



STATEMENT

of

MICHAEL H. REED

on behalf of the

AMERICAN BAR ASSOCIATION

before the

SUBCOMMITTEE ON BANKRUPTCY AND THE COURTS

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

for the hearing

on

“FEDERAL JUDGESHIP ACT OF 2013”

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1050 Connecticut Avenue, NW • Washington, DC • (202) 662-1760
Suite 400

www.americanbar.org

Governmental Affairs
Office

Mr. Chairman and Members:

My name is Michael H. Reed. I am a partner in the Philadelphia office of Pepper Hamilton LLP, and am the current Chair of the ABA Standing Committee on Federal Judicial Improvements. I am here today at the request of ABA President James R. Silkenat to express our support for S. 1385, the Federal Judgeship Act of 2013, which is based on the detailed assessment of judgeship needs of the federal judiciary released by the Judicial Conference of the United States this past March. We request that this statement be made part of the hearing record.

This long-overdue comprehensive judgeship bill would authorize 70 permanent and 21 temporary judgeships at the district and appellate court levels, and would convert eight existing temporary district court judgeships into permanent positions. In total, these new judgeships would increase the number of authorized Article III judges by 10 percent. We thank you for introducing S. 1385 on behalf of the judiciary and applaud you for holding this hearing, which will help highlight a growing problem that should concern every Member of Congress as much as it does the American Bar Association – insufficient resources are diminishing the ability of our federal courts to serve the people and deliver timely justice.

Adverse Effects of Insufficient Resources

Our judicial system is predicated upon the principles that each case deserves to be evaluated on its merits, that justice will be dispensed even-handedly, and that justice delayed is justice denied. While neither the Judicial Conference nor the ABA wants to encourage unnecessary growth in the size of the federal judiciary, the ability of our federal courts to live up to these principles is, in large part, dependent on our judges having manageable workloads.

When federal courts do not have sufficient judges to keep up with the workload, civil trial dockets take a back seat to criminal dockets due to the Speedy Trial Act. As a result, persistent judge shortages increase the length of time that civil litigants and businesses wait for their day in court, create pressures that “robotize” justice, and increase case backlogs that will perpetuate delays for years to come. This has real consequences for the financial well-being of communities and businesses and the personal lives of litigants whose cases must be heard by the federal

courts – e.g., cases involving challenges to the constitutionality of a law, unfair business practices under federal antitrust laws, patent infringement, police brutality, employment discrimination, and bankruptcy.

The negative consequences of too few judges have been exacerbated by the across-the-board budget cuts mandated by sequestration this fiscal year. Staff layoffs and furloughs and reductions in services and operating hours implemented in courts across the country in response to sequestration have made it even more difficult for courts with too few judges to keep up with caseloads and deliver timely justice.

The combination of too few judges and insufficient funding is creating a resource crisis for the federal judiciary. While the ABA has long advocated for increased resources for the federal judiciary, the current state of affairs prompted our ABA president to take the unusual step of sending a communication last month to all 390,000 members to urge them to take action.

S. 1385

S. 1385 proposes the creation of a sizable number of new judgeships because it, in effect, is a “catch-up” bill. The last comprehensive judgeship bill was enacted in 1990. In the intervening years, federal judicial caseloads have steadily and steeply increased, fueled in large part by congressional expansion of federal court jurisdiction and national drug and immigration policies that call for and fund enhanced law enforcement efforts. Starting in the 105th Congress, new judgeship bills, based on the Judicial Conference’s analysis of need, were introduced regularly but failed to receive action in both chambers. Instead, Congress adopted a piecemeal approach, authorizing 34 additional district court judgeships in 1999, 2000, and 2002, while allowing a half dozen temporary judgeships in other districts expire. Consequently, over the past 23 years, district courts have experienced a 39 percent increase in filings but only a 4 percent increase in judgeships. Even more sobering, the number of appellate court judges has not changed, despite a 34 percent increase in filings since 1991.

The district courts in which the Judicial Conference is recommending additional judgeships currently are laboring under weighted case filings of almost 630 per authorized judgeship, far

above the 430 weighted caseload threshold that the Judicial Conference uses as a starting point for examining a district court's need for additional judgeships. If Congress created all of the judgeships requested, the weighted caseload of all authorized district court judgeships would still be in excess of 430 cases.

In some jurisdictions, the current caseloads are dramatically worse: judges of the District of Arizona and the Western District of Texas have caseloads that exceed 700 weighted filings, and judges in three districts – the Western District of Texas, the Eastern District of Texas, and the District of Delaware – labor to dispense timely justice with weighted caseloads of over 1,000 per judge. The litigants before these courts deserve better. We join the Judicial Conference in making an urgent plea to Congress to authorize a sufficient number of new judgeships in each of these five districts as soon as possible.

The need for more judgeships is just as evident in our courts of appeals, where the number of appeals filed annually has grown from approximately 41,000 in 1990 to close to 56,500 in March 2013. The Judicial Conference has limited its request to four permanent judgeships for the Ninth Circuit Court of Appeals and one permanent judgeship for the Sixth Circuit Court of Appeals.

Congressional Response to Judgeship Recommendations
and the GAO Report on Methodology

Over the last decade, even though Members of Congress largely disregarded the Judicial Conference's requests for additional judgeships, they have respected the judiciary's funding needs during the appropriation process, requiring in return that the judiciary find ways to economize and contain growth. The judiciary has obliged and continues to aggressively seek ways to contain administrative costs, including recently implementing a new records retention policy that is expected to save \$3 million annually once it is fully operational.¹ It also has implemented many new methods to handle caseload growth, including enhancing its use of time-saving and cost-effective technologies, developing and implementing innovative case-

¹The Third Branch, *Reappraisal of Records Saving Millions for Judiciary*, 8/20/13, at: <http://news.uscourts.gov/reappraisal-records-saving-millions-judiciary>

management systems, and relying more heavily on senior judges, magistrate judges and staff attorneys.

We understand that some Members of Congress continue to believe that the judiciary is not trying hard enough. The ABA's practicing lawyers, on the other hand, are concerned that in seeking ways to compensate for insufficient "judge-power," courts may be forced to adopt time-saving judicial procedures, some of which may serve efficiency at the price of altering the delivery and quality of justice over time in ways not intended. We caution that utilization of more and more methods to dispose of cases as quickly as possible runs the grave risk of adversely affecting the quality of justice delivered by our federal courts.

We are aware that some Members of Congress also question the method by which weighted and adjusted case filings are determined and caseload minimums for considering the need for additional judgeships are set by the Judicial Conference. A review of documents dating back to 2003 reveals that the concerns of the Government Accountability Office (GAO) with regard to the validity of the methodology used to determine case weights has been a major factor of contention that likely has contributed to the failure to enact a comprehensive judgeship bill since 1990.² We urge the Judicial Conference and the GAO to collaborate and resolve this impasse so that the substantive needs of the U.S. courts can be met without further delay.

Recommendations to Restore Funding

Just as Congress has an obligation to oversee the courts, it likewise has an obligation to provide the judiciary with the resources it needs to carry out its constitutional and statutory duties. There are several steps, short of enactment of S. 1385, that Congress could take to help the judiciary maintain its excellence and serve the people in a timely and just manner:

²Federal Judicial Center, 2003-2004 District Court Weighting Study (2005); S. Rpt. 110-427 and S. Hrg.110-457, Serial No. J-110-111(2008); Government Accountability Office, The General Accuracy of District and Appellate Judgeship Case-Related Workload Measures, Testimony before the Committee in the Judiciary, GAO-03-937T (2003); Government Accountability Office, The General Accuracy of District and Appellate Judgeship Case-Related Workload Measures, Testimony before the Committee in the Judiciary,GAO-08-928T (2008);Government Accountability Office, The General Accuracy of District and Appellate Judgeship Case-Related Workload Measures, Testimony before the Committee in the Judiciary, GAO-09-1050T(2009)

1. Congress should establish new judgeships in the five district courts singled out by the Judicial Conference for immediate relief -- the Central District of California, the District of Arizona, the Western District of Texas, the Eastern District of Texas, and the District of Delaware. The astronomically high caseloads under which they struggle are indisputable. Members of the Senate Financial Services and General Government Appropriations Committee acknowledged the severity of the conditions by including a provision in their FY 2014 appropriations bill to authorize new judgeships in each of the five districts.³
2. Congress should convert the eight temporary judgeships into permanent judgeships or at least extend their temporary status for ten years or more. To reiterate the Judicial Conference's concern, without reauthorization, all eight will lapse next year, further diminishing scarce judicial resources in these districts, and both the Senate and House Financial Services and General Services Appropriation bills contain provisions extending these judgeships.
3. Congress should consider the impact of legislation on the workload of the federal courts. Congress should take steps to assure that the judiciary has sufficient resources to handle new responsibilities resulting from enactment of legislation that expands federal court jurisdiction or is expected to substantially increase the workload of the federal courts. For example, Congress should take steps to assure that the judiciary has sufficient resources and manpower to fulfill its new responsibilities under S. 744, the Border Security, Economic Opportunity and Immigration Modernization Act, if enacted.
4. Congress should make the filling of judicial vacancies a priority and work with common purpose to reduce the long-standing 10 percent vacancy rate. Particular attention should be given to vacancies identified as judicial emergencies. This requires Senators to submit their recommendation to the White House in a timely manner and to avoid undue delay in scheduling up-or-down floor votes on nominees reported by the Judiciary Committee.

³ See appendix.

The vacancy rate has lingered at or above 10 percent for most of the past four years. As of September 8, there are 94 vacancies on the courts, 38 of which have been classified as judicial emergencies by the Administrative Office of the U.S. Courts.⁴ Filling these vacancies expeditiously would provide immediate and lasting relief to the courts.

5. When making budgeting decisions, Congress should take into consideration that the federal judiciary is essential to preserving constitutional democracy and freedom, and that waiting to restore funds until the erosion in the quality of justice becomes a *fait accompli* is not a viable national option. The ABA urges Congress to protect the federal judiciary from future deficit reduction and to increase funding for FY 2014 to the Senate Appropriations Committee's recommended funding level of \$6.67 billion.
6. To better prepare for challenges facing the courts, we suggest that your subcommittee give consideration to holding hearings to explore creating structures that would facilitate cooperation and ongoing discussion of issues of mutual concern. The so-called "Williamsburg Conferences," convened annually from 1979 to 1994, and the Office of the Administration of Justice, operational within the Justice Department from 1977 to 1981 might provide valuable guideposts for such an endeavor.

Thank you for the opportunity to express the views of the ABA on issues so central to our mission.

⁴ <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/JudicialEmergencies.aspx>:

**NOTABLE LEGISLATIVE PROPOSALS THAT WOULD AUTHORIZE
NEW ARTICLE III JUDGESHIPS**

113TH CONGRESS

[S. 1385](#), the Federal Judgeship Act of 2013, was introduced by Senators Chris Coons (D-DE) and Patrick Leahy (D-VT) on 7/30/13. This omnibus judgeship bill is based on the recommendations of the Judicial Conference of the United States.

[S. 1371](#), the FY 2014 Financial Services and General Government Appropriations Act, was reported to the Senate on 7/25/13.

[H.R. 2789](#), the FY 2014 Financial Services and General Government Appropriations Act, was reported to the House on 7/17/13.

[S. 744](#), the Border Security, Economic Opportunity, and Immigration Modernization Act, was passed by the Senate on 6/27/13.

[S. 699](#), Court Efficiency Act of 2013, was introduced by Senator Charles Grassley (R-IA) on 4/10/ 13.

Court of Appeals					
	S. 1385	S. 1371	H.R. 2789	S. 744	S. 699
Second Circuit					1P
Sixth Circuit	1P				
Ninth Circuit	4P, 1T				
Eleventh Circuit					1P
DC Circuit					-3P

District Courts					
	S. 1385	S. 1371	H.R. 2789	S. 744	S. 699
New York (Eastern)	2P				
New York (Southern)	1P, 1T				
New York (Western)	1P				
Delaware	1P	1P			
New Jersey	2P, 1T				
Virginia (Eastern)	1T				
Texas (Eastern)	2P, 1T/P	1T	1T		
Texas (Southern)	2P	1P		1P	

	S. 1385	S. 1371	H.R. 2789	S. 744	S. 699
Texas (Western)	4P, 1T	2P		2P	
Tennessee (Middle)	1T				
Indiana (Southern)	1P				
Wisconsin (Western)	1P				
Minnesota	1P, 1T	1P			
Missouri (Eastern)	1T/P	1T	1T		
Missouri (Western)	1T				
Arizona	6P, 4T, 1T/P	2P, 1T, 1T/P	1T	2P	
California (Northern)	5P, 1T				
California (Eastern)	6P, 1T	4P		3P	
California (Central)	10P, 2T, 1T/P	1T, 1T, 1T/P	1T		
California (Southern)	3P, 1T				
Hawaii		1T			
Idaho	1P				
Nevada	1P, 1T				
Oregon	1T				
Washington (Western)	2P				
Colorado	2P				
Kansas*	1T/P	1T	1T		
New Mexico	1P, 1T/P	1P, 1T, 1T/P	1T		
Alabama (Northern)	1T/P	1T	1T		
Florida (Northern)	1P				
Florida (Middle)	5P, 1T				
Florida (Southern)	3P, 1T/P	1T	1T		
Georgia (Northern)	1P, 1T				

“P” denotes permanent; “T” denotes temporary; “T/P” denotes conversion of temporary to permanent

* If the temporary judgeship in this district lapses, the Judicial Conference’s recommendation would be amended to one additional permanent judgeship.