from Montana, probably can figure out that it was partly my ties to Montana that helped him to get that job. And it was great for Montana, it was great for him, it was great. And now he's in Idaho, which I don't believe he's from either, as chief deputy there. And so these chief deputy roles, you have more and more people pursuing those.

So to young lawyers, I would say strike while the iron's hot. I think over time these roles are going to become more nationalized, which means the competition for them is going to be harder, right? In the past, you might become a state solicitor general without having the credentials and the background and experience that you will need in the future probably to get, and it's not just solicitor general, it's general council, chief deputy, et cetera. So people are recognizing that these are really important and impactful roles and the value of them for their own careers, as well as their ability to have an impact and influence. But I still think that it's less discovered than it will be, so go after it.

And I will say also, we have more and more people who are coming out of those roles like Ketan, right, and working at a big law firm or doing something else. So it's becoming more of like o instead of just going to the government and you're in government for the rest of your life, becoming more of like you transition through it, which I think is all I think is really good. It's good for the industry and it's good for those roles to have the best quality people possible in those roles. And that's all I have to say about that, as Forrest Gump would say. Well, thank you both.

**Ketan Bhirud:**

Yeah. Thank you so much for your time.

**Mike Yaghi:**

Yeah, thank you so much. This was fantastic.

**Stephen Piepgrass:**

Mike and Ketan thank you. Judge VanDyke, it has been a real honor and a pleasure to chat with you today. I want to thank you again for joining us. We, and I know our listeners, enjoyed your candid remarks and invaluable insights.

I want to thank our audience for tuning in today. Please make sure to subscribe to this podcast via Apple Podcast, Google Play, Stitcher or whatever platform you use, and we look forward to having you join us next time!

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