

**STATEMENT OF HONORABLE TIMOTHY M. TYMKOVICH
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JUDICIAL CONFERENCE OF THE UNITED STATES
BEFORE THE SUBCOMMITTEE ON
BANKRUPTCY AND THE COURTS
OF THE
COMMITTEE ON THE JUDICIARY OF THE
UNITED STATES SENATE**

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Chairman Coons, Ranking Member Sessions and members of the subcommittee, I am Timothy Tymkovich, Circuit Judge for the Tenth Circuit Court of Appeals and Chair of the Judicial Conference Committee on Judicial Resources, and I appreciate your invitation to appear today to discuss the Article III judgeship needs of the Federal Judiciary.

The Judicial Resources Committee of the Judicial Conference of the United States is responsible for all issues involving human resource administration, including the need for Article III judges and support staff in the U.S. courts of appeals and district courts. My testimony today has two purposes: to provide information about (1) the judgeship needs of the district and appellate courts, and (2) the process by which the Judicial Conference determines those needs.

It has been over two decades since Congress passed a comprehensive judgeship bill. In that 1990 legislation, Congress created 85 additional judgeships reflecting an 11% increase in total authorized Article III judgeships. As I will discuss later, Congress has

also provided some relief in district courts with exceptional needs, primarily along the border, in the late 1990s and early 2000s.

But caseloads have continued to rise. To enable the Judiciary to continue serving litigants efficiently and effectively, the judicial workforce must be expanded. I would therefore like to thank Senator Coons and Senator Leahy for introducing S. 1385, the Federal Judgeship Act of 2013, which reflects all of the Judicial Conference's Article III judgeship recommendations transmitted to Congress earlier this year. While the Judicial Conference feels strongly that each of these judgeship recommendations is justified due to the growing workload in these courts, it is cognizant of the current economic realities and the prospective cost associated with the proposal. It therefore acknowledges that it may not be possible for all of these judgeships to be authorized in a single legislative vehicle and that prioritization within the recommendations may be necessary.

Every other year, the Conference conducts a survey of the judgeship needs of the U.S. courts of appeals and U.S. district courts. The latest survey was completed in March 2013. Consistent with the findings of that survey and the deliberations of my Committee, the Conference recommended that Congress establish 91 new judgeships in the courts of appeals and district courts. The Conference also recommended that eight existing temporary district court judgeships be converted to permanent status. Appendix 1 contains the specific recommendation as to each court. All of the judgeships recommended by the Conference would be authorized by S. 1385. For many of the

courts, the recommendations reflect needs that have existed since the last omnibus judgeship bill was enacted in 1990.

Survey Process

In developing these recommendations, the Judicial Conference (through its committee structure) uses a formal process to review and evaluate Article III judgeship needs. The Committee on Judicial Resources and its Subcommittee on Judicial Statistics conduct these reviews, but the Conference makes the final recommendations on judgeship needs. Before a judgeship recommendation is transmitted to Congress, it undergoes careful consideration and review at six levels within the Judiciary, beginning with the judges of the particular court making a request. If the court does not make a request, the Conference does not consider recommending a judgeship for that court. Next, the Subcommittee on Judicial Statistics conducts a preliminary review of the request and either affirms the court's request or offers its own reduced recommendation, based on the court's workload and other stated contributing factors. Once this review is complete, the Subcommittee's recommendation and the court's initial request are forwarded to the judicial council of the circuit in which the court is located.

Upon completion of the council's review, the Subcommittee on Judicial Statistics conducts a further and final review of the request and/or recommendation, reconciling any differences that may still exist. The Subcommittee then submits the recommendation to the full Committee on Judicial Resources. Finally, the Judicial Conference considers

the full Committee's final product. In the course of the 2013 survey, the courts requested 94 additional judgeships, permanent and temporary. Our review procedure reduced the number of recommended additional judgeships to 91.

During each judgeship survey, requests from courts recommended for additional judgeships in the previous survey (two years prior) are re-considered, taking into account such factors as the most current caseload data, relevant trends and changes in the availability of judicial resources. In some instances, this review prompts adjustments to previous recommendations.

Judicial Conference Standards

The recommendations developed through the review process described above (and in more detail in Appendix 2) are based in large part on a numerical caseload standard. These standards are not by themselves fully indicative of each court's needs. They represent the caseload at which the Conference begins to consider requests for additional judgeships – the starting point in the process, not the end point.

Caseload statistics must be considered and weighed with other court-specific information to arrive at a sound measurement of each court's judgeship needs. Circumstances that are unique, transitory, or ambiguous are carefully considered so as not to result in an overstatement or understatement of actual burdens. The Conference process therefore takes into account additional factors, including:

- the number of senior judges available to a specific court, their ages, and levels of activity;
- available magistrate judge assistance;
- geographical factors, such as the size of the district or circuit and the number of places of holding court;
- unusual caseload complexity;
- temporary or prolonged caseload increases or decreases;
- the use of visiting judges; and
- any other factors noted by individual courts (or identified by the Statistics Subcommittee) as having an impact on the need for additional judicial resources. (For example, the presence of high profile financial fraud and bribery prosecutions, the number of multiple defendant cases, and the need to use court interpreters in a high percentage of criminal proceedings).

Courts requesting additional judgeships are specifically asked about their efforts to make use of all available resources including their use of senior and magistrate judges, intercircuit and intracircuit assignment of judges to provide short-term relief, and alternative dispute resolution.

District Court Analysis

Reviewing the judgeship needs of the district courts, the Conference, after accounting for the additional judgeship(s) requested by the court, initially applies a

standard of 430 weighted filings per judgeship to gauge the impact on the district.

Weighted filings statistics account for the different amounts of time district judges require to resolve various types of criminal and civil cases. Applying this standard to the current recommendations, the workload exceeds 500 weighted filings per judgeship in 28 of the 32 district courts in which the Conference is recommending either an additional judgeship or conversion of an existing temporary judgeship to permanent status; 17 courts exceeded 600 weighted filings per judgeship.

Appellate Court Analysis

In the courts of appeals, the Conference, again after accounting for the additional judgeship(s) requested by the circuit court, uses a standard of 500 adjusted filings per panel as its starting point. Adjusted filings are calculated by removing reopened appeals and counting original pro se appeals as one-third of a case. In each appellate court in which the Conference is recommending additional judgeships, the caseload levels substantially exceed the standard, averaging over 700 adjusted filings per panel. Other factors bearing on workload have been closely considered as well. For example, the circuits' individual rules regarding how cases are designated for oral argument affect the percentage of cases that receive oral argument in each circuit, which also impacts the workload.

In short, caseload statistics furnish the threshold for consideration, but the process entails a critical scrutiny of the caseloads in light of many other considerations and variables, all of which are considered together.

Caseload Information

National data provide general information about the changing volume of the courts' business. Since the last comprehensive judgeship bill for Article III courts was enacted in 1990, case filings have risen significantly. From fiscal year 1991 to fiscal year 2012 filings in the district courts have risen 39 percent, with civil filings increasing by 32 percent and criminal felony defendants by 67 percent. Between 1999 and 2002, Congress created 34 additional judgeships in the district courts in response to particular problems in certain districts. Even with these additional resources, however, the number of weighted filings per judgeship nationwide in district courts has reached 520--clearly well above the Judicial Conference standard for considering additional judgeships.

Over the same time, court of appeals filings have grown by 34 percent, but, unlike the district courts, no judgeships have been added to the courts of appeals since 1990. As a result, the national average caseload per three-judge panel has reached 1,033. Were it not for the assistance provided by senior and visiting judges, the appellate courts would not have been able to keep pace.

The judgeship needs of a particular court, however, require a more focused analysis of court-specific data. Indeed, in districts where the Conference has recommended additional judgeship resources, the need is much more dramatic compared to the national figures. As stated previously, there are 28 district courts with caseloads exceeding 500 per judgeship, and more than half of these courts have caseloads in excess

of 600 per judgeship. Overall, the average weighted filings for courts needing additional judgeships is 628, far exceeding the Conference standard of 430 for additional judgeships. Appendix 3 provides a more detailed description of the most significant changes in the caseload since 1990.

The lack of additional judgeships combined with the growth in caseload has created enormous difficulties for many courts across the nation, but it has reached urgent levels in five district courts that are struggling with extraordinarily high workloads, with 700 or more weighted filings per authorized judgeship, averaged over a three-year period. The severity of conditions in the Eastern District of California, the Eastern District of Texas, the Western District of Texas, the District of Arizona, and the District of Delaware requires immediate action. The Conference urges Congress to establish new judgeships in those districts as soon as possible.

The Conference is also extremely concerned about the eight existing temporary judgeships which have been recommended for conversion to permanent status. All eight of these judgeships will lapse before the end of fiscal year 2014, and without re-authorization, these on-board resources will be lost, further damaging the Federal Judiciary by diminishing already scarce judicial resources in these districts.

The Conference appreciates the efforts that the Senate, and in particular this Committee, has made to authorize some of these critically needed judgeships. Specifically, the Conference supports all of the judgeships included in S. 744, the Border Enforcement, Economic Opportunity, and Immigration Reform Act, passed by the Senate earlier this year. That bill would authorize eight new district court judgeships and convert two temporary district court judgeships to permanent status in Southwest border districts

where the caseload, already at extraordinarily high levels, would be further impacted by the bill's immigration enforcement measures.

Conclusion

Over the last 20 years, the Judicial Conference has developed, adjusted, and refined the process for evaluating and recommending judgeship needs in response to both judiciary and congressional concerns. The Conference does not recommend, or wish, indefinite growth in the number of judges. It recognizes that growth in the Judiciary must be carefully limited to the number of new judgeships that are necessary to exercise federal court jurisdiction.¹ The Conference attempts to balance the need to control growth and the need to seek resources that are appropriate to the Judiciary's caseload. In an effort to implement that policy, we have requested far fewer judgeships than the caseload increases and other factors would suggest are now required. Furthermore, the Conference, mindful of the dire fiscal realities that our federal government is currently facing, acknowledges the possibility that not all of the requested judgeships may be created and that some prioritization may have to occur.

Again, the Judicial Conference of the United States is grateful for the introduction of S. 1385, the Federal Judgeship Act of 2013, which reflects the Article III judgeship recommendations of the Judicial Conference of the United States. Thank you for the opportunity to appear today and for your continued support of the Federal Judiciary. I would be happy to answer any questions the Subcommittee may have.

¹JCUS-SEP 93, p.51; JCUS-SEP 95, p.44.

TABLE 1. ADDITIONAL JUDGESHIPS OR CONVERSION OF EXISTING JUDGESHIPS RECOMMENDED BY THE JUDICIAL CONFERENCE
2013

CIRCUIT/DISTRICT	AUTHORIZED JUDGESHIPS	JUDICIAL CONFERENCE RECOMMENDATION	ADJUSTED FILINGS PER PANEL/WEIGHTED FILINGS PER AUTHORIZED JUDGESHIP
U.S. COURTS OF APPEALS		5P, 1T	ADJUSTED FILINGS
NINTH	29	4P, 1T	843
SIXTH	16	1P	593
U.S. DISTRICT COURTS		65P, 20T, 8T/P	WEIGHTED FILINGS
DELAWARE	4	1P	1,165
CALIFORNIA, EASTERN	6	6P, 1T	1,132
TEXAS, EASTERN	8	2P, T/P	1,042
TEXAS, WESTERN	13	4P, 1T	752
ARIZONA	13	6P, 4T, T/P	712
CALIFORNIA, CENTRAL	28	10P, 2T, T/P	691
CALIFORNIA, NORTHERN	14	5P, 1T	675
COLORADO	7	2P	663
WASHINGTON, WESTERN	7	2P	660
INDIANA, SOUTHERN	5	1P	642
FLORIDA, SOUTHERN	18	3P, T/P	639
FLORIDA, MIDDLE	15	5P, 1T	634
NEW YORK, WESTERN	4	1P	626
FLORIDA, NORTHERN	4	1P	619
WISCONSIN, WESTERN	2	1P	613
ALABAMA, NORTHERN	8	T/P	613
CALIFORNIA, SOUTHERN	13	3P, 1T	602
NEW YORK, EASTERN	15	2P	596
NEW JERSEY	17	2P, 1T	587
IDAHO	2	1P	577
TEXAS, SOUTHERN	19	2P	568
MINNESOTA	7	1P, 1T	556
MISSOURI, WESTERN	6	1T	553
GEORGIA, NORTHERN	11	1P, 1T	552
NEVADA	7	1P, 1T	547
OREGON	6	1T	533
NEW MEXICO	7	1P, T/P	527
NEW YORK, SOUTHERN	28	1P, 1T	525
TENNESSEE, MIDDLE	4	1T	497
VIRGINIA, EASTERN	11	1T	472
KANSAS*	6	T/P	471
MISSOURI, EASTERN	8	T/P	424

P = PERMANENT; T = TEMPORARY; T/P = TEMPORARY MADE PERMANENT

* If the temporary judgeship lapses, the recommendation is amended to one additional permanent judgeship.

**JUDGESHIP RECOMMENDATIONS OF THE JUDICIAL CONFERENCE
OF THE UNITED STATES**

JUDICIAL CONFERENCE PROCESS

In developing judgeship recommendations for consideration by Congress, the Judicial Conference, through its committee structure, uses a formal survey process to review and evaluate Article III judgeship needs, regularly and systematically. The nationwide surveys of judgeship needs are based on established criteria related to the workload of the judicial officers. These reviews are conducted biennially by the Committee on Judicial Resources (Committee), with final recommendations on judgeship needs approved by the Judicial Conference.

The recommendations are based on justifications submitted by each court, the recommendations of the judicial councils of the circuits, and an evaluation of the requests by the Committee using the most recent caseload data. During each judgeship survey, the Judicial Conference reconsiders prior, but still pending, recommendations based on more recent caseload data and makes adjustments for any court where the workload no longer supports the need for additional judgeships. The Judicial Conference has also implemented a process for evaluating situations where it may be appropriate to recommend that certain positions in district courts be eliminated or left vacant when the workload does not support a continuing need for the judicial officer resource.

In general, the survey process is very similar for both the courts of appeals and the district courts. First, the courts submit a detailed justification to the Committee's Subcommittee on Judicial Statistics (Subcommittee). The Subcommittee reviews and evaluates the request and prepares a preliminary recommendation which is given to the courts and the appropriate circuit judicial councils for their recommendations. More recent caseload data are used to evaluate responses from the judicial council and the court, if a response is submitted, as well as to prepare recommendations for approval by the Committee. The Committee's recommendations are then provided to the Judicial Conference for final approval.

COURT OF APPEALS REVIEWS

At its September 1996 meeting, on the recommendation of the Judicial Resources Committee, which consulted with the chief circuit judges, the Judicial Conference unanimously approved a new judgeship survey process for the courts of appeals. Because of the unique nature of each of the courts of appeals, the Judicial Conference process involves consideration of local circumstances that may have an impact on judgeship needs. In developing recommendations for courts of appeals, the Committee on Judicial Resources takes the following general approach:

- A. Courts are asked to submit requests for additional judgeships provided that at least a majority of the active members of the court have approved submission of the request; no recommendations for additional judgeships are made without a request from a majority of the members of the court.
- B. Each court requesting additional judgeships is asked to provide a complete justification for the request, including the potential impact on its own court and the district courts within the circuit of not getting the additional judgeships. In any instance in which a court's request cannot be supported through the standards noted below, the court is requested to provide supporting justification as to why the standard should not apply to its request.
- C. The Committee considers various factors in evaluating judgeship requests, including a statistical guide based on a standard of 500 filings (with removal of reinstated cases) per panel and with pro se appeals weighted as one third of a case. This caseload level is used only as a guideline and not used to determine the number of additional judgeships to recommend. The Committee **does not** attempt to bring each court in line with this standard.

The process allows for discretion to consider any special circumstances applicable to specific courts and recognizes that court culture and court opinion are important ingredients in any process of evaluation. The opinion of a court as to the appropriate number of judgeships, especially the maximum number, plays a vital role in the evaluation process, and there is recognition of the need for flexibility to organize work in a manner which best suits the culture of the court and satisfies the needs of the region served.

DISTRICT COURT REVIEWS

In an ongoing effort to control growth, in 1993, the Judicial Conference adopted new, more conservative criteria to evaluate requests for additional district judgeships, including an increase in the benchmark caseload standard from 400 to 430 weighted cases per judgeship. Although numerous factors are considered in looking at requests for additional judgeships, the primary factor for evaluating the need for additional district judgeships is the level of weighted filings. Specifically, the Committee uses a case weighting system¹ designed to measure judicial caseload, along with a variety of other factors, to assess judgeship needs. The Judicial Conference and its Committee review all available information on the workload of the courts and supporting material provided by the individual courts and judicial councils of the circuits. The Committee takes the following approach in developing recommendations for additional district judgeships:

- A. In 2004, the Subcommittee amended the starting point for considering requests from current weighted filings above 430 per judgeship to weighted filings in excess of 430 per judgeship *with the additional judgeships requested*. For courts with fewer than five authorized judgeships, the addition of a judgeship would often reduce the caseload per judgeship substantially below the 430 level. Thus, for small courts the 430 per judgeship standard was replaced with a standard of current weighted filings above 500 per judgeship. These caseload levels are used only as a guideline and a factor to determine the number of additional judgeships to recommend. The Committee **does not** attempt to bring each court in line with this standard.
- B. The caseload of the individual courts is reviewed to determine if there are any factors present that create a temporary situation that would not provide justification for additional judgeships. Other factors are also considered that would make a court's situation unique and provide support either for or against a recommendation for additional judgeships.
- C. The Committee reviews the requesting court's use of resources and other strategies for handling judicial workload, including a careful review of each court's use of senior judges, magistrate judges, and alternative dispute resolution, in addition to a review of each court's use of and willingness to use visiting judges. These factors and geographic considerations are used in conjunction with the caseload information to decide if additional judgeships are appropriate, and to arrive at the number of additional judgeships to recommend for each court.
- D. The Committee recommends temporary judgeships in all situations where the caseload level justifying additional judgeships occurred only in the most recent years, or when the addition of a judgeship would place a court's caseload close to the guideline of 430

¹ "Weighted filings" is a mathematical adjustment of filings, based on the nature of cases and the expected amount of judge time required for disposition. For example, in the weighted filings system for district courts, each civil antitrust case is counted as 3.45 cases while each homicide defendant is counted as 1.99 weighted cases. The weighting factors were updated by the Federal Judicial Center in June 2004 based on criminal defendants and civil cases closed in calendar year 2002.

weighted filings per judgeship. The Committee also recommends at least a portion of additional judgeships as temporary when recommending a large number of additional judgeships for a particular court. In some instances the Committee also considers the pending caseload per judgeship as an additional factor supporting an additional temporary judgeship.

CASELOAD CHANGES SINCE LAST JUDGESHIP BILL

A total of 34 additional district court judgeships have been created since 1991, but six temporary judgeships have lapsed. These changes have resulted in a four percent increase in the overall number of authorized district court judgeships; court of appeals judgeships have not increased. Since the last comprehensive judgeship bill was enacted for the U.S. courts of appeals and district courts, the numbers of cases filed in those courts have grown by 34 percent and 39 percent, respectively. Specific categories of cases have seen dramatic changes over the past two decades. Following is a summary of the most significant changes.

U.S. COURTS OF APPEALS *(Change in authorized judgeships: 0)*

- The total number of appeals filed has grown by 34 percent, nearly 15,000 cases, since 1991.
- Appeals of criminal cases have increased 33 percent since 1991.
- The most dramatic growth in criminal appeals has been in immigration appeals, which increased from 145 in 1991 to 1,616 in 2012.
- Appeals of decisions in civil cases from the district courts have risen eight percent since 1991.
- The most dramatic growth in civil appeals has been in prisoner appeals where case filings are up 37 percent since 1991.
- Appeals involving administrative agency decisions have fluctuated over the years, but have nearly tripled, growing from 2,859 in 1991 to 8,391 in 2012. The increases resulted primarily from appeals of decisions by the Board of Immigration Appeals, with the largest increases occurring in the Second and Ninth Circuits.
- Original proceedings have grown from 609 in 1991 to 4,265 in 2012, partially as a result of the Antiterrorism and Effective Death Penalty Act which requires prisoners to seek permission from courts of appeals for certain petitions. Although enacted in April 1996, data for these and certain pro se mandamus proceedings were not reported until October 1998.

U.S. DISTRICT COURTS *(Change in authorized judgeships: +4%)*

- Total filings have grown by over 100,000 cases, a 39 percent increase since 1991.
- The civil caseload has fluctuated over the last 21 years, but has increased 32 percent overall since 1991.

- The most dramatic growth in civil filings occurred in cases related to personal injury product liability which have grown from 10,952 filings in 1991 to 43,083 in 2012, due to a large number of asbestos filings and an increase in multi-district litigation cases.
- Civil rights filings increased steadily after the Civil Rights Act of 1990 was enacted. Although cases have declined from their peak in 1997, the number of civil rights filings was 90 percent above the 1991 level.
- Protected property rights cases more than doubled between 1991 and 2012. Trademark, patent, and copyright filings all showed growth since 1991, although the largest increase occurred in patent filings, which more than quadrupled.
- The number of social security cases filed in 2012 rose to more than twice the number filed in 1991.
- Prisoner petitions increased 26 percent between 1991 and 2012, due to significantly higher numbers of motions to vacate sentence filings and habeas corpus petitions.
- Fair Debt Collection Practices Act cases were first categorized separately in 2008. These filings increased from 4,239 in 2008 to 9,320 cases in 2012.
- Foreclosure filings nearly quadrupled between 2008 and 2012, reversing a steady decline between 1991 and 2008.
- The number of criminal felony defendants has increased 67 percent since 1991.
 - The largest increase, by far, has been in immigration offenses which rose from 2,448 in 1991 to 25,184 in 2012.
 - Defendants charged with firearms offenses more than doubled between 1991 and 2012, an increase of over 4,500 cases.
 - The number of drug-related defendants in 2012 was 26 percent above the number filed in 1991.
 - The number of fraud defendants fluctuated between 1991 and 2012, but remained 24 percent above the number filed in 1991.
 - Defendants charged with drug, immigration, firearms, and fraud offenses comprised 85 percent of all felony defendants in 2012.
 - Sex offense defendants nearly doubled between 2005 and 2012.