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FEDERAL JUDGESHIPS

The General Accuracy of District and Appellate Judgeship Case-Related Workload Measures

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Mr. Chairman and Members of the Subcommittee:

I appreciate the opportunity to submit this statement on our work on case-related workload measures for district court and courts of appeals judges. My statement today is based on work completed and reported in 2003[1] and discussed in testimony on June 17, 2008,[2] and September 30, 2009.[3] My statement is focused exclusively on these workload measures; we have not assessed or taken a position on the Judicial Conference's pending request for additional judgeships.

Biennially, the Judicial Conference, the federal judiciary's principal policy-making body, assesses the judiciary's needs for additional judgeships.[4] If the conference determines that additional judgeships are needed, it transmits a request to Congress identifying the number, type (such as courts of appeals or district courts), and location of the judgeships it is requesting.

In assessing the need for additional judgeships, the Judicial Conference considers a variety of information, including responses to its biennial survey of individual courts, temporary increases or decreases in case filings, and other factors specific to an individual court. However, the Judicial Conference's analysis begins with the quantitative case-related workload measures it has adopted for the district courts and courts of appeals—weighted case filings and adjusted case filings, respectively. These two measures recognize, to different degrees, that the time demands on judges are largely a function of both the number and complexity of the cases on their dockets. Some types of cases may demand relatively little time and others may require many hours of work. Generally, each case filed in a district court is assigned a weight

[1]GAO, *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 (Washington, D.C., May 30, 2003).

[2]GAO, *Federal Judgeships: General Accuracy of District and Appellate Judgeship Case-Related Workload Measures*, GAO-08-928T (Washington, D.C., June 17, 2008).

[3]GAO, *Federal Judgeships: The General Accuracy of District and Appellate Judgeship Case-Related Workload Measures*, GAO-09-1050T (Washington, D.C., Sept. 30, 2009).

[4]The Chief Justice of the United States presides over the conference, which consists of the chief judges of the 13 courts of appeals, a district judge from each of the 12 regional circuits, and the chief judge of the Court of International Trade. The conference meets twice a year.

representing the average amount of judge time the case is expected to require. The weights are relative to one another: the higher the case weight, the greater the time the case would be expected to require. For example, on average, a case with a relative weight of 2.0 would be expected to require twice as much judge time as a case with a weight of 1.0. In the courts of appeals, all case filings are weighted equally at 1.0, except for *pro se* case filings—those in which one or both parties are not represented by an attorney—which are discounted.

Using these measures, individual courts whose past case-related workload meets the threshold established by the Judicial Conference may be considered for additional judgeships. These thresholds are 430 weighted case filings per authorized judgeship for district courts and 500 adjusted case filings per three-judge panel of authorized judgeships for courts of appeals (courts of appeals judges generally hear cases in rotating panels of three judges each). Authorized judgeships are the total number of judgeships authorized by statute for each district court or court of appeals.

The Judicial Conference relies on these quantitative workload measures to be reasonably accurate measures of judges' case-related workload. Whether these measures are reasonably accurate rests in turn on the soundness of the methodology used to develop them. This statement summarizes information and recommendations from our 2003 report and related updates to the methodology including (1) whether the judiciary's quantitative case-related workload measures were reasonably accurate measures of district judges' and courts of appeals judges' case-related workload, and (2) actions the judiciary has taken to implement recommendations from our 2003 report.

Our 2003 report and 2008 and 2009 testimonies were based on the results of our review of documentation provided by the Federal Judicial Center (FJC) and the Administrative Office of the U.S. Courts (AOUSC) on the history and development of the case-related workload measures and interviews with officials in each organization. The scope of our work did not include how the Judicial Conference used these case-related workload measures to develop any specific request for additional district or courts of appeals judgeships. In addition, in August 2013, we met with FJC and AOUSC officials to discuss any updates that have been made to the methodologies for developing case-related workload measures. While we obtained some updated information for the purposes of this statement, we did not evaluate these methodologies or the judiciary's efforts in this area. This work was conducted in accordance with generally accepted

government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Background

The demands on judges' time are largely a function of both the number and complexity of the cases on their dockets. To measure the case-related workload of district court judges, the Judicial Conference has adopted weighted case filings. The purpose of the district court case weights was to create a measure of the average judge time that a specific number and mix of cases filed in a district court would require. Importantly, the weights were designed to be descriptive, not prescriptive—that is, the weights were designed to develop a measure of the national average amount of time that judges actually spent on specific cases, not to develop a measure of how much time judges should spend on various types of cases. Moreover, the weights were designed to measure only case-related workload. Judges have noncase-related duties and responsibilities, such as administrative tasks, that are not reflected in the case weights.

With few exceptions, such as cases that are remanded to a district court from the court of appeals, each civil or criminal case filed in a district court is assigned a case weight. For example, in the 2004 case weights—which are still in use—drug possession cases are weighted at 0.86, while civil copyright and trademark cases are weighted at 2.12. The total annual weighted filings for a district are determined by summing the case weight associated with all the cases filed in the district during the year. A weighted case filing per authorized judgeship is the total annual weighted filings divided by the total number of authorized judgeships. The Judicial Conference uses weighted filings of 430 or more per authorized judgeship as an indication that a district may need additional judgeships. Thus, for example, a district with 460 weighted filings per authorized judgeship, including newly requested judgeships, could be considered for an additional judgeship. However, the Judicial Conference does not consider a district for additional judgeships, regardless of its weighted case filings, if the district does not request any additional judgeships.

Accuracy of Judiciary's Workload Measures Could Not Be Determined

1993 District Case Weights Reasonably Accurate, but Accuracy of 2004 Case Weights Could Not Be Statistically Determined

In our 2003 report, we found the district court case weights approved in 1993 to be a reasonably accurate measure of the average time demands a specific number and mix of cases filed in a district court could be expected to place on the district judges in that court. The methodology used to develop the weights used a valid sampling procedure, developed weights based on actual case-related time recorded by judges from case filings to disposition, and included a measure (standard errors) of the statistical confidence in the final weight for each weighted case type. Without such a measure, it is not possible to objectively assess the accuracy of the final case weights.

At the time of our 2003 report, the Subcommittee on Judicial Statistics of the Judicial Conference's Judicial Resources Committee had approved the research design for revising the 1993 case weights, with a goal of having new weights submitted to the Judicial Resources Committee for review in the summer of 2004. The design for the new case weights relied on three sources of data for specific types of cases: (1) data from automated databases identifying the docketed events associated with the cases; (2) data from automated sources on the time associated with courtroom events for cases, such as trials or hearings; and (3) consensus of estimated time data from structured, guided discussion among experienced judges on the time associated with noncourtroom events for cases, such as reading briefs or writing opinions.

As we reported in 2009, according to FJC, the subcommittee wanted a study that could produce case weights in a relatively short period of time without imposing a substantial record-keeping burden on district judges.[5] FJC staff provided the subcommittee with information about various approaches to case weighting, and the subcommittee chose an event-based method—that is, a method that used data on the number and types of events, such as trials and other evidentiary hearings, in a case. The

[5]GAO-09-1050T.

design did not involve the type of time study that was used to develop the 1993 case weights. Although the proposed methodology appeared to offer the benefit of reduced judicial burden (no time study data collection), potential cost savings, and reduced calendar time to develop the new weights, we had two areas of concern—the challenge of obtaining reliable, comparable data from two different data systems for the analysis and the limited collection of actual data on the time judges spend on cases.

First, the design assumed that judicial time spent on a given case could be accurately estimated by viewing the case as a set of individual tasks or events in the case. Information about event frequencies and, where available, time spent on the events would be extracted from existing administrative databases and reports and used to develop estimates of the judge time spent on different types of cases. For event data, the research design proposed using data from two databases (one of which was new in 2003 and had not been implemented in all district courts) that would have to be integrated to obtain and analyze the event data. FJC proposed creating a technical advisory group to address this issue. In August 2013, FJC officials told us that the process of integrating the two data systems, though labor-intensive, was successful and resulted in accurate data. However, we have not reviewed the integration process for the two data systems, so we cannot determine the effectiveness of this process or whether accurate data resulted.

Second, we reported that the research design did not require judges to record time spent on individual cases, as was done for the 1993 case weights. Actual time data would be limited to that available from existing databases and reports on the time associated with certain courtroom events and proceedings for different types of cases. However, a majority of district judges' time is spent on case-related work outside the courtroom. The time required for noncourtroom events—and some courtroom events that did not have actual time data available—would be derived from structured, guided discussion of groups of 8 to 13 experienced district court judges in each of the 12 regional circuits (about

100 judges in all).[6] The judges would develop estimates of the time required for different events in different types of cases within each circuit using FJC-developed "default values" as the reference point for developing their estimates. These default values would be based in part on the existing case weights and, in part, on other types of analyses. Following the meetings of the judges in each circuit, a national group of 24 judges (2 from each circuit) would consider the data from the 12 circuit groups and develop the new weights.

The accuracy of judges' time estimates is dependent upon the experience and knowledge of the participating judges and the accuracy and reliability of the judges' recall about the average time required for different events in different types of cases—about 150 if all the case types in the 1993 case weights were used. In 2003, we found that these consensus data could not have been used to calculate statistical measures of the accuracy of the resulting case weights. Thus, we concluded that the planned methodology did not make it possible to objectively, statistically assess how accurate the new case weights are—weights whose accuracy the Judicial Conference relies upon in assessing judgeship needs.

In August 2013, AOUSC officials stated that, since 2005, for purposes of determining the need for an additional authorized judgeship, a district's weighted case filings per authorized judgeship is calculated by including the potential additional judgeship. For example, if a district had total weighted filings of 4,600 and 9 authorized judgeships, and it planned to request 1 additional judgeship, its weighted filings per authorized judgeship, for purposes of the judgeship request process, would be 460. Without including the potential additional judgeship in the calculation, the weighted case filings would be about 511. AOUSC officials stated in August 2013 that the judiciary adopted the proposed methodology in 2004 and does not have plans to update the 2004 district court case weights.

[6]In August 2013, FJC officials stated that, for the 2004 case weight methodology, there were 15 criminal case event types and 13 civil case event types. Actual event frequency data from administrative databases and reports were used in the case weight methodology for all criminal and civil case event types. Actual event time data from administrative databases and reports were used for 4 of the criminal and civil case event types, such as a jury trial. Time estimates from the judge discussion process were used for 11 criminal case event types and 9 civil case event types—including all 6 noncourtroom events, such as preparation for trial.

Accuracy of Courts of Appeals Case-Related Workload Measure Could Not Be Assessed

In 2003, we found that the principal quantitative measure the Judicial Conference used to assess the need for additional courts of appeals judgeships was adjusted case filings. The measure is based on data available from standard statistical reports for the courts of appeals. The adjusted filings workload measure is not based on any empirical data regarding the time that different types of cases required of appellate judges.

The Judicial Conference's policy is that courts of appeals with adjusted case filings of 500 or more per 3-judge panel may be considered for 1 or more additional judgeships. Courts of appeals generally decide cases using constantly rotating 3-judge panels. Thus, if a court had 12 authorized judgeships, those judges could be assigned to four panels of 3 judges each. In assessing judgeship needs for the courts of appeals, the conference may also consider factors other than adjusted filings, such as the geography of the circuit or the median time from case filings to disposition.[7]

Essentially, the adjusted case filings workload measure counts all case filings equally, with two exceptions. First, cases refiled and approved for reinstatement are excluded from total case filings.[8] Second, *pro se* cases are weighted at 0.33, or one-third as much as other cases, which are weighted at 1.0. For example, a court with 600 total *pro se* case filings in a year would be credited with 198 adjusted *pro se* case filings (600 x 0.33). Thus, a court of appeals with 1,600 filings (excluding reinstatements)—600 *pro se* cases and 1,000 non-*pro se* cases—would be credited with 1,198 adjusted case filings (198 discounted *pro se* cases plus 1,000 non-*pro se* cases). If this court had 6 judges (allowing two panels of 3 judges each), it would have 599 adjusted case filings per 3-judge panel, and, thus, under Judicial Conference policy, could be considered for an additional judgeship.

[7]At the time of our 2003 report, FJC had suggested that adjusted case filings may not be an appropriate measure for the Court of Appeals for the D.C. Circuit, given the distinctive characteristics of the administrative agency appeals that were a major source of that court's caseload. Details on the FJC analysis for the D.C. Circuit can be found in our 2003 report: GAO-03-788R. In August 2013, AOUSC reported that the judiciary does not have plans to develop an authorized judgeship workload formula specific to the Court of Appeals for the D.C. Circuit.

[8]Such cases were dismissed for procedural defaults when originally filed, but "reinstated" to the court's calendar when the case was later refiled. The number of such cases, as a proportion of total cases, is generally small.

The current court of appeals workload measure, which, AOUSC officials stated, was adopted in 1996, represents an effort to improve the previous measure. In our 1993 report on judgeship needs assessment, we found that the restraint of individual courts of appeals, not the workload standards, seemed to have determined the actual number of appellate judgeships the Judicial Conference requested.[9] At the time the current measure was developed and approved, using the new benchmark of 500 adjusted case filings resulted in judgeship numbers that closely approximated the judgeship needs of the majority of the courts of appeals, as the judges of each court perceived them. The current courts of appeals case-related workload measure principally reflects a policy decision using historical data on filings and terminations. It is not based on empirical data regarding the judge time that different types of cases may require. On the basis of the documentation we reviewed for our 2003 report, we determined that there was no empirical basis for assessing the potential accuracy of adjusted case filings as a measure of case-related judge workload.

Judiciary Has Taken No Action to Address Our 2003 Recommendations

In our 2003 report, we recommended that the Judicial Conference of the United States

- update the district court case weights using a methodology that supports an objective, statistically reliable means of calculating the accuracy of the resulting weights, and
- develop a methodology for measuring the case-related workload of courts of appeals judges that supports an objective, statistically reliable means of calculating the accuracy of the resulting workload measures and that addresses the special case characteristics of the Court of Appeals for the D.C. Circuit.

Neither of these recommendations has been implemented, and in August 2013, AOUSC officials stated that the judiciary does not have plans to update the 2004 district court case weights or the 1996 court of appeals adjusted filings weights. With regard to our 2003 recommendation for updating the district court case weights, we reported that FJC agreed that the method used to develop the new case weights would not permit the calculation of standard errors, but that other methods could be used to

[9]GAO, *Federal Judiciary: How the Judicial Conference Assesses the Need for More Judges*, GAO/GGD-93-31 (Washington, D.C., Jan. 29, 1993).

assess the integrity of the resulting case weight system.[10] In response, we noted that the Delphi technique to be used for developing out-of-court time estimates was most appropriate when more precise analytical techniques were not feasible and the issue could benefit from subjective judgments on a collective basis. More precise techniques were available for developing the new case weights and were to be used for developing new bankruptcy court case weights.

In our 2003 report, we also concluded that the methodology the Judicial Conference decided to begin in June 2002 for the revision of the bankruptcy case weights offered an approach that could be usefully adopted for the revision of the district court case weights.[11] The bankruptcy court methodology used a two-phased approach. First, new case weights were to be developed based on time data recorded by bankruptcy judges for a period of weeks—a methodology very similar to that used to develop the bankruptcy case weights that existed in 2003 at the time of our report. The accuracy of the new case weights could be assessed using standard errors. The second part represents experimental research to determine if it is possible to make future revisions of the weights without conducting a time study. The data from the time study could be used to validate the feasibility of this approach. If the research determined that this was possible, the case weights could be updated more frequently with less cost than required by a time study. We concluded in 2003 that that approach could provide (1) more accurate weighted case filings than the design developed and used for the development of the 2004 district court case weights, and (2) a sounder method of developing and testing the accuracy of case weights that were developed without a time study. However, we have not reviewed the effectiveness of this methodology or confirmed whether the judiciary implemented this approach.

With regard to our recommendation on improving the case-related workload measure for the courts of appeals, the Chair of the Committee on Judicial Resources commented that the workload of the courts of

[10]We have not reviewed in detail the materials FJC has posted on its website with regard to the methodology actually used to develop the revised case weights approved in 2004. However, those materials indicate that FJC essentially followed the design we reviewed and that standard errors were not computed for the final weights.

[11]See GAO, *Federal Bankruptcy Judges: Weighted Case Filings as a Measure of Judges' Case-Related Workload*, GAO-03-789T (Washington, D.C., May 22, 2003).

appeals entails important factors that have defied measurement, including significant differences in case-processing techniques. We recognized that there were significant methodological challenges in developing a more precise workload measure for the courts of appeals. However, we stated that using the data available, neither we nor the Judicial Conference could have assessed the accuracy of adjusted case filings as a measure of the case-related workload of courts of appeals judges.

The Ranking Member of the Subcommittee on Bankruptcy and the Courts has requested that we conduct a full review of the case-related workload measures for district court and courts of appeals judges, including a follow-up on our 2003 recommendations. Such a review will allow us to evaluate the judiciary's methodology and efforts over the last 10 years.

Mr. Chairman, this concludes my statement for the record.

Contact and Staff Acknowledgments

For further information about this statement, please contact David C. Maurer, Director, Homeland Security and Justice Issues, on (202) 512-9627 or maurerd@gao.gov. In addition to the contact named above, the following individuals also made major contributions to this testimony: Chris Currie, Acting Director; David P. Alexander, Assistant Director; Brendan Kretzschmar; Jean M. Orland; Rebecca Kuhlmann Taylor; and Janet G. Temko.

PREPARED STATEMENT OF

THE HONORABLE GERALD BARD TJOFLAT

CIRCUIT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

BEFORE

THE SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS

OF THE COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

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

WEDNESDAY, SEPTEMBER 30, 2009

Introduction

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

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

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

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

effect the increase has on (1) the court's efficiency, and (2) the stability of the rule of law in the circuit. My experience—and that of others who have given the subject considerable study and thought—is that the increase in circuit court judgeships negatively affects both these areas. Moreover, as the consistency in the rule of law diminishes, the demand for more district judgeships increases for the obvious reason that an unstable rule of law leads to more litigation.

I. Efficiency

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

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

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

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

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

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

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

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

Close interpersonal relationships facilitate the creation of higher-quality judicial opinions. Those relationships also form the basis for interaction and continued functioning when a court faces the most emotional and divisive issues of the day.

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

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

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

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

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

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

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

My concerns with large courts are drawn from personal experience. Having served on both the former Fifth Circuit and now the Eleventh Circuit, I can definitively attest that the entire judicial process—opinion writing, *en banc* discussions, emergency motions, circuit administration, and internal court matters—runs much more smoothly on a smaller court. The Eleventh Circuit has steadfastly opposed efforts to increase the size of the court[6] precisely to maintain an efficient operation.

II. Stability of the Rule of Law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

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

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

[13] *Id.*

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

Thank you very much for your kind attention.

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

ACLJ
American Center for Law & Justice

Federal Judgeship Act of 2009

September 25, 2009

Executive Summary

On Wednesday, September 30, 2009, the Senate Committee on the Judiciary, Subcommittee on Administrative Oversight and the Courts, will hold a hearing on S. 1653, the Federal Judgeship Act of 2009. The Act creates new permanent and temporary federal appellate and district court judgeships. While we encourage Congress to create new judgeships if there is a clear and demonstrable need for them, we are concerned that S. 1653 could bring partisan politics into the process of creating judgeships. The Senate Judiciary Committee should ascertain the true need for additional judgeships before assuming the cost for new judgeships. It should also delay the effective date for any new judgeships until after the next presidential election.

I. Introduction

On September 8, 2009,[1] Senator Patrick Leahy introduced S. 1653, the Federal Judgeship Act of 2009 ("Act").[2] Effective upon enactment,[3] the Act would add nine permanent and three temporary judgeships to the United States Circuit Courts of Appeals.[4] The newly created permanent judgeships would be as follows: one for the First Circuit, two for the Second Circuit, one for the Third Circuit, one for the Sixth Circuit, and four for the Ninth Circuit.[5] The newly created temporary judgeships would be one each for the Third, Eighth, and Ninth Circuits.[6] The Act would also add thirty-eight permanent and thirteen temporary judgeships to various United States District Courts,[7] convert five existing temporary United States District Court judgeships into permanent positions, and extend one existing temporary position.[8]

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[1] *See* Press Release, Senator Patrick Leahy, Leahy Introduces Bill to Authorize Federal Judgeships (Sept. 8, 2009), *available at* http://leahy.senate.gov/press/200909/090809c.html.
[2] Federal Judgeship Act of 2009, S. 1653, 111th Cong. (2009).
[3] *Id*. § 5.
[4] *Id.* § 2.
[5] *Id*. § 2(a).
[6] *Id.* § 2(b).
[7] *Id.* § 3.
[8] *Id.* § 3(c).

II. History of Judgeship Bills

Since the Constitution came into effect, Congress has modified the federal judiciary in many ways through the creation of lower courts and the authorization of judgeships. The last comprehensive judgeships act passed in 1990.[9] Although Congress has authorized additional district court judgeships and extended temporary judgeships since 1990,[10] it remains that "judgeship needs have been addressed piecemeal, first in 1999 with the creation of nine judgeships in the omnibus appropriations act, and again in 2000 when [ten] new Article III judgeships were included in the Commerce, Justice, State, the Judiciary and Related Agencies Appropriations Act."[11]

Over the past decade, judgeship bills have been introduced in nearly every Congress since the 105th Congress, but have all died before being enacted.[12] For example, in 1997, Senator Leahy introduced the Federal Judgeship Act of 1997,[13] which would have added, effective upon date of enactment, permanent and temporary court of appeals and district court judgeships.[14] Senator Grassley, then-chair of the Senate Judiciary Subcommittee on Administrative Oversight and the Courts, "requested that the General Accounting Office review the basis upon which the Judicial Conference made its request for Article III and bankruptcy judgeships" in the proposed legislation, and held hearings in which judges were called to "testify on the need for new judgeships and the use of current resources."[15] The bill ultimately failed to pass.[16]

During the 110th Congress, Senator Leahy introduced S. 2774, the Federal Judgeship Act of 2008. Upon introducing the bill, Senator Leahy observed that

> "Without a comprehensive bill, Congress has proceeded to authorize only a few additional district court judgeships and extend temporary judgeships when it could. For instance, in 2002 we were able to provide for 15 new judgeships in the Department of Justice authorization bill. However no additional circuit court judgeships have been created since 1990 despite their increased workload. . . . Our Federal judges are working harder than ever, but in order to maintain the integrity of the Federal courts and the promptness that justice demands, judges must have a manageable workload."[17]

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[9] *See* Leahy Introduces Bill to Authorize Federal Judgeships, *supra* note 1.
[10] *Id*.
[11] The Third Branch, Judicial Conference Again Asks for New Judgeships to Meet Court Needs, http://www.uscourts.gov/ttb/feb01ttb/page2.html (last visited Sept. 16, 2009).
[12] *See* S. 678: Federal Judgeship Act of 1997, Related Legislation, http://www.govtrack.us/congress/bill.xpd?bill=s105-678&tab=related (last visited Sept. 17, 2009); The Third Branch, End of the 105th Congress Resolves Legislative Action, http://www.uscourts.gov/ttb/nov98ttb/105congres.html (last visited Sept. 17, 2009).
[13] *See* Federal Judgeship Act of 1997, S. 678, 105th Cong. (1997).
[14] *Id.* §§ 2-3, 5.
[15] The Third Branch, End of the 105th Congress Resolves Legislative Action, http://www.uscourts.gov/ttb/nov98ttb/105congres.html (last visited Sept. 17, 2009).
[16] *Id*.
[17] S. REP. NO. 110-427, at 2 (2008) (quoting 154 CONG. REC. S2138-01, S2153 (daily ed. Mar. 13, 2008) (statement of Chairman Leahy)).

The bill was scheduled to receive a hearing in June 2008; however, the hearing was suspended after Republicans invoked a Senate procedural rule to protest the slow pace of confirmations for federal appeals court judges.[18] The bill, which would have gone into effect on January 21, 2009 and had bipartisan support,[19] passed out of the Judiciary Committee in July 2008, but the full Senate never acted on it.

In the Senate Report submitted with the bill, four Republican Senators challenged the Judicial Conference's recommendations on the number of needed judgeships. The Senators stated,

> We are of the position that if there is a clear, demonstrated need for new judgeships, the Congress should act to create those positions. There may well be a need for some of the judgeships contained in S. 2774. However, the GAO continues to find that the Judicial Conference's methodology is flawed and unreliable. . . . [T]he federal judiciary has not proven that it has taken every step it can to improve efficiencies, be it through use of technology, case management techniques, or senior/magistrate/visiting judges. Further, there are significant costs that come with creating new permanent and temporary judgeships. For these reasons, we believe that the Judiciary Committee should not be quick to rubber-stamp the AO's request in S. 2774. Moreover, because of the continued findings by the GAO that the methodologies utilized by the Judicial Conference are not accurate and could be improved, we believe that the AO should implement the GAO's recommendations before it submits—and Congress approves—any further judgeship requests.[20]

Upon reintroducing the Federal Judgeships Act in the 111th Congress, Senator Leahy stated that case filings in federal appellate and district courts have risen since 1990. Thus, Senator Leahy asserted, Congress should pass a comprehensive judgeships bill to "ease the strain of heavy caseloads that has burdened the courts and thwarted the administration of justice."[21] It is likely, however, that Republicans, who have yet to sign on to the bill, will have concerns about the legislation.

III. Concerns About the Act

We agree with Senators Grassley, Sessions, Brownback, and Coburn that if there is a clear need for new judgeships, those judgeships should be created. However, the creation of new judgeships by Congress should not be used as a political tool to reshape the federal judiciary. For that reason, we recommend that any judgeships bill contain safeguards to ensure that the independent judiciary remains just that—independent.

A. Possible Inaccuracy of the Judicial Conference's Recommendations

[18] The Third Branch, Judicial Confirmations at Center of Cancelled Hearing, July 2008, http://www.uscourts.gov/ttb/2008-07/article07.cfm (last visited Sept. 17, 2009).
[19] *See* Federal Judgeship Act of 2008, S. 2774, 110th Cong. § 5 (2008).
[20] S. REP. NO. 110-427, at 19 (2008) (statement of Sens. Grassley, Sessions, Brownback, and Coburn).
[21] Leahy Introduces Bill to Authorize Federal Judgeships, *supra* note 1.

The newly created judgeships are based on recommendations by the Judicial Conference of the United States,[22] which was created by Congress to offer policy recommendations on the structure and operation of the federal judiciary.[23] Yet, unlike Congress, the Judicial Conference is not directly accountable to the people.

Assessments of the need for more judgeships demand more scrutiny before casting this cost onto the taxpayer. It costs approximately $1,062,000 to create a circuit court judgeship the first year, and approximately $931,000 each subsequent year to maintain it.[24] A district court judgeship costs slightly more—approximately $1,169,000 the first year, and $960,000 each subsequent year.[25] In recent prepared testimony for a Senate Judiciary Committee hearing, William O. Jenkins, Jr., director of Homeland Security and Justice at the Government Accountability Office ("GAO"), stated that "neither [the GAO] nor the Judicial Conference can assess the accuracy of adjusted case filings as a measure of the case-related workload of courts of appeals judges."[26] In 2003, the GAO had produced a report on the accuracy of the weighted and adjusted case filings systems for calculated judicial workload.[27] "The GAO concluded that there were problems with the reliability of both district and appellate court methodologies."[28] In 2008,

> Mr. Jenkins reiterated his concerns with the reliability of the AO's methodology, and specifically questioned the accuracy of the case weights used by the AO to assess judgeship needs. Mr. Jenkins noted that notwithstanding the findings of the 2003 GAO report, the AO had not implemented their recommendations to improve the accuracy of their methodology.[29]

Given the uncertainty surrounding the need for new judgeships, and the fact "that it is easier to create judgeship positions than to eliminate them," "Congress must be reasonably confident that, before it creates new federal court judgeships and expands the federal judiciary on a permanent basis, it does so based upon accurate and complete information."[30] One way to do this, as Senators Grassley, Sessions, Brownback, and Coburn suggested, is for Congress, before it creates new judgeships based on possibly inaccurate information, to fill the current judicial vacancies.[31] According to the Administrative Office of the U.S. Court's website, as of September 25, 2009, there are twenty current vacancies to the U.S. Courts of Appeals, and seven nominees

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[22] *See* Leahy Introduces Bill to Authorize Federal Judgeships, *supra* note 1. For the actual judgeship recommendations, see Press Release, The Third Branch, Judicial Conference Judgeship Recommendations (Mar. 2009), *available at* http://www.uscourts.gov/Press_Releases/2009/recommendations.pdf.
[23] *See* 28 U.S.C.S. § 331.
[24] S. REP. NO. 110-427, at 17 (2008) (statement of Sens. Grassley, Sessions, Brownback, and Coburn).
[25] *Id*.
[26] *Responding to the Growing Need for Federal Judgeships: The Federal Judgeship Act of 2008: Hearing Before the S. Judiciary Comm.*, 110th Cong. 95 (2008) (statement of William O. Jenkins, Jr., Director, Homeland Security and Justice, Government Accountability Office).
[27] S. REP. NO. 110-427, at 18-19 (2008) (statement of Sens. Grassley, Sessions, Brownback, and Coburn).
[28] *Id*. at 18.
[29] *Id*. at 19.
[30] *Id*. at 17.
[31] *Id.*

to fill those vacancies.[32] There are seventy-four current vacancies to federal district court benches, with nine nominees awaiting confirmation.[33] The site also lists twenty-six future vacancies.[34] During the previous administration, the Senate failed to confirm numerous well-qualified judicial nominees, such as Judge Robert Conrad, Rod Rosenstein, Steve Matthews, and Peter Keisler. If there is such a great need for judges, then these well-qualified individuals should have been confirmed. Before Congress creates additional judgeships, the existing vacancies should be filled with similarly well-qualified individuals. If the courts still find themselves in need of additional judges after the existing vacancies are filled, then Congress should consider judgeships legislation.

B. Date of Effectiveness

The date of effectiveness in a judgeship bill can serve as a political tool to reshape the judiciary. The judgeships bill introduced in the 110th Congress, while the Democrats controlled Congress and the Republicans controlled the White House, would have come into effect on January 21, 2009,[35] after the new president assumed office, thus eliminating concerns about partisan court-packing. As Senator Hatch, a co-sponsor of the 2008 Act, noted at its introduction,

> Americans are blessed to have the best and most independent judicial system in the world. In our constitutional framework, Congress has responsibility to both make the laws and ensure that the judiciary tasked with interpreting and applying those laws has the appropriate resources. This includes addressing the staffing and compensation needs of the judicial branch, and we should strive to do so without political gambles or speculation about the outcome of a Presidential election.[36]

The current bill, however, provides that it "shall take effect on the date of enactment of this Act."[37] If the bill passes this Congress, President Obama would be tasked with immediately filling all of the new permanent and temporary judgeships with nominees whom he has selected and who represent his judicial philosophy. While every president leaves his mark on the judiciary, this would certainly increase the extent of President Obama's mark.

To further the goal of an independent judiciary and to avoid any attempts by Congress to use the judgeships bill to attempt to reshape the federal judiciary, the bill should be amended to come into effect on January 21, 2013. While this change would delay filling these new judgeships, such a delay is a small price to pay for Congress to avoid partisan interference with the federal judiciary.

Furthermore, the Act will likely garner more bipartisan support with an amendment of this type. For example, a Republican aide noted that Senator Hatch "would consider cosponsoring the

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[32] Summary of Judicial Vacancies, U.S. Courts, Administrative Office of the U.S. Courts, http://www.uscourts.gov/judicialvac.cfm (last visited Sept. 25, 2009).
[33] *Id*.
[34] *Id*.
[35] *See* Federal Judgeship Act of 2008, S. 2774, 110th Cong. § 5 (2008).
[36] S. REP. NO. 110-427, at 3 (2008) (quoting 154 CONG. REC. S2138-01, S2154 (Mar. 13, 2008) (statement of Sen. Hatch)).
[37] Federal Judgeship Act of 2009, *supra* note 2, § 5.

[Act] again if the effective date were changed to Jan[uary] 21, 2013."[38] In response, "Democrats contend that a postponed effective date has been the exception, not the rule, for proposals of this kind," citing for support "the last comprehensive [judgeship] bill [passed] in 1990, when a Democratic Congress and a Republican president agreed on an immediate increase" of judgeships.[39]

Another suggestion to ameliorate partisan interference in the molding of the judiciary is to stagger the creation of the new judgeships to include some judgeships created before the next presidential election, and some after the election. This solution should alleviate concerns about partisan court-packing.

C. The Act Allows Even More Partisan Interference over the Courts than it First Appears

The Act allows even more partisan interference over the courts than it first appears, as the temporary judgeships are lifetime appointees, and thus are effectively permanent positions. As Ed Whelan, president of the Ethics and Public Policy Center, pointed out, the distinction between the temporary and permanent judgeships created is,

> irrelevant from the perspective of President Obama's appointment power, since Obama would fill the new "temporary" judgeships with lifetime (not temporary) appointments . . . . The distinction matters only 10 years or more down the road when the first vacancy occurs on the court with a temporary judgeship: whoever is president at that time would not be able to fill the vacancy (which means that the number of actual judgeships on that court would then equal the permanent authorized number).[40]

Therefore, if the legislation passed, President Obama would be able to immediately fill all of the judgeships created by the bill with lifetime appointees. Furthermore, future presidents would be prevented from filling vacancies on the courts with temporary judgeships when a vacancy occurs. In order to avoid encroaching on a future president's ability to fill judicial vacancies, these temporary judgeships should be removed from the bill.

IV. Conclusion

This bill, if enacted, will have a profound effect on the federal judiciary. We urge Congress to modify the legislation in several ways to (1) avoid partisan interference with the judiciary's operation, and (2) ensure taxpayer money is spent wisely and efficiently. While it is recognized that federal judgeship nominees will likely possess similar views to those of the president, the judiciary has always been viewed as set apart from partisan politics to some degree. Legislation passed to alter the judiciary by enabling the appointment of judges holding a certain political viewpoint is to be discouraged. While it is recognized that a certain amount of partisan

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[38] David Ingram, *Without GOP Support, Leahy Pushes for More Judges*, Blog of LegalTimes, Sept. 9, 2009, http://legaltimes.typepad.com/blt/2009/09/without-gop-support-leahy-pushes-for-more-judges.html.
[39] *Id.*
[40] Ed Whelan, *Re: Senator Leahy Wants Judges*, National Review: Bench Memos, Sept. 10, 2009, http://bench.nationalreview.com/post/?q=ODg2OWQ1ZmJkMWExNGFjNjU3YjA5MjkwYWU1Mjg5ZjE=.

entanglement is unavoidable by the fact that the judiciary will need to be modified and expanded at certain points during our nation's growth, and this expansion will be conducted by politicians, the judiciary's independence must be cultivated, and with that aim in mind, we urge that several of the solutions and proposals contained within this document be incorporated into the Act.

THE SIZE OF THE FEDERAL JUDICIARY

STATEMENT OF JOEL F. DUBINA
UNITED STATES CIRCUIT JUDGE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

I want to thank the Committee, and especially Senator Sessions, for giving me the opportunity to submit this statement concerning the issue of whether the Federal Judiciary should be further expanded in size. Since my appointment to the Eleventh Circuit on October 1, 1990, the judges of our court annually have voted whether or not we should ask Congress to authorize more federal judges. Each time our court considers the topic, an overwhelming majority of our members have voted "no!" The judges who feel the strongest about this issue are those who served on our predecessor court, the Fifth Circuit, before Congress divided it in 1981 and created the Eleventh Circuit. They, more than the rest of my colleagues, remember the problems created by serving on a court with 26 judges.

I submit for your consideration several reasons why I believe a smaller judicial body is better. First, collegiality suffers when a court has too many judges. I cannot emphasize enough the importance of collegiality on a federal appellate court. It is not something that just happens—the judges have to work to achieve common respect and collegiality. The larger the court, the more difficult it is to get to know your colleagues. On our court, the judges not only work together, but we socialize together. Socialization helps us develop common interests and goals, in

spite of our differing interpretations of the law. On a smaller court, not only do the judges get to know each other personally, but they begin to build a trust with one another that would be more difficult to achieve on a large court.

Second, it is easier to maintain a cohesive body of law in the circuit when the court is small. When a court is too large, the clarity and stability of the circuit's law suffers. The primary reason federal courts of appeals exist in our nation is to make the law within the circuits clear so the federal district judges will know what the law is and how they should apply it in the individual cases they decide. The larger the court, the more difficult it becomes to maintain a cohesive body of law, because there are more varied opinions to consider.

Third, large courts reduce the efficiency of the court as a whole. Our court sits en banc three times a year; the cases we consider during this time are important and time consuming. However, because we are a smaller court, we have been able to hear oral arguments in as many as three en banc cases, conference the cases, and assign the opinions, all within the same day. On the old Fifth Circuit, it would often take days for the judges to formulate the issues that the lawyers should brief for the en banc court, and it would also take much time for the court to hear oral arguments, conference the cases and assign the opinions. Thus, efficiency suffered. On a court as busy as ours, we judges need to make good use of our time in order to be as efficient as possible. As a court grows in size, judges spend more

of their time monitoring their colleagues' work and less time working on their own cases. This hinders the administration of justice.

I am not alone in my view that a smaller judicial body is better. My colleague, Judge Gerald Bard Tjoflat, wrote an article for the *American Bar Association Journal* in July 1993 entitled "More Judges, Less Justice."[1] In that article, Judge Tjoflat provided sound support for why bigger is not always better. Other circuit judges feel the same way. District of Columbia Circuit Judge Harry T. Edwards, in a law review article on the subject, stated that "to some unquantifiable degree, the impediments to collegiality that stem from the sheer number of members of the court reduce the overall quality of the court's work product."[2] In 1928, Supreme Court Justice Charles Evan Hughes observed that "[e]veryone who has worked in a group knows the necessity of limiting size to obtain efficiency. And this is peculiarly true of a judicial body."[3] When President Franklin Delano Roosevelt tried to pack the Supreme Court, Justice Hughes also

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[1] 79 A.B.A. J., July 1993, at 70–73.

[2] *Id.* at 70 (quoting Hon. Harry T. Edwards, *The Rising Work Load and Perceived "Bureaucracy" of the Federal Courts: A Causation-Based Approach to the Search for Appropriate Remedies*, 68 IOWA L. REV. 871, 919 (1983)).

[3] *Id.* at 71 (quoting CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES 238 (Colum. Univ. Press 1966) (1928)).

stated, "[t]here would be more judges to hear, more judges to confer, more judges to discuss, more judges to be convinced and to decide."[4]

Irving Kaufman, former Chief Judge of the Second Circuit, stated that "[a]dditional judgeships are both an inefficient use of scant judicial resources and a disruptive influence on the development of the law."[5] It was also Judge Kaufman's view that "[t]he coherence and uniformity of the law are bound to decline with the addition of new judges. Such instability can have a snowball effect. The judicial workload is increased because more panel hearings and en banc votes are required. And the uncertainty of outcomes resulting from a cacophony of differing opinions can act as a catalyst for new appeals as more litigants find a roll of the appellate dice worth the chance."[6] In sum, it is important in every circuit in the country for the law to remain clear and consistent. When the law is not uniform, the public loses, and the system breaks down.

The final argument for keeping the federal judiciary small is the sheer cost. I have seen studies where the estimated costs to add a new federal appellate judge is in excess of one million dollars. The huge financial cost of adding new judges is hard to justify.

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[4] *Id.* (quoting Letter from Chief Justice Hughes to Senator Burton Wheeler (Mar. 22, 1937)).

[5] *Id.* (quoting Hon. Irving R. Kaufman, *New Remedies for the Next Century of Judicial Reform: Time as the Greatest Innovator*, 57 FORDHAM L. REV. 253, 257 (1988)).

[6] *Id.* (quoting Kaufman, *supra* note 5, at 259).

Again, I want to thank the Committee for the opportunity to submit this statement, and I hope that as you weigh the views of judges and debate this very important issue, you will come to the conclusion that the vast majority of my colleagues and I share—that a smaller judicial body is a better, more effective, judicial body.

Thank you very much.