Justice at Stake

September 10, 2013

The Honorable Christopher Coons
Chairman
Senate Judiciary Committee, Subcommittee on Bankruptcy & the Courts
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Jefferson Sessions III
Ranking Member
Senate Judiciary Committee, Subcommittee on Bankruptcy & the Courts
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Coons and Ranking Member Sessions:

On behalf of Justice at Stake (JAS), a nonpartisan, national partnership[1] of more than fifty organizations dedicated to keeping our courts fair and impartial, I write to thank you for your attention to the issue of staffing our federal courts. Today's hearing on the Federal Judgeship Act of 2013 (S. 1385) raises important issues at a critical time for our courts and for the Americans who depend upon them.

In a July 31, 2013 letter to Majority Leader Harry Reid and Republican Leader Mitch McConnell, JAS already expressed its support for the Federal Judgeship Act of 2013, but we reiterate that strong support today. This bill would create 91 new federal judgeships in two federal circuits and 32 judicial districts across 21 states.

This legislation represents an important step toward addressing the growing disparity between the number of judges on the bench and the caseload that faces them. For more than 2 decades, there has been little congressional action to address judicial staffing deficits despite steadily increasing workload. Importantly, this legislation implements the recommendations of the nonpartisan Administrative Office of the United States Courts (AO) and the Judicial Conference of the United States, which is chaired by Chief Justice John Roberts. Created in 1939 to provide support and counsel to the Judicial Conference, the AO has long served as the source of thoughtful, non-partisan analysis and recommendations on resource allocation within the federal courts, including the number of authorized judgeships for each federal

[1] As with any diverse partnership, the views stated in this Justice at Stake letter do not necessarily reflect the positions of every JAS partner organization or board member.

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circuit. The AO's recommendations are based on close analysis of data, including not only the number of cases heard by a court, but also the complexity of such cases.

JAS asks leaders from both sides of the aisle to work together to pass this commonsense legislation. Failing to provide adequate resources for our nation's courts—whether these resources be additional judgeships or desperately needed funds—imperils our ability to live up to our Constitution's promises. Inadequately providing for the courts harms the American people, who depend upon judges for the adjudication and protection of their rights, and American businesses that rely on the courts for the structural certainty necessary for economic growth.

JAS expresses its gratitude to you for your tireless efforts on behalf of the American public. We understand how many issues compete for the time and attention of your Subcommittee within the confines of a tight congressional calendar, so we're particularly grateful to you and your staff for the effort involved in today's hearing. If the members of your staff have any questions or want any additional information on this matter, please contact Praveen Fernandes, Director of Federal Affairs & Diversity Initiatives, at pfernandes@justiceatstake.org. Thank you for your time and consideration.

Respectfully,

Bert Brandenburg

Executive Director

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Testimony of Alicia Bannon
Counsel, Brennan Center for Justice at NYU School of Law

On S. 1385, Federal Judgeship Act of 2013

Submitted to Senate Judiciary Subcommittee on Bankruptcy and the Courts

September 10, 2013

The Brennan Center for Justice at NYU School of Law[1] thanks the Subcommittee on Bankruptcy and the Courts for holding this hearing on the Federal Judgeship Act of 2013 (the "Act"). The Act would play a vital role in ensuring that Americans enjoy meaningful access to justice in the federal courts, and the Brennan Center urges its prompt passage.

Over the past two decades, the federal courts have faced a growing disparity between caseloads and the number of judges on the bench. These rising judicial workloads burden the administration of justice and harm the individuals and businesses that rely on the courts to protect their rights and resolve their disputes. The Federal Judgeship Act of 2013 represents an important step in addressing this growing judge gap, ensuring that courts have the capacity to fairly and efficiently adjudicate the cases that appear before them.

The Act would implement the judgeship recommendations of the Judicial Conference of the United States, chaired by Chief Justice John Roberts, which are based on a careful analysis of individual districts' and circuits' judicial workloads and case complexity. Following the Judicial Conference's recommendations, the Act creates five permanent and one temporary circuit court judgeships and 65 permanent and 20 temporary district court judgeships. It also gives permanent status to eight temporary district court judgeships.

The Brennan Center supports the proposed additional judgeships in both the circuit and district courts, which have both seen dramatic increases in their caseloads since the most recent comprehensive judgeship bill was enacted in 1990. Because there has been extensive attention to the caseload challenges facing the circuit courts, and because we expect that the subcommittee will hear substantial testimony on how the circuit courts are being affected, this testimony focuses on the challenges faced by the federal district courts. In particular, we submit this

[1] The Brennan Center for Justice at NYU School of Law is a nonpartisan law and policy institute that seeks to improve our systems of democracy and justice. The Center's Fair Courts Project works to promote fair and impartial courts as a guarantor of equal justice in America's constitutional democracy.

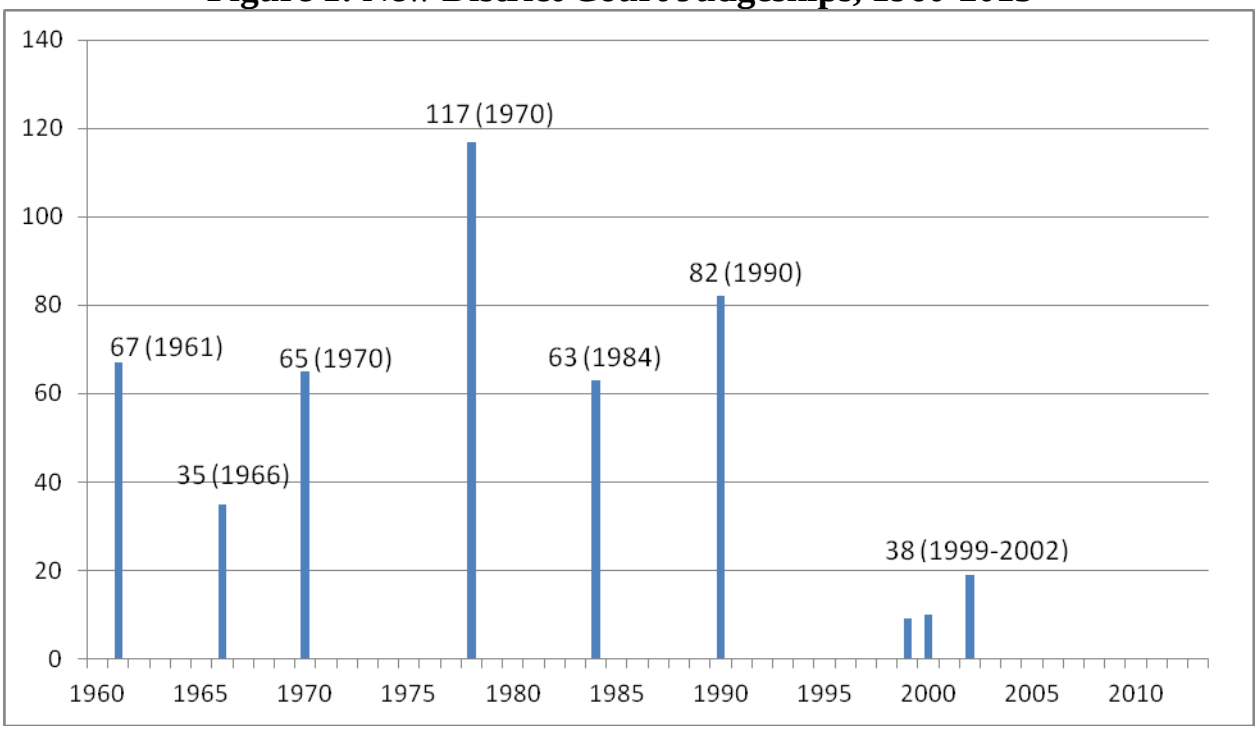
testimony to share our research regarding judicial shortages in the district courts, and the impact that these shortages have on access to justice for litigants around the country. We urge the Subcommittee on Bankruptcy and the Courts to approve the Act without delay and to take all necessary steps to ensure its prompt consideration by the full Judiciary Committee.

I. Breaking with historical patterns, district courts have not had a major increase in the number of judgeships since 1990

Since 1990, district courts have experienced a stark decline in the number of new judgeships authorized by Congress. As reflected in Figure 1, between 1961 and 1990, Congress authorized major increases to the number of district court judgeships an average of every six years. In total, 429 new district court judgeships were added during this period (including the creation of new permanent and temporary judgeships and the conversion of temporary judgeships into permanent positions), for an average of 14.3 new judgeships per year.

In contrast, since the last comprehensive judgeship act in 1990, district courts have experienced only minor additions to their ranks. Congress authorized nine additional permanent judgeships in 1999 and 10 additional permanent judgeships in 2000. In 2002, it authorized eight permanent and seven temporary judgeships, in addition to converting four temporary judgeships into permanent positions. These 38 new judgeships over the course of more than twenty years average to only 1.7 new judgeships per year.

Figure 1: New District Court Judgeships, 1960-2013[2]



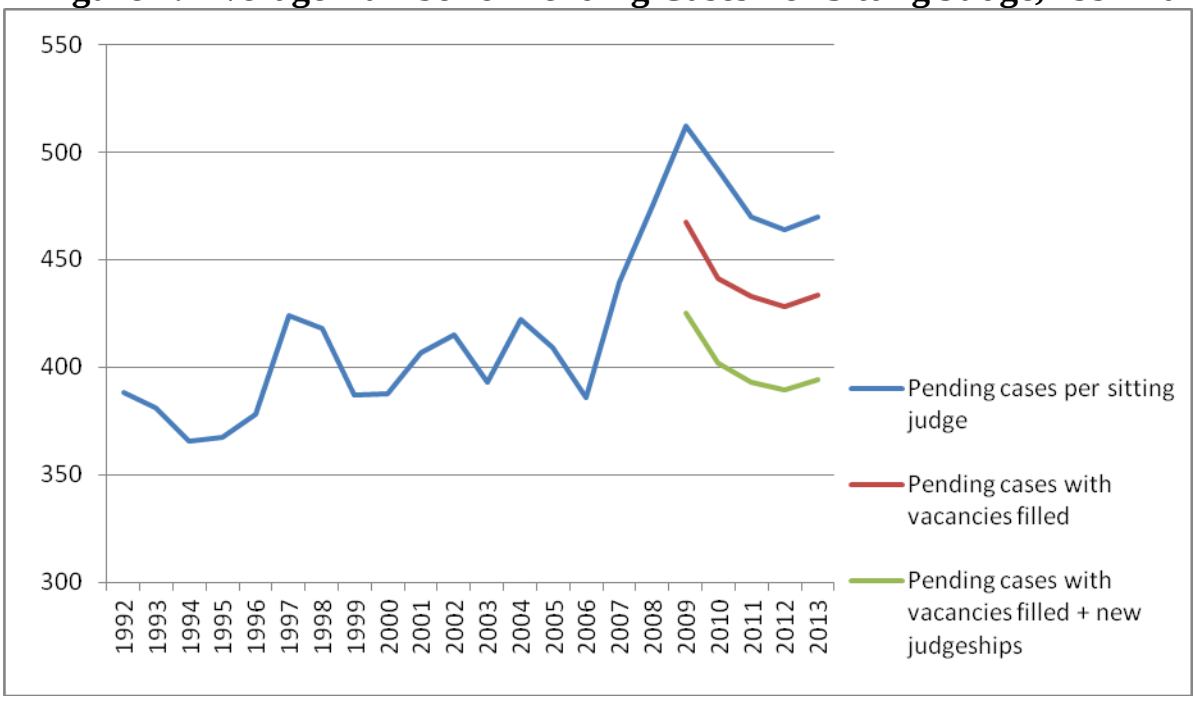
[2] *See* ALICIA BANNON, BRENNAN CENTER FOR JUSTICE, FEDERAL JUDICIAL VACANCIES: THE TRIAL COURTS 6 (2013), *available at* http://www.brennancenter.org/publication/federal-judicial-vacancies-trial-courts.

II. District court judges' workloads are growing increasingly unmanageable, impeding their ability to effectively dispense justice

While the creation of new district court judgeships has lagged since 1990, judges' workloads have increased dramatically, leaving judges with record caseloads in recent years. Total filed cases in the district courts have increased by 43 percent since 1992, while total "weighted filings," the number of filed cases weighted by an estimate by the Administrative Office of the U.S. Courts as to how time-consuming they are likely to be, has grown 14.8 percent since 1999 (the earliest year for which comparable data is available).[3] The total number of pending cases has likewise increased by 40 percent between 1992 and 2013, from 262,805 to 370,067 cases, reflecting a growing backlog.

District court judgeships have not kept pace. Since 1992, the number of pending cases per authorized judgeship has increased by 35 percent. Estimates of the workload of all sitting judges – including both active judges and senior judges, who typically work part-time – likewise shows dramatically increasing burdens for judges. As reflected in Figure 2, the average number of pending cases per sitting judge (defined as active judges plus senior judges counted as half-time because of their reduced workloads) reached an all-time high in 2009. This figure was higher as of March 31, 2013 than at any point from 1992-2007.

Figure 2: Average Number of Pending Cases Per Sitting Judge, 1992-2013



[3] Analysis in this section based upon data maintained by the Administrative Office of the United States Courts. Data for 2013 reflects the 12-month period ending March 31, 2013. *See* Administrative Office of the United States Courts, Federal Court Management Statistics, http://www.uscourts.gov/Statistics/FederalCourtManagement Statistics.aspx; *see also* Bannon, *supra* note 2 at 5-6 (utilizing data through September 30, 2012).

While the current high level of judicial vacancies partially explains this high per-judge burden, even if every existing vacancy were filled, the existing workload per sitting judge would still exceed historical levels, as reflected by the red line in Figure 2. In contrast, the green line estimates what per-judge caseloads would be if all 2009-2013 vacancies had been filled and Congress had created 85 additional district court judgeships (the number of additional permanent and temporary judgeships proposed in the Act). As Figure 2 demonstrates, authorizing these additional 85 judgeships is necessary to restore the number of pending cases per sitting judge to the level of the late 1990s.

The growing workload in district courts around the country negatively impacts judges' ability to effectively dispense justice, particularly in complex and resource-intensive civil cases, where litigants do not enjoy the same "speedy trial" rights as criminal defendants. For example, the median time for civil cases to go from filing to trial has increased by more than 70 percent since 1992, from 15 months to more than two years (25.7 months). Older cases are also increasingly clogging district court dockets. Since 2000, cases that are more than three years old have made up an average of 12 percent of the district court civil docket, compared to an average of 7 percent from 1992-1999. For a small company in a contract dispute or a family targeted by consumer fraud, these kind of delays often mean financial uncertainty and unfilled plans, putting lives on hold as cases wind through the court system. All too often, justice delayed in these circumstances can mean justice denied.

These patterns of delay are starkly reflected in the districts for which additional judgeships are recommended, many of which lag behind the national average in key metrics. In the Eastern District of California, for example, the median time for civil cases to go from filing to trial is almost four years (46.4 months). This district would receive six additional permanent judgeships and one additional temporary judgeship under the Act. In the Middle District of Florida, over 23 percent of the civil docket is more than three years old. This district would receive five additional permanent judgeships and one additional temporary judgeship under the Act.

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The federal courts are a linchpin of our democracy, protecting individual rights from government overreach, providing a forum for resolving individual and commercial disputes, and supervising the fair enforcement of criminal laws. In order for judges to perform their jobs effectively, however, they must have manageable workloads. The Brenan Center urges Congress to promptly pass the Federal Judgeship Act of 2013, so as to ensure the continued vitality of our federal courts.

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September 9, 2013

Hon. Christopher Coons
Chairman, Senate Judiciary Committee
Subcommittee on Bankruptcy and the Courts
127A Russell Senate Office Building
Washington, DC 20510

Dear Chairman Coons:

To assist the Subcommittee in its consideration of the issues to be presented at its September 10, 2013 hearing on the "Federal Judgeship Act of 2013," a hearing that will consider "the caseload and need for judges nationwide, including the [United States Court of Appeals for the] D.C. Circuit,"[1] we are writing on behalf of Constitutional Accountability Center mainly to address a bill recently introduced by Judiciary Committee Ranking Member Charles Grassley to eliminate immediately three of the 11 authorized judgeships from the D.C. Circuit. Unlike the Federal Judgeship Act, Senator Grassley's proposal is not based on recommendations by the Judicial Conference or on any other study. Rather, it appears to be intended primarily to prevent the President from filling vacancies on this critical court. It should be rejected for this reason.

On April 10, 2013, at the start of the Judiciary Committee's confirmation hearing for then-D.C. Circuit nominee Sri Srinivasan, Senator Grassley announced that he was introducing a "Court Efficiency Act," S. 699, which would, if enacted, eliminate three of the 11 authorized judgeships from the D.C. Circuit, and add one judgeship each to the Second Circuit and the 11th Circuit.[2] Senator Grassley justified S. 699 by highlighting the "imbalance" in the workloads of the three Circuits, and stated that the bill would take effect upon enactment.[3] All of the other Republican members of the Judiciary Committee are original co-sponsors of the bill.

While it is perfectly legitimate for members of the Senate to question whether a specific federal court has too many judges, or too few, based on workload, S. 699 goes far beyond asking such questions -- it answers them. And it does so without the benefit of any of the indicia of neutrality and objectivity that should accompany a proposal to dramatically reduce the size of a federal court. Perhaps the most telling indication that this proposal is not objective or neutral is that in one fell swoop it would eliminate nearly 30% of the seats on the D.C. Circuit, yet it is not based on any study of the court's workload or judicial staffing concluding that such an extraordinary reduction in the number of judges on this important court is warranted. In fact, the proposal ignores recent recommendations of the Judicial

[1] Remarks of Hon. Patrick Leahy, Chairman, Senate Judiciary Committee, Executive Business Meeting (Aug. 1, 2013).
[2] *See* Senator Charles Grassley News Release, "Nomination of Sri Srinivasan and Court Efficiency Act" (April 10, 2013), available at <http://www.grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=45436>.
[3] *Id.*

Conference. By letter of April 5, 2013 to Senate Judiciary Chairman Patrick Leahy, a copy of which was also sent to Senator Grassley, the Judicial Conference transmitted to the 113th Congress "the Conference's Article III and bankruptcy judgeship recommendations and corresponding draft legislation for the 113th Congress" (the basis of the proposed Federal Judgeship Act of 2013). With respect to the Circuit Courts, these recommendations included the addition of four judges to the Ninth Circuit and one to the Sixth Circuit; there was no recommendation to add any judges to the Second or 11th Circuits, or to eliminate any seats on the D.C Circuit or not fill any existing vacancies on that court. S. 699 would not only dramatically reduce the size of the D.C. Circuit bench, but it would also add judgeships to courts where the Judicial Conference has not stated they are needed.

Senator Grassley's proposal is based on a comparison of the numbers of cases in the D.C. Circuit with the numbers of cases in other Circuits, equating one D.C. Circuit case with one case in the other courts in terms of workload burden. While this might be an appropriate methodology when comparing the workloads of other appellate courts, it is not appropriate for the D.C. Circuit, which, according to the Federal Judicial Center, has a unique caseload heavily weighted with administrative agency appeals "that occur almost exclusively in the D.C. Circuit and [are] more burdensome than other cases in several aspects,"[4] including having "more independently represented participants per case" and "more briefs filed per case," as well as the fact that they are "more likely to have participants with multiple objectives, involve complex or statutory law, and require the mastery of technical or scientific information."[5]

The unique nature of the D.C. Circuit's workload has been noted repeatedly by those who have served as judges on that court, including no less an authority than the Chief Justice of the United States, John Roberts, who has said:

> It is when you look at the docket that you really see the differences between the D.C. Circuit and the other courts. One-third of the D.C. Circuit appeals are from agency decisions. That figure is less than twenty percent nationwide. About one-quarter of the D.C. Circuit's cases are other civil cases involving the federal government; nationwide that figure is only five percent. All told, about two-thirds of the cases before the D.C. Circuit involve the federal government in some civil capacity, while that figure is less than twenty-five percent nationwide.[6]

As former D.C. Circuit Chief Judge Pat Wald -- who served on that court for more than twenty years -- has explained:

> The D.C. Circuit hears the most complex, time-consuming, labyrinthine disputes over regulations with the greatest impact on ordinary Americans' lives: clean air and water regulations, nuclear plant safety, health-care reform issues, insider trading and more. These cases can require thousands of hours of preparation by the judges, often consuming days of argument, involving

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[4] U.S. General Accounting Office, *Federal Judgeships: The General Accuracy of the Case-Related Workload Measures Used to Assess the Need for Additional District Court and Courts of Appeals Judgeships,* GAO-03-788R, at 10 (May 30, 2003) (quoting Federal Judicial Center, *Assessment of Caseload Burden in the U.S. Court of Appeals for the D.C. Circuit*, Report to the Subcommittee on Judicial Statistics of the Committee on Judicial Resources of the Judicial Conference of the United States (Washington, D.C. 1999)).

[5] *Id.*

[6] John G. Roberts, Jr., "What Makes the D.C. Circuit Different? A Historical View," 92 Va. L. Rev. 375, 376-77 (2006).

> hundreds of parties and interveners, and necessitating dozens of briefs and thousands of pages of record – all of which culminates in lengthy, technically intricate legal opinions.[7]

Judge Wald further noted that "My colleagues and I worked as steadily and intensively as judges on other circuits even if they may have heard more cases. The nature of the D.C. Circuit's caseload is what sets it apart from other courts."[8]

Indeed, precisely because of the unique and complex nature of the D.C. Circuit's caseload, the Judicial Conference does not apply to the D.C. Circuit the caseload formula that it uses to evaluate how many judges are appropriate for the other Circuit Courts.[9] In this respect, the Conference recognizes what Senator Grassley's proposal does not -- that the D.C. Circuit's cases cannot be equated numerically, one for one, with the cases of the other federal appellate courts. Senator Grassley's proposal is based on the flawed comparison of apples and oranges.

In addition, the assertion that the current caseload of the D.C. Circuit requires the elimination of nearly 30% of its authorized judgeships is contradicted by the fact that other recent nominees were confirmed to this same court when the caseload numbers were less. For example, President George W. Bush's nominees Janice Rogers Brown and Thomas Griffith were confirmed to the 10th and 11th seats on the D.C. Circuit in June 2005, even though the caseload per authorized judge (109) was smaller than it is now (132).[10] That number was also smaller when John Roberts was confirmed to the D.C. Circuit in May 2003 -- 83 cases pending per authorized judge – as well as when Brett Kavanaugh was confirmed in May 2006 -- 125 cases pending per authorized judge.[11]

And in February 2003, when there were eight active judges on the D.C. Circuit (the same number as now), Senator Orrin Hatch stated the following in urging the confirmation of Bush nominee Miguel Estrada to the court's ninth seat:

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[7] Patricia M. Wald, "Senate must act on appeals court vacancies," *Washington Post* (Feb. 28, 2013), available at: < http://articles.washingtonpost.com/2013-02-28/opinions/37350554_1_senior-judges-chief-judge-appeals-court-vacancies>.

[8] *Id.* For more information, *see also* Judge Wald's remarks about the D.C. Circuit at the March 25, 2013 discussion of "Why Courts Matter: The D.C. Circuit," here: http://www.americanprogress.org/events/2013/03/14/56746/why-courts-matter-the-d-c-circuit/.

[9] *See* U.S. General Accounting Office, *Federal Judgeships: The General Accuracy of the Case-Related Workload Measures Used to Assess the Need for Additional District Court and Courts of Appeals Judgeships,* GAO-03-788R, at 8, 11 (May 30, 2003).

[10] On March 31, 2005 -- the date closest to the confirmations of Brown and Griffith for which these figures have been published by the U.S. Courts -- there were 1,313 cases pending in the D.C. Circuit, which at the time had 12 authorized judgeships, or 109 cases per authorized judge. The most current published U.S. Courts statistics are as of March 31, 2013, when there were 1,456 pending cases in the D.C. Circuit, or 132 cases per authorized judge. Another way to look at the data is by cases per active judge, measuring the workload of the judges actually on the court. In March 2005, there were nine active judges on the D.C. Circuit, and thus 146 cases per active judge. After Brown's confirmation to the 10th seat, there were 131 cases per active judge, a number that dropped to 119 when Griffith was confirmed. Currently, with only eight active judges on the D. C. Circuit, the caseload is 182 appeals per active judge, 53% higher than it was when Griffith was confirmed. (With all three current vacancies filled, the caseload per active judge would be 132.)

[11] These figures are calculated using the number of cases pending on March 31, 2003 and March 31, 2006, respectively, the closest dates to the confirmations of Roberts and Cavanaugh for which these statistics are published.

> It is a very important court. In fact, next to the Supreme Court, it is the next most important court in the country – no question about it – because the decisions they make affect almost every American in many instances. . . *I might also add that the D.C. Circuit is in the midst of a vacancy crisis unseen in recent memory. Only eight of the court's 12 authorized judgeships currently are filled. . . The D.C. Circuit has not been down to eight active judges since 1980. It is a crisis situation because it is extremely important. The vacancy crisis is substantially interfering with the D.C. Circuit's ability to decide cases in a timely fashion*. As a result, litigants find themselves waiting longer and longer for the court to resolve their disputes. Because so many D.C. Circuit cases involve constitutional and administrative law, this means that the validity of challenged government policies is likely to remain in legal limbo.[12]

As of March 31, 2003, the nearest date to Senator Hatch's speech for which there are published data from the U.S. Courts regarding the D.C. Circuit's workload, the court had 1,001 cases pending, or a workload of only 83 cases per authorized judge. Now, as noted above, that workload is 132 cases per authorized judge. Moreover, what Senator Hatch said about the D.C. Circuit in 2003 remains true today: the court is of vital importance to America and it is currently understaffed, not overstaffed.

Some conservatives who support Senator Grassley's proposal or who have advocated that the Senate not permit the vacancies on the D.C. Circuit to be filled have claimed that President Obama, by complying with his constitutional mandate to nominate people to fill authorized seats on the federal bench, is engaging in "court packing."[13] This of course is an utter misuse of the term, which has its origins in the proposal by President Franklin Delano Roosevelt to add *new* judicial seats to the Supreme Court in an effort to shift the Court's balance – not to a President's simply doing his constitutionally specified job, that is, nominating people to fill existing, authorized judicial *vacancies*.

It should come as no surprise, then, that even some conservatives have had a hard time understanding the "court packing" charge. As Byron York, a Fox News contributor and author of *The Vast Left Wing Conspiracy*, noted, "it doesn't strike me as 'packing' to nominate candidates for available seats."[14] American Enterprise Institute scholar Norm Ornstein said that the claim made him "laugh out loud."[15] Ornstein continued by asking, "How could a move by a president simply to fill long-standing existing vacancies on federal courts be termed court packing?"[16] That's a good question. If anything, it appears that Senator Grassley and other supporters of S. 699 are attempting to maintain the D.C. Circuit's marked ideological imbalance; with six senior judges continuing to hear cases alongside the eight active judges, the court is starkly divided (or packed, one might say), 9-5, in favor of judges appointed by Republican Presidents.

The D.C. Circuit is rightly considered to be the Nation's second most important court, after the Supreme Court. This is because the D.C. Circuit has exclusive or favored jurisdiction over disputes

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[12] 149 Cong. Rec. No. 21, S1953 (daily ed. Feb. 5, 2003) (statement of Senator Hatch, emphasis added), available at: <http://www.gpo.gov/fdsys/pkg/CREC-2003-02-05/pdf/CREC-2003-02-05-pt1-PgS1928-3.pdf#page=25>.

[13] *See*, *e.g.*, Jennifer Bendery, "Republicans Charge Obama With Court-Packing for Trying to Fill Empty Seats," *Huffington Post* (May 28, 2013), available at: < http://www.huffingtonpost.com/2013/05/28/obama-court-packing_n_3347961.html>.

[14] Byron York, Twitter (May 28, 2013), available at: <https://twitter.com/ByronYork/statuses/339389884672389121>.

[15] Norm Ornstein, "It Might Finally Be Time for the 'Nuclear Option' in the Senate," *The Atlantic* (May 30, 2013), available at: < http://www.theatlantic.com/politics/archive/2013/05/it-might-finally-be-time-for-the-nuclear-option-in-the-senate/276377/>.

[16] *Id*.

involving numerous federal laws and regulations, and is responsible for resolving critically important cases involving national security, environmental protection, employment discrimination, food and drug safety, separation of powers, and the decisions of a wide array of administrative agencies. The full staffing of this court is of nationwide importance. Certainly no decision to effectuate a nearly 30% reduction in the number of judges on this critical court, or to decline to fill authorized vacancies, should be made in a partisan, political manner and without careful study.

Sincerely,

Judith E. Schaeffer
Vice President

Doug Kendall
President
Constitutional Accountability Center

September 10, 2013

S.1385: Federal Judgeship Act of 2013

On behalf of our hundreds of thousands of members across the country, People For the American Way commends the Subcommittee on Bankruptcy and the Courts for holding this hearing on the Federal Judgeship Act of 2013.

America's federal courts play a critical role for our nation and in our communities. Indeed, "having one's day in court" is fundamental to our conception of fairness and justice. Individuals and businesses alike rely on a properly functioning federal court system to ensure that the rule of law upon which our society and economy are based can continue.

But that system falls apart if there aren't enough judges to hear cases in a timely manner, and that is the situation in which we find ourselves. Since federal judges are required to give priority to criminal cases over civil ones, an increase in criminal cases without a concomitant increase in judges by necessity results in less time available to civil cases. Since 1990 (the last time Congress passed a comprehensive judgeship bill[1]), the number of criminal cases pending in district courts has more than doubled from 36,170 to 76,014, while Congress has increased the number of district court judgeships by only 4%. With the number of criminal cases surging, judges are forced to delay civil cases, often for years. This means long delays for Americans seeking justice in cases involving job discrimination, civil rights, predatory lending practices, consumer fraud, immigrant rights, the environment, government benefits, business contracts, mergers, copyright infringement, and a variety of other areas.

Court delays damage small businesses as well as individuals, whether they are seeking to vindicate their rights as plaintiffs or to put a lawsuit behind them. Courts – the infrastructure of justice – are just as important to the rule of law as roads and bridges are to transportation. Without enough judges, that infrastructure crumbles. That is why making our courts fully functional is a basic issue of good government.

The entity responsible for assessing the federal courts' ability to effectively manage their caseloads is the Judicial Conference of the United States, which was created by Congress in 1922. The Chief Justice presides over the Conference, whose members are the chief judge of each circuit, the chief judge of the Court of International Trade, and one district court judge from each of the regional circuits. The Judicial Conference is specifically charged with making policy (or,

[1] Judicial Improvements Act of 1990, Pub. L. No. 101-650.

as appropriate, policy recommendations) with regard to the administration of federal courts. Among its statutory responsibilities are to "make a comprehensive survey of the condition of business in the courts of the United States and prepare plans for assignment of judges to or from circuits or districts where necessary."[2]

Therefore, the Judicial Conference regularly surveys every federal circuit and district court in the nation, obtaining detailed information about their caseloads. Such information includes the numbers of cases filed, terminated, or pending both in raw numbers and (for district courts) weighted by complexity and resources needed to process. In order to get as accurate and comprehensive a picture as possible, the analysis includes great detail on a variety of other factors. For circuit courts other than the Federal Circuit, these include how many decisions are written vs. unwritten, how many are based on the merits and how many are procedural, how many are terminated after oral hearings and after submission on briefs, and how many are terminated with written signed opinions, and how many cases are of particular types (e.g., prisoner appeals, criminal appeals, and administrative appeals). For district courts, factors analyzed include the basis of jurisdiction, the general category of civil suits, and whether the case was terminated before or after trial, and whether the district received assistance from or provided assistance to other district courts. Due to the level of detail, the tables presenting the data take hundreds of pages.

Based on this data and upon input from the courts themselves, the nonpartisan Judicial Conference has requested Congress to create 91 new federal judgeships:

- For the 9th Circuit, five judgeships (one of which would be temporary);
- For the 6th Circuit, one new judgeship; and
- For the district courts, 85 new judgeships (20 of which would be temporary).

It is this set of proposals that the Federal Judgeship Act of 2013 would set into law.

Adopting the Judicial Conference's recommendations would improve access to justice for individuals and businesses alike in every region of America. The affected districts are located throughout the country, in ten of the twelve regional circuits. Stories about the impact in affected districts on already overworked judges and on Americans who are being denied their timely and fair day in court are powerful. For example:

- The Western District of Texas, which has one judicial emergency, and which includes much of the state's border with Mexico. The Judicial Conference has asked Congress to create five additional judgeships there, one of which would be temporary. The situation in the Western District is so pressured that Judge David Ezra of Hawaii took senior status last year and moved to Texas, saying, "This is corollary to having a big wild fire in the

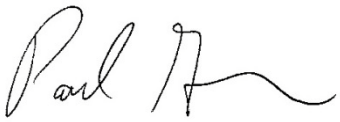
[2] 28 U.S.C. 31.

Southwest Border states, and fire fighters from Hawaii going there to help put out the fire." Chief Judge Fred Biery has described the judges there as "pedaling as fast as we can on a rickety bicycle."

- California's Eastern District, which has a judicial emergency and which the Ninth Circuit's chief judge calls the most overloaded court in the circuit. Earlier this year, Sen. Feinstein noted that "[i]t takes a criminal case 30 percent longer to be completed than it did in 2009, and a civil case takes nearly four years to get to trial, up nearly 50 percent from two years ago and nearly twice the national average." The Judicial Conference has requested Congress to create 7 additional judgeships there.

This hearing provides the best opportunity to learn from the nonpartisan experts why they made their specific recommendations. The Judicial Conference regularly makes its caseload data public, and it similarly makes its request for judgeships public. With this hearing members of the subcommittee will have the opportunity to inquire about the basis for the current request, and Congress will have public information upon which to make objective, non-partisan determinations as to where additional judgeships are needed.

This is the proper way for Congress to legislate on something as important as maintaining the third branch of government.



Marge Baker
Executive Vice President for Policy and Program
People For the American Way

Paul Gordon
Senior Legislative Council
People For the American Way

STATEMENT OF PATRICIA M. WALD,
RETIRED CHIEF JUDGE OF THE D.C. CIRCUIT COURT OF APPEALS,
ON COMPLEXITY OF D.C. CIRCUIT CASES
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COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
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I have been asked to comment on the complexity of the cases on the D.C. Circuit Court of Appeals' docket as compared to the other 11 circuit courts of appeal. The comparative complexity of its cases is of course only one factor to be considered in deciding the appropriate number of judgeships to enable the Circuit Court to do its work efficiently, but it is a singularly important one. There is virtually unanimous agreement that the kind and mix of cases that come before the D.C. Circuit are exceptionally demanding from a technical standpoint, and uniquely burdensome in terms of sheer time compared to other circuits. Chief Justice John Roberts noted in his 2006 Virginia Law Review article, "What Makes the D.C. Circuit Different?", written while he served on the Circuit, that the D.C. Circuit's caseload is composed of one third appeals from federal agencies (the national figure for all circuits is 20%); combined with another one fourth consisting of other federal civil cases makes up a total of two thirds of the D.C. Circuit's docket involving the federal government rather than disputes between individual parties (the comparable national figure is 25% for all circuits). In the now-Chief Justice's own words "whatever combination of letters you can put together, it is likely that jurisdiction to review that agency's decision is vested in the D.C. Circuit", adding "lawyers frequently prefer to litigate in the D.C. Circuit because there is a far more extensive body of administrative law developed there than in other courts".

Washington Post columnist Glenn Kessler more recently dipped down another layer into these and later statistics gleaned from the Administrative Office of the U.S. Courts that show in 2012 , 45% of D.C. Circuit appeals were administrative appeals which he described as "highly complex and tak[ing] more time to review". This figure he compared to the less than 3% administrative appeals (omitting immigration cases of which the D.C. Circuit rarely has any) that is the national average of other circuits. The most recent figures from the Administrative Office for the year ending June 30, 2013 show that the D.C. figure remains about the same today.

(Table B-3). Minimally then, it seems clear that the D.C. Circuit's docket cannot be rationally compared to other circuits on the basis of raw case numbers alone, regardless of how those calculations are made.

The greater complexity of administrative appeals manifests itself in judge's workloads in several ways, some statistically demonstrable, some not. The D.C. Circuit according to the latest figures has the highest percentage (49.2%) of decisions on the merits rendered after oral argument, in marked contrast to 10 circuits where oral argument is denied in 70-90% of merits cases (63% in the Seventh Circuit). Further, 42% of D.C. Circuit termination decisions on the merits result in written, published opinions, again the highest among the 11 circuits and the D.C. Circuit's 57% unpublished opinion rate ranks lowest among the circuits, the national figure being 88%. (Tables S-1 and S-3). These statistics indicate that a higher percentage of D.C. Circuit cases than those of other courts of appeal merit oral argument and require the research and drafting that attend a formal opinion with precedential value. The larger percentages of appeals accorded summary treatment in other circuits indicates a lesser degree of judicial input for their largest category of cases which are typically disposed of by short memoranda, often relying on a single precedent and/or a few sentences of discussion. It is relatively rare that an administrative agency appeal of the kind heard in the D.C. Circuit, certainly not a rulemaking, could be treated in that fashion, in large part due to the several levels of internal review within the government before an agency can go to court. Also to be noted is that a single massive consolidated appeal in an agency case combining the separate appeals of many organizations and parties will be counted statistically as one appeal even though reading, reviewing and considering the separate arguments of many appellants may take widely disproportionate amounts of time. About 22% of D.C. Circuit appeals in 2013 terminated on the merits were consolidated cases, a vastly greater number than in other circuits.

But it is undoubtedly the nature of the agency appeal cases, especially the rulemakings, that set the D.C. Circuit apart. Agency appeal cases deeply impact every aspect of Americans' lives, the air they breathe, the water they drink, the safety of their workplace, the health care they receive, the security of their investments, the competitive pricing of the goods they buy. These complex regulations which undergird every major government regulatory program-regulations which often consume hundreds of triple-columned, single-spaced Federal Register pages –if challenged and the major ones usually are-almost inevitably pass through the D.C. Circuit's

portal. And because these rules come directly to the appeals court, its judges must do their legal evaluations from scratch without the benefit of lower court's findings available in non-agency appeals. This kind of review takes time. Their complexity is of two dimensions— understanding the underlying factual situations giving rise to the disputes which can be scientific, technological, industrial and often obtuse to non-experts and assessing the legal questions arising from the precepts of administrative law which themselves are often versed in general terms like "preponderance of the evidence", "substantial evidence", "due deference", "in the public interest" and must be applied to those factual situations. It is also of moment that the D.C. Circuit is the court of last resort in such cases except for those few that the Supreme Court elects to hear. In the past the High Court has steered clear of the vast bulk of the monstrous regulatory reviews. But when it does take agency cases, not surprisingly it takes more of them from the D.C. Circuit than from any other. It thus behooves the Circuit judges to do their important work painstakingly and fastidiously since in the final analysis they are responsible for the major part of the development of the body of administrative law that guides the regulatory governance of the nation. Thus it is the D.C. Circuit that will hear the inevitable challenges to the Affordable Care Act's implementing regulations and to the Dodd-Frank Financial Services regulations. Indeed Chief Justice Roberts in his 2006 article acknowledged "the D.C. Circuit's unique character, as a court with special responsibility to review legal challenges to the conduct of the national government…." It goes without saying that to perform that special responsibility the court needs sufficient time and resources; according to Professor John Golden who studied the Circuit's history, "When the D.C. Circuit addresses questions such as the constitutionality of legislative vetoes of agency rulemaking or agency rules of national scope, such as setting national ambient quality standards the significance for policymakers and members of the general public is plain".

The D.C. Circuit has a separate complex litigation track for hearing a handful of the most time-consuming and complex of these regulatory cases; five such are scheduled for the coming year. Neither the Chief Judge nor senior judges customarily sit on these cases (only one senior judge currently has). One example of such a case is *Sierra Club v. Costle*, 657 F2d. 298 (1981) in which I wrote the opinion. It dealt with "the extent to which new coal-fired steam generators that produce electricity must control their emissions of sulfur dioxide and particulate matter into the air". The Petitioners in the appeal (consolidated from 7 separate cases) all filed separate briefs totaling 760 pages setting forth varied arguments and interests. They included the Appalachian

Power Company, the Sierra Club, the Environmental Defense Fund, California Air Resources Board; the Intervenors included the National Coal Association and the Missouri Association of Municipal Utilities; the Respondent was the Environmental Protection Agency assisted by the Department of Justice. Oral argument consumed days and involved many advocates. The environmental groups thought the EPA regulations too lax, the utilities thought them too rigorous. The effects of coal-burning power plants on public health and their importance to our economy were pitted against each other. The Joint Appendix totaled 5600 pages. EPA's explanation of the Rule in the Federal Register took up 43 triple columns of single spaced type. The rule had been several years in the making inside EPA and later undergoing White House review. Our review at the Circuit level encompassed numerous novel procedural issues with serious implications for agency informal rulemaking as well as substantive challenges, culminating in a 227 page slip opinion (with a 26 page appendix of charts) issued within 7 months of argument. While it was being deliberated and drafted, life went on in the Circuit and our panel judges had to maintain their normal schedule of other cases.

Cases accorded special complex schedule treatment as well as other agency cases on the regular calendar, likewise entailing issues of enormous national import and likewise extremely time consuming are, if anything, more typical of the D.C. Circuit's docket now than during my tenure. A prime example is the area of climate control. The D.C. Circuit has exclusive jurisdiction to hear challenges to national regulations promulgated under several major environmental statutes, including notably the Clean Air Act. A 2008 study prepared by then-chair of the House Energy & Commerce Committee, Henry Waxman, reported that between 2002 and 2008, the D.C. Circuit decided 94 cases involving challenges to EPA decisions implementing the Clean Air Act alone. During subsequent years, the Circuit has reviewed a continuing stream of highly significant and complex Clean Air Act regulatory decisions by the current administration including an August 20, 2013 ruling on sewage sludge incinerator standards, a July 12, 2013 ruling on ethanol and other non-fossil-fuel carbon dioxide sources, a January 4, 2013 ruling on two EPA regulations concerning airborne particulate matter, and a June 2012 decision (now on review before the Supreme Court) striking down EPA's "good neighbor rule" regulating individual states' contributions to air pollution levels in neighboring downwind states.

The environmental area's intimate relationship to the Circuit is paralleled by other agencies such as communications (FCC) and energy (FERC). Mid-2013 figures show that 68% of the Court's consolidated cases terminated on the merits involved agency rulemakings. (Tables B-3 and S-1).

Finally, in the interests of brevity, I will only mention the extraordinary prominence of the Circuit in constitutional as well as regulatory jurisprudence, setting the stage for the Supreme Court on such issues as executive privilege, attorney client privilege for government lawyers, the survival of that privilege after death, the application of the recess clause to executive appointments, First Amendment rights to demonstrate in front of embassies, the application of constitutional guarantees to "enemy combatants" (all appeals from habeas corpus petitions by Guantanamo detainees and from military commission convictions are heard exclusively by the D.C. Circuit). None of these cases are "average" or "typical" for federal courts.

In sum it seems highly relevant to consider seriously the kinds of cases the D.C. Circuit hears with atypical frequency when deciding on its special judicial needs.