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

HEARING

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

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

WEDNESDAY, SEPTEMBER 30, 2009

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE
OVERSIGHT AND THE COURTS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:31 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Sheldon Whitehouse, Chairman of the Subcommittee, presiding.

Present: Senators Whitehouse, Cardin, and Sessions.

OPENING STATEMENT OF HON. SHELDON WHITEHOUSE, A U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Chairman WHITEHOUSE. All right. The hearing will come to order. We are cleared to proceed so as not to keep three such distinguished members of the judiciary waiting. I am going to make a brief statement, and then with any luck our Ranking Member will have arrived, and he can make whatever opening statement he wishes. If for some reason I get through my opening statement and he is not here, I think we will just swear in the witnesses and begin with the testimony and interrupt for the Ranking Member when he arrives. So if you are in the middle of enormously vital and important testimony and I interrupt for the statement, please take no offense.

One of our primary responsibilities here on the Senate Judiciary Committee, and particularly of this Subcommittee on Administrative Oversight and the Courts, is to make sure the Federal judiciary has the tools and the resources it needs to perform its crucial role in our constitutional structure. Today's hearing takes up that responsibility by considering the need for Federal judgeships in district and circuit courts across the country. We all recognize the importance of the Federal judiciary in the proper functioning of our democracy and we all want to ensure that the courts have the resources they need to protect our liberties and administer justice.

The confirmation of Justice Sonia Sotomayor to the United States Supreme Court was the focus of great attention and much media coverage. That is understandable given the importance of our Supreme Court, but we must never forget that most of the judicial business in our Federal system never gets anywhere near the Supreme Court. Every day, Americans from all walks of life come

to Federal district court to vindicate their legal rights. The rule of law depends on the prompt and proper resolution of those cases. Justice delayed is often justice denied, so district courts must be able to process cases in a timely manner.

Similarly, swift redress from a circuit court is not a matter of politics or controversy, but of simple justice and effective government. Courts must have resources adequate to meet their high purpose. We in Congress must ensure that they do not lack the tools for their constitutional role.

The Federal Judgeship Act of 2009, which was introduced by the Chairman of the Judiciary Committee, Senator Leahy, would fulfill that responsibility. That bill reflects the recommendations made by the Judicial Conference in March of 2009. It would be the first comprehensive judgeships legislation since 1990, nearly 20 years ago, a period which has seen significant expansion in the workload of numerous Federal courts. It provides for 12 new circuit court judgeships and 51 new district court judgeships. These recommendations are, understandably, very similar to the 2007 recommendations of the Judicial Conference that passed out of Committee last year by a bipartisan vote of 15–4. The Federal Judgeship Act of 2009 should expect similar support from both sides of the aisle. I hope that the Judiciary Committee will consider and pass it soon.

The numbers underscore the need for action. On average, there are 573 so-called weighted filings in the district courts for which new judgeships are recommended, well above the 430 weighted filings needed to trigger a judgeship recommendation by the Judicial Conference. For the six circuit courts where new judgeships are recommended, there are an average of 802 adjusted filings per panel, well above the 500 adjusted filings per panel measure used for judgeship recommendations.

Of course, the courts do not simply consider mere statistics in making their judgeship recommendations. They also are careful to consider all the resources available to a district or circuit court, including senior and visiting judges who can contribute to sharing the workload, and the use of magistrate judges within statutory limits. Given the care and conservatism with which they have been developed, the Judicial Conference's recommendations deserve the utmost consideration. It is telling, for example, that while 77 new judgeships were requested by courts across the Nation, the Judicial Conference has recommended only 63 judgeships to Congress.

Congress has repeatedly put off dealing with the courts' growing workload. Now is the time to act, and I commend Chairman Leahy for his leadership on the issue. The Federal judiciary is a beacon of principle and justice to the rest of the world. We must keep it that way.

Today we will hear from Judge Singal of the District of Maine who is appearing on behalf of the Judicial Conference and will explain the 2009 judgeship recommendations made by that body.

We will also hear from Judge O'Neill of the Eastern District of California, a district facing an overloaded docket despite the best efforts of the active, senior, and magistrate judges. I know that this has been a particular concern of my colleague Senator Feinstein,

and it demonstrates the kind of pressures put on judges and the delays facing litigants as workloads spiral out of control.

Finally, we will hear from Judge Tjoflat, a judge on the Eleventh Circuit and its former chief judge. I welcome all the witnesses. I look forward to your testimony, and I thank you all for being here today.

Since we do not have the Ranking Member present, let me first inquire if the distinguished Senator from Maryland, Senator Cardin, would like to make an opening statement in the time we have available. Then we will proceed to the witnesses.

STATEMENT OF HON. BENJAMIN L. CARDIN, A U.S. SENATOR FROM THE STATE OF MARYLAND

Senator CARDIN. Well, Mr. Chairman, thank you very much, and thank you for convening this hearing, and perhaps by the time I finish my remarks, maybe Senator Sessions will be here and we can stay on schedule.

Let me welcome our guests here today, and thank you very much for your service.

I agree with the Chairman that we need to make sure we have adequate personnel to administer our judicial system. And I do not argue with the methodology that has been used in coming up with needed additional Federal judges.

My concern, quite frankly, is whether we have the resources to support that. And I was one of those who voted against the bill in the last Congress. I say that because it is not just the new judgeships. There is a lot of additional cost that is associated with it, with additional personnel and facilities.

The letter that I wrote to the Director of the Administrative Office in May of 2008 in response to the legislation last year pointed out that there would be a one-time expense of $51 million in order to have adequate facilities for the new judgeships contemplated in the legislation. When you add to that the demands on the facilities related to judges' taking senior status, which it was reported to me we need 1.7 million additional square feet just to handle the judges taking senior status, you add to that the fact there are many vacancies in the Federal bench today, that if they were all filled, we do not have all that space available for those judgeships, it raises serious questions as to whether we have the resources in the budget to accommodate new judgeships.

And then I add an issue that is particularly important to people in Maryland. We are not seeking additional judgeships. We do not have adequate space today for our bench, for our judiciary. We were No. 1 on the list for a new courthouse about 8 years ago. After the attack of 9/11, we were ranked No. 1 for security concerns because of the way that building is constructed and the severe security risks that it presents.

So, Mr. Chairman, I just really want to put on the record that I am concerned that if we create new judgeships, the needed replacement or renovations in the courthouses in Maryland may have to wait another couple decades, to me at great risk to the administration of justice to the people in the State of Maryland with our Federal bench.

So I am going to be submitting some questions—I am sorry I cannot stay for the entire hearing—as to what steps are being taken in order to meet our current needs, what additional resources will be needed if this legislation is enacted into law, and what protections I have as a Senator representing the people of Maryland that adequate attention will be directed to our current facilities.

Chairman WHITEHOUSE. I thank the distinguished Senator from Maryland, and I welcome our distinguished Ranking Member, who has joined us. Senator Sessions?

STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. Thank you. I thank each of our witnesses and look forward to hearing from you. I do have an Armed Services Committee hearing with General Odierno, and I need to be there for part of that. But I appreciate your holding the hearing, but I have significant concerns about legislation that is pending to supply these judgeships.

I think first we have got to understand that our National debt is reaching staggering proportions, and nearly 10 percent of Americans are out of work. So somewhere somehow we are going to have to start finding the will to say no like every mayor, county commission, and Governor is doing in this country, except us. Our ag bill was a 14-percent increase; our Interior bill was a 16-percent increase. Another one of these bills, Transportation—HUD was 23 percent. At 14 percent, the whole Department doubled in 5 years. I believe that we are not listening to the American people who are in tune with reality and we are in denial. We think things are just normal, and we have got a bunch of requests for judges, and we are just going to approve them. I am just telling you we do not have the money, first. And I know judges would like a pay raise, but I am concerned about that—repeat that little phrase I just made about the debt.

According to the Administrative Office, the cost of creating each circuit judgeship is over $1.1 million for the first year, with recurring annual costs a little more than $979,000. A district judgeship costs roughly $1.2 million for the first year and another $981,000 for each year thereafter. This bill would add 12 circuit and 51 district court permanent judgeships. If it became law, it would cost the American taxpayer approximately $75 million the first year and $62 million each year thereafter, which would go up, of course, as the cost-of-living raises take effect. With costs this high, I think it is incumbent upon us to make certain that we do not propose more judges than are necessary.

Now, I do understand there are some districts, particularly trial courts, that probably have to have some additions. In addition to the cost of this legislation, the methodology is not proven. It is based on recommendations by the Judicial Conference, yet in 2003, the GAO issued a report that questioned the Conference's methodology for calculating caseloads.

For district courts, the Judicial Conference calculated caseloads based on weighted filings. According to GAO, this methodology yields inaccurate results because the weights assigned to the cases:

(1), assumed additional time spent on a case can be accurately estimated by viewing the case as a set of individual tasks or events; (2) include limited data on the time judges actually spend on specific cases; and, (3) do not objectively account for non-courtroom time spent on cases.

Likewise, the Judicial Conference used adjusted filings to calculate the need for circuit judgeships. The GAO found no empirical basis to assess the accuracy of this method.

In 2004, the Judicial Conference Committee on Judicial Resources approved new case weights, but the Conference continued to rely on consensus estimates for time spent in non-trial proceedings and chamber activities which the GAO criticized as not objective.

The GAO's concerns regarding the Conference methodology seemed to have been borne out by the evidence. A simple comparison of a circuit court workload numbers show that the request for judgeships and the subsequent recommendations by the Conference follow no uniform method and are not strictly based on caseloads per panel.

For example, three of the circuit courts that requested additional judgeships have some of the lowest caseloads per panel. One of these, the Third Circuit, requested two additional judgeships, yet four circuits with higher caseloads—Fourth, Fifth, Seventh, and Eleventh—requested none.

In 2008, only 2 percent of all civil cases reached the trial stage. This is really remarkable. And the decline in the number of cases actually going to trial where judges are committed full-time on the bench and not able to do other things, only 2 percent of civil cases reached the trial stage. According to a recent study examining the period between 1962 and 2003, the total number of civil cases terminated rose 400 percent, while the number of trials fell 32 percent. We are using magistrates better. We are using mediation more.

In criminal cases, the story is similar. The number of criminal defendants during this period increased by 152 percent while the number of trials decreased by 32 percent. You still have to do guilty pleas and preside over motions. I know that. I am aware of that.

I am especially interested to hear the testimony of Judge Tjoflat. Judge, you have never adhered to the view that bigger is better. Is it still true that the Eleventh Circuit carries the highest caseload per judge in the country?

Judge TJOFLAT. Yes.

Senator SESSIONS. I just salute you for the great work that you and your fellow judges have done, and you have testified before this Committee on this subject for more than a decade. This is your fifth time?

Judge TJOFLAT. Fifth or sixth.

Senator SESSIONS. Fifth or sixth. And I always appreciate your remarks, one of which was, "Putting more cooks in the judicial kitchen may add some spice to the stew, but will ultimately ruin the taste."

I know magistrates participate very effectively today in pretrial matters and helping move cases forward. The district judge does

sentencing and maybe has a pretrial hearing or two, but much of this load can be handled by magistrates. They are doing a great job, and we have more magistrates now. And so there are a lot of things that are occurring that I think the courts deserve credit for. They have brought efficiencies. They have improved productivity in every circuit in the country. We should not dismiss that.

But I cannot ignore the fact that some of our judges are carrying a good bit heavier loads than others, and those judges are not asking for increased judges.

Mr. Chairman, I look forward to proceeding with you, and I will just conclude by saying I really have the greatest respect for the Federal judiciary. I do believe that day after day you objectively and fairly handle cases, and that our judicial system is the cornerstone of American liberty and prosperity. We do not need to allow the system to be overwhelmed, and I am open to looking at any district and circuit that is in a crisis. And if we need more judges, I will support it, but particularly in this time of financial crisis, we need to look very carefully before we expand the courts as greatly as the legislation proposes.

Chairman WHITEHOUSE. Let me thank the Ranking Member for his statement. It enjoys, among many virtues, that of consistency. He was one of the four who voted against the 2007 judgeships bill, along with the distinguished Senator from Maryland. However, 15 of us did support it, so do not let a discouraging word completely deflate you.

Senator CARDIN. We are ready to vote now without proxies.

[Laughter.]

Chairman WHITEHOUSE. And I also very much appreciate the Ranking Member's very sincere and principled concern about the Federal deficit and where we are going. But I cannot help but point out that we have calculated that an $8 trillion deficit differential arose under the administration of President Bush. The policies in place at the time also led to the greatest economic contraction since the Great Depression, which required emergency intervention by the Government to protect from real catastrophe, beginning under the Bush administration and then continuing under the Obama administration. And it is, I think, all of our hope that once the economy turns around, we are in a very strong position to begin addressing the deficit issues. But I take a slightly different economic picture than the distinguished Ranking Member. When individuals and families and businesses and municipalities and States are all in a state of contraction, I subscribe more readily to the economic theory that the Federal Government can be a counterweight by diminishing the pain of families and increasing the speed of recovery of the economy by spending money. Had we been more prudent through the Bush years, we would have had more to spend now. But that is an economic dispute that——

Senator SESSIONS. So you are complaining about Bush overspending and causing a recession, and now you justify the recession, as a means to justify even more spending. I would just note that, according to CBO, in the next 10 years the lowest deficit they project in 10 years is $600 billion, and Bush never had a deficit that high. The highest one he had was $450 billion. And he de-

serves some criticism, I will agree, but we have never seen anything like the spending that we are looking at now.

Anyway, every dollar is important, even though in the scheme of things this is not a huge expenditure, but I think we have got to start looking at every single expenditure.

Chairman WHITEHOUSE. With that backdrop, let me now call first on Judge Singal. Judge George Singal has served on the district court for the District of Maine since 2000. He currently chairs the Judicial Conference Committee on Judicial Resources, after being appointed to that position by Justice John Roberts, and is testifying today on behalf of the Judicial Conference, the policy-setting body of the judiciary. Prior to taking the bench, Judge Singal practiced with the firm of Gross, Minsky, Mogul and Singal. He is a graduate of the University of Maine and the Harvard Law School.

Welcome, Your Honor.

STATEMENT OF GEORGE Z. SINGAL, JUDGE, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE, PORTLAND, MAINE

Judge SINGAL. Thank you, Senator Whitehouse and members of the Committee. I am George Singal, and I am a district judge in the District of Maine, as well as Chair of the Judicial Conference Committee on Judicial Resources. I am here today to provide information about the judgeship needs of the United States courts and the process by which the Judicial Conference of the United States determines those needs.

It has been nearly two decades since Congress passed comprehensive judgeship legislation. To enable the judiciary to continue serving the American people efficiently and effectively, the judicial workforce must be expanded. I would like, therefore, to thank Senator Leahy for introducing Senate bill 1653, the Federal Judgeship Act of 2009. I would also like to thank Senator Whitehouse and Senator Leahy for scheduling this hearing. The Judicial Conference supports S. 1653 which reflects the Article III judgeship recommendations of the Judicial Conference.

In March of 2009, the Director of the Administrative Office of the United States Courts submitted and transmitted to Congress the judgeship recommendations of the Judicial Conference, which are: to create 12 additional judgeships for the United States courts of appeals, create 51 additional judgeships for the United States district court, convert five temporary district court judgeships to permanent positions, and to extend one temporary district court judgeship for an additional 5 years.

The recommendations in the bill reflect needs that have arisen or have become acute since the last comprehensive judgeship bill enacted in 1990. The delay in establishing needed judgeships has real-life implications on litigants seeking justice in our courts.

In the Southern District of Indiana, for example, where magistrate judges are already utilized fully, litigants seeking civil jury trials must generally wait approximately 18 months for their trials to begin even in routine cases and often face delays beyond that.

In the Middle East District of Florida, where the population has grown rapidly, the lack of needed judgeships has meant that se-

verely overburdened divisions have had to rely on the assistance of already busy judges in other divisions to process cases. To litigants, people seeking justice in our courts, this often means traveling several hundred miles or several hours to appear before a judge. And this is in a district that relies on six senior judges and has made full use of visiting judges through our process of inter-circuit assignments.

And these examples are not even the courts with the very highest caseloads in the country where litigants also face delays despite our judges' efficient, diligent work.

In the Western District of Texas, even in a non-border division, one judge's published docket for a typical criminal docket day has seven sentencings and three motion hearings in criminal cases, plus a civil docket call and five civil hearings. Another such docket showed ten sentencings, five motion hearings in criminal cases, and two evidentiary hearings.

Due to this crushing criminal caseload, civil dockets are set a year in advance, and that is with judges there working 6 to 7 days a week.

In the Eastern District of California, which is the highest weighted caseload in the country, filings continue at such a high rate that even the assistance of 80 judges from around the circuit has not stemmed the overwhelming burden.

In developing its recommendations for additional judgeships, the Conference uses a formal, systematic, and rigorous process for evaluating judgeship needs. The Judicial Conference conducts a new survey of judgeship needs every 2 years. That survey involved six steps.

First, each court that requests an additional judgeship submits a detailed justification to my committee's Subcommittee on Judicial Statistics. If a court does not request an additional judgeship, the Conference does not consider recommending an additional judgeship for that court.

Second, the Subcommittee reviews each court's submission and sends its preliminary recommendation to that court and to the appropriate circuit judicial council and advises them to provide whatever information it determines will assist the Committee in making its final recommendations.

Third, the circuit judicial council provides their input, their recommendations to the subcommittee.

Fourth, the Subcommittee reviews the responses from the responses from the various courts as well as the judicial councils with updated caseload data and submits its recommendations to the Committee on Judicial Resources.

Fifth, the Committee on Judicial Resources provides its recommendations to the Judicial Conference.

And, finally, the Judicial Conference decides which request for judgeships it will approve and makes its recommendations to Congress.

To reduce requests for additional judgeships, the judiciary has taken steps to maximize existing judicial resources, including the following: recommending temporary rather than permanent judgeships where that will suffice; looking at the use of senior judges and effective use of magistrate judges; using inter-circuit and intra-

circuit assignment of judges; using alternative dispute resolution procedures; implementing new technologies such as videoconferencing of meetings with counsel, for instance; using conservative formulas to evaluate court judgeship requests; and recommending that vacancies not be filled in courts with consistently low caseloads.

As part of this judgeship survey, courts requesting additional judgeships are questioned about their efforts to make use of all the resources they have available.

Since the last comprehensive judgeship bill was enacted in 1990, no additional circuit judgeships have been created, and only 34 additional district judgeships have been created in response to particular exigencies in particular districts. And yet caseloads have grown dramatically.

Since fiscal year 1991, filings in the court of appeals have increased by 38 percent, and the national average caseload for a three-judge panel is over 1,000. Overall, district court filings have risen 31 percent. Criminal——

Senator SESSIONS. Thirty-one percent over what time period?

Judge SINGAL. Since 1991. Criminal felony filings have risen 91 percent, and civil filings have risen 22 percent. Today the national average weighted filing for district court judgeships stands at 471, but the average weighted filings for the courts needing additional judgeships is 575—well above the Conference standard of 430 for considering recommendations for additional judgeships.

Twenty of the courts have weighted filings of 500 per judgeship or higher. Almost half of these courts have per judgeships filings exceeding 600.

The Judicial Conference recognizes that there cannot be indefinite growth in judgeships. Growth must be limited in the number of new judgeships to that which is necessary to exercise Federal court jurisdiction. The Conference process demonstrates a commitment to controlling growth and shows that judgeships are not requested merely on numerical criteria but are requested only after a highly critical analysis of caseload data and many other factors.

Again, the Judicial Conference of the United States is grateful for the introduction of S. 1653, the Federal Judgeship Act of 2009, and appreciates the scheduling of this hearing. I will be happy to respond to any questions you may have.

[The prepared statement of Judge Singal appears as a submission for the record.]

Chairman WHITEHOUSE. Thank you, Your Honor.

We will now hear from Judge O'Neill. The Honorable Lawrence J. O'Neill has served as United States District Judge in the Eastern District of California since February 2007. Prior to that, he was a United States magistrate judge for 8 years. He previously served as a California State superior court judge and was a trial attorney in the civil area. Judge O'Neill earned his bachelor's degree in criminology from the University of California, his master's degree in public administration from Golden Gate University, and his law degree from the University of California Hastings College of Law.

Judge O'Neill.

STATEMENT OF LAWRENCE J. O'NEILL, JUDGE, UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA, FRESNO, CALIFORNIA

Judge O'NEILL. Thank you, Mr. Chairman, Ranking Member Sessions, and members of the Committee. My focus today is going to be on the Eastern District of California. However, I do not want that to indicate that we are the only district in need. There are districts in need and in trouble. We happen to be in crisis. And I, frankly, applaud the other districts who are in trouble coming to you now before they are in the crisis that we find ourselves in.

We attempted to avoid the crisis. We were unable to do that. But good stewards—and I view all district judges, circuit court judges, all judges in the Federal system as good stewards. We need to make sure that if we can avoid a crisis, we do exactly that.

In the Eastern District of California, we are by anyone's account, no matter how you do it—stats—no matter how you do it, we are busy. It is not enough to be busy, and we know that. A court must work hard, work smart, and be productive. We accept that responsibility.

Our annual weighted filing per authorized judgeship in the Eastern District of California is 1,095 cases. The national average is 471. That is busy.

Our annual termination rate per authorized judge in the Eastern District of California is 1,041 cases. The national average figure is 503. That is productive.

The combination of being both busy and productive results from working smart. There is no other way to do it.

Very briefly, I want to touch on two highlights: one, the make-up of our judicial officers; and, two, how those judicial officers are being utilized. You are entitled to know that. Senator Sessions made a comment in his introductory remarks about exactly that. It is not good enough just to be there and just say, "I am busy."

The reason I have chosen these two issues is because we acknowledge that if we are not managing our resources well, then we should not be here asking you for more resources to manage poorly. I assure you, in the Eastern District of California that is not the case.

We have a population of 6.735 million people, an increase of 1 percent in the past 12 months. Over the past 9 years in our district, it has contained 18 of the 25 fastest counties in the State of California—fastest growing counties. This is but one of the reasons for the enormity of the workload. Others include the depth and the complexity and the consistency of the water law problems, the enormous methamphetamine epidemic, the burgeoning illegal alien problem, the 19 prisons, both Federal and State, with prison populations exceeding 100,000 inmates who are not strangers to litigation. They make up, or at least made up this last year, 55 percent of our civil case filings.

These are only samplings. There are other reasons.

Excluding our bankruptcy judges in our district with its more than 87,000 square miles, containing 55 percent of the land mass of the State of California, we have six different judge authorized positions. It is a number that we have had since 1978, some 30

years ago. And I assure you that the numbers of cases have not remained the same.

We have 12 magistrate judge authorized positions. One of the highest ratios in the country, it is a 2;1 ratio when the national average is 1:1.3.

We have five senior judges, four of whom are working 100-percent caseloads, both civil and criminal, and one of them who is handling a 40-percent caseload. He is in his 80's.

There is no living senior judge in the Eastern District of California who is physically able who is not working, and working very hard.

The magistrate judges are at full utilization. They handle all of the settlement conferences, the scheduling conferences, civil law and motion discovery disputes, Social Security appeals where we have a very high rate of consent, habeas corpus petition findings and recommendations, all initial appearances in criminal hearings, including detention matters, and misdemeanor trials. They handle all hearings including contested trials for infractions occurring in the 18 national forests and the 9 national parks in the Eastern District of California. They handle all of our naturalization hearings and are available 24 hours a day, 7 days a week to handle arrests and search warrants.

Half of our magistrate judges handle the initial proceedings in death penalty cases, and, in addition, we make every effort to obtain the consent of parties in civil cases so that they can handle them from beginning to end.

Multiple factors, including civil trial delays and judicial fatigue, play a part in the day-to-day operations of our quest for public access to our courts. We are indeed a busy, hard-working, smart-working, productive, and very tired court, and we need your help and we need your consideration.

Back home, right before I left, somebody from our court asked me the question: Aren't you just a little busy to go across the country to testify? And my answer to that question to that person is the same statement I am making to you. We in our district are too busy for me not to come across the country and testify here.

I thank you for understanding that statement, and I am available for any questions that you might have.

[The prepared statement of Judge O'Neill appears as a submissions for the record.]

Chairman WHITEHOUSE. Thank you, Judge O'Neill.

We will now call on our final witness, Judge Tjoflat.

Is my pronunciation anywhere close on that, by the way, Your Honor?

Judge TJOFLAT. It is on the mark.

Chairman WHITEHOUSE. Good. I appreciate that. Give me 1 second while I find your bio.

Judge Gerald Tjoflat was appointed to the Fifth Circuit in 1975 and was transferred to the Eleventh Circuit when the Fifth Circuit was split in 1981. He has served as the Chief Judge of the Eleventh Circuit from 1989 to 1996 and previously served from 1970 to 1975 on the Middle District of Florida.

He began his legal career in private practice and served as a State court judge prior to joining the Federal bench. He received

his law degree from Duke University, and we welcome his testimony.

STATEMENT OF GERALD B. TJOFLAT, JUDGE, ELEVENTH CIRCUIT COURT OF APPEALS, JACKSONVILLE, FLORIDA

Judge TJOFLAT. Thank you, Mr. Chairman. I have been before this Committee I think five or six times. It started back about 1994 or 1995 when the Senate was considering the bill to split the Ninth Circuit. And the reason why I was invited to testify before the Committee at that time, not as an advocate for any particular position, was because I was on the Fifth Circuit before we acquired 11 judges in 1979, and it rose from a court of 15 to a court of 26. And along with Judge John C. Godbold of Montgomery, Alabama, he and I were the spokespersons for the Fifth Circuit in petitioning the House and the Senate to split the court because we could not function as a court with 26 judges.

In 1979, we in the Fifth Circuit had roughly 23 or 24 percent of the Nation's business. The Ninth Circuit was right behind us with maybe 21 percent, something like that. They had 13 judges. The omnibus judgeship bill of 1979 gave them 10 judges—they went to 23—and gave us 11—we went to 26.

That statute authorized those two circuits to create mini en banc courts, that is to say, en banc courts of less than the majority of the judges.

The Ninth Circuit opted to have a mini en banc court. They rehear cases with 11 judges—the chief judge and ten drawn by lot.

The judges of the Fifth Circuit felt that who was going to choose whom to be on the en banc court, and everybody was an Article III judge and felt that without participating on the full court was sort of like giving up a constitutional right of some sort or another. But at any rate, that is why we asked the Congress to divide us.

I subsequently appeared before this Committee because not only that experience with a large court compared to a small one, but I have sat on courts of the old Fifth and Eleventh Circuit ranging between, say, 9 judges, because you had disqualifications; 10, 12, 14, 15, 17, 20, 23, 26, and have been deeply involved in court administration all through those periods of time. And so I have a pretty good idea, which is not shared by many other judges from the courts of appeals simply because they are either on small courts or they never got as large as we did, so you do not confront those problems.

But the thoughts I express have been expressed by many. Griffin Bell, who came from the old Fifth, who was a colleague, the same sentiments. Judge Harvey Wilkinson of the Fourth Circuit, Justice Kennedy who came from the Ninth when they had 23 to the Supreme Court.

I have an exhibit that was not in my statement which I would like to be submitted if we could pass it out.

Chairman WHITEHOUSE. Without objection, it will be added to the record.

Judge TJOFLAT. Thank you, sir.

Judge TJOFLAT. Mr. Chairman, sometimes a picture is worth a thousand words. The numbers on the front side of this exhibit show courts with numbers of judges. The numbers in the second column

show the increase in panel possibilities for an appeal, a three-judge court, every time an appeal is taken in a circuit. And the column on the right shows the number of total panels that would be assembled to hear those appeals.

Now, if you would turn to the other side, this is a graph which depicts the numbers on the reverse side, which shows the number of panel possibilities as you add judges to a court of appeals. My concern is with the court of appeals, and I have no grievance with the Judicial Conference or with the Committee because they do what they can do given the difficulty in deciding how many judges ought to be on a court of appeals.

The threshold number is 500 adjusted panel filings. That is where the Conference Committee starts. Our court is entitled to 27 judges on that threshold. We have never asked for a judge since 1981, and when we split the Fifth Circuit, 14 judges happened to live in the western three States and 12 in the eastern three, and that is how we wound up with 14 and 12.

For a long time on that court—and we were very intact—we had memories of what it was like with 26 judges. And that tradition has passed on down so to this day we ask for no judges, notwithstanding numbers and people saying you ought to request some more judges.

Senator SESSIONS. How many do you have now, Judge?

Judge TJOFLAT. Twelve, the same 12. Different people but the same 12 judges.

Here is what happens as a court of appeals increases judges. You have a court, say, with a dozen or 15 or whatever it is. And there is a backlog. So the idea is that if we have one more judge, we can decrease the backlog or at least meet it. And then there is more backlog.

So here is what happens. As you increase judges, if you want to maintain—the thing a court of appeals must do is to maintain a stable rule of law, because if you do not have a stable rule of law in the circuit, you create unrest, instability, and create litigation. Litigation means you have to have more district judges. That means you are going to have more appeals. And you do that with the en banc function.

The First Circuit, from where you come, Mr. Chairman—a simple proposition. I sat in the First Circuit in Boston one time in 1971 or 1972, and there were three judges on the court of appeals. So every time they sat, they were en banc. But, in any event, as you add judges, you have to keep up with the work product of everybody else on the court. Justice Kennedy told me when he left the Ninth Circuit, he spent half of his time keeping up with the law of the Ninth Circuit, a quarter of his time doing administrative work, and a quarter of the time doing his own work. So when you do that, what happens is the output of the court does not decrease because you are spending more time keeping the law pure, as it were. Or you can do the opposite. You can maintain—fight off the backlog, and then you sacrifice stability in the rule of law, and that in turn causes unrest and people basically lose their rights when the law is unstable.

So the point is with the courts of appeals, if you can control for all factors, there is in theory a point at which, if you added a judge

to a court of appeals, the overall production of the court would decrease. It would decrease assuming the judges are maintaining a stable rule of law through the en banc process.

So the point of my remarks and the remarks of others who made the same point basically over the last 15 years, let us say, is that the courts of appeals are scarce dispute resolution resource. They can only get so large without creating instability in the rule of law, which means that you cannot have too many district judges, or you wind up with too many delays. So it is the Congress' task to decide what jobs——

Chairman WHITEHOUSE. Too many circuit judges, you meant.

Judge TJOFLAT. Yes, you have too many circuit judges. If you have too many circuit judges so they create instability in the rule of law, then Congress has to say, What jobs are we going to take away from the courts of appeals or the Federal courts? Are we going to put something in an Article I court or are we going to work out some other solution? But we are not like the State courts. The State Supreme Court can remain, like in Florida, seven justices. It would be seven justices when we had 3 million people and seven justices when we have got about 20 million now. But that is not the case with the United States Courts of Appeals where you have an appeal as a matter of right.

Thank you for inviting me. I hope I have been of some little assistance in this debate, and I will answer any questions you might have.

[The prepared statement of Judge Tjoflat appears as a submissions for the record.]

Chairman WHITEHOUSE. Thank you. We are delighted to have you here.

It strikes me listening to your testimony, from having read it yesterday, that first of all it is directed primarily to the circuit courts, and you do not intend to bring it to bear on the Judicial Conference recommendations for——

Judge TJOFLAT. No.

Chairman WHITEHOUSE [continuing]. District judges. Correct?

Judge TJOFLAT. No.

Judge O'NEILL. And I thank you for that.

[Laughter.]

Chairman WHITEHOUSE. And the second is, in its focus on circuit courts, if I were to summarize your recommendation, in a world of growing caseloads and an expanding population and the additional litigation that ensues, your argument is less that there should be fewer judges than that there should be—than that there is an optimal number of judges per circuit in order to for that circuit to be most efficient, and that, therefore, the best way to be dealing with the burgeoning caseload is not to add more judges per circuit, but to add more judges and more circuits so that that collegiality and that optimal size can be maintained. I mean, if you do the math, that seems to follow as your recommendation.

Judge TJOFLAT. That was the task of the White Commission in 1997, which grew out of the circuit split bill, which no action was taken, and the Commission was created to study the circuit alignment. That is the point.

Chairman WHITEHOUSE. Yes, got you. OK. I think I understand that.

Let me ask you, Judge Singal, the methodology of the Judicial Conference has been questioned here, and I wonder if you could comment a little bit on, first of all, whether the methodology—what is its travel? Has it changed since the 2007 Judicial Conference recommendations?

Judge SINGAL. It has not changed since 2007. The same methodology is used and the same case-weighting system is used.

Chairman WHITEHOUSE. And that was developed years ago with the RAND Corporation——

Judge SINGAL. Back in 2003, 2004, and the same methodology has been in place since then.

I want to add, however, that the methodology that gives us case weighting, the 430, that we use in the district court, is not the end of the procedure that we use in terms of getting to a final recommendation. That is simply the beginning. It is not even—as Winston Churchill said, it is not the beginning of the end; it is the beginning of the beginning. After that, the——

Chairman WHITEHOUSE. Dunkirk, right.

Judge SINGAL. Well, I hope we can avoid that.

[Laughter.]

Judge SINGAL. After that, we go through an entire review process, as I have indicated in my opening statement, where we look at the effective use of magistrate judges, the effective use of senior judges, the complexity of the litigation, whether the litigation trends in that district, for instance, are increasing or are temporary. We look at the issue of visiting judge use and many other factors.

So in terms of the formula we use, it is the same formula that we presented to this Committee the last time I was here and was presented to the Committee each time since we developed it in 2003, 2004.

Chairman WHITEHOUSE. And do you have any reaction to the criticism from, I think it was, GAO and any evaluation of the methodology that they appear to have recommended?

Judge SINGAL. Well, GAO had two criticisms of the methodology that related to the case-weighting system. One was that the Conference was using results from two electronic systems. I am telling you something I am sure you already are aware of from the vast material that has been developed and provided to you. But the Federal Center, Judicial Center, was able to develop a program that was able to integrate those two electronic systems.

I might add that since that time, our electronic system is one. CM/ECF is a marvelous electronic system that manages our cases, enables me in Washington last night to work on a case in Portland, Maine, and have before me all of the docket entries, all of the pleadings. And I was able last night, in addition to preparing for this hearing, to issue an order because that information was available to me.

By the way, it is one of the ways we survive now in the judiciary that we are able to do that—much to my wife's dismay when I am on vacation, I might add.

The other aspect of it was the GAO's worry about the lack of a standard deviation and the lack of a time study under the new system. I feel very confident that the information provided to us in the electronic system that we have, the concrete information we have on judge time in court on evidentiary disputed hearings, provides us a solid basis for court time. The estimates given by experienced judges with regard to non-court activities has stood the test of time.

I want to be clear. Our of the 77 requests for judgeships that were given to my committee, we did not approve them all. We are not a rubber stamp. We approved 63 and the Conference approved 63.

I want to make one other point. At the time we submitted our requests to this Committee and to Congress, note that one of the temporary judgeships that was already in place is not being asked to be converted to permanent. We are asking that it be extended for 5 years. What does that indicate? Instead of going whole hog saying make it permanent, we are wondering, Will those caseloads continue to increase in that district into the future?

We are going to take it easy, and we will take a look at it over that period of time. So rather than make it permanent, rather than request making it permanent, we are holding back and trying to be as conservative as we can.

Chairman WHITEHOUSE. My time has expired, and I yield to the distinguished Ranking Member.

Senator SESSIONS. Thank you.

Judge Singal, I think I understood you to say that two different numbers you gave us, 31- and 32-percent increases in filings, I believe you said, since 1991?

Judge SINGAL. It is 38 percent for the circuits and 31 percent for the district courts.

Senator SESSIONS. Well, about how many more magistrates do you have today than you had in 1991?

Judge SINGAL. I cannot give you the exact figure, but there are many more magistrates than existed at that time.

Senator SESSIONS. And you have got better computer systems.

Judge SINGAL. We do.

Senator SESSIONS. Most judges now are going to three law clerks, or some of them are giving up their secretary.

Judge SINGAL. Some are.

Senator SESSIONS. And some have permanent law clerks.

Judge SINGAL. Some are, though we have limited that by Conference rule that the number of career law clerks will be limited in the future as a cost-saving device.

Senator SESSIONS. Right. But a career law clerk can prepare prisoner petitions or Social Security petitions, he can become very skilled in helping a judge sort through the critical issues in a case.

A lot of these things have happened, and overall, Mr. Chairman, all I am saying is that with a 31-percent increase in cases at the district court level or 38 on the court of appeals, some of that is offset by technology and better and larger staff.

Second, I acknowledge that in this dynamic country that we have, you can have districts like Central or Eastern California that

are having extraordinary increases, and they are not able to meet that challenge.

Now, we have had a number of court bills to add judges to those crisis districts, so we have not failed to respond. I do not know who remembers how many judges we have added——

Judge SINGAL. Thirty-four.

Senator SESSIONS. Thirty-four, since how long?

Judge SINGAL. The last judgeship bill, so 4 percent.

Senator SESSIONS. So we did our best to target the districts that had the biggest crisis, although, Mr. Chairman, this is a political body, and some of the judges may have had more to do with their Senator's view on it than exactly the caseload.

Chairman WHITEHOUSE. Do not further astonish me by telling me that seniority might have played a role.

Senator SESSIONS. Perhaps, even.

One of the things that is astounding to me, Judge Tjoflat, was when I first became United States Attorney in 1981, I ended up trying a case before Judge Cox who is now senior judge on the Eleventh Circuit. And it was a 5-week trial with about 2 weeks of preliminary motions, a land bank fraud case. During that period of time, we had another trial that I tried that lasted 7 weeks. We had another trial that lasted 11 weeks, another trial that lasted 5 or 6 weeks. But to an astounding degree the number of cases actually going to trial has declined.

Now, that does not mean a judge does not have anything to do with the case. You have to rule on pretrial motions or whatever. But when a judge is in a big trial, they are just tied to that seat. No other work can get done unless they get another judge basically to help him, or at night. How do you factor, Judge Singal, the decline in the cases actually going to trial, civil and criminal?

Judge SINGAL. If I might, Senator, address the three areas you discuss: the use of staff to help, the judges that Congress has provided in the interim, and the number of trials.

Judge SINGAL. In our district, we have three judges, and you have almost every 6 months a big trial lasting multiple weeks that really hurt that daily work of it. So how does it show up nationally?

Judge SINGAL. Well, I was in private practice for 30 years, tried criminal cases, civil cases, and every kind of case there was, from murder cases to driving cases. Most of my cases settled. And most cases settled, I think 95 percent of civil cases settled in 1991. Probably about 96 percent settle today.

We all know that if all the cases went to trial, our judiciary would stop dead in its track. We also know, as you said, because you have the same experience, that many of those cases that settled settle after most of the work has been done on those cases. Judges will tell you consistently they would much rather be in court presiding over a trial than they would doing summary judgment motions, which takes hours and hours and hours. And it is only after one side has lost the summary judgment motion that the case settles. The trial, were we able to move then to court immediately, we would have used less time of judicial time in some cases trying the case rather than dealing with all the discovery motions, all of the summary judgment motions, and all of the other.

So whether the case settles or not, judges are tied up in terms of the amount of effort they spend——

Senator SESSIONS. You would say that a judge does spend more time on summary judgment motions than 15 years ago?

Judge SINGAL. I think that is true. Senator Sessions. I would suspect that is true. And that does facilitate settlement. In the old days, a lot of judges would carry it with the trial. But if you get a ruling early that your cause of action is invalid, maybe you settle.

Judge SINGAL. As you probably know the old saying, nothing focuses a trial lawyer's mind like that courtroom door.

Senator SESSIONS. That is right. Judge, I just want to point out a few things. I know that some circuits would like more judges, but if you look at the median current caseload it raises some questions. The Second Circuit seems to have the highest caseload. The Eleventh Circuit is second now, at least with caseload, but you are able, Judge Tjoflat, to dispose of those cases in an average of 9.3 months, which is the second lowest on the chart. So not only do you have the second highest caseload, but the second shortest disposition time, for which I say thank you and good work.

On oral argument, most circuits evaluate cases before they set oral argument and do not set it unless they think it would benefit the court, which I think is good for clients because they have to pay their lawyers to spend weeks getting prepared for a 20-minute oral argument and pay their expenses in some highfalutin city. But if it is not necessary, it is a good thing not to do it, in my opinion.

Do you think some of our circuits might benefit from being more cautious about the number of cases they accept for oral argument?

Judge TJOFLAT. I think so, and let me say that we do not have better judges than the other circuits, and that is not the reason for the decrease in the time. When we were on the Fifth Circuit and had all that business—this is with 15 judges—we had to devise a lot of procedures, which required a lot of collegiality, in order to process 23 percent of the cases in the United States.

After the circuit split, within 2 or 3 years then the 12 of us had as much business as the old court had, and we were a forerunner, with the help of the Administrative Office and the Congress, in automation. I think we have been the forerunner in automation and other kinds of things that help save judge time, make judge time more valuable with parajudicial personnel doing the administrative kind of legwork, I will put it that way.

It is that culture, rather than that we work any harder than anybody else, which accounts for the disposition times you are talking about, and also a good deal of attention on which kinds of cases really ought to have oral argument. It is pretty hard to have somebody fly from Seattle, Washington, to Atlanta, Georgia, to argue a case, and after about 3 or 4 minutes it is obvious that the case does not deserve argument. If you are on the Second Circuit in Manhattan, you can get on a subway and come downtown or come from Connecticut or Vermont and be cut off in the middle of an argument, and you have not wasted a day or 2 days and a couple of hotel nights. So you can get more oral argument and cut them off, as it were, mid-argument.

So the circuits have traditions and operate in different kinds of ways, and that in my view accounts for the differential in some of the numbers that you have on that board.

Senator SESSIONS. Thank you. I have let my time run over. Thank you all for your comments. I would just say this: I am generally, as you can tell, not disposed to a major increase in judges. I am not criticizing the President, but I think we have a number of vacancies we have, but we do not have that many nominees. And so the President has got a lot to do. He is having to get his team together. But some of the vacancies we have because we do not have nominations. I know our Chairman complains that we are holding up nominees, but——

Chairman WHITEHOUSE. I will not go there.

Senator SESSIONS.—some that are controversial will get scrutinized, but we just did one last night that everybody supported, and we have done a number and we will see more. But only about 10 percent, I think, of the vacancies do we even have nominations for.

So we can do better about that. Then we need to identify particularly those district courts that have for some sort of unusual reason or just natural trends have resulted in a big, big workload, like you may have in Eastern California. We have found on the Arizona border some of the California circuits got most of the judges in the last bill. I think that was justified—Florida got some of the district judges. I just think that is the way to proceed.

Mr. Chairman, I will work with you in good faith on it and identify those areas where we have got to act, and maybe we can keep our courts as cohesive as possible and keep the burden on the taxpayers as low as possible.

Chairman WHITEHOUSE. Well, I know you will, and it is an honor always to be able to work with the Ranking Member on these issues.

If I could, let me ask just one last question before I conclude the hearing, and that is for Judge O'Neill. Your description of the crisis or the troubles in your district was quite compelling. It focused more on it from the court's eye view. From a litigant's eye view, either from the U.S. Attorney's Office or from civil litigants coming in or defense counsel, what are the ways in which they most experience the distress that your court is presently experiencing?

Judge O'NEILL. It is a delay in setting the trials. I think that—and I almost wish I were not a judge right now of the Eastern District so I could brag about the judges of the Eastern District. The judges of the Eastern District have taken——

Chairman WHITEHOUSE. We do that as Senators all the time, so go right ahead.

[Laughter.]

Judge O'NEILL. The judges of the Eastern District truly have taken it upon themselves to simply continue to work harder and harder and harder. And I am talking about 12- and 14-hour days, bringing things home every single night, every single weekend.

One of my biggest concerns that almost none of us voices often is the concern that we share as district judges for our senior district judges and their health. The amount of stress we are putting on them—and they never point it out—is phenomenal. And to lose

just one of them is to lose 20 percent of their help, because we only have five of them. If we were to lose one person——

Chairman WHITEHOUSE. Again, you are back to the court's—I appreciate that very much, but you are back again at the court's eye view of the problem.

Judge O'NEILL. That is because the court——

Chairman WHITEHOUSE. My question had to do with from a litigant's eye view. You mentioned that delays in getting to trial obviously are a problem. Are there others, or is that——

Judge O'NEILL. The reason I am focusing on the court is because the court thus far has taken most of the burden, but we cannot continue to do that because there is nothing left. There are no more resources left. There is no more energy. There is no more time. And as a result of that, even though there have been some delays and it takes longer to get onto our calendars and our dockets, especially the civil cases that get bumped because of the Speedy Trial Act on the criminal side, we are going to be—if we do not get help and/or if we lose even one senior district judge, the——

Chairman WHITEHOUSE. You are at the break point.

Judge O'NEILL. We are. And what is going to happen then is that the litigants will be bearing 100 percent of that burden because we cannot bear any more.

Chairman WHITEHOUSE. Thank you very much——

Judge O'NEILL. And could I make just one last comment?

Chairman WHITEHOUSE. Of course. You have come all this way.

Judge O'NEILL. You know, Senator Sessions said in his statement, "The court is the cornerstone of liberty and prosperity." And my colleague from the Eleventh Circuit said, "People lose their rights when the law is unstable."

The law is unstable when we do not have access to our courts, and that is where we are right now. We need help.

Chairman WHITEHOUSE. I appreciate that.

Senator SESSIONS. Mr. Chairman.

Chairman WHITEHOUSE. Please.

Senator SESSIONS. I would just note to clarify and be accurate, there are 74 district court vacancies in the country today with nine nominees pending before the Senate. And that will catch up some, so we are going to pick up some. We will get the average of——

Chairman WHITEHOUSE. The background checks and all——

Senator SESSIONS. The background checks, and you might have to ask a Senator what they think of the person before they are nominated, and all of that, and it takes a while. But that vacancy rate should constrict as the President has more time in, unless we have nominees, a large number, that are controversial.

Then I would offer for the record the GAO report called "Federal Judgeships: The General Accuracy of District and Appellate Judgeship Case-Related Workload Measures," and they note that—you know, they made recommendations in 2003, and they are critical that more changes have not been done to implement some of their suggestions, although GAO is not perfect either——

Chairman WHITEHOUSE. Without objection, the report will be made a matter of record.

Senator SESSIONS. So I would offer that for the record.

[The GAO report appears as a submissions for the record.]

Senator SESSIONS. I thank the witnesses, and, again, I know there are some areas in our country that are going to need some relief.

Chairman WHITEHOUSE. Should we also add your table?

Senator SESSIONS. Yes, I have got that in print here, and I would offer the table.

Chairman WHITEHOUSE. That will also be made a matter of record.

[The table appears as a submission for the record.]

Chairman WHITEHOUSE. I also have a statement from Chairman Leahy that, without objection, we will add to the record.

[The prepared statement of Chairman Leahy appears as a submissions for the record.]

Chairman WHITEHOUSE. I have a statement from Senator Dianne Feinstein, who, as you know, Judge O'Neill, is extraordinarily concerned about the situation in California, and she has a statement for the record which will be accepted, without objection.

[The prepared statement of Senator Feinstein appears as a submissions for the record.]

Chairman WHITEHOUSE. We have a letter from the Federal Bar Association which will be entered into the record, without objection.

[The letter appears as a submissions for the record.]

Senator SESSIONS. If they have more judges, more of the Federal Bar attorneys might be one, 1-day.

No, I kid. They also support more judges and higher pay. I used to be a member of that group.

Chairman WHITEHOUSE. And the Federal Judicial Center has also sent a letter and a report from John S. Cook, and that, too, will be made a matter of record, without objection.

[The letter and report appears as a submission for the record.]

Chairman WHITEHOUSE. The record of this proceeding will stay open for another week, and I thank the witnesses for their testimony. I thank the Ranking Member for his willingness to work through this, and we look forward to producing some results from this, I hope in the not too distant future, as we are both former lawyers, former United States Attorneys, former trial lawyers, and so we are both very pleased to have three such distinguished members of the Federal judiciary before us.

Senator SESSIONS. Thank you for a good and fair hearing, Mr. Chairman.

Chairman WHITEHOUSE. Of course. We are adjourned.

[Whereupon, at 3:44 p.m., the Subcommittee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

United States District Court

EASTERN DISTRICT OF CALIFORNIA

7701 United States Courthouse
2500 Tulare Street
Fresno, California 93721
(559) 499-5680

Chambers Of
Lawrence J. O'Neill
United States District Judge

Fax (559) 499-5959
Calendaring: (559) 499-5682

ANSWERS TO FOLLOW-UP QUESTIONS FROM
SENATOR JEFF SESSIONS

Question 1:

Alternative dispute resolution and other settlement methods significantly decrease caseloads and increase case management efficiency.

a. What steps is your court taking to utilize such programs to balance your caseloads?

b. As a judge, how do you encourage litigants to consider ADR programs?

Answer:

The Eastern District of California (EDCA) has recognized for years that alternative dispute resolution (ADR) techniques, methods and innovations are of tremendous importance in decreasing caseloads. As a matter of fact, we in the EDCA are viewed by the Federal Judicial Center in Washington, D.C., as being a laboratory for ADR. They will soon be evaluating our various pilot projects, and as a result of the evaluation will be publishing a report available to the entire Federal judiciary, with the hope that our programs will help other district and circuits.

a. From the very first hearing in Federal Court (which is generally the Rule 16 scheduling conference), the discussion of settlement begins. We take that opportunity to evaluate the legal and/or factual complexities of the case to determine the best method of ADR that has the highest possibility of early resolution.

   We have established a Voluntary Dispute Resolution Program (VDRP) wherein we have a panel of veteran attorneys who provide pro bono mediation services upon referral from the Court. Since the panel is limited to volunteers, we generally save this alternative for the more complex cases.

   We have a pilot project wherein two Magistrate Judges handle settlement conferences in cases brought by prisoners. The judges travel to the prisons and hold multiple

conferences at the prison in one day, thereby saving collateral resources of travel (U.S. Marshal's office) and appearances and travel for counsel (U.S. Attorney's office).

In all non-prisoner cases, we set settlement conferences before Magistrate Judges unless parties wish private mediation. We encourage binding arbitration, and offer that as a substitute for further appearances at the Federal Courthouse.

American Disabilities Act (ADA) cases have their own peculiar issues as they relate to settlement possibilities, mainly due to the limited actual damages with attorney fees clauses within the statute. This has caused us to have counsel come in to discuss settlement, often times well before we would ordinarily have a scheduling conference. We have found that our rate of success is significantly higher when we are able to get the parties talking settlement before the attorney fees become too burdensome.

The EDCA has hired a staff attorney whose job it is to build on our existing in-house programs, to strengthen the pro bono panel, and to implement new programs to enhance ADR within the District. That position is a pilot project and its effectiveness will be measured in February, 2010.

b. In addition to supporting all procedures identified in 1a, above, every one of us encourages Magistrate Judge consent. We take the time to explain the true and real benefits of consent. When the consent is given, this in no way takes away Magistrate Judge settlement conference activity, but such a conference would be held before a judge other than the trial judge. In addition, we make it clear that some form of ADR is mandatory. We help them to make the most productive choice, but everyone must participate in some form of dispute resolution.

Question 2:

46% of all litigation in the Eastern District of California is comprised of prisoner petitions.

a. How does your court utilize other resources, such as staff attorneys, to quickly dispense of frivolous filings?

b. Would increasing the number of law clerks per judge help increase judicial efficiency?

Answer:

a. Pro Se staff attorneys, temporary staff attorneys, Magistrate Judge elbow clerks and recalled Magistrate Law clerks all work on prisoner cases. As is required by statute, each and every complaint or petition is screened after its filing, and is only allowed to be served on the adverse party if the complaint or petition states a claim.

b. The reviewing attorneys within the Court, after thorough review to facilitate weeding out the pleadings that lack merit, draft memoranda and orders, but the Magistrate Judges and District Judges have to read, analyze, and often further research the cases before we can sign the Orders. This is true even in the cases that lack merit. We, as the judges who must do the reading and refined research and analysis, are at the breaking point. Adding more law clerks does not widen the bottleneck that can only be alleviated with more judges.

Question 3:

You noted in your written testimony that the Eastern District of California is considered a "judicial emergency" due to currently vacant district judgeships. If these vacancies were filled, would the need for additional judgeships still remain?

a. Given the fact that additional judgeships is very costly, especially in the first year, would you agree that Congress should fill the vacancies within your district first before adding judgeships to your district court? Why or why not?

Answer:

The written testimony made reference to the fact that we have one District Judge vacancy, but at no time did I indicate that this one vacancy is the reason for the judicial emergency that exists within the EDCA. The reference to which this question refers is the declaration by the Judicial Conference Committee on Judicial Resources, specifically that the EDCA is one of ten district courts that has been declared a court with a judicial emergency due to the vacancies. If the EDCA's one vacancy were filled today, the judicial emergency would be untouched by anyone's calculations, reasoning or analysis. As I indicated at the hearing, our annual weighted filing per authorized judgeship is 1095, while the National average is 471. I further stated that the annual termination rate per authorized judgeship in the EDCA is 1041, while the National average is less than half that, at 503 cases.

a. In sum, I disagree that filling the one vacancy before adding more judgeships would be any kind of a realistic solution to this overwhelming emergency. Frankly, we need both urgently.

Question 4:

What methodology or process does the Eastern District of California utilize to determine the number of additional judgeships needed?

Answer:

The EDCA utilizes the very same methodology and process to determine judicial needs that is used by the Judicial Conference of the United States and its Committee on Judicial Resources. They use the weighted caseload standard, under which the EDCA would be entitled to six additional judges. That said, the need is so great in the EDCA, that it wouldn't make a difference what methodology were to be used by anyone, the conclusion would be the same: the need is present and clear, the caseload is a crushing crisis, and the district needs help now.

Question 5:

Even though the Eastern District of California has one of the highest caseloads among the district courts, your district recently lent out a senior judge to provide assistance to another district. If your district is so overburdened, why would it relinquish one of its most valuable resources?

Answer:

The one Senior District Judge to which the question refers wanted to keep his trial skills fresh and utilize the opportunity at the same time to help a colleague in a different District. It was a decision that he made, and was not a decision that was made for him by the District. That senior judge kept his entire caseload, and continued (and continues) to work concurrently on that full caseload.

On the Senior Judge question, it is important to recognize that should any of our numerous Senior District Judges exercise their right to retire, something that any one of them could do at anytime, the results would be devastating. The EDCA is dependent on those judges, dependent in a way that is not sustainable.

Question 6:

It appears that your circuit has made some efforts to reduce the caseload, without the desired success. You have used visiting judges, shipped pro se prisoner litigation to other courts in the circuit, and improved case management practices. One thing I didn't see discussed in your written testimony (and this may not be possible with the current number of magistrate judges) was the use of magistrate judges to dispose of civil cases where the parties consent. Is this a practice the circuit has implemented or encouraged?

a. Is it not less expensive and easier to add magistrate judges - full or part time?

Answer:

This very issue of full Magistrate Judge utilization, including consent was indeed discussed in my testimony to the Committee on September 30, 2009. I stated: "The Magistrate

Judges are at full utilization. They handle all of the settlement conferences, the scheduling conferences, civil law and motion discovery disputes, Social Security appeals (where there is a very high rate of consent), habeas corpus petition findings, all initial appearances in criminal hearings, including detention matters, and misdemeanor trials. They handle hearings including contested trials for infractions occurring in the eighteen national forest and the nine national parks in the Eastern District of California. They handle all of our naturalization hearings and are available 24 hours a day, 7 days a week to handle arrest and search warrants. Half of our Magistrate Judges handle the initial proceedings in death penalty cases, and in addition, we make every effort to obtain consent of parties in civil cases so that they can handle them from beginning to end."

a. We already have 12 Magistrate Judge authorized positions, one of the highest Magistrate Judge District Judge ratios in the Nation. It is a 2:1 ratio, while the National average is 1:1.3. Magistrate Judges are limited by law in what they can handle. In the EDCA, they are handling everything that the law permits them to handle. Our need is in the District Judge category, and the need is crucial and crushing.

Question 7:

Given the economic downturn, it is not clear how much the Eastern District's population is going to continue to grow. It includes towns, such as Fresno, with some of the highest mortgage foreclosure rates in the country. It is not certain how the economic troubles may affect litigation and the case filings in the district. Judge, do you know what has happened to the case filings in the last 6 to 10 months?

Answer:

The population of the Eastern District of California, now at 6.735 million, has continued to grow during this economic downturn, and specifically in the past 12 months has grown an additional 1%. The mortgage foreclosure rates referred to have only added to the work of the Court. Our civil filings increased 18% during the year ending June 30, 2009. A majority of the increase stems from the non-prisoner case filings and the mortgage crisis. It is important to highlight that our Bankruptcy court filings increased a whopping 63% during the same period, which will have a direct effect on the appellate activity that District Judges handle. In addition our Civil Rights cases have increased 27% during this same period. On the criminal side, filings increased 9% over the previous year, with the largest increases being in the area of immigration and drug offenses, up 43.8% and 8.6% respectively over the previous year.

In sum, as I finish these answers at 8:30 p.m. in chambers, constituting a day in this courthouse that began at 6:10 a.m., I am asking only what is due the Eastern District of California: more judgeships. Thank you for your consideration.

COMMITTEE ON JUDICIAL RESOURCES
of the
JUDICIAL CONFERENCE OF THE UNITED STATES

October 29, 2009

Honorable Patrick Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Thank you for inviting me to testify at the recent hearing on "Responding to the Growing Need for Federal Judgeships: The Federal Judgeship Act of 2009," before the Senate Judiciary Subcommittee on Administrative Oversight and the Courts. I am pleased to answer written questions from Senators Whitehouse, Sessions, and Cardin, and I write on behalf of the Judicial Conference of the United States to transmit answers.

As you know, the judgeships recommended by the Judicial Conference are essential for the Judiciary's effective and efficient administration of justice for the American public. It has been nearly 20 years since the judiciary's judgeship needs were addressed comprehensively. Since then, national filings in the circuit and district courts have grown by more than 30%, and yet there have been no new circuit judgeships created, and the number of district court judgeships has increased by only 4%. In order to provide access to justice and uphold the law, the courts have no choice but to fairly adjudicate each case that is presented – the courts do not have prosecutorial discretion or other means of controlling the caseload that comes through the courthouse doors. More judgeships are needed to handle the growth.

The jurisdiction of the Judicial Resources Committee of the Judicial Conference of the United States relates to issues of human resource administration, including the need for additional Article III judges. Several of the questions relate to issues that are within the jurisdiction of another Judicial Conference committee, the Committee on Space and Facilities, chaired by Judge Michael A. Ponsor, or the Committee on Court Administration and Case Management, chaired by Judge Julie A. Robinson. In answering the Senators' space and facilities questions and court administration questions, I have consulted and relied upon the expertise of Judge Ponsor and Judge Robinson.

With this context as background, answers to the Subcommittee members' questions follow. I respectfully request that this letter be made a part of the hearing record as well.

Sincerely,

George Z. Singal

George Z. Singal

Answers to Senator Whitehouse's Questions

1. **Question:**
The Government Accountability Office has criticized the methodology used to generate District Court case weights. They endorse a time-study approach. Has such an approach been used to generate the Judicial Conference District Court judgeship recommendations in the past? If so, why does the Judicial Conference not continue to use such a time-study approach?

Answer:
A time-study was conducted by the Federal Judicial Center ("FJC") to develop the 1993 case weights that were in effect until 2004, when the FJC completed a new, event-based study to develop updated case weights. The event-based methodology used by the FJC to develop the 2004 case weights incorporated *both* empirical data and other information derived from an accepted and widely-used research technique developed by the Rand Corporation, and the study design ensured the accuracy of the results it would produce. This study resulted in case weights that, when applied to 2003 national case filings, showed ***lower*** national weighted caseload than the 1993 weights. In other words, the 2003 national weighted caseload was ***5 percent lower*** when measured under the 2004 case weights than it was when measured under the 1993 case weights.

The Judicial Conference approved the FJC's event-based methodology for the 2003-2004 case weighting study, and believes that a time study is not justified, for several reasons. In short, it was clear that the rigorous study methodology would produce accurate results, while at the same time offering significant resource savings and the ability to update the case weights more frequently and efficiently in the future. The Government Accountability Office ("GAO") noted these significant advantages of reduced judicial burden (so judges can focus on cases), cost savings, and faster development of case weights in its 2003 report. Given the accuracy and the additional advantages of this type of case weighting study in the district courts, the Judicial Conference believes that the resource-intensive costs of a time study in the district courts are not justified.

Indeed, as the FJC wrote in its September 29, 2009 letter to the Chairman and the Ranking Member of the Senate Judiciary Subcommittee on Administrative Oversight and the Courts, "[t]here are several different, and accepted, ways to compute case weights." "Event-based designs have been used in several state case-weighting efforts." The FJC further explained,

"The Federal Judicial Center has conducted four case-weighting efforts in the federal district courts over the last 38 years. . . . The design of each study was different from the previous one and each strove to (a) to address issues that had come up in the previous design, (b) to deal with inherent limitations, and (c) to take advantage of new developments. This does not mean that older designs were "worse" or newer designs "better," only that each design tried to meet as best it could the situation in which the study was executed. [Time studies] obtained good empirical data but were very resource intensive, demanding substantial time and effort from participating judges, court staff, and research staff. Because of the effort and time involved, these studies were conducted only once every ten years or more, a time frame that sometimes led to concerns that the weights had become outdated before new weights could be calculated."

"Over the past 15 years, the federal courts have implemented automated case-management systems in each of the district courts. These systems maintain detailed docketing information on all cases filed in the courts. This information is empirical, recorded contemporaneously with the occurrence of the events, and, because it is in active use by the courts for multiple administrative purposes, regularly and carefully checked for accuracy. These automated records provide a level of information about case processing that was unavailable to previous case weighting studies."

"The 2003-2004 case-weighting study in the district courts took advantage of this new data source."

"The event-based method not only had beneficial implications for the 2003-2004 study, but the method also affects case-weighting efforts going forward. Because so many components of the case-weight calculations are driven by data routinely collected in the courts' case-management databases, additions and enhancements to those database systems are available to be incorporated when computing future revisions of the weights. In addition, . . . targeted additions and revisions to the weights can be made without the need to recompute all weights. Thus the weights can be modified between major case-weighting studies to adjust to new case types or changes in case-management procedures in a way that past weights derived from time studies could not. This keeps the weights more up-to-date and more representative of current court practice."

2. **Question:**
Professors William M. Richman and William L. Reynolds argued in the *Cornell Law Review* in 1996 that circuit courts are effectively becoming courts of certiorari since they are increasingly refusing litigants oral argument and disposing of cases summarily. Increased delays in district courts can make litigation too expensive and uncertain for litigants, causing them to abandon their claims or defenses and denying them their day in court. As resources become more limited, judges have to find ways to dispose of cases quicker, often resulting in a lower quality of justice for the parties and limiting the time judges have to write opinions that will clarify the law. Professor Richman and Reynolds argue that additional judgeships answer this problem without leading to greater litigiousness or instability in the law. Will the judgeships recommended by the Judicial Conference strengthen the federal courts as they undertake their constitutional responsibility to adjudicate disputes and administer justice?

Answer:
Yes. The additional judgeships will improve judicial workload conditions and efficiency, and consequently the administration of justice for the public. The Judicial Conference has provided the Judiciary's workload-based justification and demonstrated the need for additional judgeships in order to continue effectively adjudicating cases and administering criminal and civil justice. That need persists despite the efficient use of judicial resources and the implementation of workload management techniques described in my testimony for this hearing and in the answers to other Questions for the Record.

In addition, there are many factors that dispel the notion that additional judgeships increase the workload of the courts rather than decrease the workload or contribute to inefficiency. Assumptions about the size of course and workload are unfounded. For example, there is no correlation between the number of filings in a court and the number of judges it has. The Tenth and Eleventh Circuits have the same number of authorized judgeships, yet the Eleventh Circuit has the third highest number of total filings among the circuits and the Tenth Circuit has the second lowest number of total filings among all the circuits in the country. In addition, scholars Richman and Reynolds have demonstrated that it's not more judgeships that causes instability in the law or increases the rate of appeal. Rather, it's the "absence of circuit precedent that's closely on point."

Moreover, even if there was a concern about large courts, the reality is that the current Judicial Conference judgeship recommendation will not create them. The bill reflecting the Conference recommendations, S. 1653, would create a mere 12 circuit judgeships for the first time in almost 20 years. Seven of those judgeships will be spread among 5 courts of appeals. The additional judgeships will help – not hamper – the work of the federal courts in serving the American public.

Answers To Senator Sessions' Questions

District Court Methodology

1. **Question:**
Given the expense of creating and maintaining additional district court judgeships, it would seem essential that the Judicial Conference have the most accurate measure of the judicial case-related workload possible. The bankruptcy court case weights are being revised based on a time study in which judges record the actual in-court and out-of-court time they spend on a sample of cases filed within a specific time period. This methodology permits an estimate of potential error in the revised bankruptcy court case weights. This is not possible for the revised district court case weights because the methodology used to revise the district court case weights collected little data on the actual amount of out-of-court time that judges spend on different types of cases.

(a) Why did the Judicial Conference adopt a more precise approach for bankruptcy courts than it did for district courts in revising their respective case weights?

Answer:
In summary, a time study is not necessarily more precise than the event-based study conducted by the Federal Judicial Center ("FJC") to develop the 2004 district court case weights. The methodology used by the FJC in 2004 incorporated *both* empirical data and other information derived from an accepted and widely-used research technique developed by the Rand Corporation, and the study design ensured the accuracy of the results it would produce. Indeed, the integrity of the 2004 case weights is demonstrated by the similarity of findings compared to the prior 1993 case weights that had been developed through a time study. In fact, the 2003 national weighted caseload was ***5 percent lower*** when measured under the 2004 case weights than it was when measured under the 1993 case weights. Moreover, because the event-based study would still provide accurate results and provide significant additional advantages, the Judicial Conference believes that the resource-intensive costs of a time study in the district courts are not justified. The Judicial Conference based its respective decisions on the case weighting methodology for the district courts and bankruptcy courts on the appropriate considerations pertaining to workload needs, operation and functioning of the respective types of courts.

There are several reasons why a time-study is not necessarily more precise than the event-based study conducted by the Federal Judicial Center. Raw case weight values developed from traditional time studies are an arithmetic mean computed from many individual time entries. Standard errors, which the Government Accountability Office ("GAO") desired as a means of estimating how representative the sample data are, cannot by themselves indicate how accurate those data are. They cannot tell you whether the computed mean value compares favorably to the true mean value of time expended. What contributes to the accuracy of the mean value is a nationally representative sample and correct recording of time entries. The design and execution of the study has substantial effect on both of these dimensions through sample selection, training of participants, control of factors such as seasonal variations that can skew representativeness, and adherence to consistent definitions of case types and case events.

An evaluation of whether a study has properly managed such factors, therefore, is a good way to assess the likely accuracy of the resulting weights. The FJC's 2003-2004 case weighting study was carefully designed and executed. It received input from an advisory group of judges to define the case types to be weighted, the major case events, and the case characteristics to be included in the computations. It used empirical data from over 297,000 cases from across the nation to develop national event frequencies; it used empirical data from all districts to determine time measures for trials and other evidentiary hearings. It developed consensus time expenditure information under controlled conditions from more than 100 experienced judges representing districts in all circuits. These consensus measures were derived from a research technique developed by the Rand Corporation. A notable feature of the raw weight calculations is that they include a self-adjustment feature: events that occur frequently – thus arguably the ones participants had most experience with – have greater impact on the calculations than those that occur rarely and might therefore have been harder to measure.

Ultimately, as the FJC has explained, the integrity of the 2004 weights that resulted from this methodology is demonstrated by the similarity of the findings using the case weights that resulted from the different 1993 and 2004 methodologies. When total weighted caseload for 2003 filings was computed on the basis of both case weights, the national average of weighted filings per judgeship was approximately 5 percent lower using the 2004 case weights than using the 1993 case weights.

As the FJC wrote in its September 29, 2009 letter to the Chairman and the Ranking Member of the Senate Judiciary Subcommittee on Administrative Oversight and the Courts, "[t]here are several different, and accepted, ways to compute case weights." "Event-based designs have been used in several state case-weighting efforts." The FJC further explained,

> "The Federal Judicial Center has conducted four case-weighting efforts in the federal district courts over the last 38 years. . . . The design of each study was different from the previous one and each strove to (a) to address issues that had come up in the previous design, (b) to deal with inherent limitations, and (c) to take advantage of new developments. This does not mean that older designs were "worse" or newer designs "better," only that each design tried to meet as best it could the situation in which the study was executed. [Time studies] obtained good empirical data but were very resource intensive, demanding substantial time and effort from participating judges, court staff, and research staff. Because of the effort and time involved, these studies were conducted only once every ten years or more, a time frame that sometimes led to concerns that the weights had become outdated before new weights could be calculated."

> "Over the past 15 years, the federal courts have implemented automated case-management systems in each of the district courts. These systems maintain detailed docketing information on all cases filed in the courts. This information is empirical, recorded contemporaneously with the occurrence of the events, and, because it is in active use by the courts for multiple administrative purposes, regularly and carefully checked for accuracy. These automated records provide a level of information about case processing that was unavailable to previous case weighting studies."
>
> "The 2003-2004 case-weighting study in the district courts took advantage of this new data source."
>
> "The event-based method not only had beneficial implications for the 2003-2004 study, but the method also affects case-weighting efforts going forward. Because so many components of the case-weight calculations are driven by data routinely collected in the courts' case-management databases, additions and enhancements to those database systems are available to be incorporated when computing future revisions of the weights. In addition, . . . targeted additions and revisions to the weights can be made without the need to recompute all weights. Thus the weights can be modified between major case-weighting studies to adjust to new case types or changes in case-management procedures in a way that past weights derived from time studies could not. This keeps the weights more up-to-date and more representative of current court practice."

Therefore, the rigorous methodology used by the Federal Judicial Center to develop the 2004 weights, with its combination of empirical data and judicial experiential information, not only produced accurate case weights, but also had ***significant advantages noted by the GAO*** in its May 20, 2003 report, *The General Accuracy of the Case-Related Workload Measures Used to Assess the Need for Additional District Court and Courts of Appeals Judgeships*: reduced judicial burden (so judges can focus on cases), cost savings, and faster development of case weights. The inclusion of empirical data from the electronic case management systems also allows for more frequent updates of case weights.

Given the accuracy and the additional advantages of this type of case weighting study in the district courts, the Judicial Conference believes that the resource-intensive costs of a time study in the district courts are not justified. Just as the Judicial Conference based its decision on how to develop case weights in the district courts on the workload needs, operation and functioning of the district courts, the Judicial Conference based its decision on how to develop case weights in the bankruptcy courts on the different workload needs, operation, and functioning of the bankruptcy courts.

Question:

(b) Given that district court judges have lifetime appointments and bankruptcy judges are term judges and thus are less costly, is it not even more important that there be the most accurate measure of district court workload that can be devised to support requests for additional judgeships?

Answer:

Our case-related workload measures should be as accurate as practicable. As discussed in response to Question 1(a) under "District Court Methodology," the methodology used by the FJC to develop the 2004 case weights was designed to ensure accuracy. The integrity of the 2004 case weight methodology is demonstrated in part by the similarity of the findings using the case weights that resulted from the two different 1993 and 2004 methodologies. In fact, when total weighted caseload for 2003 filings was computed on the basis of both case weights, the national average of weighted filings per judgeship was approximately ***5 percent lower*** using the 2004 case weights than using the 1993 case weights.

Moreover, weighted caseload is not the only factor considered by the Judicial Conference in making judgeship recommendations – it is the starting point, not the ending point. The standard of 430 weighted filings per judgeship after accounting for however many additional judgeships are requested is the Judicial Conference's threshold for considering recommendations for new judgeships. The Judicial Conference recommendations are the product of an extensive, six-step review that involves the individual courts, the circuit councils, the Judicial Conference Committee on Judicial Resources and its Subcommittee on Judicial Statistics, and the Judicial Conference itself. Within this process, the Conference considers several workload factors in addition to weighted filings, including assistance from senior, visiting, and magistrate judges, unusual caseload complexity, geographical characteristics of the court, workload management efforts, and temporary caseload increases or decreases. The Conference makes every effort to maximize existing resources before requesting additional judgeships. For instance, courts requesting judgeships must demonstrate that they are efficiently utilizing senior, visiting, and magistrate judges, and the Conference recommends a temporary rather than permanent judgeship when it is not clear that a court's high caseload will persist.

The Conference process demonstrates a commitment to controlling growth. It does not request a judgeship merely on numerical criteria. The Conference requests a judgeship only after a highly critical analysis of many factors.

2. **Question:**
How does the Judicial Conference determine that a district court has made "maximum" use of magistrate and senior judges– both local and visiting– before supporting a request for an additional district court judgeship?

Answer:
With regard to magistrate judges, each court that requests judgeships must provide detailed information on the range of duties its magistrate judges perform, such as whether they handle preliminary matters in civil and criminal felony cases, conduct settlement conferences, or may be selected for direct assignment of civil cases. The Conference asks each court that requests an additional Article III judgeship why its need for judicial resources cannot be met by additional magistrate judges and, when appropriate, whether the court has considered a change in how it utilizes magistrate judges as an alternative to requesting an additional Article III judgeship. The use of magistrate judges in each court is reviewed by the Judicial Conference Committee on the Administration of the Magistrate Judges System every five years, the results of which are incorporated into the Conference process for recommending Article III judgeships.

With regard to visiting judges, the Judicial Conference Committee on Intercircuit Assignments assists courts by identifying judges in other circuits who can assist in districts where the caseloads are high. Each court that requests an additional judgeship provides information on the range of duties of any visiting judges that provided assistance, including trials, motions, pretrial conferences, settlement procedures, and sentencing hearings. Courts are also asked to identify any factors that prevented the use of visiting judges to alleviate workload problems. In some instances, the Conference will recommend that a court explore greater use of visiting judges to ensure that all available judicial resources are being utilized fully.

With regard to senior judges, the Conference considers, for each court that requests an additional judgeship, the number of active judge equivalents provided by that court's senior judges. The Conference also considers the ages of the current senior judges and the number of currently active judges that will become eligible to take senior status in the near future in order to assess whether the contributions from senior judges will likely increase, decline, or stay the same.

3. **Question:**
Alternative dispute resolution ("ADR") programs are shown to be less expensive and less time consuming than litigation, and both parties are usually extremely satisfied with the outcome. These programs also emphasize cooperation amongst the parties instead of the harsh adversarial atmosphere that tends to arise in a litigation setting. And, these programs help alleviate the workload of judges.

(a) How are district courts using ADR to help speed the disposition of cases and use judicial resources effectively and efficiently?

Answer:
The district courts already use mediation and other case settlement programs to reduce the amount of judge-time required to dispose of cases and reduce the amount of time between filing and disposition. The Judicial Conference, through its Committee on Court Administration and Case Management, publishes and transmits to the courts a Manual for Litigation Management and Cost Delay and Reduction. As directed by statute, the manual contains a description and analysis of alternative dispute resolution programs, as well as other principles and techniques for reducing the cost and delay of litigation, that are considered most effective by the Judicial Conference, the Director of the Federal Judicial Center, and the Director of the Administrative Office of the United States Courts.

To ensure that judicial resources are being used efficiently, each court that requests additional judgeships must provide information regarding its use of ADR, including the type of ADR techniques used and the impact that ADR has had on the workload of the judges. The Judiciary's judgeship recommendations reflect workload needs that persist even after the implementation of ADR programs.

Question:
(b) What studies, if any, have been done on the effect of ADR on judges' workload?

Answer:
Both the academic community and the Federal Judiciary have conducted numerous studies to assess the impact of alternative dispute resolution ("ADR") programs. Those studies focus on the rate of settlement and litigant satisfaction rather than judge time. The effect of ADR programs is reflected in the case weights for district judges. Mediation and other case settlement programs reduce the case weight for case types that are referred to the programs in significant numbers. This is because the frequency of docketed events handled by a district judge has a major influence on the case weight computation. Thus, savings in judge time that occur as a result of settlement programs are reflected in the case weights.

4. **Question:**
In trying to alleviate the burden of an overloaded docket, many courts have adopted different case management practices, such as requiring all civil parties to mediate before moving forward with a trial.

(a) What efforts have been made to identify and share good case management practices among district courts?

Answer:
The Judicial Conference and the courts recognize that identifying and sharing best practices stimulates improved methods of case management that benefit both the courts and those that appear before the courts. The Judicial Conference and the courts thus engage actively in the exchange of "best practices" information.

The Judicial Conference, through its Committee on Court Administration and Case Management, continually reviews the case management activity of the district courts and makes recommendations for changes and improvements. Toward this end, the Committee makes recommendations on proposals involving case management and alternative dispute resolution and reviews initiatives on the development of electronic technologies for their effect on case management. These recommendations are regularly provided to the courts.

In addition, the Judicial Conference prepares, revises periodically, and transmits to the district courts a Manual for Litigation Management and Cost Delay and Reduction. By statute, the manual must "contain a description and analysis of the litigation management, cost and delay, reduction principles and techniques, and alternative dispute resolution programs considered most effective by the Judicial Conference, the Director of the Federal Judicial Center, and the Director of the Administrative Office of the United States Courts." This manual is again being updated, with the update slated for publication in early 2010.

The FJC, as part of its mission to provide research and training to federal courts, studies effective case management methods and produces publications and videos on case management. The FJC also holds workshops and training sessions on case management for judges, with special attention given to new judge training. In addition to producing materials on general case management, the FJC has provided case management publications and videos to assist in the efficient disposition of various types of cases, such as patent, multidistrict litigation, national security, and other types of complex litigation. The FJC's efforts are continuous, and they are carried out in conjunction with the Judicial Conference committees and advisory panels of judges. The FJC's internal and external web sites provide easy access to these materials and the Federal Judicial Television Network airs judiciary-produced videos to assist judges with various case management issues.

The judiciary also has a very active District Court Methods Analysis Program (DMAP) that is designed to identify clerks' offices best practices. When a DMAP study is initiated, a group of subject matter experts from the courts meets to develop best practices for a specific aspect of court operations. The best practices identified through the DMAP process are shared with all courts. Over the years, DMAP studies have been conducted in areas such as habeas corpus petitions, sealed cases, temporary restraining orders, and multidistrict litigation cases. District Court Clerks' Office reviews are conducted periodically to analyze court operations and identify ways to improve case management and court administration.

Question:

(b) Is the adoption of such practices considered in evaluating the need for judgeships in specific courts?

Answer:

Yes, the Judicial Conference takes these practices into consideration when developing its judgeship recommendations, particularly in regard to evaluating the workload-management efforts undertaken by each court to determine whether courts are maximizing the use of available judicial resources. For example, each court that requests additional judgeships must provide information on the use of ADR techniques and the resulting impact on the workload of the district judges. The Conference recommendations thus reflect needs that persist even considering the various case management practices that courts use in accordance with their various needs and available judicial resources.

5. **Question:**
In the appendix of your written testimony, you discuss the growth in specific categories of cases. Can you describe how any group of judges can be reasonably certain about the average amount of out-of-court time that judges spend on one type of case (say product liability) versus another (say immigration or firearms cases)?

Answer:
As discussed in response to Question 1(a) under "District Court Methodology,"the Federal Judicial Center's rigorous methodology for development of the 2004 case weights incorporated *both* empirical data from more than 297,000 cases and every district court, *and* judges' experiential information. The experiential information was elicited under controlled conditions from more than 100 experienced judges representing districts in all circuits. These consensus measures were derived from a research technique developed by the Rand Corporation. As the Federal Judicial Center explained in its September 29, 2009 letter to the Chairman and the Ranking Member of the Senate Judiciary Subcommittee on Administrative Oversight and the Courts, this technique has been used in many research situations – including the development of case weights in some state courts – to obtain consensus from subject-matter experts.

Question:
(a) As a follow up to my previous question, can you explain specifically how factors other than case weights are used to determine whether and how many additional judgeships a court may need?

Answer:
Weighted caseload is only one factor considered by the Judicial Conference in making a judgeship recommendation. The standard of 430 weighted filings per judgeship after accounting for an additional judgeship (or judgeships) is the Judicial Conference's threshold for considering recommendations for new judgeships. It is not the exclusive indicator of each court's needs – it is the starting point, not the ending point. The Judicial Conference recommendations are the product of an extensive, six-step review that involves the individual courts, the circuit councils, the Judicial Conference Committee on Judicial Resources and its Subcommittee on Judicial Statistics, and the Judicial Conference itself. Within this process, the Conference considers several workload factors in addition to weighted filings, including assistance from senior, visiting, and magistrate judges, unusual caseload complexity, geographical characteristics of the court, workload management efforts, and temporary caseload increases or decreases. The Conference makes every effort to maximize existing resources before requesting additional judgeships. For instance, courts requesting judgeships must demonstrate that they are efficiently utilizing senior, visiting, and magistrate judges, and the Conference recommends a temporary rather than permanent judgeship when it is not clear that a court's high caseload will persist.

The Conference's process demonstrates a commitment to controlling growth. The Conference does not request a judgeship merely on numerical criteria. It requests a judgeship only after a highly critical analysis of many factors.

Circuit Court Methodology

1. **Question:**
It is widely recognized that the adjusted filings workload measure for the circuit courts is not much more precise than a simple count of raw filings in each circuit. For more than a decade, there have been proposals for developing a better measure of judges' case-related workload for the circuit courts. Yet the Judicial Conference has not been able to agree on any approach including developing a separate measure for each circuit court.

(a) Why has the Conference failed to develop a better, more differentiated case-related workload measure for the circuit courts?

Answer:
Inherent in any attempt to create a set of case weights that could be applied consistently across the circuit courts are several difficulties. First, cases of the same type (e.g., drug prosecutions) at the district court level raise vastly different issues on appeal, with varying degrees of complexity. Second, different circuits have different procedures and precedents. Varying mixes of cases across circuits means that even cases that raise the same issues on appeal will take less time in a circuit that has many precedents on an issue, and more time in a circuit that has little or no precedent on an issue. Third, different circuits have different practices. For example, at least one circuit affords oral argument to all parties (other than prisoner or pro se litigants) unless the parties waive oral argument, while other circuits rely more on submissions on briefs. Also, some circuits issue one-word affirmances for certain cases, while other circuits tend to provide a statement of reasons for almost all merits decisions. A set of nationally-applicable appellate case weights has thus eluded development.

In addition, the current Judicial Conference standards are already reasonable. Data from the FJC support the one-third figure for pro-se cases. In addition, Professor Arthur Hellman of the University of Pittsburgh School of Law, a noted expert on federal court issues, testified before a House Judiciary Subcommittee in 2003 that because only a very small percentage of pro se cases receive oral argument or a published opinion, it is reasonable to conclude that pro se cases contribute significantly less to the judicial workload. Professor Hellman further explained that in a world of limited resources, it is not necessary to carry out direct empirical research to support this reasonable figure, especially with the FJC's data. Professor Hellman calls the one-third adjustment of pro se cases "justified."

As for other types of cases, adjusted case filings, and the standard of 500 adjusted filings per panel as the threshold for considering recommendations for an additional appellate judgeship, is a useful and appropriate standard that is based on the experience of appellate judges and is recognized as an appropriate standard outside the Judiciary. As Professor Arthur Hellman testified in 2003, the 500 adjusted filings standard, based on historical data on filings and terminations, is "quite defensible," and that the "Judicial Conference has indeed taken a conservative approach in assessing courts of appeals requests for new judgeships." In addition to the historical basis, Professor Hellman's examination of typical workloads led him to conclude that the Judicial Conference baseline of 500 adjusted filings per panel is "reasonable."

Therefore, with limited resources, it would not be sensible or cost-effective to undertake a difficult and complex study to make a determination about a figure and a standard that are widely agreed to be reasonable, especially when the Judicial Conference is using the standard prudently. Indeed, if the caseload of 500 adjusted filings per panel was the only factor in making circuit judgeship recommendations, the Conference could recommend several more circuit judgeships than it has recommended. The Conference considers recommending judgeships for a court only if that court submits a request, and then examines all the factors for recommending judgeships (as indicated in detail in the written testimony) before making a recommendation. The fact that the Conference's process involves six levels of review and uses multiple factors to determine judgeship needs demonstrates the Conference's commitment to controlling growth.

2. **Question:**
Since there is no useful measure of circuit courts' workload that differentiates among different types of cases or dispositions, how does the Conference determine the actual judge time required for the number and mix of cases filed in a circuit court?

Answer:
As discussed in response to Question 1(a) under "Circuit Court Methodology," adjusted filings and the standard of 500 adjusted filings per panel as the threshold for considering recommendations for additional appellate judgeships are, in fact, recognized both inside and outside the Judiciary as reasonable and justified. Beyond these already reasonable standards, a set of nationally-applicable appellate case weights that could be applied consistently across the circuit courts has eluded development, for the reasons described in response to Question 1(a). The Conference is prudently using its existing standards to control growth, as evidenced by the fact that it recommends far fewer judgeships than it could if adjusted filings were the only factor in appellate judgeship recommendations, as also discussed in response to Question 1(a).

Question:
(a) Given the qualitative assessment that results in circuit court judgeship requests, what is the biggest factor (or factors) that affect judgeship requests?

Answer:
First, the Judicial Conference will not even consider recommending judgeships for a court unless that court submits a formal request, so that is the initial factor. The standard of 500 adjusted filings per panel as the threshold for considering recommendations for additional appellate judgeships is a quantitative factor that is a major component in considering recommendations for additional appellate judgeships, but it is the starting point, not the ending point, for the analysis. The Conference considers numerous other factors in assessing the actual workload created by adjusted filings, some of which are quantitative and some of which are qualitative. For the courts of appeals, these include factors such as the mix of cases, the number of appeals terminated after oral hearings vs. submissions on briefs, and the assistance provided by senior and visiting judges. The Conference examines all these factors before making a recommendation.

If the caseload standard of 500 adjusted filings per panel was the only factor in making circuit judgeship recommendations, the Conference could recommend several more circuit judgeships on many courts than it has recommended. The fact that the Conference's process involves six levels of review and uses multiple factors to determine judgeship needs demonstrates the Conference commitment to controlling growth.

Question:
(b) Why are these considered the most important and what analysis supports that conclusion?

Answer:
To the extent that the initial factor is whether a court requests additional judgeships, there are many reasons why a circuit court might not feel it needs to request additional judgeships even if it has a very high level of adjusted filings per panel. One such reason might be that the actual workload of a court may be lower than its adjusted filings would suggest, due to factors such as the percentage of published opinions that the court completes, or the percentage of cases granted oral argument. Other reasons that might affect the actual workload were suggested by Judge Gerald B. Tjoflat in his written testimony for this hearing. Or, as Professor Arthur Hellman has explained, and as your Question 4 below notes, another such factor might be the manner in which the court uses staff attorneys.

Once the Conference is considering requests from the courts, the standard of 500 adjusted filings per panel as the threshold is a useful and appropriate standard that is based on the experience of appellate judges and experts outside the judiciary. Professor Hellman testified that the 500 adjusted filings standard, based on historical data on filings and terminations, is "quite defensible," and that the "Judicial Conference has indeed taken a conservative approach in assessing courts of appeals requests for new judgeships." In addition to the historical basis, Professor Hellman's examination of typical workloads led him to "conclude" that the Judicial Conference baseline of 500 adjusted filings per panel is "reasonable."

3. **Question:**
Given the Conference's years of inaction, is there any reason why Congress should not mandate that the Conference, in conjunction with the Federal Judicial Center, develop a more precise means of measuring case-related workload for the circuit courts?

Answer:
Such action is not necessary because the current standard for assessing judgeship needs in the circuit courts is reasonable. As discussed in response to Question 1(a) under "Circuit Court Methodology," adjusted filings and the standard of 500 adjusted filings per panel as the threshold for considering recommendations for additional appellate judgeships are recognized both inside and outside the Judiciary as reasonable and justified. Beyond these already reasonable standards, a set of nationally-applicable appellate case weights that could be applied consistently across the circuit courts would be difficult and costly to develop, for the reasons described in response to Question 1(a). In addition, the Conference is prudently using its existing standards to control growth, as evidenced by the fact that it recommends far fewer judgeships than it could if adjusted filings were the only factor in appellate judgeship recommendations, as also discussed in response to Question 1(a). There is thus no need for Congress to issue such a mandate.

Question:
(a) Is it really appropriate, especially given the state of the American economy, to request expensive, lifetime judgeships using a starting point that is essentially just raw case filings?

Answer:
As discussed in response to Question 2(a) under "Circuit Court Methodology" as well as other questions, judgeships are requested based on several factors, all of which support the Judicial Conference judgeship recommendations.

Moreover, the costs associated with the Judicial Conference's total judgeship request are more than justified. The need for judgeships has burgeoned in the nearly 20 years during which Congress has not created any circuit judgeships and has not addressed the judiciary's other comprehensive judgeship needs. Yet the costs of creating the judgeships recommended by the Conference are a tiny fraction of federal spending – only one-thousandth of one percent of the total FY 2009 federal budget authority, and just slightly more than one-tenth of one percent of the total FY 2009 federal law enforcement obligations. Given that there has been barely any spending on new judgeships since 1990, the costs compare as minuscule.

The costs are also justified when comparing the tremendous growth of law enforcement and justice personnel (and associated spending) outside the courts with the meager growth of judgeships in the courts. Since 1990, the last time Congress passed a comprehensive judgeships bill, the number of United States Attorneys has grown 189%. The growth in other law enforcement personnel has also grown – the number of FBI agents has increased by 42%, the number of DEA agents has increased by 109%, and the number of ATF agents has increased by 56%. In contrast, the number of circuit judgeships has not grown at all, while the number of district court judgeships has grown by a mere 4%.

The growth in law enforcement and justice personnel affects the growth in caseload and thus the need for judgeships. From FY 1991 to June 30, 2009, filings in the circuit courts increased 38%, and filings in the district courts in creased 31%. Unlike the Department of Justice and other criminal and civil law enforcement agencies, however, the courts do not have prosecutorial discretion or other means of controlling the caseload that comes through the courthouse doors. Indeed, in order to provide access to justice and uphold the law, the courts have no choice but to fairly adjudicate each case that is presented. More judgeships are needed to handle the growth.

4. **Question:**
Circuit courts differ widely in how they manage their caseloads, such as their use of staff attorneys, oral arguments and unpublished opinions.

(a) What studies have been done to examine the effect of these various procedures on judges' workload in individual circuit courts?

Answer:
Numerous studies by the academic community and the Federal Judicial Center have been conducted to assess the various case management practices of the courts of appeals. A key study was the one conducted by the FJC in 2000 that both highlighted the variations in how the circuit courts manage their cases and described in detail the practices of each circuit court.

(b) What were the findings?

Answer:
Writing an opinion for publication is among the most time-consuming responsibilities for a circuit judge, and the FJC study found that fewer than five percent of pro se appeals had published opinions, far below the percentage for counseled appeals. The percentage of pro se appeals varies significantly among the circuit courts. The FJC study also showed that the percentage of counseled appeals that receive oral argument is several times higher than for pro se appeals. Similar to published opinions, the percentage of appeals, both pro se and counseled, that receive oral argument varies widely among the circuit courts.

5. **Question:**
What efforts have been made to identify and share "best practices" in case management among the circuit courts?

Answer:
The Judicial Conference and the courts recognize that identifying and sharing best practices stimulates improved methods of case management that benefit both the courts and those that appear before the courts. The Judicial Conference and the courts thus engage actively in the exchange of "best practices" information.

The Judicial Conference, through its Committee on Court Administration and Case Management, reviews the case management activity of the courts of appeals and, working with the FJC, makes recommendations for changes and improvements. In the publication *"Case Management Procedures in the Federal Courts of Appeals,"* the FJC synthesized various data to demonstrate the variety of practices and procedures that can comfortably coexist under the umbrella of the Federal Rules of Appellate Procedure.

Furthermore, the small number of circuit courts allows for routine sharing of best practices. The clerks of court and senior staff attorneys and their senior staff routinely communicate, both in person and remotely, to address case management issues. For example, in response to case management challenges prompted by the unprecedented growth in cases arising from the Board of Immigration Appeals and several recent U.S. Supreme Court rulings on sentencing, the clerks and senior staff attorneys regularly shared process improvements and visited each other's courts to learn of efficient practices. In addition, chief judges, particularly in those circuits with the heaviest caseloads, exchanged ideas for how their courts were managing the sudden increase in filings and growing pending docket. Such exchanges are common and have led to improvements in practices and procedures. On the horizon is the possibility of additional efficiencies from full implementation of the national CM/ECF system in the courts of appeals.

Question:
(a) Is the adoption of such practices considered in evaluating the need for judgeships in specific courts?

Answer:
Yes, the Judicial Conference takes these practices into consideration when developing its judgeship recommendations, particularly in regard to evaluating the workload-management efforts undertaken by each court to determine whether courts are maximizing the use of available judicial resources. For example, each circuit court that requests additional judgeships must provide information on processes and procedures it uses that promote the efficient use of judicial resources, such as mediation or the use of settlement counsels. The Conference recommendations thus reflect needs that persist even considering the various case management practices that courts use in accordance with their various needs and available judicial resources.

Answers to Senator Cardin's Questions

1. **Question:**
When recommending new judgeships, what weight does the Judicial Conference give to the quantity of existing courthouse space?

Answer:
The Judicial Conference makes judgeship recommendations on the basis of workload factors. The initial factor in the district courts is weighted filings per authorized judgeship, and the initial factor in the circuit courts is adjusted filings per panel. The Conference also considers several other factors in developing its judgeship recommendations, such as the amount of assistance from senior, visiting, and magistrate judges, unusual caseload complexity, temporary caseload increases or decreases, and geographic considerations.

The Judicial Conference judgeship recommendations for each court are based on these workload factors. It would not make sense to deny citizens the judgeships their courts need to efficiently process their cases based on space factors, when space needs can be accommodated in various ways. Of course, when developing future space needs, anticipated judgeship needs must be taken into account.

2. **Question:**
When recommending new judgeships, what weight does the Judicial Conference give to the quality of existing courthouse space?

Answer:
As noted in response to Question 1, the Judicial Conference judgeship recommendations are based on each court's workload factors, not courthouse space.

3. **Question:**
What are the practical drawbacks for judges and their casework when they are forced to share courtrooms due to inadequate available space?

Answer:
Courtroom sharing among Article III judges, in general, has been rare. In locations where there are more judgeships than courtrooms, courtroom sharing is sometimes necessary. Even in the best equipped courthouses, federal judges, on occasion, share courtrooms. Courtrooms are not necessarily uniform in all courthouses. Some courtrooms do not have courtroom technology that may be necessary for a particular type of trial, or do not have holding cells, which are necessary for security in criminal cases. Other courtrooms do not have jury boxes. Some courtrooms will not accommodate a multi-defendant or high profile trial. When judges have shared courtrooms, they have reported that it is not an ideal situation, because of the inefficiencies it creates. When using a shared courtroom, judges report that they may have to have the event at a later date than they would have in their own courtrooms, due to the need to find an available courtroom, as well as accommodate the schedules of the judge's other cases, counsel, witnesses, and, potentially, the transportation of an in-custody defendant or interpreters for criminal case participants who are not proficient in English. Some judges report being hesitant to assign a hearing date until they know for certain that a courtroom is available – otherwise, they risk wasting litigant's time and funds on the attorneys' preparation and travel (which may involve long-distance air travel). As a result, the hearing may not be held until a later date, leaving the case pending longer than it otherwise would be. Some judges have also reported delays in proceedings where a last minute change in assigned courtroom creates confusion among attorneys, jurors, and/or witnesses as to where the proceeding is being held.

During the hearing itself, judges report being less efficient because they may not have all the materials on the bench that they need to review in order to issue an immediate ruling. In addition, recesses in proceedings may need to be longer in a shared courtroom, in order to give the judge sufficient time to travel back to their chambers to get the materials or to deal with matters relating to other cases. Finally, judges, although presiding over only one hearing at a time, are often also simultaneously dealing with other cases – directing law clerks on research and opinion-drafting projects, as well as working with their chambers staff or clerk's office staff to handle routine motions in cases -- and using a shared courtroom typically means that the judge is not in close proximity to his/her staff to efficiently manage these tasks.

Sharing on a routine basis could have a more drastic effect. Judges may have to delay trials and case proceedings if they are unable to find an available courtroom. Delays can prolong litigation and increase costs. When the consulting firm Ernst & Young in 2000 conducted an independent assessment of whether routine courtroom sharing could realistically occur, their study found that the scheduling of district court matters requires a significant degree of flexibility for a myriad of reasons. Consequently, they recommended that the judiciary's policy of planning for one courtroom per active judge should not be changed.

Most often, the effect of routine sharing would be felt in civil cases, where the court may have to delay issuing a firm trial date. In routine courtroom sharing situations, the need for swift progress toward trial in criminal cases as required by the Speedy Trial Act could necessitate the prioritization of criminal cases over civil cases in scheduling the use of courtrooms. Repeated independent studies have supported the proposition that providing early and firm trial dates (premised on the ready availability of a courtroom) reduces litigation costs and delays. Furthermore, an available courtroom is a valuable resource in resolving cases: it tells parties to a case that the court is ready to have a trial. Agreements to settle a civil case or to plead guilty in a criminal case are often reached at virtually the last minute before a trial is to start. A delay in setting a firm trial date, or the inability to guarantee courtroom availability on a specific date due to a courtroom sharing policy will prolong litigation by allowing litigants to delay these important discussions.

In the Baltimore courthouse, about which you have previously expressed concerns, there has fortunately not been a need for active Article III judges to share courtrooms, because the number of courtrooms in the Baltimore courthouse is sufficient to preclude the need for district courtroom sharing. There are six district judgeships in Baltimore, with nine district courtrooms. Of the three extra courtrooms, two of the courtrooms are unassigned, and there is an additional special proceedings courtroom that judges use as needed. As Article III judges take senior status, if additional courtrooms are needed, they will be shared in accordance with the senior-judge courtroom sharing policy that the Judicial Conference adopted at the urging of Congress.

4. **Question:**
Do you anticipate constructing new chambers and courtrooms over the next decade in order to provide adequate facilities for judges who take senior status?

Answer:
Yes, the judiciary plans to construct chambers and courtrooms to accommodate judges taking senior status when there are no available chambers in the locations of those judges. Most senior judges, however, will be accommodated in existing space. Senior judge courtroom usage will be governed by the senior judge courtroom sharing policy that was adopted by the Judicial Conference at the urging of Congress.

5. **Question:**
Shortly after the 9/11 terrorist attacks, the Baltimore Courthouse was moved up to #1 for site and design in FY 2005 on the FY 2003-FY 2007 Five-Year Courthouse Construction Plan. The Baltimore Courthouse remained #1 on this list for 3 years. However, a 2004 memorandum advised that only four courthouse construction projects would be funded in FY 2005, and that Baltimore was not among the projects. Why was the Baltimore Courthouse not replaced?

Answer:
In response to Congressional budgetary pressures and because the Judiciary recognizes the tight budgetary constraints within which the government must operate, and to be a good steward of public funds, the Judiciary adopted a cost containment program in 2004. As part of this program, the Judicial Conference placed a moratorium on all new courthouse construction projects with the exception of those that had already received some funding or authorization from Congress. The moratorium enabled the Judicial Conference to develop and implement a new extensive long range facilities planning methodology called the Asset Management Planning process. This process provides a more detailed analysis of costs and benefits of housing solutions for courts and considers a number of housing strategies so that limited resources are put to their best use. The results of this planning effort indicate that the space needs of the Baltimore courthouse can be met without building a new courthouse.

6. **Question:**
Do you believe the security concerns of the Baltimore Courthouse have increased, decreased, or remained the same since 2001 ?

Answer:
Since 2001, the U.S. Marshals Service has replaced or upgraded all of its cameras and the monitoring system, and has replaced vehicle barriers.

To address security needs, the Judiciary and GSA must consider the availability of limited resources where needs nationwide far exceed available funds. Therefore, in 2005, the Conference's Asset Management Planning process was used to examine the physical security situation at the Baltimore courthouse. This review reflected updated information and clarifications which addressed many of the concerns identified in 2001. As a result of this on-site review, the existence of several major components of physical security were documented. Judges have a separate, restricted elevator and secure parking, the public has separate circulation, and the U.S. Marshals Service has prisoner elevators and a sallyport for prisoner movement.

7. **Question:**
Do you factor in security concerns at all when deciding when to recommend building a new courthouse? What weight do you give this factor?

Answer:
The Judiciary considers several factors, including security, in determining the relative urgency of need of courthouses for either new construction or renovation. Security has a 25% weight within the assessment for physical and functional condition, and an overall weight of 10% for the ordinal rankings of courthouses.

Earlier this calendar year, the Judiciary examined whether to raise the weight accorded to the security factor and prepared numerous scenarios modeling different (higher) weights for security relative to the other factors. The analyses showed that, because so many courthouses have security deficiencies, raising the weight accorded to the security factor tended to lift the "raw" urgency scores for most locations, but did not significantly change the relative order (i.e., the ordinal ranking with respect to each other) of the 143 courthouses in the sample. Based on information compiled for the Judicial Conference Committee on Space and Facilities, with the current security weighting of 10% , the Baltimore courthouse is ranked 37th out of 143 courthouses; when the security factor weight was raised to 17.5%, Baltimore's rank, in the context of all other buildings studied, became 38th.

Under current Judicial Conference policy, a new courthouse is not recommended when space needs 15 years into the future can be met in the existing facility.

8. **Question:**
What is the estimated cost in terms of reinvestment to bring the Baltimore Courthouse to a good conditional level? What are the most pressing needs to be met?

Answer:
The Long Range Facilities Plan for the District of Maryland, dated June 2008, recommends a "renovation strategy" through 2020 for the Baltimore Courthouse. The following projects, and potentially others, are being discussed for the Baltimore courthouse (though there are no specific priorities or timelines associated with each project listed below at this time):

GSA's list of future projects:
upgrading electrical system
replacing water line/piping
replacing air handling units

Court's list of future projects:
converting 2 undersized courtrooms on second floor into one courtroom
renovate courtrooms 7A & 7B
renovate courtroom 3B
complete "First Impressions" project by moving the main entrance to Pratt Street

Security Improvement project:
adding progressive collapse mitigation to building.

It is the understanding of the Judicial Conference Committee on Space and Facilities that GSA has not developed a master plan or a funding strategy for addressing these issues. GSA has shared a rough, preliminary estimate of approximately $80-110 million to address building conditions, but this information is dated. GSA has shared a rough, preliminary estimate of $1.5 million to address progressive collapse mitigation, but this information is dated as well. Because GSA has primary responsibility for determining the feasibility and costs of undertaking such projects, more current data regarding this request can be obtained from GSA.

9. **Question:**
What is the process the Judiciary anticipates using to develop a renovation strategy for courthouses not slated for construction of a new courthouse or an annex/addition to an existing courthouse?

Answer:
All courthouse locations in all districts for which a long range facilities plan is prepared are assigned an "urgency" score on which its ordinal rankings are based. The factors for the "urgency" score are chambers shortages, courtroom shortages, caseload growth, security, building condition, space functionality, and space standards. Locations are then sorted in score order, from most urgent to least. Given limitations on the amount of funding that will likely be made available by Congress to GSA to build new courthouses or modernize existing courthouses, the Judiciary expects to have to select a small number of locations each year, first to undergo feasibility studies of construction alternatives (e.g., build new, annex, modernize, lease) and then, ultimately to request from GSA a specific project type. The process is to select locations on the basis of urgency ranking, not to select on the basis of project type. In other words, the same process is followed, whether the recommended execution strategy is to construct a new courthouse or to renovate an existing one.

10. **Question:**
How does the Judiciary plan to fund courthouse projects under this renovation strategy option in its courthouse construction plan?

Answer:
The Judiciary will provide a list of requests to GSA for courthouse projects, including renovations. The Judiciary must rely on GSA to request funding from Congress for such large courthouse construction projects, and on Congress to appropriate the funding for these projects.

11. Question:
Does the Long Range Facilities Plan process contemplate a 5 year courthouse renovation plan list, similar to the 5 year courthouse construction list, that would prioritize and fund large renovation projects among those districts relegated to a renovation strategy?

Answer:
At the present time, the Judicial Conference does not have a 5 year renovation plan list similar to the 5 year courthouse construction list for large renovation projects.

12. Question:
If GSA has already obligated their total expected allotment of funding for the Baltimore Courthouse over the next ten years to replace of plumbing, electrical and air handling systems that are currently at the end of their prospective life cycles and repair progressive collapse issues, what funding mechanism is available to the Judiciary's building tenants who seek funds for building renovation projects that will likely be at or exceed prospectus level funding?

Answer:
GSA is the only funding source for major building or systems renovation projects that will likely be at or exceed prospectus level funding. As you note, GSA is responsible for providing funding for building system replacements. The Administrative Office of the U.S. Courts understands that in response to the American Recovery and Reinvestment Act of 2009, GSA considered a proposal to spend $60 million to address systems renovation projects at the Baltimore courthouse, but that the proposal was not ultimately submitted by the Administration to Congress.

There are several Judiciary funding sources available to the District of Maryland to seek resources for non-systems building renovations projects, such as refurbishing courtrooms. Circuit judicial councils and district courts receive an allotment of money for tenant alterations that districts can use for certain smaller building renovation projects. Districts and circuit judicial councils also receive cyclical maintenance funds that can be used for certain refurbishment projects.

13. Question:
How does the Judiciary anticipate funding courthouse and courtroom renovations that are at or above prospectus level when it is anticipated that fiscal GSA funding will not be available because of the commitment of those funds to critical building systems needs?

Answer:
As noted in response to Question 12, GSA is the only funding source for major building or systems renovation projects that are at or in excess of prospectus level funding.

SENATOR JEFF SESSIONS
QUESTIONS FOR THE RECORD
JUDGE GERALD TJOFLAT

1) Your circuit, the 11th, has not requested any additional judgeships, even though it has the second highest caseload among all of the circuits- 1,113 adjusted filings per panel. Your circuit also has one of the shortest median times for disposition of cases- 9.3 months.

a. How does the 11th Circuit efficiently manage its caseload?

Answer. The 11th Circuit is an efficient manager of its caseload principally due to its size. Under the Judicial Conference threshold standard for assessing 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 11th Circuit would be entitled to 27 judgeships, rather than the 12 judgeships currently authorized. If judges were added to our court, our efficiency would actually decrease with the addition of each new position. Efficiency depends on the level of collegiality—the ability of judges to anticipate each other's reasoning—and the greater the number of judges on a court, the less its collegiality and efficiency. Our efficiency is also affected in a positive way by up-to-date automation and adequate staff support.

b. What practices can other circuits utilize to help maximize their efficiency?

Answer. Courts the size of the 11th Circuit or smaller are able to screen cases out of oral argument with screening panels. The size of the court has a direct bearing on the level of the judges' collegiality and insight into each other's reasoning and the court's ability to identify cases that are not in need of oral argument.

2) What is your biggest concern about the authorization of new additional judgeships?

Answer. The clarity and stability of the rule of law in a circuit depends on the size of its court of appeals. Clarity and stability depend on the ability of the court to hear/rehear cases en banc with a full complement of its active judges. As the court's judgeships increase, the potential for such en banc review—and the clarity and stability of the rule of law—correspondingly diminishes.

When the rule of law is not clear or stable, the citizens governed by the rule of law lose freedom, and the potential for litigation increases.

3) How would additional judgeships at the district court level impact the workload and burden at the circuit court level?

Answer. Additional district judges increases the output of district court judgements, and, assuming the appeal of a district court judgement is granted as a matter of right, this would inevitably increase the number of appellate filings.

4) Judge Tjoflat, in previous articles and testimony, you have expressed concerns regarding the impact that additional judgeships would have on the stability and consistency of a circuit's precedent.

a. How does increasing the number of judgeships at the circuit court level affect the circuit's ability to maintain its internal consistency of precedent?

Answer. As indicated above, and in my written testimony submitted to this Committee prior to its September 30, 2009 hearing, the stability of the rule of law in a circuit depends on the size of the court of appeals. Each judge 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 5th Circuit was pulled in 26 different directions. In this situation, litigants are uncertain

as to 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."

The sheer number of possible panel combinations increases the potential for inconsistent rulings. This, in turn, creates a need for the court to sit en banc, which, depending on the size of the court, can be an onerous undertaking—so onerous that the judges become reluctant to en banc a case.

5) As an alternative to additional judgeships, would splitting the Ninth Circuit alleviate the circuit's current problems with caseload management and inconsistent precedential decisions?

Answer. Splitting the 9th Circuit would have a positive impact on the clarity and stability of the rule of law. This would lead to a reduction of litigation in the district courts, a reduction of appeals, and greater efficiency in the courts of appeals, as I explain above.

a. Has the creation of mini *en banc* proceedings already fostered an environment ripe for the split of the Ninth Circuit?

Answer. I answer this question by referring to the Old 5th Circuit, which, prior to its division in 1981, consisted of 26 active judgeships. We asked the Congress to split the circuit because functioning with an en banc court of 26 judges was undesirable from many points of view. We did not want to adopt the mini en banc procedure (which the law permitted us to do) because it could result in en banc decisions that did not reflect the view of the majority of the court. Suppose a mini en banc court of 11 judges—the chief judge and ten judges drawn at lot. Suppose further that, in a given case, six of the judges held a view eschewed by the other 20 members of the court, but rejected the majority's view in deciding the case. If the majority of

the judges thereafter voted to re-en banc the case, it would undermine public confidence in the stability of the rule of law.

6) Judge Tjoflat, I think you have some experience in managing a rising caseload with a static number of judges. As I recall, the 5th Circuit, from which the 11th Circuit split, was the pioneer in using staff attorneys to screen cases and suggest cases for decisions on the briefs and those that warranted oral argument. The staff attorneys also drafted decision memos and the Judges, of course, have the final authority. I also know you support smaller circuits because they enhance collegiality and make caseloads often more manageable. How would you recommend addressing the problems we are faced with today?

Answer. The Old 5th Circuit was a pioneer in using staff attorneys. In time, the use of staff attorneys was replicated nationwide. I cannot speak for how the staff attorneys are utilized in other circuits; all I can say is how they were used in the Old 5th Circuit and how they are currently used in the 11th Circuit.

The staff attorneys' work has always been prioritized. The first priority is to determine the presence of appellate jurisdiction. Over 50% of current appeals are resolved on jurisdictional or procedural grounds, with minimal judicial involvement. Pro se appeals are the second priority. Many of them present jurisdictional problems or questions as to whether the arguments presented in brief were preserved at the trial court level. Staff attorneys receive excellent training in this area and are a great asset in ferreting out these issues. The priorities vary from time to time, depending on the types of cases that are making up the court's docket. Depending on the workload, staff attorneys may be assigned to habeas corpus cases brought

under 28 U.S.C. §§ 2241, 2254 and 2255. Those working on habeas cases are well schooled in the rules governing federal disposition of such cases, especially the provisions of the Antiterrorism and Effective Death Penalty Act of 1996. When staff attorneys are assigned to a specific area of the law, they become highly proficient.

Part of staff attorney work involves writing a memorandum analyzing the issues the parties' briefs present in an appeal and accompanying the memorandum with a draft of an opinion disposing of those issues. (The staff attorneys perform this work in areas of the law that are well settled and with which they are quite familiar. Cases presenting issues for which there is little if any precedent are invariably sent to oral argument without staff attorney input.) The memorandum and accompanying opinion, the parties' briefs, and the record on appeal are sent by the clerk of the circuit court to the initiating judge (the "IJ") of the screening panel assigned to the case. The IJ's initial task is to decide whether oral argument will be necessary to decide the appeal. The IJ reaches a decision by anticipating the other two judges of the panel and whether they will conclude that the case needs oral argument. If the IJ concludes that oral argument will not be necessary, the IJ then decides whether all three judges will agree unanimously to a disposition. If so, the IJ drafts an opinion for the panel. In doing so, the IJ considers what the staff attorney has written. The IJ may disregard it entirely, or may adopt part but not all of what the staff attorney has presented. In some cases, what the staff attorney has written is worthy of adoption and is incorporated into the IJ's proposed opinion for the court.

The IJ forwards his or her proposed opinion, the parties' briefs, and the record on appeal to the second member of the panel, who decides whether the case needs oral argument. If the answer is "yes," the judge sends the case to the clerk for placement on the oral argument calendar. If it is "no," the judge decides whether to concur in what the IJ has written. If the

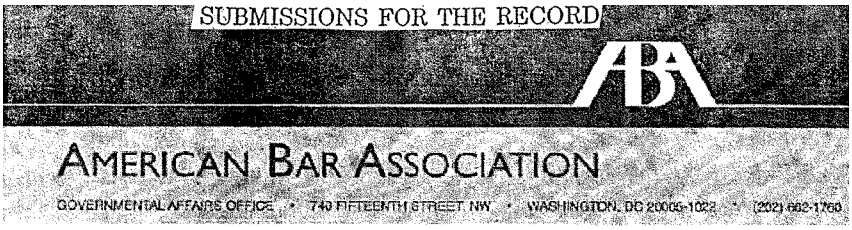
judge cannot concur, the case is sent to oral argument. If the judge concurs, the judge sends the IJ's proposed opinion to the third member of the panel, who engages in the same tasks as the previous judges. If, at the end of the day, the third judge believes that oral argument is not needed and concurs in the proposed opinion, the case is at an end. The proposed opinion (which may have been modified at the request of the second or third member of the panel during the screening process) will likely be unpublished, appearing in the Federal Appendix.

Courts that employ the services of staff attorneys have come under the criticism that much of the court's work product, i.e., the opinions the court issues, in particular those that go unpublished, is actually fashioned by the staff attorneys, not the judges. This problem would be alleviated—the criticism goes—if we had more judges; more judges would eliminate the need for staff attorneys (save for those assigned to menial tasks, such as checking district court records for appealable "final judgments"), and the public would thereby be assured that the court's opinions were fashioned by the judges.

My response to such criticism is that a judge who would blindly accept and sign onto an opinion a staff attorney has written would blindly accept and sign onto an opinion drafted by one of his or her "elbow" law clerks. Some judges are heavily involved in the opinions they author, while some are not. A judge who is easily, and routinely, swayed by a memorandum or opinion drafted by a staff attorney is more easily, and routinely, swayed by what an elbow law clerk has written. Cutting staff attorneys and adding judges to a court of appeals will not solve the problem of inappropriate judge reliance on opinions drafted by support staff.

You ask how I would address the problem we face today—with ever increasing litigation and the unceasing demand for new judges. As I stated in my testimony at the hearing on September 30, 2009, the Article III courts are a scarce dispute resolution resource. Congress

determines the scope of the Article III courts' jurisdiction. Accordingly, it is Congress's task to determine which disputes are to be resolved in the Article III courts and which are not. Some must be resolved elsewhere, in other fora.



STATEMENT

of the

AMERICAN BAR ASSOCIATION

submitted to the

Subcommittee on Administrative Oversight and the Courts

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

for the hearing on

"Responding to the Growing Need for Federal Judgeships: The Federal Judgeship Act of 2009"

September 30, 2009

Mr. Chairman and Members:

The American Bar Association is pleased to have this opportunity to express its support for S. 1653, the Federal Judgeship Act of 2009, which is based on a detailed assessment of resource needs conducted by the Judicial Conference of the United States last year. We request that this statement be made part of the hearing record.

This long-overdue comprehensive judgeship bill would authorize nine permanent circuit court judgeships and 38 permanent district court judgeships, and would convert five existing temporary judgeships into permanent positions. In addition, it would create 16 temporary judgeships and extend one existing temporary judgeship in districts and circuits where burdensome caseloads are expected to subside in time.

The last comprehensive judgeship bill was enacted in 1990. That legislation established 11 additional circuit court judgeships and 61 permanent and 13 temporary district court judgeships. Since 1990, case filings in the federal appellate courts have increased by 42 percent and in district courts by 34 percent. In the intervening years, Congress authorized only a modest number of additional district court judgeships on an *ad hoc* basis in 1999, 2000, and 2002; it has not authorized any additional circuit court judgeships, despite the explosive growth in the number of both criminal and civil appeals.

While neither the Judicial Conference nor the ABA wants to encourage unnecessary growth in the size of the federal judiciary, the quality of the federal courts is dependent on judges having manageable workloads. 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. When judges are laboring under excessive workloads, we cannot fairly expect each case to receive the time and attention it needs or our judges to resolve every dispute in a timely fashion.

The Judicial Conference's recommendations for new district court judgeships start with an examination of weighted case filings, after which many other factors are taken into

consideration. The district courts in which the Judicial Conference is recommending additional judgeships have seen an average growth in weighted filings from 427 in 1991 to 573 in 2008. These statistics do not reveal the seriousness of the situation in some jurisdictions in which new judgeships are sought. Consider, for example, the Western District of Texas, where district court judges have weighted caseloads of 688, or the District of Minnesota, where the district court caseload is 799 per judge. Most disturbing of all, district court judges in the Eastern District of California labor to dispense timely justice with a weighted caseload of 970 per judge -- the highest in the country.

The need for more judgeships is just as dire in our courts of appeals, where the number of appeals has grown from 40,898 in 1990 to 61,492 in 2008. According to the Administrative Office of the U.S. Courts, based on totals for 2008, the average circuit court caseload per three-judge panel was 1,049, dramatically above the 773 average circuit court caseload filings recorded in 1991, one year after 11 new circuit court judgeships were created by Congress.

There is no doubt that such untenable workloads degrade the delivery of justice by delaying access to the courts for the resolution of civil disputes, and that they encourage early resignations from the bench and deter retiring judges from taking senior status. These actions, in turn, bear their own financial cost and negatively affect our business communities.

Over the last decade, Congress has primarily responded to caseload growth by providing more resources, not additional judgeships. The judiciary, in turn, 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-management systems, and relying more heavily on senior judges, magistrate judges and staff attorneys. These responses have represented good-faith efforts by both Congress and the courts to develop cost-saving alternative methods to handle caseload growth. But they are no longer sufficient, given the continuing growth of federal caseloads, fueled in

large by the "war on terror," congressional expansion of federal court jurisdiction, and new national policies that call for enhanced law enforcement efforts.

The ABA's practicing lawyers around the country are concerned that our federal courts cannot continue to compensate for insufficient "judge-power." Case backlogs and court delays impede the delivery of justice. And utilization of more and more methods to dispose of cased as quickly as possible is fundamentally altering the quality of justice in our federal courts. Promptly filling existing vacancies will ameliorate -- not fix -- the problem. To maintain the excellence of, and timely access to, our federal courts, the only viable solution is to authorize new judgeships in areas where the need is overwhelming.

We are aware that some members of Congress question the method by which weighted case filings are determined and optimal caseload standards are set by the Judicial Conference. After carefully reviewing the record for S. 2774, the omnibus judgeship bill of the110th Congress approved by the Judiciary Committee last year, including the responses to questions posed by congressional members in lieu of a hearing (S. Rpt. 110-427 and S. Hrg.110-457, Serial No. J-110-111), and after listening to experiences of our ABA members who have first-hand experience, we have concluded that these concerns do not provide justification to delay consideration of S. 1653. The Judicial Conference and the Federal Judicial Center have thoroughly and satisfactorily explained the basis for the methodology used to calculate case weights and have offered sufficient evidence of its validity.

Furthermore, we believe that undeserved importance has been attributed to case weights and case filing standards. The significance of these caseload statistics is that they furnish the threshold for consideration of requests for new judgeships; they are by no means determinative of need. As the Judicial Conference has explained in great detail in its written statement and responses to questions last year, judgeship recommendations are developed using a multi-step process of review and evaluation that takes into account the experience-based views of judges affected by the workloads, magistrate judge assistance, status of senior judges, geographical factors, cause of caseload growth and availability of

alternative methods to handle it, administrative practices, and a host of other factors. Consideration of these additional factors diminishes the overall importance of the weighted case filings and explains why judgeships are not requested in every jurisdiction or circuit with abnormally high caseloads.

Congressional reluctance to authorize new judgeships is understandable in light of the substantial expense associated with each new judgeship and competing government-wide demands for resources. But the cost to this nation of not providing the judiciary with its most essential resource is far greater. Our government of separated powers requires a judicial branch comprised of a sufficient number of Article III judges to resolve disputes between the branches, rule on constitutional and statutory questions, and protect individual liberties. It is incumbent on Congress to authorize the judgeships the judiciary now needs to carry out its constitutional duties and deliver fair, impartial, and timely justice.

In order to respond constructively to future growth and other challenges facing the courts, we suggest that the subcommittee give consideration to holding hearings to explore creating structures that would facilitate cooperation and ongoing discussion of issues and solutions. 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.

We thank you for your leadership on this issue and urge members of your Subcommittee swiftly and decisively to approve S. 1653 with bipartisan support and to take all necessary steps to assure its prompt consideration by the full Judiciary Committee.

THE FEDERAL JUDICIAL CENTER
THURGOOD MARSHALL FEDERAL JUDICIARY BUILDING
ONE COLUMBUS CIRCLE, N.E.
WASHINGTON, DC 20002-8003

JOHN S. COOKE
DEPUTY DIRECTOR

TEL: 202-502-4164
FAX: 202-502-4099
EMAIL: jcooke@fjc.gov

September 29, 2009

Honorable Sheldon Whitehouse
Chairman, Subcommittee on Administrative Oversight and the Courts
Committee on the Judiciary
United States Senate
Washington, DC 20510

Honorable Jeff Sessions
Ranking Member, Subcommittee on Administrative Oversight and the Courts
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Senators Whitehouse and Sessions:

I write to provide you information regarding the work the Federal Judicial Center did to develop the current district court case weights. Attached is a short document that describes the methods we used, and in particular how we addressed the concerns about the study design that were raised by the GAO in their May 2003 report and recounted in statements provided to the Committee on the Judiciary in June 2008. Also attached is a copy of the published report from the case-weighting study.

We believe that the current case weights reliably reflect the caseload-related burdens facing the district courts. The event-based design used to produce the current case weights is a well-recognized method and was carefully tailored and implemented to ensure accurate results.

We will be happy to provide any additional information that you or your staff might need.

Sincerely yours,

John S. Cooke

Attachments: Methods Used by the Federal Judicial Center to Compute the 2003-2004 District Court Case Weights and Response to GAO Concerns About the Study Design; 2003-2004 District Court Case-Weighting Study

Methods Used by the Federal Judicial Center to Compute the 2003-2004 District Court Case Weights and Response to GAO Concerns About the Study Design

Background Context for the Inquiry

The Government Accountability Office (GAO) included in their May 30, 2003, report *The General Accuracy of the Case-Related Workload Measures Used to Assess the Need for Additional District Court and Courts of Appeals Judgeships* a short assessment of the design of the new district court case-weighting study that had begun in December 2002. The Federal Judicial Center was conducting the study at the request of the Subcommittee on Judicial Statistics of the Judicial Conference Committee on Judicial Resources. In its review, the GAO identified two concerns about the design for the new study, essentially (1) the challenges associated with employing data from two different automated data systems, and (2) the effect of computing weights using consensus time data. Before the GAO report was issued, the Center was given an opportunity to respond to the concerns identified, and a letter by the Center's then Deputy Director, Russell Wheeler, addressed the issues raised.[1] Because of the very early stage of the study at that time, the response necessarily identified the way that the Center proposed to deal with the issues as they arose during the execution of the study. Now, after the completion of the study, we can discuss those concerns from the perspective of what challenges actually surfaced during the study and how they were addressed.

Preliminary Notes on Case-weighting Methods

There are several different, and accepted, ways to compute case weights.[2] The available data greatly influence the methodological options. All case-weighting studies require at least two types of data: (1) information about cases that allows individual cases to be grouped into case types (e.g., contract cases, antitrust cases, drug trafficking offenses), and (2) information about the amount of time judges spend processing cases. Event-based methods also require a third type of data, information about the type and frequency of events that occur in a case.

The Federal Judicial Center has conducted four case-weighting efforts in the federal district courts over the last 40 years. The first three were time studies in which case weights were computed at the level of the entire case based on the direct reporting of time by judges. The design of each study was different from the previous one and each strove (a) to address issues that had come up in the previous design, (b) to deal with inherent limitations, and (c) to take advantage of new developments. This does not mean that the older designs were "worse" or newer designs "better," only that each design tried to meet

[1] This letter was included as an addendum to the GAO report.

[2] *Assessing the Need for Judges and Court Support Staff* (National Center for State Courts 1996).

as best it could the situation in which the study was executed. These time studies obtained good empirical data but were very resource-intensive, demanding substantial time and effort from the participating judges, court staff, and research staff.[3] Because of the effort and time involved, these studies were conducted only once every ten years or more, a time frame that sometimes led to concerns that the weights had become outdated before new weights could be calculated.

Over the past 16 years the federal courts have implemented automated case-management systems in each of the district courts. These systems maintain detailed docketing information on all cases filed in the courts. This information is empirical, recorded contemporaneously with the occurrence of the events, and, because it is in active use by the courts for multiple administrative purposes, regularly and carefully checked for accuracy. These automated records provide a level of information about case processing that was unavailable to previous case-weighting studies.

The 2003–2004 case-weighting study in the district courts took advantage of this new data source. The study used an event-based method in which event weights were computed for individual case events. Case weights then were computed as the sum of the defined set of individual event weights.[4] Event-based designs have been used in several state case-weighting efforts, but had not been used before in the federal courts. The new study used the docketed event information and other case information available from the courts' case-management databases to develop event frequencies for each case type. The study used average time values computed from directly reported time for some events (e.g., routinely collected information on the time spent in trials, other evidentiary hearings, and certain non-evidentiary hearings), and average time values based on judges' consensus estimates[5] for other events (e.g., time spent deciding motions and writing opinions).

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[3] In time studies participants report contemporaneously on the work that they perform to process cases. In the most common design, the diary time study, judges usually record information daily for a period of several weeks, marking down on special forms the amount of time spent in each activity, indicating the case being worked on, and often the type of work being done. Statistical analyses are then used to compute a raw weight that represents the average amount of judge time required to process an entire case of a particular type. Usually raw case weights, which are expressed in terms of time, are converted to relative weights, so that the typical case has a weight of 1.0 and cases of other types have a range of weights that compare their average processing time to that of the typical case (e.g., a weight of 2.0 represents a case that requires twice the amount of case-processing time as the typical case).

[4] In an event-based method a raw case weight is computed by identifying a set of major events that can occur during the processing of a case, identifying how often such events occur, and how long it takes for a judge to process each event. The raw weight is the sum of the products of frequency and time for each event. The set of events should represent the major activities in a case that account for the majority of case-processing time, but not necessarily all time. The event frequencies and judge-time components represent the average values over all cases of a particular type. Raw weights are then converted to relative weights in most studies.

[5] Based on their case-processing experience, judges were asked to identify a value that best represented the average time required to process a particular event in a particular type of case (e.g., to produce an order on a discovery motion in a contracts case). The judges discussed their individual estimates and through a defined process arrived at a consensus value that represented the general practice. See the section below ***Response to GAO's Concerns*** for more details about the procedures used.

Response to GAO's Concerns

Now to the specific concerns listed by GAO and how they were addressed in the case-weighting study.

1. In their 2003 report GAO listed their first concern as "the challenge of obtaining reliable, comparable data from two different automated data systems for the analysis."

   At the time the study was conducted—2003 to mid-2004—the district courts were in the process of converting from the case-management systems that they had been using for several years, ICMS, to a new system, CM/ECF, but relatively few courts had changed over completely. In order to use national docketed event information in our calculations we had to extract the information from both types of systems. To do this, after convening a technical advisory group of experienced technicians and data managers from the Administrative Office of the U.S. Courts (AO) and the district courts, we built separate but equivalent data extraction programs for each system. We then converted all court-specific codes into a standard set of codes, and used those standard codes in the analyses. This successful approach to dealing with the dual database issue allowed us to construct event frequency counts that were solidly based on a large cohort of cases that represented national case-processing practice in the district courts[6].

   The published report from the study describes the procedures that were used to extract the required data and perform these conversions and frequency calculations.[7] The technical appendices to the study report, which are available on-line, provide additional detail.[8]

2. The second concern identified by GAO in their report was "the limited collection of actual data on the time judges spent on cases."

   As mentioned above, we used routinely collected empirical data wherever possible in developing the case weights, but consensus-based estimates of judge processing time were required for some of the event-weight calculations. We decided to take advantage of the knowledge of experienced district judges about how they process cases, and ask them to estimate the amount of time required to

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[6] For the study we received docketed event data from 87of the 91 Article III district courts (96%). Sixty-nine courts provided data from ICMS systems, and 20 courts provided data from CM/ECF (two of the courts used both systems, one for civil cases and one for criminal defendants). The event frequencies used in the profiles were based on events docketed in approximately 297,000 cases (civil and criminal) that were closed in calendar 2002.

[7] *2003-2004 District Court Case-Weighting Study: Final Report to the Subcommittee on Judicial Statistics of the Committee on Judicial Resources of the Judicial Conference of the United States* (Federal Judicial Center 2005). A copy of the published report is attached; the printed version of the report does not include the appendices.

[8] The published report, including all appendices, can be obtained on-line from the Center's Internet web page at http://www.fjc.gov/public/home.nsf/autoframe?openform&url_l=/public/home.nsf/inavgeneral?openpage&url_r=/public/home.nsf/pages/665.

conduct specific case activities in various types of cases. The challenge was to obtain these expert estimates in a structured manner.

To do this we used a variation of the Delphi Method, a technique originally developed by the Rand Corporation in 1964 and used since then in many research situations—including the development of case weights in some state courts—to obtain a consensus estimate from subject-matter experts.[9] The method uses an iterative approach of individual estimates, statistical feedback, and re-estimates to arrive at a consensus.

We used a two-step process to obtain the estimates:

1. We conducted a series of facilitated meetings, one in each of the twelve circuits, with district judge representatives from each of the districts in the circuit. More than 100 experienced district judges participated in these meetings. At the meetings the judges discussed the amount of time they spend on various case activities and came to agreement on the value that best represented the average processing time in their circuit. They filled these time values into a worksheet depicting major case events in different types of cases.[10] Judges prepared to participate in these meetings by filling out a copy of the worksheet in advance of the meeting based on their own personal experience before having the benefit of discussions with their colleagues.[11] The worksheets had default values listed for each type of event. These default values were computed using empirical data available from other sources for activities that were similar to, but not exactly the same as, those required for the study.[12] The defaults served to focus the judges on reporting an average value.
2. An analysis of the worksheet time values obtained during the circuit meetings was then presented to a group of twenty-two judges who met in a national meeting. These judges were tasked with evaluating the data from the circuit meetings to produce consensus estimates of the time values that best represented national practice. Using an iterative process of discussion, voting, and feedback the participants arrived at the values that were included in the final case-weight computations.[13]

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[9] *Assessing the Need for Judges and Court Support Staff* (National Center for State Courts 1996), pp. 73–81. *The Delphi Method: Techniques and Applications* (Harold A. Linstone & Murray Turoff, eds. 2002). Although originally implemented as a series of surveys mailed back and forth between respondents and researchers, face-to-face group meetings have also been used.

[10] An example of the worksheet is included in the published report at page 27.

[11] The information from these pre-meeting worksheets was collected and analyzed. The analysis is presented in Appendix K of the report.

[12] For non-trial proceedings such as motion hearings and conferences, the default values were computed using multiple regression from the information reported by judges on page 2 of the monthly JS-10. For chambers events such as producing orders on motions, the average time reported during the previous district court time study for similar activities was used.

[13] The details of this process are presented in the project report.

GAO recounted their 2003 study in their 2008 statement to the Committee on the Judiciary, explaining that their 2008 testimony was based on the 2003 study rather than any additional study. In their statement, GAO commented that "The accuracy of case weights developed on such consensus data cannot be assessed using standard statistical methods, such as the calculation of standard errors."[14] We do not believe that standard errors are the only way to assess the integrity of the weights. An evaluation of the design and execution of our study, and whether it properly managed factors that could affect the representativeness and accuracy of the information obtained, is an alternative way to assess the likely accuracy of the resulting weights. The estimation process used in our study was structured, rigorous, and based on an accepted method for obtaining expert estimates that has been used for years in various settings. The meeting materials and process were designed to focus the task with empirically-derived default values, and to address some of the common difficulties with estimating. The time values produced by this process can be relied on as good estimates of the national average time required to complete the defined case events.

Characteristics of the New Case Weights

The 1993 weights were thought to be outdated and not representative of current case-management practice, so we expected the 2003–2004 district court case weights to be different from the previous case weights. The observed differences are in the expected directions, with criminal weights generally lower and the weights for complex civil cases higher. The relative ranking of the case types also follows a generally expected pattern (e.g., death penalty habeas corpus, civil RICO, environmental, and patent cases have the highest weights, overpayment and recovery actions and asbestos torts the lowest).

The current weights, however, are not so different from the 1993 weights as to suggest they are flawed. The total weighted caseload on a national level changed downward by approximately 5% for 2003 filings computed under both systems (reducing from a national average 532 weighted caseload per authorized judgeship according to the 1993 weights to 505 based on the 2003–2004 weights). And, for approximately two-thirds of the courts their weighted caseload changed by less than 10% in either direction. It is likely, given the differences between the two sets of weights, that if the 1993 weights had been used to evaluate current judgeship needs instead of the 2004 weights, the resulting request for new judgeships would be higher.

Future Implications of the Event-Based Case-Weighting Method

The event-based method not only had beneficial implications for the 2003–2004 study, but the method also affects case-weighting efforts going forward. Because so many com-

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[14] Highlights of *Federal Judgeships: General Accuracy of District and Appellate Judgeship Case-Related Workload Measures*. Testimony by the Government Accountability Office before the Committee on the Judiciary, United States Senate, June 17, 2008.

ponents of the case-weight calculations are driven by data routinely collected in the courts' case-management databases, additions and enhancements to those database systems are available to be incorporated when computing future revisions of the weights. In addition, because the raw weight for each case type is computed independently of the others, targeted additions and revisions to the weights can be made without the need to recompute all the weights. Thus the weights can be modified between major case-weighting studies to adjust to new case types or changes in case-management procedures in a way that past weights derived from time studies could not. This keeps the weights more up-to-date and more representative of current court practice.

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2003–2004 District Court Case-Weighting Study

Final Report to the Subcommittee on Judicial Statistics of the Committee on Judicial Resources of the Judicial Conference of the United States

Project Directors

Patricia Lombard and Carol Krafka

Federal Judicial Center Project Team Members

George Cort and Nicholle Reisdorff
Joe Cecil, Meghan Dunn, Jennifer Marsh, Dean Miletich, and David Rauma
Robert Day, Tyeika Hartsfield, and Jeannette Summers

with assistance from the Administrative Office of the U.S. Courts

Ellyn Vail and Patrick Walker

Federal Judicial Center 2005

Contents

Acknowledgments

This project benefited from the efforts of many people. Those contributing included the members of the Judicial Conference Committee on Judicial Resources, especially the members of its Subcommittee on Judicial Statistics; more than a hundred district judges serving as consultants, reviewers, and study participants; chief judges in the courts of appeals; circuit executives; the clerks and court executives of the district courts; members of the clerk's office operations and systems staffs; administrators and staff from various organizational units of the Administrative Office of the U.S. Courts (especially the IT staffs); and administrators and staff from divisions of the Federal Judicial Center (especially those who helped with the logistics and program preparation for our circuit-based meetings and those who performed data entry and data-cleaning tasks). When we sat down to compile a list of all the people who played a significant role in this project, we soon realized that recognizing every individual by name and singling out their contribution would result in an excessive number of pages being added to an already lengthy document. We also realized that in the end, when it was too late to remedy, we would almost certainly discover that we had neglected to acknowledge individuals who came through for us in a time of need. There were simply too many.

So we are left with the prospect of expressing our gratitude to most of the project's contributors by stating general appreciation. Offering general, rather than specific, thanks doesn't satisfy our compulsion for detail, but we understand the value of exercising restraint and so declare, to everyone who assisted with this study, you have our profound gratitude. We could not have asked for a better group of collaborators.

General acknowledgments aside, we would like to recognize the contributions of a few specific individuals.

We thank the past and present chairs of the Statistics Subcommittee, Hon. Marilyn L. Huff (S.D. Cal.) and Hon. Wiley Y. Daniel (D. Colo.), who, in addition to serving as liaisons to their individual circuit-based meetings, lent a guiding hand to the project throughout, and are responsible, respectively, for launching the project and seeing it through to fruition. We are grateful for their support, and we are grateful as well for their willingness to learn the details of how the case weights were developed.

We are also grateful for assistance provided by other judges from the Judicial Resources Committee and Statistics Subcommittee. For helping, as members of the Judge Advisory Group, to conceptualize the initial structure of the case-weighting system, and for serving as liaisons to the circuit-based meetings, reviewing project materials, and providing feedback as we felt our way through the process of designing a new case-weighting system, we thank our other circuit liaisons: Hon. Nathaniel M. Gorton (D. Mass.), Hon. James R. Melinson (E.D. Pa.), Hon. Robert J. Cindrich (W.D. Pa.), Hon. Karen J. Williams (4th Cir.), Hon. W.

Royal Furgeson, Jr. (W.D. Tex.), Hon. Jennifer B. Coffman (E.D./W.D. Ky.) (who volunteered the Sixth Circuit for our first circuit-based meeting), Hon. Blanche M. Manning (N.D. Ill.), Hon. Harry F. Barnes (W.D. Ark.), Hon. Ursula M. Ungaro-Benages (S.D. Fla.), and Hon. Ellen Segal Huvelle (D.D.C.). We additionally thank Hon. James A. Parker (D. N.M.), a representative of the Board of Directors of the Federal Judicial Center, who shared ideas and experience as a participant in the initial meeting of the Judge Advisory Group.

Members of our project team worked closely, on an extended basis, with staff from the AO's Analytical Services Office, who serve as staff to the Statistics Subcommittee. Ellyn Vail and Patrick Walker, both of the AO, assisted the project in ways too numerous to recount, from the beginning to the end. The assistance they provided was enhanced further by contributions from Nate Paul and Joyce Bridges, who helped with the circuit-based and national consensus meetings. This group of four provided essential input, and we benefited greatly from having them as colleagues.

We are grateful to a number of court and Administrative Office staff who helped us plan for extracting court data or helped with field testing of the process. These folks included Technical Advisory Group members Denise Lucks (D. Neb.), Mike Mallory (W.D. Tex.), Susan Matlack (E.D. Pa.), Doug Palmer (E.D.N.Y.), Frances Pickering (AO/OCADS-TD), Dave Weaver (E.D. Mich.), and Lee Womack (AO/OIT-SDSD); as well as Bruce Curran (AO/OCADS-TD), Bob Eland (AO/OCADS-TD), Kelly Brewer (D. Neb.), Diann Duino (D. Colo.), Mel Gray (D. Colo.), and Pam Hancock (M.D. La.). We thank district clerks Larry Baerman (N.D.N.Y.) and Sherri Carter (C.D. Cal.) for their general comments and input, especially their assistance with the docketing practices survey.

We owe a debt to Russell Wheeler, deputy director of the FJC, for sheltering us from distractions so we could focus on producing timely case weights. We thank Jim Eaglin, director of the FJC Research Division, for providing the division resources we needed to meet the demands of this project. Special appreciation goes to Donna Stienstra of the Research Division for the detailed review and substantive comment she provided on this manuscript. Any errors or omissions in the text remain our responsibility, of course.

The members of our project team—listed on the title page of this report—are a formidable group of researchers, computer specialists, and support staff. For almost two years we wrestled together with the myriad aspects of this study. These team members have our respect and gratitude, for we could not have completed the work without their individual and group efforts and dedication to the project.

Last, but by no means least, we thank our family members. They tolerated graciously our unusual travel and work schedules, and were generous with the kind of support you can only get from home.

Pat Lombard and Carol Krafka
Research Division, Federal Judicial Center

Executive Summary

The Federal Judicial Center (FJC), with assistance from staff of the Administrative Office of the U.S. Courts (AO), conducted a study in 2003–2004 to develop a new set of federal district court case weights using an event-based methodology. The Subcommittee on Judicial Statistics (Subcommittee) and the Committee on Judicial Resources (JRC), which had requested the study, approved the replacement of old weights with the resulting set of new weights at their respective meetings in June 2004. The old weights had been in use since they were approved in 1993.

The AO will use the new case weights to compute weighted caseload statistics for the district courts. Weighted caseloads estimate the case-processing effort required by district judges to adjudicate the volume and mix of cases filed in their courts and help to identify the level of judicial resources needed by the courts to meet their caseload burden.

What are case weights?

Cases filed in the district courts require varying amounts of judicial work to process. At the time a case is filed, the best prediction of how much work will be required hinges on the nature of the case. Observers of the courts would agree, for example, that a judge is likely to spend more time processing a newly filed patent case than a newly filed student loan case. A number of case-specific factors can cause an individual patent or student loan case to depart from this pattern, but over a large number of cases, the general relationship holds true.

Because different case types present different levels of burden, the mix of cases filed in a court is as important a factor in determining the amount of work required to process the court's caseload as is the number of cases. Case weights are a measure of the judicial work required by cases of different types. They indicate how much more or less time-consuming one type of case is compared to other cases.

Case weights have been used in the federal district courts for over thirty years. Previous case weights were based on time studies that asked judges to report contemporaneously on time they spent working on cases of different types. The case weights derived from such studies reflected the average amount of time spent on each type of case.

This study used a different method for determining case weights. Instead of computing weights from time reports, the staff modeled weights as the interaction between two components: (1) the different events that a judge must complete to process a case (e.g., hold hearings, read briefs, decide motions, and conduct trials) and (2) the amount of time required to accomplish those events. The assumption underlying the method is that the reason patent cases take more judge time than

student loan cases is because patent cases have more events and the events tend to take longer to complete.

Event-based case weighting is new to the federal courts. The Subcommittee decided to pursue this innovative approach after considering both the opportunities and challenges the method presented. Factors that weighed in favor of the decision to proceed included the following: (1) staff could complete the study in a relatively short period of time; (2) the method relied substantially on objective data that courts already routinely collect for administrative and case-management purposes; (3) the study would not require judges to keep case-processing time diaries; and (4) case weights derived from event-based methods can be updated more frequently than weights based on time studies, either in a targeted manner for particular case types, or in a comprehensive manner for the entire set. This latter feature means that the weights can be more readily updated to reflect changes in case-management procedures implemented in the courts in response to judicial or legislative initiatives.

The main challenge that staff conducting the study expected to face was how to acquire and process the data needed for computations. Much of the data came from the case-docketing databases used in individual district courts. Data issues were especially salient because federal district courts were in the process of transitioning from one automated case-docketing system to another.

The Design of the Event-Based Study

Project staff required three types of information to compute the event-based case weights: (1) structural categories, (2) event frequency, and (3) judicial time. Staff obtained the required information from standard statistical reports that the courts submit to the AO, data extractions from district court docketing databases, and consensus judgments provided by experienced district judges.

Structural Categories: Case Types and Case Events

Structural categories are the case types and case events that form the components of the case-weight computations. A Judge Advisory Group, composed of the members of the Statistics Subcommittee and the district judge members of the JRC, worked with staff to define civil and criminal case types that would form the backbone of the case-weighting system. The final case-weighting system included forty-two civil case types and twenty-one criminal case types.

Civil case types were based on the set of nature-of-suit codes that the AO uses to categorize the various causes of action under which a civil case can be filed in the federal courts; a few case types were further differentiated by federal jurisdiction. Examples of major civil case types, each of which accounted for more than 5% of the nation's fiscal 2002 civil caseload, include Personal Injury, Product Liability, Civil Rights (non-prisoner), Prisoner Civil Rights/Prison Conditions

(State), and Social Security. Criminal case types were mainly based on the list of codes the AO uses to represent the various federal offenses for which an offender can be indicted; two additional case types were established to account for the holding of supervision revocation hearings. Major criminal case types include All Other Fraud, Other Immigration, Sell or Distribute (drug offense), Firearms, and All Misdemeanor and Petty Offenses.

Case events are tasks that judges perform to process a case. The case events used in the computation of case weights for this study comprised four general case-event categories: (1) Trials and Other Evidentiary Hearings (e.g., conducting jury and non-jury trials); (2) Non-Evidentiary Hearings and Conferences (e.g., conducting pretrial conferences, motion hearings, arraignments); (3) In-Chambers Case Related Activities (e.g., preparing orders on summary judgment or other dispositive motions); and (4) Case Adjustments (which required, for example, special consideration of cases having more than five parties and cases with an interpreter present at proceedings). The events included in the case-weighting structure represent a range of case activities that require substantial time and attention from district judges.

Event Frequency

Event frequency refers to how often a specific event is likely to occur, on average, in a case of a particular type. The project team determined event frequency by analyzing docketed events from 297,029 cases (245,666 civil cases and 51,363 criminal defendants) that terminated in calendar 2002. Eighty-seven district courts contributed data from their docketing databases to the event-frequency measures.

Judicial Time

Estimates of the average time district judges spend processing each of the defined case events are critical to event-based case weighting. The information for estimating time expenditure was drawn from two sources: (1) monthly JS-10 reports of trial proceedings—these reports provided objective measures of judicial time spent in trial, and (2) the consensus assessments of experienced district judges, providing estimates of time spent in non-trial proceedings and chambers activities.

Project staff used JS-10 reports on 36,010 civil trials and 37,576 criminal trials to compute the trial time estimates. For non-trial time estimates, staff designed a two-stage process to gather and evaluate judgment-based time estimates. More than 100 district judges representing 90 courts convened in meetings held in each circuit to determine regional estimates of time required to handle events in different cases. Twenty-two district judges who participated in the circuit meetings then attended a national meeting during which they analyzed the circuit estimates and agreed on final time-expenditure estimates to represent the national average.

These final, consensus-based estimates were used in the new case-weight calculations.

Computing the Weights

The raw case weight for any particular case type was calculated by (1) multiplying event frequency and judicial time for each type of case event and (2) summing the products across case-event types. The raw weight estimated the total time required, on average, to process a newly filed case of the given type.

Staff then transformed the raw weights into relative weights. Relative weights preserve the relationship among case types, but are easier to use than raw weights when comparing case-type burden. These weights do not represent actual time; they instead measure the relative work required to process cases of different types. Thus, a case type with a weight of 2.00 requires twice as much district judge work as a case type with a weight of 1.00. A case type with a weight of 0.50 requires half as much work as a case type with a weight of 1.00.

The relative weight for any particular case type was its raw weight divided by the raw weight value of the median case type. When all the case types were ranked by raw weight, the median case type was All Other Felonies. All Other Felonies, therefore, received the benchmark weight of 1.00. Other case types were weighted relative to All Other Felonies.

The project staff submitted preliminary weights to the Judge Advisory Group for their review in mid-May 2004. An additional adjustment was applied to the weights following the review to incorporate the effect of trying co-defendants together in criminal trials, and final weights were presented to the Subcommittee at its June 15, 2004, meeting. Following a discussion of the weights and their impact on the weighted caseloads of the district courts, the Subcommittee approved the new weights for immediate use. At the recommendation of the Subcommittee, the JRC approved the weights on June 17, 2004.

Table 1 lists the approved weights, by case type, derived from this study. The case type with the highest computed case weight was Death Penalty Habeas Corpus (12.89), followed by Environmental Matters (4.79), Civil RICO (4.78), Patent (4.72), and Continuing Criminal Enterprise (4.36). The lowest weighted case types were Overpayment and Recovery (0.10), Asbestos (0.12), Supervised Release/Probation Revocation Hearing (Non-Evidentiary) (0.14), All Misdemeanor and Petty Offenses (0.18), and Supervised Release/Probation Revocation Hearing (Evidentiary) (0.22).

Table 1: New 2004 District Court Case Weights

Case Weights for Civil Case Types		
General Category	**Case Type**	**2004 Study Weight**
Admiralty	Admiralty	0.88
Banking and Finance	Banking and Finance	1.17
Bankruptcy	Bankruptcy Appeals	0.57
	Bankruptcy Withdrawals	0.74
Civil Rights	Civil Rights: Employment	1.67
	Civil Rights: Other	1.92
	Civil Rights: Voting	3.86
Commercial Litigation	Antitrust	3.45
	Civil RICO	4.78
	Interstate Commerce	0.84
	Other Fraud	1.70
	SEC, CFTC, and Similar Enforcement Actions (US Plaintiff)	2.08
	SEC, Commodities, and Stockholder's Suits (Non-US Plaintiff)	1.93
Contracts	Insurance Contracts	1.41
	Other Contract Actions	1.22
	Overpayment and Recovery	0.10
Forfeiture and Penalty	Forfeiture and Penalty	0.42
Intellectual Property	Copyright and Trademark	2.12
	Patent	4.72
Labor	All Other Labor	1.02
	ERISA	0.84
Other Actions	All Other Actions (Including Local Jurisdiction)	0.99
	Environmental Matters	4.79
	Federal Tax Suits	1.29
	Freedom of Information Act	3.06
Prisoner Litigation	§2254 Habeas Corpus Petitions	0.54
	§2255 Petitions to Vacate Sentence	0.32
	Death Penalty Habeas Corpus	12.89
	Deportation / Immigration	0.44
	Mandamus	0.49
	Prisoner Civil Rights / Prison Conditions (Federal)	0.75
	Prisoner Civil Rights / Prison Conditions (State)	0.67
Real and Personal Property	Foreclosure	0.32
	Land Condemnation	0.76
	Other Property Actions (Real or Personal)	1.17
Social Security	Social Security	0.63
Torts	Asbestos	0.12
	Assault, Libel, and Slander	1.47
	Federal Employer's Liability	0.76
	Medical Malpractice	1.40
	Personal Injury (Excluding Admiralty)	0.90
	Product Liability (Excluding Admiralty)	0.61

Table 1: New 2004 District Court Case Weights (continued)

Case Weights for Criminal Case Types		
General Category	**Case Type**	**2004 Study Weight**
Drug Offenses	Continuing Criminal Enterprise	4.36
	Import / Export	0.61
	Manufacture	1.12
	Possession	0.86
	Sell or Distribute	1.07
Espionage and Terrorism	Espionage and Terrorism	1.08*
Extortion, Threats, and RICO	All Extortion, Threats, and RICO	1.89
Financial Crimes	All Fraud	0.97
	Embezzlement, Forgery and Counterfeiting	0.75
Firearms	Firearms	1.00
Homicide, Assault, Kidnapping	Aggravated or Felonious Assault, Kidnapping	1.34
	Murder, Manslaughter, Homicide	1.99
Immigration Offenses	Alien Smuggling	0.57
	Other Immigration	0.47
Misdemeanor and Petty Offenses	All Misdemeanor and Petty Offenses	0.18
Other Felony Offenses	All Other Felonies	1.00
Robbery, Burglary, Larceny and Theft	Larceny and Theft	0.87
	Robbery and Burglary	0.71
Sexual Offenses	Sexual Offenses and Pornography	1.10
Supervised Release and Probation Revocation Hearings	Supervised Release and Probation – Evidentiary Revocation Hearing	0.22
	Supervised Release and Probation – Non-Evidentiary Revocation Hearing	0.14

* This weight is believed to underestimate the average burden associated with Espionage and Terrorism cases. The weight is based on a small sample (12 cases) that probably does not represent the range of case-processing activity that would be found if a larger sample size that included cases representative of pending and future filings were analyzed. Despite the weight's limitation, the Subcommittee will use the weight as computed until such time as more representative terminations data become available and the weight can be recomputed.

Organization of the Report

The report is divided into six parts:

I. **Overview of the Event-Based Design**—Describes the background of the study, the basic elements of the design, and subsequent design modifications.

II. **Structure of the Study**—Describes work performed with the assistance of advisory groups to define the preliminary structure of the case-weight model, the calculation of trial time estimates from objective data, and the development of default values for case events.

III. **Circuit and National Meetings**—Describes the preparation for and execution of the twelve circuit meetings, modifications to the case-weighting structure that were proposed in circuit meetings, decisions on the proposed modifications, and development of final time estimates at the National Consensus Meeting.

IV. **Data Extraction and Data Processing**—Describes the procedures used to extract docketed information from the courts' case-docketing databases, process the extracted data, and produce event frequency values.

V. **Computation of the Case Weights**—Describes the development of preliminary weights, the incorporation of a multidefendant case adjustment to arrive at the final weights, and how case weights are computed.

VI. **Action on Final Case Weights**—Describes materials submitted to support the final review of the case weights (materials that included weighted caseload calculations for the district courts), Subcommittee and JRC decisions to approve the case weights, and case-weight information prepared for dissemination to the courts.

Part I. Overview of the Event-Based Design

This section of the report provides background on the origins of the event-based case-weighting study, including discussion of the proposed and final design.

Background

In December 1993, the Subcommittee on Judicial Statistics replaced an outdated set of case weights with new weights derived from a time study conducted by the Federal Judicial Center. The Administrative Office used the 1993 weights to calculate weighted caseloads in the U.S. district courts over the next ten years.

With the passage of time, federal courts experienced changes in the volume and nature of cases entering the federal system. The courts responded to the changing caseload, as well as to legislative initiatives such as the Civil Justice Reform Act, by adapting their case-management practices. As a result of such changes, Subcommittee members began to anticipate the need for updated case weights, and in June 1999 they asked the FJC to investigate options for a new case-weighting study.

Over the next several years, FJC staff provided the Subcommittee with information about various approaches to case weighting and the options for conducting a study in the district courts. The Subcommittee reviewed the options and expressed particular interest in an approach that had been used to develop case weights in some state courts but that had not previously been applied to the federal courts. This approach—which used an event-based method—relied heavily on objective case information collected by courts on a routine basis.

An event-based method appealed to the Subcommittee for several reasons. The method makes use of existing data and provides the means for a targeted updating of specific weights in the future, without the need for a full-scale study. The method also holds the promise of increasing precision. Docketing features soon to be in everyday use will provide for an increasing proportion of objective time data. Moreover, as more courts convert from ICMS docketing to CM/ECF docketing systems, the data on which event-based weights rely will become standardized.[1]

A central question that FJC staff posed about the event-based approach was whether court data were available in sufficient detail to support case-weight calculations. This question remained unsettled until 2002, when FJC staff concluded that data contained in standard statistical reporting systems, along with data contained in courts' ICMS and CM/ECF docketing databases, were sufficient to proceed. The structure of CM/ECF systems provided detailed, uniform docketing

1. ICMS is the acronym for a general database system known as the Integrated Case Management System that has been used for docketing in all but a handful of district courts for many years; CM/ECF stands for Case Management/Electronic Case Filing, which is a database-management system currently being phased into the courts to replace ICMS.

data and was especially suited for event-based case weighting. Although fewer than half of the courts had replaced ICMS with CM/ECF by the end of 2002, the existence of uniform data from a substantial number of courts favored using an event-based case-weighting methodology.

Proposed Design and Design Modifications

In December 2002, the Subcommittee considered several proposals for a new case-weighting study in the federal district courts. Written materials, prepared by staff of the FJC and the AO, presented different options for conducting the study. 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.

The FJC design proposed the use of routinely collected data to identify case types, compute event frequencies, and provide objective time estimates for trials and proceedings. Project staff recommended conducting a national survey of district judges to obtain time estimates for non-proceeding chambers activities. The survey results would then be presented to a gathering of district judges representing a cross-section of district courts, and these judges would discuss the results and use a structured iterative-feedback technique (a variation of the Delphi Method) to arrive at a consensus estimate of the judge time required to process each case type and event combination.[2] Appendix A provides an overview of the original FJC design.

The AO document presented general information about design options rather than a single study proposal, including two different approaches to determining case weights: (1) judges would decide average estimates of the total time required to process different kinds of cases in their entirety, with either the FJC or AO transforming the estimates into relative case weights; or (2) judges would decide on such estimates and determine the appropriate case-weight values directly, without assistance from the FJC or AO.

The AO document additionally described options for collecting the necessary time estimates. Suggestions included focus groups, focus groups with separate data validation, and judge interviews. The focus group option, which was explored in detail, proposed that judges gather together in a series of group meetings, held in each circuit, to obtain initial regional estimates of case burden. This would be followed by a national gathering of district judges to resolve differences among circuit estimates.

After considering both the FJC and AO submissions, the Subcommittee asked the FJC to conduct a case-weighting study that merged elements of the two agen-

2. The Delphi Method is an iterative-feedback group estimation procedure for obtaining a consensus estimate. Some state courts have used the method to develop case weights. Originally, the method was implemented through written exchanges and voting, but more recently it has been employed with groups that are meeting face-to-face.

cies' proposals. The study retained the general components of the FJC's event-based design but collected regional time estimates through a series of circuit meetings rather than a survey. A national review group would then evaluate the regional estimates using structured consensus-building techniques modeled after the Delphi Method to arrive at final national time estimates.

The Subcommittee asked the FJC to provide new case weights by June 2004 and asked the AO to provide the FJC with assistance.

Event-Based Case-Weighting Overview

The computation of the event-based case weights for this study required three types of information:

- *case characteristics*—used to organize individual cases into case types and to identify civil and criminal cases with special characteristics that place additional demands on judges' processing time;
- *event frequency*—used to profile the frequency of activities requiring judicial attention in each of the defined case types; and
- *judicial time*—estimates of the average time required for judges to handle the events leading to disposition of various case types.

We obtained basic information on case characteristics from standard statistical reporting forms that courts submit to the AO. Such information included nature of suit, basis of federal jurisdiction, and indicted offense. Other information was obtained from data residing in courts' case-management databases. Such information identified, for example, civil cases having multiple parties and criminal cases involving prosecution with the death penalty, multiple defendants, or a courtroom interpreter.

We derived the information required to calculate event frequency from records of docketed activity contained in the courts' administrative databases. Events included such proceedings and activities as trials, conferences, hearings, the issuance of orders, and the issuance of opinions.

Two sources of information provided estimates of the judicial time needed to handle case events and activities. One source was JS-10 reports (JS-10 Monthly Report of Trials and Other Court Activity). JS-10 reports are monthly reports, submitted by courts to the AO, of time spent in trial and other non-trial proceedings. These JS-10 reports provided objective measures of judicial time spent in trials and evidentiary hearings. (See Appendix F for a copy of the JS-10 form.)

The second source of judicial time measures came from judgment-based estimates provided by district judges. Experienced judges met in every circuit to estimate the average time that judges in their circuit spend on various case events and activities, specifically non-evidentiary proceedings (such as motion hearings and conferences) and case-related activities conducted in chambers (such as reading briefs or writing opinions). Representatives from the twelve circuit meetings

then convened in a national forum to evaluate the circuit results. Using a variation of the Delphi Method, the national group established final time estimates that we incorporated into the case-weight computations for non-trial case events.

Table 2 presents an overview of the components of the event-based case-weighting study conducted by the FJC.

Introducing the Project to the Courts

We notified judges and court staff about the upcoming study once the Subcommittee decided to launch the project. Notification entailed presentations to the Conference of District Judge Representatives to the Judicial Conference of the United States (March 2003), the Administrative Office's District Clerks' Advisory Group (April 2003), the FJC's annual conference for chief judges of the U.S. district courts (with the then-chair of the Subcommittee, April 2003), and the circuit executives' meeting at the time of the Judicial Conference meeting (September 2003). Liaison staff from the FJC to various Judicial Conference committees provided members of those committees with regular project updates during the course of their reporting on FJC activities. In addition, the June 2003 edition of the *Third Branch,* the federal courts' newsletter, described the study and how it would be conducted. Appendix B includes an example of slides we presented to several of the groups, as well as a copy of the *Third Branch* article.

Table 2: Development of District Court Case Weights Using an Event-Based Approach

	Final Calculation Components	
Event Categories	**Source of Time Information/How Analyzed**	**Source of Frequency Information and Docket Markers/ How Analyzed**
(A) **Trials and Other Evidentiary Hearings**	• Trial hours reported on the JS-10 (page 1). • Computed average times directly from reported data. • Data reported by active district judges for period 1996–2002. • Data matched to case information to identify case type. • Criminal trial times based on single-defendant trials only. • Data for evidentiary supervised release and probation revocation hearings only available for 2001–2002.	• Court administrative databases (ICMS and CM/ECF) and JS-10 data. • Identified docket events that documented the occurrence of an evidentiary hearing or trial. • JS-10 trial (page 1) records matched to analysis case. • Detected and eliminated duplicate events from the two data sources. • Examples: Docket entry indicating a jury trial was held, JS-10 record identifying a preliminary evidentiary hearing was conducted.
(B) **Non-Evidentiary Hearings and Conferences**	• Computed average times for non-evidentiary supervised release and probation revocation hearings directly from the times and counts reported on the JS-10 (page 2). Data available for 2001–2002 only. • Time spent by judges in other non-evidentiary proceedings is not recorded with sufficient specificity on the JS-10 (page 2) to use in the case-weighting calculations. Estimates of time spent in these activities were obtained using this two-step approach: (1) Conducted a series of meetings, one in each circuit, of active district judges representing the district courts in the circuit. Asked the judges to discuss and agree on an estimate of the average time required to accomplish the described tasks for each case type. Prior to the meeting participants were asked to record their individual estimates of the time required on a set of worksheets. (2) Convened a group of judges, two from each circuit who participated in the circuit meetings, to review the estimates obtained from the circuit meetings. Using structured iterative-feedback (i.e., Delphi) techniques they arrived at a consensus estimate of time required, on average nationally, for each task. • Time estimates obtained at the national consensus meeting were used in the case-weight computations.	• Court administrative databases (ICMS and CM/ECF). • Identified docket events that documented the occurrence of a non-evidentiary proceeding. • Examples: Minutes of a motion hearing filed, reference to status conference held, indication that a plea hearing was held.

Table 2: Development of District Court Case Weights Using an Event-Based Approach (continued)

	Final Calculation Components	
Event Categories	**Source of Time Information/How Analyzed**	**Source of Frequency Information and Docket Markers/ How Analyzed**
(C) **In-Chambers Case-Related Activities** **(e.g., activities related to issuing an order or writing an opinion, preparation for trials or hearings)**	• Indications of non-proceeding time spent by judges are not captured in any standard reporting. Therefore, estimates of time spent in these targeted activities were obtained using the same two-step approach described above: (1) Conducted a series of circuit meetings to obtain regional estimates. (2) Convened a national consensus meeting to obtain an estimate of the national average time required. • Time estimates obtained at the national consensus meeting were used in the case-weight computations.	• Court administrative databases (ICMS and CM/ECF). • Identified docket events that mark the issuance of an order, judgment, or opinion on certain types of dispositive and substantive motions. • The order is the docket marker, but the time estimate included a full range of activity that resulted in that order, including reading briefs, doing research, conferring with colleagues and staff, deciding, and writing the order or opinion. It did not include holding a hearing on the issue, which was credited separately (in one of the above categories) or direct preparation for the hearing which was included separately in this category. • Examples: Issuing an order on a motion for summary judgment, a motion to dismiss, a discovery motion, or a final judgment in a case. Counts of trials and non-trial proceedings obtained in the categories above were used as the frequency values for the preparation events.
(D) **Case Adjustments** **(e.g., cases with multiple parties, death penalty cases)**	• Judges recognized that there is often a time savings associated with trying co-defendants together. The estimated savings was computed from JS-10 data (page 1) based on multidefendant trials conducted 1996–2002. • Although judges agreed that the existence of certain case characteristics added to the time required to process a case that was not reflected in the time or incidence of defined events, there was no objective source of information on the amount of time added. Estimates of the relevant adjustment based on these case characteristics were obtained using the same two-step approach described above: (1) Conducted a series of circuit meetings to obtain regional estimates. (2) Convened a national consensus meeting to obtain an estimate of the national average value. • At both the circuit meetings and the national meeting, judges found it more appropriate to define the value of the adjustment in terms of a percentage of the time otherwise spent on the case rather than assigning a specific time value. • Estimates obtained at the national consensus meeting were used in the case-weight computations.	• Court administrative databases (ICMS and CM/ECF). • Identified docket events that mark the filing of certain motions or requests, or the existence of defined case characteristics. • Examples: Count of the number of parties appearing in the case, filing of a motion to certify a class, filing of a notice of intent to seek the death penalty, filing a CJA Form 30 request, appointment of an interpreter, indication on the JS-10 trial record that co-defendants were tried together.

Part II. Structure of the Study

This section of the report describes work done with advisory groups to define the structural components of the case-weight computations, the calculation of trial time estimates from objective data, and the development of default values for case events.

Technical Advisory Group

We assembled a Technical Advisory Group to help us understand the technical details of docketing using the ICMS and CM/ECF systems. The Technical Advisory Group consisted of operations and systems staff from several courts and technical staff from the programming and automation support divisions of the AO. Members were chosen to reflect a cross-section of experience with the docketing systems used in the courts.

The advisory group met with us for two days beginning March 20, 2003.[3] The goals of the meeting were to (1) obtain a better understanding of the courts' docketing systems; (2) identify existing court resources, tools, and utilities that might be adapted for use in the project; (3) receive immediate Technical Advisory Group assistance in developing event categorizations and extraction routines; and (4) secure a commitment for continuing assistance to the project from Technical Advisory Group members, especially a commitment to review materials and pilot test programs. (See the meeting agenda in Appendix C.)

After presenting the design and purpose of the new study, we described for the advisory group the type of information that would be required from court databases. The technical advisors then discussed whether the information was consistently captured in databases and what data elements would need to be extracted. The group addressed structural differences between the ICMS and CM/ECF docketing systems as well as differences between ICMS implementations (differences were based on the models distributed by the Arizona and Texas Training Centers). The group also reviewed starter dictionaries, which identify the codes and descriptions used to docket various events when databases first begin operation, for indications of the information available in each of the systems. (See Appendix D for examples of these dictionaries.)

We came away from the Technical Advisory Group meeting realizing that we would face a number of docketing data issues. We drew the following conclusions from the group discussions:

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3. Four FJC and two AO project staff members convened with four Technical Advisory Group members at the Thurgood Marshall Federal Judiciary Building in Washington, D.C.; two additional members attended via videoconference and one attended via telephone conference. Two individuals invited to participate as members of the advisory group were unable to attend as a result of travel and security problems.

- Many courts, especially those using ICMS, have customized their docketing systems. Data from these courts would require special processing before we could use it.
- Docketing practices in the courts (including such basic practices as whether hearings were docketed or how events were docketed in consolidated cases) varied considerably. The technical advisors recommended that we conduct a survey of practices to identify critical variations. We expected such information to help us determine what events could be consistently identified and counted.
- No standard conversion maps were available to translate between the codes from the ICMS starter dictionary (i.e., event and relief codes) and the CM/ECF starter dictionary (i.e., type and subtype codes). Each district court that had already converted from ICMS to CM/ECF docketing had instead created its own individualized maps as part of its conversion process. The AO agreed to assist us in obtaining these maps.
- Several programs and utilities for extracting data from the courts' case-management databases were available for adaptation.
- We could not expect systems staff in the courts to convert their event codes to a set of standard project codes. Courts would need extraction routines from us that pulled data from their systems "as is"; we would have to handle the conversions. The Technical Advisory Group advised us that programs we developed to extract data should have good documentation, be thoroughly tested in various environments, and permit courts flexibility in how and when they ran the extractions.

The meeting adjourned with members of the advisory group agreeing to provide examples of existing database query programs and to continue to assist the project. They provided subsequent assistance by reviewing materials and pilot testing extraction programs and instructions.

Judge Advisory Group

We asked the Subcommittee in December 2002 to designate members to serve as a Judge Advisory Group to the project and to ask the district judge members of the full Judicial Resources Committee to participate as well. Eight members of the designated Advisory Group, plus a district judge member of the FJC Board, met with us for two half-days beginning April 30, 2003, to help decide four principal issues: (1) which case types should receive a distinct case weight; (2) what events should be included in the case-weight computations; (3) what, if any, special case characteristics should be reflected in the case-weight computations; and (4) whether JS-10 data and information from the 1993 Time Study should be used to provide default values to help anchor judges' estimates for non-trial proceedings and in-chambers activities.

The meeting agenda and materials sent to the Judge Advisory Group before the meeting are included in Appendix E.

Establishing Case Types

The Judge Advisory Group reviewed civil nature-of-suit codes and criminal offense codes to develop civil and criminal case type categories.

Establishing Events

The Judge Advisory Group worked from the JS-10 form and the dictionary of CM/ECF events to help establish the case-weighting events. The group started from the premise that trial and proceeding events identified on the JS-10 (e.g., jury and non-jury trials, evidentiary hearings involving TROs and preliminary injunctions, conferences, pleas and arraignments, sentencing hearings) would, with one exception, be included in the case-weight calculations. The exception was grand jury proceedings, which, because they normally occur in a prefiling stage at a time when the specific offense is not yet completely determined, have traditionally been omitted from case-weight analyses. (A copy of the JS-10 form is provided at Appendix F.)

After reviewing the JS-10 form, the judges spent considerable time determining whether significant expenditures of judge time were *not* accounted for by the report. They determined that substantial judicial time is expended in chambers on substantive motions. We consequently asked them to review the CM/ECF starter dictionary to identify orders that would be issued in response to such motions. Orders, rather than motion filings, were defined as the triggering event for inclusion in the case-weighting structure because orders are likely to be docketed in a consistent manner across the courts and they reliably signal an outlay of judge time. (A sample of the list of orders in the CM/ECF starter dictionary is provided at Appendix G.)

Special Case Characteristics (Case Adjustments)

The Judge Advisory Group discussed several special case characteristics (e.g., multiple parties) that members believed would improve precision if they were incorporated into the case-weight calculations. We told the advisory group that individual case characteristics could be incorporated into case-weight calculations as "case adjustments." Case adjustments are similar, but not identical, to case events. Frequency and time estimates can be obtained for case characteristics, but they are not things that judges "do" to process cases.

Rather than rely solely on their own perceptions about what case adjustments might be important to include in the weights, the Judge Advisory Group decided that we should seek additional feedback on case adjustments from circuit partici-

pants. We were to ask, in the circuit-based meetings, whether to include these or other adjustments in the final case-weights structure.

Event Default Values

We discussed with the Judge Advisory Group the concept of providing empirically based information to judges attending circuit meetings to help anchor their judgment-based time estimates. To advance this discussion, we provided results from analyses of JS-10 data that calculated average times for selected non-trial events. We reported that data from the 1993 Time Study might provide additional non-trial event anchors.

The data were limited, since neither source provided data that corresponded precisely to events defined for the study. Moreover, the data from the 1993 Time Study were collected as segments of time rather than as total time expenditure, and they were quite dated. Still, the results of the analyses presented to the advisory group suggested the value of giving judges empirical information for their consideration when estimating time expenditure, and the advisory group therefore approved the concept of relying on these data. The empirical measures—to be presented to judges as default values for case events—were expected to provide context for the judgment process.[4]

Judge Review of Final Categories

The Judge Advisory Group appointed three of its members to work with us to follow up on decisions made at the meeting and to review the final categories of case types and events. We prepared materials showing how the recommendations made by the advisory group would be implemented, and we met with this follow-up working group by conference call to discuss the materials and other issues.

One issue that was still outstanding after the advisory group met was how to handle revocation hearings. The advisory group asked us to investigate and advise the working group on the options. We conducted additional analyses and reported that revocation hearings could be handled as (1) separate case types or (2) events in the underlying criminal case that led to the term of supervision. If handled as separate case types, revocation hearings would be counted in the weighted caseload of a court during the year in which the hearing was held. If handled as events in criminal cases, revocation hearings would be represented by a fractional increase in the weight of the underlying criminal case leading to the term of supervision.

To finalize the case-weighting structure that staff would present to judges at the circuit-based meetings, the working group (1) made minor adjustments to the

4. Default values are discussed in greater detail in later sections of the report titled "Time Data from the JS-10 Form," "Default Time Values for Non-Evidentiary Hearings and Conferences Events," and "Default Time Values for In-Chambers Case-Related Activities."

preliminary case-type groupings; (2) determined the set of case-adjustment factors to be included on the circuit worksheets; (3) provided clarification of the specific orders to be included in the event categories; (4) reviewed the proposed set of default estimates based on the analyses of JS-10 and 1993 Time Study data; and (5) decided on the best method for incorporating supervision revocation hearings. The decision on revocation hearings was to make evidentiary and non-evidentiary revocation hearings two separate case types. The full advisory group had an opportunity to review the final structure and approved the materials used in circuit-based meetings.

Time Data from the JS-10 Form

An important source of information for this study was objective data on the frequency and length of proceedings in federal district courts. Clerks of court report these data monthly to the AO for each district judge on the standard statistical form "Monthly Report of Trials and Other Court Activity" (JS-10). (A copy of the JS-10 form is provided at Appendix F.) Information on trial proceedings—defined generally as contested proceedings before a court or jury at which evidence is introduced—is recorded on the front side of the JS-10 (page 1). The back side (page 2) reports less detailed information about non-trial proceedings. These non-trial proceedings include arraignments/pleas, sentencing hearings, motion hearings, pretrial conferences, grand jury proceedings, and supervision revocation hearings.

Most of the non-trial information on the JS-10 is presented in aggregate form, which does not permit a direct accounting of the time spent on different types of proceedings or proceedings in different types of cases. Only the total time that a judge spends each day in non-trial proceedings is reported, along with a count of the non-trial proceedings by category. The JS-10 was recently modified, however, to require more specific reporting on revocation hearings, making more detailed analysis of revocation hearings possible.[5]

As described in more detail below, we used JS-10 information to calculate (1) trial time estimates, (2) revocation hearing time estimates, and (3) default time values for non-trial events. We presented the latter to judges attending circuit meetings to anchor their judgment-based estimates.

Computation of Objective Trial Time Estimates

We calculated time estimates for trials and evidentiary hearings using a two-step process that linked records in two databases. In the first step, we created a trials data set[6] from JS-10 reports submitted for active district judges during calendar

5. The JS-10 form now provides information on the total time a judge spends each day in supervised release hearings as well as probation hearings, and the number of such hearings.

6. In this discussion, the term *trials* refers to final disposition trials, preliminary evidentiary hearings, and evidentiary sentencing hearings. Objective time reports on evidentiary hearings held on the modification

years 1996 through 2002.[7] This database included trials conducted by sitting judges, active during the entire year, for whom a JS-10 report was submitted at least eleven months of the year. We excluded trials reported for senior judges, judges who were confirmed partway through the year, judges who ended their service as a district judge partway through the year (e.g., took senior status, were elevated), judges for whom there was no trial or non-trial proceeding time reported for more than one month (e.g., because of the judge's extended illness), and non-district judges (e.g., circuit judges, magistrate judges).

In the second step, we used identifiers on the trial records to match the trial information to cases contained in a separate data set, thus identifying the type of case in which the trial was held. This procedure produced a match rate of approximately 85%, which decreased to 83% after additional consistency checks were applied to reduce the probability of incorrect matches. The end result was a data set containing reported trial times on 36,010 civil trials and 37,576 criminal trials (single defendant trials only). The trial time estimates were computed on these data.[8]

Computation of Objective Revocation Hearing Time Estimates

In calendar 2001, clerks began reporting on the JS-10 form the time district judges spent in evidentiary and non-evidentiary hearings regarding the revocation or modification of a term of federal probation or supervised release. We used reported times from 1,747 evidentiary hearings and 27,129 non-evidentiary hearings conducted in calendar 2001 and 2002 to estimate the average time required by judges to conduct revocation hearings.

Computation of Default Time Values Used as Anchors for Estimates of Non-Evidentiary Hearing and Conference Events

We analyzed data from the JS-10 to generate default values for non-evidentiary hearing and conference events. We then presented the default values to judges in circuit-based meetings, with the intention of anchoring their estimates to counter tendencies toward overestimating time.

Our analysis relied on non-trial information from 22,793 monthly JS-10 reports submitted for active district judges during the three-year period from Octo-

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or revocation of probation or a term of supervised release are also reported on the JS-10 but were treated separately. See the discussion in "Computation of Objective Revocation Hearing Time Estimates," page 20.

7. We conducted preliminary analyses using trials concluded during the period October 1998 through September 2001. To obtain more data points, we subsequently expanded the data set to cover the full seven-year time period from 1996 through 2002. Expansion was necessary to permit calculation of objective trial time estimates for several case types with infrequent trials.

8. Data from an additional 11,460 criminal trials in which two or more defendants were tried together were used to calculate multidefendant adjustments that were incorporated into the final case weights. See the discussion in "Development and Application of the Multidefendant Adjustment," *infra* page 52.

ber 1998 to September 2001 (i.e., fiscal 1999–2001). As with the trial analysis, we used only data reported for district judges for whom at least eleven reports were submitted and who were active for the entire year. (See Appendix H for a more complete discussion of this analysis.)

Part III. Circuit and National Meetings

This section describes how we obtained time estimates from judges in different circuits and then used the regional estimates to develop final time estimates at a National Consensus Meeting of judges. It also describes how recommendations to modify the initial case-weighting structure emerged from circuit meetings and how the recommendations were handled.

Circuit-Based Meetings

District judges met in circuit-based meetings to deliberate on, and reach consensus about, average time expenditures for case events and activities within the circuit. The estimates covered events such as conferences, hearings, and various in-chambers activities for which no objective data were available. Project staff facilitated the meetings and used worksheet materials to assist judges with the estimation task. The process for developing estimates promoted discussion of the components of the case-weighting calculations, which in turn prompted many circuit groups to recommend modifications to case types, case events, and case adjustments.

Project Liaison Judges

The Subcommittee identified a liaison for each circuit from among the members of the JRC to help us schedule and recruit for the circuit meetings. Liaison judges additionally opened the circuit meetings and helped to facilitate them. Ten of the twelve liaisons were district judges; the other two were a court of appeals judge and a magistrate judge.

Participants

One hundred and two district judges,[9] representing ninety of the ninety-one Article III district courts, participated in the circuit-based meetings.[10] Seven of the judges served both as a designated representative of their home district and as a project liaison. Three other liaisons took part in the meeting discussions as at-large district court members of their circuit (rather than as designees of a particular court). They are excluded from the total participant count.

9. With one known exception, all participants were active district judges. The exception was a judge who was active at the time he was designated, but took senior status shortly before the circuit-based meeting was held.

10. There are ninety-four federal district courts, but the Districts of the Virgin Islands, Guam, and the Northern Mariana Islands are not Article III courts.

Recruiting Procedure

By letter dated July 2003, the chair of the Statistics Subcommittee notified circuit chief judges about the launch of the case-weights project and requested the appointment of an active district judge from every Article III district court to participate in the circuit meeting. Chief judges in circuits with fewer than eight district courts nominated additional judges to bring the minimum number of designees for those circuits to eight. Recruiting within the D.C. Circuit was modified to reflect the size of the court, with six of the circuit's district judges attending the circuit-based meeting. A sample letter requesting assistance is included at Appendix I.

Meeting Group Size

Group sizes for the meetings ranged from six judges in the D.C. Circuit to thirteen in the Ninth Circuit. Two circuit meetings had seven representatives, rather than the eight who were expected, owing to last-minute scheduling conflicts. In two circuit meetings, a single judge served as the designated representative of two district courts. The median group size—as well as the most frequent group size—was eight judges.

Meeting Materials

Approximately three weeks before a scheduled meeting, we mailed materials designed to prepare participants for their upcoming meeting and to begin the data-collection process. The mailing consisted of a cover letter with enclosures from the chair of the Subcommittee and a separate information packet.

The cover letter provided basic information on the individual circuit meeting (e.g., its purpose, how participants were selected, whom to contact with questions) and, additionally, it informed participants of the need to provide pre-meeting estimates of event times. Letter recipients were directed to complete worksheets included in the accompanying information packet and to send them to the FJC in advance of the meeting.[11]

The information packet contained the following documents, which were numbered for reference purposes:

(1) Meeting Agenda—a preliminary schedule with an attached list of judges who were expected to attend;

(2) Information for Judges Attending the Circuit-Based Meetings of the 2003–2004 District Court Case-Weighting Study—a briefing paper providing basic information on the case-weighting study and an overview of how judges should approach their pre-meeting estimation task;

11. The cover letter used for the earliest scheduled meetings asked judges to bring completed worksheets to the meeting. Later participants were asked to send completed worksheets to the FJC in advance of the meeting.

(3) Instructions for Completing the Civil Case Worksheet—detailed instructions on how to complete the Civil Case Worksheet that was enclosed for the purpose of collecting pre-meeting event estimates;

(4) Civil Case Worksheet—a data-collection instrument reflecting the structure of the civil case-weighting system as it then existed; used to collect time estimates from judges before the circuit-based meeting and also used at the meeting itself to organize the discussion;

(5) Civil Case-Type Categories—a reference document listing the civil causes of action comprising each case type appearing on the Civil Case Worksheet;

(6) Instructions for Completing the Criminal Case Worksheet—detailed instructions on how to complete the Criminal Case Worksheet that was enclosed for the purpose of collecting pre-meeting event estimates;

(7) Criminal Case Worksheet—a data-collection instrument reflecting the structure of the criminal case-weighting system as it then existed; used to collect time estimates from judges before the circuit-based meeting and also used at the meeting itself to organize the discussion; and

(8) Criminal Case-Type Categories—a reference document listing the criminal offenses comprising each case type appearing on the Criminal Case Worksheet.

A copy of the full mailing to participants in one of the circuit meetings appears in Appendix J.[12]

Collecting Pre-Meeting Time Estimates

We originally had no plans to collect time estimates in advance of the circuit meetings. We expected only to ask judges to complete and bring the worksheets to meetings for their own use. Our objective was to increase the likelihood that judges would come prepared for thoughtful discussion and thus enhance the efficiency of the group-estimation process.

A few months after we launched the project, however, the Subcommittee learned that the General Accounting Office (GAO) had expressed concerns about consensus-based data—these concerns were found in a report on case-weighting methodology presented to the House of Representatives' Subcommittee on Courts, the Internet, and Intellectual Property.[13] The GAO identified the use of

12. Feedback from judges attending the first two circuit meetings prompted modest revisions to instruction documents. The revisions responded to questions about how to interpret default time values, what time should be included in estimates, and how to handle estimates for infrequently occurring case-type and event combinations. Consequently, the instructions included in the early mailings differed slightly from the set appearing in Appendix J.

13. The GAO report commented favorably on time-study methodology used in previous studies, but raised questions about the current study's event methodology, citing the absence of standard error terms from consensus-based data as a specific drawback (see pp.7–8, 12–13, & 15, *Federal Judgeships: The General Accuracy of the Case-Related Workload Measures Used to Assess the Need for Additional District Court and*

consensus estimates as a drawback to the current study because such estimates cannot be used to generate means or standard error terms, which are essential if evaluation of the resulting case weights is to proceed according to standard statistical protocols.[14]

The Subcommittee was fully committed to using consensus-based estimates in the case-weight calculations. Members were, however, sensitive to the issues raised in the GAO report and wanted to be as responsive as possible to those concerns within the constraints of the study's design. Acknowledging that error statistics could not be computed for the final weights, the Subcommittee decided at its June 2003 meeting to create a data set of *preliminary* time estimates that would be amenable to the calculation of means and standard errors. Accordingly, the members instructed us to gather time estimates from individual judges before the judges agreed on consensus-based estimates. To implement the Subcommittee's decision, we modified the instructions for the circuit meetings to explicitly request that all participants fill out the worksheets and submit their time estimates to the FJC before the meeting.

Information on how the data were collected and processed is provided in a later section of the report titled "Means and Mean Confidence Intervals Computed on Pre-Meeting Estimate Data," *infra* page 31.

Data-Collection Instruments: Civil and Criminal Case Worksheets (Circuit Meeting Version)

To help organize the work of judges at the circuit-based meetings, we developed civil and criminal worksheet matrices to guide the group-estimation process. Worksheets prepared for use at the meetings took on increased significance when they were put to additional use as data-collection instruments for the judges' pre-meeting task. The first page of the civil case worksheet has been reproduced in Figure 1 below.

General Format of the Circuit Meeting Version of the Worksheets

The worksheets presented complex information in such a way as to make the component parts of the case weights transparent. As seen in Figure 1, the worksheets arrayed case events across the top of the matrix and listed case types along the left column. The criminal case worksheet listed thirteen events and twenty-one

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Courts of Appeals Judgeships, GAO-03-788R (Washington, D.C.: May 30, 2003)). The principal author of the study repeated the concerns in testimony before the House Subcommittee on Courts, the Internet, and Intellectual Property on June 24, 2003.

14. The Federal Judicial Center acknowledged in its agency comments on the draft GAO report that the use of consensus estimates precluded us from generating statistical measures of error for the final case weights. The FJC noted, however, that a statistical evaluation was not the only means by which the integrity of the new case-weighting system could be assessed. The FJC advised that a qualitative assessment, focusing on the methods and adherence to defined research protocol, could properly evaluate the case-weighting system.

Figure 1: Sample Page of the Civil Case Worksheet Used in Circuit Based Meetings (page 1)

Civil Case Worksheet

District Court Case Weighting Study
Event Weight Estimates by Type of Case

DOCUMENT # 4

Civil Cases

	Trials and Other Evidentiary Hearings				Non-Evidentiary Hearings and Conferences			In-Chambers Case-Related Activities					Case Adjustments		
Case Type Description	Jury Trial	Non-Jury Trial	Hearing on Preliminary Injunction/ TRO	Other Evidentiary Hearing	Conference	Motion Hearing	Other Non-Evidentiary Hearing	Order on Motion for Summary Judgment	Order on a Discovery Motion	Order on Any Other Enumerated Motion	Trial Prep	Hearing Prep	Multiple Parties (6 or more)	Class Action	Medium (more than 80)
[illegible]															
Default Time Estimates (*trials in hours, other events in minutes*)	23.0 hrs	12.6 hrs	3.7 hrs	3.3 hrs	81 mins	28 mins	26 mins	72 mins	36 mins	45 mins	30 mins	30 mins	0 mins	0 mins	0 mins
[illegible] Admiralty															
Admiralty	21.5	11.7	2.5	2.7											
[illegible] Bankruptcy															
Bankruptcy Appeals and Withdrawals	32.6	12.4	2.1	3.8											
[illegible] and Finance															
Banking and Finance	23.3	10.8	3.4	2.2											
[illegible] Litigation															
SEC, CFTC, and Similar Enforcement Actions (US Plaintiff)	—[1]	20.8	3.4	1.6											
SEC, Commodities, and Stockholder Suits (non-US Plaintiff)	39.3	17.5	3.1	2.3											
Civil RICO	48.6	22.8	4.7	2.8											
Antitrust	66.6	53.1	9.8	3.4											
Other Fraud	30.1	13.4	4.0	2.6											
Interstate Commerce	—[1]	15.0	—[1]	—[1]											

[1] An estimate of trial time was not presented if there were less than 20 trials in the category.

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case types; the civil worksheet listed twelve events, three potential case adjustments, and thirty-nine case types.[15] Some events were identical across civil and criminal worksheets; others were unique. The intersection of a column and row heading defined a single cell representing a unique combination of event and case type.

Events were grouped by conceptual category, and categories were color-coded to facilitate reference to them in accompanying instructions. Categories common to both the civil and criminal case worksheets were (1) Trials and Other Evidentiary Hearings (shaded blue), (2) Non-Evidentiary Hearings and Conferences (shaded orange), and (3) In-Chambers Case-Related Activities (shaded green). The civil worksheet included one additional category labeled Case Adjustments (shaded yellow).

In the four sections that follow, we discuss time estimates listed on the worksheets under each of these conceptual categories.

Preprinted Time Estimates for Trials and Other Evidentiary Hearings Events

The first section on each worksheet depicted Trials and Other Evidentiary Hearings events. Cells in this section contained preprinted time values obtained from our analysis of time data reported on JS-10 forms. The listed times were the average number of hours required to conduct trials in each case type. If fewer than twenty trials occurred in an event cell, we entered a dash on the worksheet. The listed trial times were provided for informational purposes only.[16]

Default Time Values for Non-Evidentiary Hearings and Conferences Events

The remaining cells on the worksheets were blank, and the objective of the pre-meeting task was to obtain time estimates from individual judges for every blank cell. The worksheets provided context for this task through the listing of a default value for each of the remaining event types. The default appeared at the heading of each event.

Instructions advised judges to consider the defaults as starting points when working out their own estimates. Judges were told to determine, for each empty cell corresponding to a particular case type, whether the default value was a good estimate of the time required to complete the activity or event in the case type. If their experience suggested the default value was appropriate for the case type, they were to leave the cell blank, signaling that the default value was the estimate the judge would have recorded there. If judges determined that the default value

15. Participants of the National Consensus Meeting later expanded the number of civil case types to forty-two, reduced the number of civil case adjustments to two, and added three case adjustments to the criminal case-weights structure.

16. Refer to "Computation of Objective Trial Time Estimates," *supra* page 19, for a description of the data used to derive the objective time estimates. We did not report trial averages on the worksheets if the averages were based on fewer than twenty trials, but did use them in the case-weight computations. Because the frequency value for such combinations is negligible, these combinations have no discernible impact on the resulting case weight.

did not represent the amount of judicial time required to complete the case activity, they were to record in the worksheet cell a value that better represented their experience.

Default values listed for Non-Evidentiary Hearings and Conferences events were derived from the back side (page 2) of the JS-10. Defaults in the orange-shaded section of the worksheets are across-case-type time averages, derived through regression analyses. Because of the structure of JS-10 data, the averages made no distinctions between any case types, not even the distinction between civil and criminal cases for the defaults assigned to conference and motion hearing events. Consequently, the default time value for pretrial conferences in criminal cases is the same default listed for civil cases: thirty-one minutes. The lack of specificity similarly affects the default values for motion hearing and other non-evidentiary hearing events.

At Appendix H we provide additional information about the analyses used to derive Non-Evidentiary Hearings and Conferences event default values.

Default Time Values for In-Chambers Case-Related Activities

While JS-10 data were critical to the development of default values for Non-Evidentiary Hearings and Conferences events, they were not useful in developing default values for In-Chambers Case-Related Activities events. The absence of data from the JS-10 or other routine statistical reports had prompted us, after receiving support from the Judge Advisory Group, to investigate whether data submitted by judges for the 1993 Time Study might inform estimates of in-chambers events.

We found that although the 1993 Time Study data did not support the calculation of default values for hearing and trial-preparation events, the data could be used to compute defaults for other in-chambers events, subject to some important limitations. The limitations arose from the age of the time study data, the imperfect correspondence between categories of data in the old and new studies, and an artifact of the way the time study data were reported, which could be expected to introduce a downward bias in some of the event time averages.[17]

We computed averages from 1993 Time Study data and recommended to the three-judge subgroup of the Judge Advisory Group that these results be incorpo-

17. Some of the current study's in-chambers case-related events corresponded closely to categories used by judges to classify time entries in the 1993 Time Study (e.g., order on summary judgment motion, order on suppression motion, and order on discovery motion). The correspondence between "order on other enumerated motions" (both civil and criminal) and the 1993 categories was less precise, however, so we used the available 1993 categories to construct best-match indices and used the time reported for all the relevant categories to compute default value averages. The default value for the civil event of "order on other enumerated motions," for example, was based on time reported by judges when they handled various dismissal motions, motions to remand to state court, TROs, preliminary injunction motions, attorney fees motions, magistrate judge reports and recommendations, class action issues, and motions to vacate sentence. We were unable to aggregate related entries to reflect the total time spent on a particular order. As a consequence, the default values were averages based on individual time-study entries rather than averages based on the total span of time working on one particular order.

rated into the worksheets, their limitations notwithstanding. We recommended inclusion because the values were plausible and could help counteract a tendency on the part of judges to overestimate event time. The working group concurred with the recommendation. Worksheet instructions pointed out the limitations of the defaults.

Two of the events appearing in the In-Chambers Case-Related Activities section of the worksheet involved the time judges spent in last-minute preparation for an imminent trial or hearing. Because no objective data existed to inform estimates of the time needed to prepare for these proceedings, staff asked the Judge Advisory Group to establish default values based on the group's collective experience. The suggested values (of thirty minutes each) were included on the worksheets, with instructions noting the source.

Case Adjustments on the Civil Case Worksheet

One additional category, Case Adjustments, appeared on the civil case worksheet. Case Adjustments included three case-related characteristics that, when present in a case, had the potential for significantly increasing the amount of judge time required to manage a case, according to several members of the Judge Advisory Group. The Judge Advisory Group decided to solicit additional input from judges attending circuit meetings on whether the identified case adjustments should be included in the case-weighting structure.

The case adjustments under consideration at the time the circuit meetings were held included the presence of multiple parties (five or more), designation as a class action, and motions in excess of fifty. The unanswered question was whether the presence of any of these characteristics made time demands that were not otherwise reflected in docketed case activities. Both the pre-meeting task for circuit meeting attendees and their consensus-based response to the case-adjustment factors would inform the answer.

Because the goal was to get unbiased feedback from judges, case adjustments were listed on the civil case worksheet with default values set to zero. Setting the default values to zero presumed that these factors did not have an independent impact on judges' time. To overcome the presumption, judges needed to record values in the cells of the matrix or establish a different default.

The instructions cautioned judges against the tendency to assume that an adjustment was indicated simply because the presence of these case characteristics might signal an increased number of events such as hearings, conferences, and motions. Judges were reminded that time associated with *more* events would already be registered in analyses. The question to consider was whether the mere presence of the characteristic required additional case work not accounted for by docket entries and time estimates associated with the case type. If the answer was "yes," judges were asked to record how much additional time, on average, would be required to handle the case.

Worksheet Instructions

Instructions that accompanied the worksheets described the events in each category and specified the activity to be included in the time estimates. Judges were told that their estimates should exclude time spent by magistrate judges and law clerks, and that they should focus their attention on typical case events rather than especially lengthy or time-consuming events. The instructions additionally advised judges on how to estimate time for event and case-type combinations that occur infrequently.

Worksheet instructions explained how judges were to handle default values. They were told to decide whether the default value listed for an event was a reasonable estimate of the average time required to handle the event in a generic case type. If the preprinted default value was reasonable, the judges were told to leave it untouched; otherwise, they were asked to strike the default value and record a more appropriate value instead. If a judge provided a different default value, the substitute became the default value.

Judges then determined whether the default value was applicable to individual case types. If the default was a good estimate of how much time the event took for a given case type, judges were to leave the cell blank. If the default did not apply to the case type, the judge entered an estimate that better matched the judge's own experience with the case type.

Means and Mean Confidence Intervals Computed on Pre-Meeting Estimate Data

We received 95 worksheets from the 102 judges participating in circuit-based meetings. Two of the worksheets were submitted by liaisons who were not serving as representatives of a specific court, but rather as at-large members of the circuit; one was submitted as the result of a collaborative effort between two judges attending the meeting from a single court.

Several judges advised us that they had consulted with chambers staff, courtroom deputies, or judicial colleagues while completing the sheets. Collaboration was likely to have been the exception, though; most judges appeared to have provided estimates based solely on their own experience.

The frequency of missing data was low, overall. The recording of default values at the top of each column allowed judges to leave cells blank wherever the default value was considered appropriate; these blank cells were then set to the default value during data entry. Judges occasionally recorded "N/A," placed a question mark, or wrote a query in cells of the civil and criminal matrices that represented event and case-type combinations that their experience suggested should not occur. These notations were seen most frequently in the cells involving

Social Security cases and espionage and terrorism cases.[18] We treated them as missing data.

For purposes of reporting means and confidence intervals we also treated entries recorded in units other than time (e.g., "twice as much," "100% increase") as missing data. Such entries were most often concentrated in the Case Adjustments section of the civil worksheet.

The Case Adjustments section was intended to provide feedback on whether or not such adjustments were useful. The pre-meeting feedback, however, was ambiguous. Analysis revealed that judges tended to accept the zero as default values by about a 2:1 ratio (with acceptance rates ranging from 50%–85% across different case types). This outcome suggests one of two possibilities—judges were signaling that no adjustments were needed in the case-weighting structure or they found it difficult to describe the relationship between time and case adjustments in the format asked of them.

On the basis of feedback received in the first two circuit-based meetings, we became convinced that the procedure for collecting pre-meeting case-adjustment information was flawed and the high acceptance rate for the default values was an artifact of judges finding it difficult to describe the relationship in the unit requested (minutes). Judges made clear to us at the first two circuit meetings, as well as in all subsequent meetings, that they believed case adjustments would improve the case-weight structure, but they also indicated that the unit of measurement for adjustments was better thought of in terms of percentage increase (or decrease) in time rather than minutes or hours. As a consequence of the feedback, we told judges in later meetings that they could report their consensus estimates on case adjustments in terms of percentage increases or multiples of time (e.g., twice as much).

We computed means and standard error estimates for all non-trial cells of the civil and criminal worksheets. We then computed the 95% confidence interval around each mean. The means and the upper and lower bounds of the confidence interval are displayed in columns of a table found at Appendix K, along with national consensus values for comparison purposes. The reported statistics for the case adjustments include acceptances of zero as default values.

18. When judges asked us whether they should provide estimates for event and case-type combinations that theoretically cannot occur, we advised them to consider the question, "If the event were to occur, is there reason to believe it would differ from the default value you established?" Staff explained that many of the event and case-type combinations they considered impossible occasionally are present in courts' case-management databases and would need to be accounted for in the case-weighting system. Such combinations can, for example, occur if a case is improperly categorized at filing or data entry. Alternatively, a case that is correctly categorized at the time of filing can later reveal itself to have other causes of action, and an unexpected case-type event will be found on the docket because the case continued toward disposition under the original case-type designation.

Meeting Logistics

We held meetings in major cities within the circuits and scheduled the meetings to last a day-and-a-half. Eight circuits were able to complete the consensus task in a single day either by agreeing to extend the scheduled workday, by meeting with staff for a project briefing in advance of the meeting, or by conducting their work with particular efficiency.

The first meeting took place at the end of August 2003 and the last one took place at the end of November 2003. Three project staff members—one from the Analytical Services Office of the AO and two from the Research Division of the FJC—typically attended meetings. Staff alternated between serving as facilitators and making a record of the proceedings. With two exceptions, meetings were conducted in hotel facilities (rather than court facilities) to minimize the likelihood that court business would distract judges from the meeting agenda.

Meeting Procedures

At the beginning of each meeting, we distributed materials to judges that included (1) blank copies of civil and criminal worksheets; (2) reference documents listing the cases comprising the civil and criminal case types (i.e., Documents 5 and 8 of the Meeting Information Packet); (3) a final meeting agenda; and (4) a handout of a slide presentation giving an overview of case weighting. Staff ensured that participants had copies or originals of their pre-meeting estimates to work with during the meeting.

The project liaison judge opened each meeting with a prepared set of introductory remarks that covered specific points. The liaison gave an overview of the work of the Judicial Resources Committee and its Statistics Subcommittee, explained the purpose of the circuit-based consensus meeting, and noted that a subsequent gathering of judges in a national forum would establish final time estimates. Liaison judges additionally established the "ground rules" for the meeting. The primary ground rule was a prohibition against judges volunteering anecdotal "war stories" about unusual case matters. During the discussions, the liaison and staff steered discussion away from unusual events when necessary, but after a few reminders, judges tended to monitor the discussion themselves.

After the liaison's remarks, staff made a slide presentation. The presentation gave an overview of case weights and explained why they are used, described the new study, and provided an illustration of how this study would integrate data on event frequencies with time estimates to produce a case weight. (Appendix L includes an example set of slides.)

We answered questions at the conclusion of the slide show. The question-and-answer period ranged from half-an-hour to an hour-and-a-half in length. After a break, judges took up the task of estimating time for events in civil cases.

Estimation Process

Staff used transparencies of the worksheets on an overhead projector to organize the discussion. The worksheets were identical to those completed for the pre-meeting task. After noting that the time estimates recorded in the Trials and Evidentiary Hearings section of the worksheet were fixed—i.e., the estimates would be included directly in the case weights—we explained that participants would work through the other sections of the matrix column-by-column.

We began with the civil case worksheet and asked the judges to debate and agree on a default value for the first blank column. After setting the default, they considered whether a departure was appropriate for each individual case type. Upon completion of the first column, they moved to the next, and continued in a similar manner until they worked through the entire worksheet.

Throughout the process, we reminded judges that (1) the estimate needed to reflect the average time required in their circuit and not the experience of a single court, and (2) the relationship among the values for events and case types should be considered when arriving at a specific value. Judges appeared to intuitively grasp the latter point, and readily agreed among themselves about the case types that tend to consume more judge time for most events as well as the events that take more and less time. The discussions resulted in negotiated time estimates that judges agreed represented their circuit's central tendency.

After completing the civil case worksheet, judges developed estimates for criminal case events. Discussions of criminal estimates were typically less extensive than for civil estimates. We attributed this difference in part to fewer criminal case types and greater experience with the task, but we also observed that departures from the default value were less frequent for criminal than for civil events. The judges offered an explanation for their tendency to accept default values, explaining that a conference (or hearing or suppression motion) was much the same in one type of criminal case as it was in another, with just a few exceptions.

Comparison of Obtained Estimates Across the Circuits

Civil and criminal estimates obtained across the circuits exhibited several notable characteristics. The most obvious was that estimates for the same event and case-type combination varied widely from one circuit to the next. Some portion of the difference is no doubt the result of real differences in time demands. However, most of the difference appears to be an artifact of the judgment process. Some circuit groups coalesced around higher values, whereas other circuit groups were conservative estimators.

Less obvious, but as it turns out more significant, are the consistencies displayed across circuits. Events associated with high and low estimates were the same across circuits. Thus, for example, circuits tended to assign higher time values to the Order on Summary Judgment event than they did to the Order on Any Other Enumerated Motion event, and higher values to the Order on Any Other Enumerated Motion event than they did to Order on a Discovery Motion event.

In addition, the case types that judges singled out for departures from the defaults tended to be consistent across circuits. Circuit groups consistently assigned higher time estimates to events associated with the following civil case types: Antitrust, Civil RICO, Copyright and Trademark, Death Penalty Habeas Corpus, Environmental Matters, Patent, and SEC/CFTC/Similar Enforcement Actions (U.S. Plaintiff). They assigned the highest time estimates for criminal events to Continuing Criminal Enterprise, Espionage and Terrorism, All Extortion/Threats/RICO, and Murder/Manslaughter/Homicide case types. As a result, although circuits differed with respect to the absolute amount of time judges estimated for different events and case-type combinations, the relationship between events and case types was largely preserved across the circuits.

Circuit-Based Recommendations to Modify the Case-Weights Structure

Participants in many of the circuit-based meetings discussed changes to the worksheets, changes that they believed would improve the precision of the resulting case weights. A number of these discussions led to a formal recommendation from the circuit to modify the case-weights structure. Suggested modifications took the form of added events or case types, alterations to the case-weight design, or proposals to restructure existing events. A number of circuit groups additionally offered advice on whether more than one case adjustment should apply to a given case.

We responded to such discussions by offering to make a record of the resulting recommendations and by forwarding the recommendations for consideration by representatives attending the national meeting. We advised participants that the feasibility of any particular recommendation would depend on whether data from the courts were able to support the recommendation's implementation.

Examples of recommendations arising from circuit-based meetings included the following:

- establish Bankruptcy Appeals and Bankruptcy Withdrawals as separate case types;
- establish a new criminal case type for offenses that are eligible for the death penalty, or, alternatively, incorporate into the case-weighting system a case-adjustment factor that is applied to each offense type for which the death penalty is a possible sentence (e.g., Murder/Manslaughter/Homicide, Espionage and Terrorism);
- separate the Orders on Other Enumerated Motions event category into two events that distinguish dispositive and more substantive motions from all other orders included in the category;
- apply an adjustment to criminal cases where an interpreter is present; and
- expand the definition of the tasks included in the Trial Preparation event to include such activities as preparing for voir dire, developing preliminary

instructions, developing final jury instructions, and conducting mid-trial legal research.

Information summarizing the various circuit-based recommendations and the national meeting response to them is found in Appendix O.

Meeting Reports

Individual circuit reports summarized the proceedings of each meeting, including the consensus estimates and any circuit-based recommendations to modify the initial case-weighting system. (An example of one of the reports is found at Appendix M.)

Post-Meeting Telephone Debriefings

In the days following each meeting, the liaison judge met with staff and other liaisons by conference call to conduct a debriefing. The initial debriefings helped to prepare other judges for the liaison role in succeeding meetings and provided staff and liaison judges with an important forum for the exchange of information. Feedback on the first two meetings resulted in minor adjustments to preparation materials and meeting procedures.

To avoid having estimates from one circuit meeting contaminate the results of subsequent meetings, participants in the telephone debriefings took care to avoid discussion of specific estimates.

National Consensus Meeting

In January 2004, approximately two months after the last of the circuit-based meetings was held, representatives from those meetings met to reconcile differences among the circuits' estimated event times and to agree on estimates reflecting the average, *national* experience. These time estimates were incorporated into the case-weight computations.

Participants

Project staff consulted with the liaison after each circuit-based meeting to identify two judges that they would ask to attend the National Consensus Meeting as circuit representatives. The list was drawn up on the basis of demonstrated interest in the project and constructive contribution to the circuit meeting. The liaison judge or a staff member approached candidates informally to request their continued assistance with the project and, with few exceptions, those who were approached agreed to serve.

Twenty-two district judges—two from every circuit except the Third Circuit, whose representatives had to cancel at the last minute for personal reasons—attended the National Consensus Meeting.

Meeting Materials

Approximately three weeks before the National Consensus Meeting, we mailed participants an information packet with a cover letter from the chair of the Statistics Subcommittee.[19] The information packet consisted of the following documents, which were numbered for reference purposes:

(1) Information for Judges Attending the National Consensus Meeting of the 2003–2004 District Court Case-Weighting Study—describing the objectives of the meeting and how it would be conducted;

(2) Meeting Agenda—a preliminary schedule and a list of judges expected to attend;

(3) Original Civil and Criminal Case Worksheets—we enclosed these documents for reference, with an explanation that they would be modified for use at the National Consensus Meeting according to feedback the recipients provided us on various circuit-based recommendations summarized in Document 4; and

(4) Evaluation of Circuit-Proposed Modifications to the Case-Weights Structure—a summary of the circuit-based recommendations in a ballot format that recipients used to inform us, before the national meeting, about which of the circuit recommendations should be incorporated into the case-weighting structure.

A copy of the full mailing to the participants in the National Consensus Meeting appears at Appendix N.

Decisions on Circuit-Based Recommendations to Modify the Case-Weights Structure

We provided a detailed evaluation of the various circuit-proposed modifications to the case-weighting structure in the information packet. The evaluation recommended adoption of a few specific changes and presented information for judges to consider in deciding which of the other proposals to adopt.

Twenty judges voted on the proposals in advance of the national meeting. We incorporated the changes that received a majority endorsement into materials pre-

19. Included in the mailing was an offer to send circuit representatives reports summarizing the circuit-based meetings for review. Nine of twenty-four judges acted on the offer.

sented at the meeting.[20] At the meeting itself, we asked judges to decide how we should implement some of the changes they requested. For example, judges identified which motions contained in the Order on Any Other Enumerated Motions event should remain in that category, and which should be moved to the newly created Order on Dispositive Motions event. Information summarizing the majority-endorsed changes appears at Appendix O.

Meeting Logistics

The National Consensus Meeting convened for two days beginning January 29, 2004, in San Antonio, Texas. Two project staff members facilitated the meeting. Other staff recorded the outcome of the balloting process and operated electronic voting equipment.

Meeting Procedures

We distributed a binder of meeting materials to judges at the beginning of the first day's session. The binder included (1) civil and criminal worksheets that had been revised to reflect the vote on modifications; (2) an opening slide presentation reproduced as a handout; (3) a series of graphs summarizing the range of circuit-based time estimates for civil and criminal events; and (4) the meeting report from the particular circuit that the recipient judge represented. The worksheets and the graphs guided discussions over the course of the two-day meeting. (See Appendix P for an example set of binder materials.)

The director of the Federal Judicial Center opened the meeting by welcoming participants. The chair of the Judicial Resources Committee followed with an explanation of the process for evaluating requests for new district court judgeships. The chair of the Statistics Subcommittee provided an update on the case-weighting project and then turned the meeting over to staff facilitators.

We oriented judges to the meeting task with a slide presentation that reviewed event-based case weighting, summarized the changes to the case-weighting structure that participants had voted to accept, and explained the decision-making process for determining final time estimates. Judges then began work on consensus estimates in criminal cases.

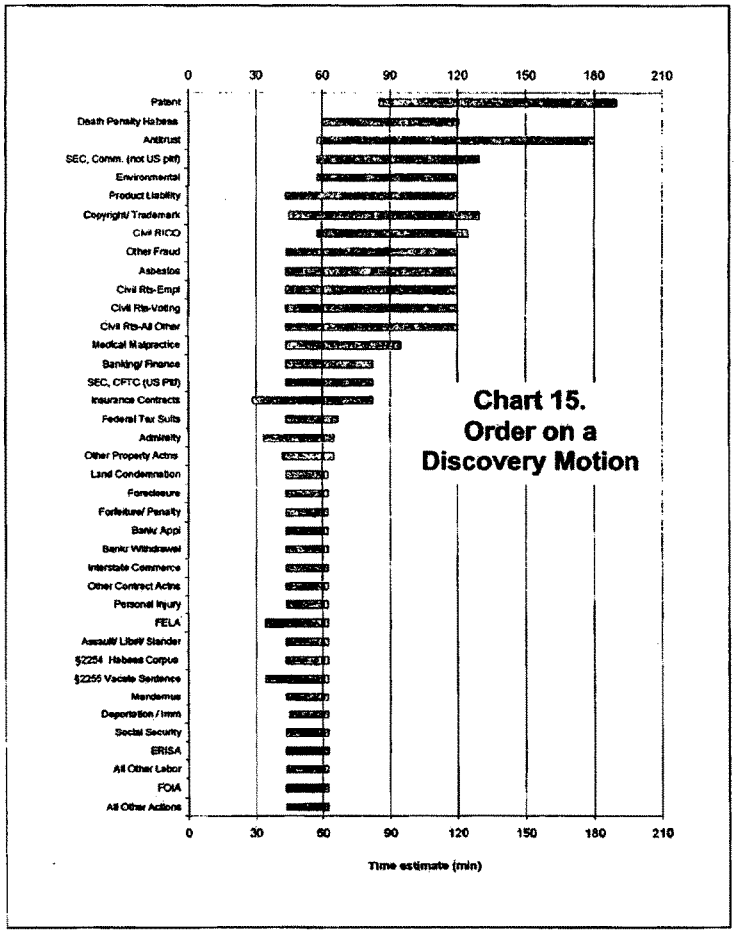
Estimation Process

Judges engaged in a structured, data-driven consensus process to establish the national event estimates. They first reviewed a series of horizontal bar charts for each criminal event. The bar charts displayed two pieces of information for each case type—the median value of the circuit time estimates and the range of esti-

20. The majorities that emerged were strong, with twelve or more judges endorsing the same position on all recommendations except one, where there was a three-way split of five, six, and nine votes distributed among three options on how to divide a single case type into two separate case types.

mates, with the two highest and two lowest estimates excluded. Case types were arrayed so that case types with the highest median value appeared at the top of the chart and case types with the lowest median value clustered at the bottom. An example of one of the summary charts used in the national meeting appears in Figure 2.

Figure 2: Sample Chart Used at National Consensus Meeting



The charts showed relative relationships among the case types and exposed patterns in assigned estimates that were consistent across circuits, even though estimates for many of the events were quite varied. The charts provided visual confirmation, for example, that circuit meeting participants tended to assign high event processing times to a limited set of case types, repeating the pattern across a number of case events.[21]

Led by project staff, with assistance from the chair of the Statistics Subcommittee, the judges examined factors influencing the circuit variations shown in the bar charts and used an electronic voting device to register judgments about values that best reflected a national average. The voting device provided direct visual feedback on the outcome of votes. After participants mastered the initially cumbersome voting procedure, the consensus process moved forward efficiently while still ensuring full analysis of important, case-related issues. Case types with high processing times stimulated more discussion than others. Case types with shorter median time estimates tended to be voted on as a group, unless one or more judges singled out a specific case type for special consideration.

The voting procedure was iterative. Consensus was defined as having occurred when seventeen or more of the twenty-two participants endorsed a specific event time. The first round of voting frequently resulted in split decisions that failed to meet the consensus criterion, so participants engaged in as many as two additional rounds of discussion and voting. If two additional rounds failed to achieve consensus the voting stopped, and the median estimate from the third vote was accepted for use in the case-weight computation.

At appropriate times during the meeting, we asked the judges to make decisions regarding the changes they recommended to the case-weighting structure. The decisions involved reclassification of motions, specification of what judge time to include in trial-preparation estimates, and determination of whether the class action adjustment in civil cases should, if possible, apply only to certified class actions or whether it should incorporate the broader category of cases having a class action allegation. We also asked the judges to choose between two approaches for implementing an additional case adjustment that they requested (i.e., an adjustment for multidefendant trials). Appendix O contains a summary of all modifications to the case-weighting structure arising from decisions made by the circuit representatives to the National Consensus Meeting—either by ballot before the meeting or at the meeting itself.

Judges extended their work day on the first day of the meeting and reconvened early the second day to finish criminal estimates. They spent the remainder of the two-day meeting deliberating and voting on civil estimates. We modified

21. The civil case types included in this set were Antitrust, Civil RICO, Copyright and Trademark, Death Penalty Habeas Corpus, Environmental Matters, Patent, and SEC/CFTC/Similar Enforcement Actions (U.S. Plaintiff); criminal case types included Continuing Criminal Enterprise, Espionage and Terrorism, All Extortion/Threats/RICO, and Murder/Manslaughter/Homicide. See the discussion of circuit-based data at "Comparison of Obtained Estimates Across the Circuits," *supra* page 34.

procedures on the second day to focus discussion on case types with greater variability; this change both streamlined the process and took advantage of groupings of case types with similar median estimates.

Final Consensus Estimates

The final time estimates used to calculate case weights—including estimates derived from objective data as well as consensus proceedings—are reproduced at Appendix Q.

Part IV. Data Extraction and Data Processing

Two elements are needed to perform event-based case-weight calculations: estimates of judicial time and estimates of the frequency of case events used in the case-weight computations. The preceding section described the various ways we obtained time estimates. This section describes how we derived estimates of event frequency from docketed event information recorded in the case-management databases of the federal district courts. These estimates are based on data we received from eighty-seven of the ninety-one Article III district courts, covering more than 297,000 civil cases and criminal defendants.

Preparing for Data Extraction

The case-management databases in the courts contain extensive detail on case events. This detail makes the databases an ideal source of information for an event-based case-weighting study. Because the databases are designed for administrative rather than research purposes, however, the information they contain presented us with a number of challenges. For example, the databases have system features that allow courts to adapt their docketing to local case-management needs. Use of the feature results in court-specific variations that complicate efforts to develop a national research data set. To use the richly detailed information found in courts' case-management databases, we first had to develop measures for obtaining data from different courts and then standardize the data we received so that it could be used in a national analysis. Before we could even begin to plan for the data extractions from the databases, however, we recognized that we needed information about the differing docketing practices that are in use.

Survey of Court Docketing Practices

Acting on the advice of the Technical Advisory Group, we conducted a survey of the district courts. The purpose was to obtain information on varying docketing practices so we could recognize and account for variations when we later processed docket information.

The survey included four parts: (1) a request for contact information for a liaison at the court in case we needed follow-up; (2) general questions about the court's case-management system, and the nature of customizations made by the court to their database; (3) questions about how case events were docketed in various situations; and (4) a request to identify any court-specific issues that we would need to take into consideration when extracting data from the court's database.

We sent the survey to the clerk of each Article III district court in August 2003 with a cover letter providing background information and advising the clerk that he or she might need to consult with systems or operations staff to answer

some of the items. The initial response to the survey was high (74%), and with an additional reminder and other follow-up efforts, we received a 100% response.

We used the survey responses for a variety of purposes. The responses guided the development of the data-extraction programs, identified potential extraction and analysis problems that we would need to address, determined which data-extraction package we would send to each court, and highlighted areas where court customizations or local practices might affect the level of detail that would be obtained. The survey information helped us understand the structure of each court's data, as well as the processing each court's data would require.

A copy of the docketing survey and additional information on its administration are provided at Appendix R.

Understanding Docket Entries

A docket entry is represented in a case-management database as one or more data records that use codes, either numeric or text, to identify such things as (1) the case associated with the entry; (2) the nature of the docket entry; (3) any relationship to other entries; (4) outcome or context information; and (5) the party or judge who participated in the event. For example, the data record generated when a party files a motion includes case identifiers (e.g., docket number), a code defining the entry as a motion filing, and a code that specifies the relief requested (e.g., to dismiss the case). If a judge then holds a hearing on the motion or issues an order, the docket entry for this later activity will record not only the occurrence of the hearing or order events, but will also refer back to the original motion and include information such as who presided at the hearing and what ruling was issued. The physical representation of this information varies according to the docketing system a court uses (ICMS or CM/ECF), but the general concept is consistent across systems and courts. To calculate event frequencies, we needed to obtain not simply the docket records from the courts' databases, but also information on how to interpret the courts' docketing codes.

Interpreting Court Docketing Codes

Most of the docketing codes used by courts are standard codes that were predefined when the system was first implemented.[22] Courts can, however, customize the initial codes, and many of them do so in order to respond to court-specific needs. Customization takes the form of newly created codes or codes that have their meaning altered. The practice of customization meant that we needed information from each court about the meaning of the codes we would encounter in the court's database information.

22. The court starts with one of three basic sets of pre-defined codes: (1) a set developed by the Arizona Training Center for ICMS; (2) a set developed by the Texas Training Center for ICMS; and (3) a set for CM/ECF. With a few exceptions (primarily early test courts for each of the systems), all courts using the same basic docketing system started with the same codes.

To obtain this court-specific information, we gathered event-code lists from all but one of the eighty-seven courts that sent us data for the study.[23] The code lists came to us by two routes. ICMS courts executed a special program that system managers could download from the AO's Systems Deployment and Support Division website to generate code lists. Code lists from CM/ECF courts were, by contrast, simply obtained as part of the data-extraction process. Appendix S includes examples of the court code lists.

Standardizing Docketing Codes Across Courts

Obtaining code lists allowed us to interpret individual court codes. With codes in hand, we began the process of categorizing a multiplicity of codes into a uniform system.

Case events to be counted in the case-weighting calculations fell into four conceptual categories: trials, hearings, conferences, and orders. A fifth category, adjustments, dealt with characteristics of a case rather than occurrences of specific events. These conceptual categories were further differentiated into the subcategories that actually defined the structure of the case-weighting system—e.g., jury trial, non-jury trial, settlement conference, other conference, and various groups of orders.

The subcategories had precise definitions but were relatively broad. Docketing codes that are used in the courts, on the other hand, are quite specific, with different codes describing important variations on the same general event (e.g., answer to the complaint, answer to the counterclaim, answer to the third-party complaint). Such distinctions are critical to case management, but many were too detailed for us to use in their original form. Docketing records also contain a great deal of case activity information that, although important for case-management purposes, was not relevant to the study.

Consequently, we developed a system that translated the plethora of docketing codes used across the courts into standardized, national codes. Drawing on information from starter dictionaries and the lists of event codes used in individual courts, we developed a map of codes that (1) specified how docketed events from individual courts would be classified into event categories and (2) distinguished between events we would, and would not, include in frequency counts.

To standardize the codes, we created a cross-reference table that listed every docketing code used in the courts next to a two-level classification scheme. The first level signified the general event category (e.g., trial, conference, order) and the second level represented the subcategory (e.g., jury trial, settlement conference, order on a summary judgment motion). We aggregated codes that contained excess detail to the subcategory level (e.g., grouping together various motions to dismiss). We also classified codes that indicated the possible presence of a case

23. To process data from the one court that failed to send court-specific docketing codes, we interpreted the court's data in accordance with the description given for the code in the standard code list that was used when the court's database was configured.

characteristic relevant to a case adjustment. Docketing codes for activities that were not relevant to the study were marked with a special code that indicated they should be skipped.

A description of the process used to categorize the courts' docketing codes is included at Appendix T.

Extracting Data from Courts' Case-Management Databases

The data to calculate event frequencies resided in individual district court databases around the nation. We needed to extract the required case data from these local databases and assemble the data into a single national database. The standard reporting capabilities of the courts' systems could not produce the precise data sets required, so we developed specialized case-extraction programs for courts to run.

Extraction Programs

From AO documentation on the structure of the case-management databases, we identified the specific data elements that we had to extract from ICMS and CM/ECF databases. These data elements needed to (1) provide unique case identification and nature-of-suit or offense information for each civil case or criminal defendant; (2) identify the events docketed in each case, along with the docketing codes that defined the nature of the event; (3) identify the parties and judges participating in the case; and (4) provide information linking parties and judges to specific events. The programs extracted the data elements directly from the individual database tables of each court and wrote them out to separate files. These direct extractions placed less of a processing burden on the courts' systems, although they required that the separate elements be merged later during processing at the FJC.

We modeled our extraction programs after existing programs written by the AO and by members of the Technical Advisory Group. They were designed to extract cases terminated in calendar 2002. Separate but functionally equivalent programs were written for ICMS and CM/ECF databases to account for physical differences in the systems. To compensate for possible memory and space limitations in some courts, and to minimize the impact of the extraction on docketing during business hours, we designed the programs to give courts control over when and how the data were extracted.

Technical Advisory Group members reviewed and tested preliminary versions of the programs. The AO provided access to test ICMS and CM/ECF databases that allowed us to incorporate refinements into the programs and conduct additional testing. Two ICMS courts and two CM/ECF courts performed final pilot tests.

Once testing was completed, we sent e-mail to the clerks of all district courts using an ICMS or a CM/ECF database to docket cases. The e-mail provided background on the project, explained the need for docketing data, and requested data extraction. The request included a copy of the appropriate extraction program and instructions to system managers on how to execute the program and transfer the output files to the FJC. (See Appendix U for more information on the data-extraction process and copies of the request, programs, and instructions.)

Response to the data request was excellent. Data were received from sixty-nine of the seventy courts using ICMS and all nineteen courts using CM/ECF. Two courts that split their civil and criminal case docketing between ICMS and CM/ECF sent in data from both systems.

Four courts used docketing systems other than ICMS or CM/ECF. One of the four tried to extract data comparable to what other courts provided, but court staff were able to provide only part of the data elements. Because the court was converting its civil database to CM/ECF, however, the staff volunteered to attempt an extraction of CM/ECF data even though the database was not yet "live." They succeeded in sending us information on the portion of civil cases terminated in calendar 2002 that their court had already converted.

Processing Extracted Data

Having obtained docketing data from the district courts, we began the task of transforming the raw data into data suitable for analysis. There were three phases to this data-processing effort: (1) identification of cases for analysis, (2) initial processing of raw data, and (3) processing of docketed event records.

Identification of Cases for Analysis

The data-extraction programs placed few limitations on the cases that courts extracted from their databases except to require a termination date in calendar year 2002.[24] This approach simplified development of the programs and limited the time it took to execute them. It additionally ensured that we received the broadest range of information possible. During data cleaning, we realized we would need to limit our analyses to cases with the following characteristics:

- *The docket type of the case was either "cv" or "cr."* Most courts docket all cases in the same database, marking the case records with a code that distinguishes one type of case from another. The largest classes of cases

24. We know, however, that sealed cases were frequently excluded from the data sets the courts sent us. Because the CM/ECF database clearly identifies and protects sealed cases with access restrictions, our CM/ECF extraction program specifically excluded them. Our ICMS extraction program did not explicitly provide for exclusion of sealed cases, but we know from responses to the docketing survey that sealed cases are not docketed in the database in all ICMS courts, and we know from direct contact with other courts that some of them chose to exclude sealed cases from the data they transmitted to us.

processed by district judges are civil cases ("cv," 66% of extracted cases) and criminal cases ("cr," 17% of extracted cases). We excluded magistrate judge cases ("m " or "mj," 13% of extracted cases), miscellaneous cases ("mc," 2% of extracted cases), and other specially defined cases (various values, 2% of extracted cases) from further consideration because these cases require little or no processing by district judges.

- *The case involved a single defendant if it was a criminal case docketed in ICMS; all criminal cases docketed in CM/ECF were included, regardless of the number of defendants.* Each criminal defendant is weighted separately in district court case weighting, regardless of whether co-defendants are prosecuted together. In order to calculate criminal case weights using event-based methods, case events must be linked to every defendant involved in the event (e.g., if two defendants are being arraigned together, two arraignments must be counted in the case, one for each). The information linking defendants is consistently available in the CM/ECF, but not the ICMS, database. To manage this problem with ICMS data, we restricted the analysis of ICMS criminal cases to those with a single defendant. Approximately 87% of all extracted ICMS criminal cases were single-defendant cases.
- *The case could be classified into a case type category.* If a civil case lacked nature-of-suit information or a criminal case lacked offense information, we excluded it from further processing because we could not assign a case type category. Less than 1% of civil cases and approximately 10% of criminal defendants were excluded on this basis.

The resulting case population numbered 245,666 civil cases and 51,363 criminal defendants (a total of 297,029 cases from 87 district courts).

Initial Processing of Raw Data

Project staff developed data-cleaning programs to process the raw data from the courts. For data-management reasons and to increase processing efficiency, we initially handled the data from each court separately. Because of structural differences in the data, we used different programs to process extractions from ICMS and CM/ECF databases.

The data-cleaning programs checked for a full range of data-integrity problems, including the following: (1) data type errors in data fields (e.g., alpha characters in numeric fields); (2) unusual or out-of-range values; (3) failure to adhere to the selection criteria (e.g., termination date within calendar 2002); and (4) basic interrelationships among the case components (e.g., all party and event records could be matched to a case record). During processing we also created unique identifiers for each case and record, and we created case flags to help characterize the cases when we later calculated case adjustments.

In keeping with standard data-cleaning practices, we reviewed field frequency reports and processing logs that were generated by the programs to identify problem areas requiring additional review or correction (e.g., deletion of duplicate case records).[25]

Appendix V presents a more detailed description of the data-cleaning programs and procedures.

Processing of Docketed Event Records

Once data cleaning was completed, we processed docketed events from each case in the analysis. This involved first constructing a single record that included case identification information, event docketing codes, other status and context information, and judge information for each docket entry. The event docketing codes were court-specific, so we next appended to each record the standardized general category and sub-category code assigned to the event docketing code (see "Standardizing Docketing Codes Across Courts," *supra* page 45).

We then had a final set of categorized event records. We passed the records through a series of programs that identified and refined the specific docketed events we would use in computing frequencies. These programs acted as filters that permitted case data to proceed only if the data passed various execution checks. The filtering programs used docketing context and sequencing information to control the passage of data from one processing program to the next.

In the initial stages of this processing we handled the data on a court-by-court basis. However, the first set of programs dramatically reduced the number of event records that required further attention, so for final processing we aggregated records from courts using the same database. We used separate but functionally equivalent programs throughout to handle the data from the ICMS and CM/ECF databases. The major operational decisions that directed this processing are summarized below:

- We processed cases one at a time. Consistent with the standard categories established for the project, we allowed events that were included in the case-weight structure to proceed to analysis (e.g., orders, hearings, case indicators) and we skipped events that were not included in the case-weight computations (e.g., clerk's office events, notices, answers).
- We included only events processed by district judges; events processed by magistrate judges were excluded. Events were generally counted if judge information was missing. Some hearing events from CM/ECF courts, however, were excluded because of missing information.

25. Two instances of truncated data submissions by ICMS courts became apparent during data cleaning. One court extracted and sent us only criminal data; the other court experienced a disruption in the extraction process that resulted in submission of few cases meeting the criteria for retention in the analysis. The analysis included all usable cases.

- We counted only one order per motion and only orders that reported a resolution of the matter in whole or in part. To avoid double counting the same event, we excluded docket entries indicating that a matter had been "taken under advisement," "stayed," or "referred."
- We counted all motion hearings regardless of the number of hearings per motion or the type of motion. If several motions were heard in the same hearing, however, we counted only one hearing.
- Some courts docket the scheduling of a hearing but not the holding of the hearing. If a hearing was scheduled and an order was later issued by a district judge, we assumed, even in the absence of a docketed hearing, that the hearing was held, and we generated a hearing record that we included in the counts. This approach allowed us to use context information to avoid an undercounting of hearings on motions.
- During the processing of docket entries received from a court, we occasionally encountered docketing codes that did not exist on the court's code description list. In such instances, we attempted to clarify the event by using other information on the docket entry, evaluating the use of the same code in other courts, and reviewing the docket text associated with the code on electronic docket sheets. We excluded docket entries containing codes that could not be interpreted after these efforts.
- We reviewed the text of all docketed events for keywords indicating whether specific case characteristics that were factors in the case-weight computations were present in the case (e.g., death-penalty-related events such as CJA 30 filings, motions to appoint an interpreter, and motions to certify a class). In addition, we used case information to identify cases with multiple defendants or multiple parties.

More detailed information about the programs and procedures used to process extracted data is included at Appendix W.

Computing Event Frequencies

The final result of the data processing was a single analysis file that contained a data record for every event to be included in the case-weight calculations. Each analysis record consisted of a unique case identifier, the case type of the case, and the event category. We aggregated the events of cases within a case type to produce total counts by case type and event category. We then divided the counts by the number of cases of each case type to generate the average frequency of the events by case type. We used the resulting frequencies in the case-weight calculations.

Part V. Computation of the Case Weights

This section of the report describes the computation and review of case weights in preliminary form, the incorporation of a final case adjustment, and the specifics of the case-weight computation.

Computation and Review of Preliminary Case Weights

By mid-May 2004, we had final time estimates and appropriate frequency information for every event and case-type combination included in the case-weight matrix. The computation of preliminary weights was at that point a matter of (1) calculating raw weights for each case type by summing the product of event frequency and event time across all event types; and (2) dividing each raw weight by the raw weight of the median case type to transform raw weights into relative weights. A detailed discussion of how time and frequency information combine to form case weights is found under the heading "Understanding the Computation of Event-Based Case Weights," *infra* page 54.

The computation of preliminary weights incorporated the case-weight specifications that participants at the National Consensus Meeting settled on, with one major and two minor exceptions, all of which involved case adjustments. The major exception was an adjustment that meeting participants requested to account for economies resulting when multiple defendants are tried together. Time constraints precluded us from including the adjustment in the preliminary weights.

The minor exceptions involved the class action adjustment and the national group's recommendation that only the single highest adjustment be taken into account if a case has more than one applicable case adjustment. We reported at the National Consensus Meeting that we would implement all recommendations that issued from the meeting to the extent that the recommendations were supported by the data we would later receive from the courts. But difficulties identifying the outcome of class action motions confounded our efforts to limit the class action adjustment to class certifications, so we instead applied it to all cases having a class allegation. Data issues similarly compelled us to apply all relevant adjustments to every case.

In mid-May, we briefed the chair of the Subcommittee on the results of calculations and then mailed the preliminary weights, with supporting material, to members of the Judge Advisory Group. The mailing included (1) a staff memo summarizing the results of computations and advising judges on how to interpret tabled information; (2) a table listing the computed raw weight, the relative weight, and the number of cases from which frequency information was derived for each case type; (3) a table comparing case-weight values from the new event-based study and the 1993 Time Study; (4) a table comparing the total weighted filings per judgeship for each court under the 1993 and the preliminary 2004 case-weighting systems; and (5) a table summarizing how we combined event frequen-

cies and time estimates in computations to form the raw weight of each case type. Copies of these materials are at Appendix X.

The chair of the Statistics Subcommittee initiated the formal review of the preliminary weights by inviting members of the Judge Advisory Group and the chair of the Judicial Resources Committee to attend a staff presentation via conference call on May 27, 2004. Seven judges attended the review session wherein we reviewed the weights, summarized outstanding issues (including data issues that required us to slightly modify the case adjustments), and responded to questions.

Our review of the weights included evaluation of the weight for the Espionage and Terrorism case type. On the basis of discussions at several circuit meetings, we had expected the weight for this case type to be considerably larger than the weight we computed (1.08). The weight of 1.08 appears to underestimate the burden associated with many pending espionage and terrorism cases because it is based only on the twelve cases that terminated in 2002—none of which went to trial. As a result, the computed weight reflects a more limited range of case-processing activity than we would expect to find in a larger sample that better represented pending cases and future filings.

The judges reviewing the preliminary weights concurred with our assessment that the low Espionage and Terrorism weight reflected a small sample size and discussed two approaches for dealing with the underestimate. They considered merging Espionage and Terrorism cases with another case type and then asking us to re-compute a weight for the combined category. They ultimately decided, however, to preserve the separate Espionage and Terrorism case type and use the weight as computed until such time as more representative terminations data become available and the weight can be recomputed.

After reviewing the weights, we summarized computational modifications that we made to case adjustments in response to observed data limitations. The judges accepted the modifications.

Finally, we sought input from the reviewers on whether to incorporate the adjustment for multidefendant trials requested by participants at the National Consensus Meeting. We noted that the impact of the adjustment would be minor for all but a handful of specific criminal case types and indicated that implementation might present data-analysis challenges. The reviewers asked us, nonetheless, to include the multidefendant adjustment in the final weights to ensure that the weights represented a balanced estimate of case burden.

Development and Application of the Multidefendant Adjustment

Early in the project, when JS-10 data were initially used to calculate time estimates for trials and other evidentiary hearings, we made an operational decision to use only single-defendant trials and hearings in the computations for criminal

case types. The grounds for the decision were practical: We did not then know whether the structure of the data would permit us to incorporate multidefendant cases into the analysis and, because about 86% of all criminal trials were single-defendant trials, it seemed reasonable to use them to compute average times.

Several judges voiced concern about this decision at the National Consensus Meeting. Their concern originated from the practice of treating every criminal defendant, even defendants who are tried together, as an individual case when calculating weighted district court caseloads. The judges felt that computing case weights using trial times that were derived only from single-defendant trials would overestimate the average trial time required across defendants. They pointed out that trying two defendants together takes less total time than trying two defendants separately. The other judges attending the national meeting found this reasoning persuasive and requested that, if feasible, we account in the case-weight calculations for the time savings resulting from trying codefendants together.

We outlined two possible approaches that we could take to implement the adjustment, one based on their judgment about the magnitude of the time savings and one that we would calculate empirically, using time data from trials. The participants endorsed the empirical approach.

Time constraints prevented us from including the multidefendant adjustment in the calculation of the preliminary weights. By the time the preliminary weights were reviewed, however, we had a plan for implementing the adjustment. The plan required turning once again to JS-10 data for information on the amount of time judges spend conducting criminal trials and evidentiary hearings.

To calculate the time estimates for the adjustment, we focused on records from proceedings completed between 1996 and 2002 in which more than one defendant was tried. Using trial records that previously had been matched to criminal case records, we identified one subset of trials involving two defendants and another subset involving three or more defendants. These data provided a total of 11,460 criminal trials and evidentiary hearings on which to base the multidefendant adjustment.

The specifics of the computation are outlined conceptually in Table 3. When computing the trial component of the weights, we determined the amount of time that each trial event contributed to the case weights by multiplying the average time for single defendant trials by the frequency of the trial event (see calculated case time, line 1 of Table 3). As a result, the preliminary weights took account of only single-defendant trials.

For the adjustment, we computed new event frequencies that distinguished between one-defendant, two-defendant, and three-or-more-defendant trials.[26] We also computed new per-defendant times for each of these subgroups. From these

26. For the cases in our study across all criminal case types, single-defendant trials accounted for approximately 86% of the total. Two-defendant trials accounted for 5% of trials, and 9% of trials had three or more defendants.

event times and frequencies, we calculated the amount of time contributed by each subgroup (see lines 2–4 of Table 3) and summed the results. The sum was the new total time based on the differentiated components (see line 5 of Table 3). Table 3 shows a Partial Multidefendant Adjustment (on line 6) that is simply the difference between the calculated case time on line 5 and the case time on line 1; it represents the average savings in trial time associated with trying some defendants together. We calculated a partial adjustment in this manner for each type of trial (i.e., jury, non-jury, evidentiary sentencing hearings, and other evidentiary hearings), and then added the partial adjustments to obtain the full Multidefendant Adjustment value that we incorporated into the case-weight computation for each criminal case type.

Table 3: Multidefendant Adjustment Calculation Example

Line	Defendant Grouping	Estimated Event Time Per Defendant	Frequency of Event	Calculated Case Time
1	All Defendants	800 minutes	.127	96.0 minutes
2	1 Defendant	800 minutes	.095	76.0 minutes
3	2 Defendants	496 minutes	.026	12.9 minutes
4	3+ Defendants	585 minutes	.006	3.5 minutes
5	Total			92.4 minutes
6	Partial Multidefendant Adjustment			-3.6 minutes

The adjustment had the greatest effect (modest as it was) on case types distinguished by a greater-than-average proportion of multidefendant cases. These case types included Continuing Criminal Enterprise, Extortion/Threats/RICO, and Drug Manufacturing cases, each of which registered a decline of between 3% and 4% in the raw weight value. Unexpectedly, the adjustment produced a slight increase (of less than 1%) in the raw weight of the Murder/Manslaughter/Homicide case type.

With the inclusion of the multidefendant adjustment, the case weights were final.

Understanding the Computation of Event-Based Case Weights

Recall that a case weight represents a calculated estimate of the burden to be shouldered by a judge handling a newly filed case. The estimate is the average burden found for similar cases terminated in the recent past. To arrive at this estimate, event-based weights are computed by combining information on event-

frequency and event-time estimates. Event frequency itself is calculated from the average event activity observed in a sample of cases.

Because of reliance on a sample, computed figures reflecting average event activity represent no actual individual case. Moreover, the weight calculated from the average event activity of a case type may be inaccurate for a single case. Nonetheless, if we look at a sizeable number of cases, the estimated burden for the cases as a group should approximate the total actual burden. These points are central to an understanding of case weights and might best be understood in the context of a concrete example.

Figure 3 displays event information used to calculate the raw case weights for two case types—Patents and Aggravated or Felonious Assaults, Kidnappings—and will serve as the basis for a discussion of how time and frequency combine to form case weights. We discuss the computation of raw case weights first, and then explain the conversion of raw case weights to final, relative case weights. Raw weights represent estimates of the time district judges need, on average, to complete the specified events in a case type; relative case weights indicate how much work is needed to fully process one type of case relative to the typical case. Weighted caseloads are computed from relative weights.

Working Through an Example of a Raw Case-Weight Calculation

Consider the information on the Patent case type displayed at the top of Figure 3. Examination of the 2,455 terminated patent cases extracted from district court databases reveals that 62 of the cases went to jury trial and another 56 of them were tried before a district judge. These trial numbers correspond to trial rates (or to use the terminology of the event-based approach, frequencies) of 0.025 and 0.023, respectively. These frequencies are listed under the appropriate event label in the row marked Frequency of the Patent matrix.

Similar information about the other events in the sample of patent cases is found by following the frequency row across the matrix. District judges held seventy-nine settlement conferences in these cases, which translates to a frequency of 0.032. The number of motions for summary judgment that judges ruled on translates to a frequency of 0.438, and so on.

The second row in the Patent matrix is labeled Estimated Event Time. The numbers located in blue boxes are the objective time estimates calculated from trial time data submitted on JS-10 forms. The numbers in the orange, green, and yellow boxes are the consensus time estimates developed by participants of the National Consensus Meeting.[27]

27. Yellow boxes represent a variation on the straightforward time estimate. They indicate that 5% of time should be added to the calculated case weight to adjust for the proportion of Patent cases characterized as having five or more parties or including a class action allegation.

Figure 3: Case-Weight Calculation Examples

Civil Case Type

Patent

Total Time = 2080 min **Scaled Weight = 4.72**

	Jury Trial	Non-Jury Trial	Hrg on Prelim Injnctn/TRO	Other Evid Hrg	[illegible] Conf	Other Conf	[illegible] Other Non-Evid Hrg	Order on Mtn for Sum Jdgmt	Order on Discvry Mtn	Order on Subst or Time-Intensive Mtn	Order on Any Other Enum Mtn	Trial Prep	Hrg Prep	Mult Parties (5 or more)	Class Actn Allgtn
Frequency	0.025	0.023	0.046	0.021	0.032	0.773	0.859	0.438	0.466	0.868	0.721	0.048	0.926	0.399	0.002
Estimated Event Time	2826	1602	336	432	290	90	150	1200	120	1080	75	750	105	0.05	0.05
Calculated Case Time	70.7	36.8	15.5	9.1	[illegible]	69.6	128.9	525.6	55.9	937.4	54.1	36.0	97.2	40.7	0.2

Criminal Case Type

Aggravated or Felonious Assault, Kidnapping

Total Time = 589 min **Scaled Weight = 1.34**

	Jury Trial	Non-Jury Trial	Sentencng Hrg (evid)	Other Evid Hrg	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	Order on Suppressn Mtn	Order on Dispositive Mtn	Order on Other Enum Mtn	Trial Prep	Hrg Prep	[illegible]	Inter-prtr	Death Pnlty	Multi Defts
Frequency	[illegible]	0.035	0.110	0.037	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	0.075	0.464	1.611	0.192	2.526	[illegible]	0.060		*
Estimated Event Time	[illegible]	420	90	138	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	120	120	15	240	25	[illegible]	0.05	0.5	*
Calculated Case Time	164.9	14.7	9.9	5.1	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	9.0	55.7	24.2	46.1	63.2	40.3	1.0	0.0	-6.0

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56347.110

The bottom row is labeled Calculated Case Time. The figures in this row are obtained by multiplying the frequency estimate and the time estimate listed directly above for each event. If a judge has a new patent case and nothing more is known about the case than that the judge will eventually conduct a jury trial, the best guess about the amount of time the judge will spend on that trial would be 2,826 minutes (just over 47 hours). A jury trial, however, is held in only 25 out of 1,000 patent cases. Consequently, to estimate the time a judge will spend processing a newly filed patent case, case weights credit only the portion of total time accounted for by a single case. To be concrete, the full trial time is multiplied by the likelihood that the trial would occur. Thus, the estimated judge time attributable to jury trial is 70.7 minutes (70.7 = 0.025 x 2826) and the estimated time for non-jury trials is 36.8 minutes (36.8 = 0.023 x 1602). The inclusion of both jury and non-jury trial time in the case-weight calculation demonstrates the previously noted point that the event averages represent no actual individual case.

The same calculation is applied to the remaining events (e.g., non-jury trials, settlement conferences, orders on motions for summary judgment) to determine the time burden imposed by each. We see from the bottom row of the Patent matrix that two events contribute heavily to the high case weight calculated for this case type. The time associated with preparing orders on substantive motions, averaged across all Patent cases, is estimated to consume more than 900 minutes (15 hours), and orders on motions for summary judgment consume more than 500 minutes (8.3 hours). These event categories stand out both because the time estimate is substantial and because there is a relatively high likelihood that a newly filed patent case will include a ruling on one of these types of motions.

The raw case weight is obtained by adding together all of the calculated case times appearing in the bottom row of the Patent matrix. This weight is shown as 2,080 minutes (34.7 hours) next to the Total Time entry.

We computed the raw case weight for the Aggravated or Felonious Assault, Kidnapping case type in a similar manner. Note, however, that the frequency entry and the estimated time entry for the multidefendant case adjustment are missing—the relevant cells are instead filled with an asterisk (*). The asterisk appears in the table only because this adjustment was calculated by combining event frequency and time from multiple subsets of data (as shown in the example presented in Table 3, *supra* page 54), and we decided that listing all levels of the parameters was excessive. The value that summarizes the adjustment, however, appears in the bottom row (-6.0 minutes), and is summed with the other calculated case-time events to obtain the Total Time entry of 589 minutes (9.82 hours).

Converting Raw Weights to Relative Weights

Relative weights, rather than raw weights, are used to compute district court weighted caseloads because relative weights result in values that have a unit of measurement and a range of magnitude that is readily understood. Relative

weights have the additional advantage of facilitating direct comparison of the burden associated with different case types. On average, a case type with a relative weight of 2.00 takes twice as much processing time from a judge as a case type with a weight of 1.00.

Relative weights are computed by dividing raw weights by a scale value. The scale value used in case-weighting studies is the raw weight value of the "typical" case. When we calculated the case weights, we identified three possible scale values, each of which corresponded to a slightly different definition of the "typical" case: (1) the raw weight value of the median case type (equal to 441 for the final weights); (2) the average of all raw weight values weighted by the number of cases in a case type (equal to 439); and (3) the raw weight value of the median case (equal to 386).

The differences between the scale options were slight, and we chose to divide raw weights by the raw weight value of the median case type, which was All Other Felonies. Our choice turned on two considerations—this scale value returned a cluster of case types around the 1.00 baseline that appeared to us to be "typical," and the choice was easy to explain to the Judge Advisory Group. Members of the group confirmed that the clustering case types were typical when they reviewed the preliminary weights.[28]

The resulting relative weights ranged in value from a low of 0.10 for Overpayment and Recovery cases (which are primarily student loan cases) to 12.89 for Death Penalty Habeas Corpus cases. The highest weighted criminal case type was Continuing Criminal Enterprise at 4.36. The new weight for Death Penalty cases extended the range of weights significantly beyond the range of the old case-weighting system—Death Penalty cases previously were weighted 5.99—but the magnitude of the scaled weight values was otherwise similar. With respect to the case-type examples from Figure 3 above, the relative weight values (referred to in Figure 3 as scaled weights) are listed opposite the Total Time entry.

28. The case types falling within ± .02 of the 1.00 baseline were All Other Labor (5,782 cases), All Other Felonies (2,194 cases), Firearms (5,470 cases), All Other [Civil] Actions (12,008 cases), and All Fraud (7,038 cases).

Part VI. Action on Final Case Weights

This section of the report describes the sequence of events leading to formal adoption of the final case weights and describes case-weight information prepared for dissemination to the courts.

Submission of Final Weights to the Statistics Subcommittee

We submitted final weights to the Subcommittee for review and approval at its meeting on June 15, 2004. We provided background and supporting documents modeled after materials we sent when the judges conducted their review of preliminary weights. These materials included the following:

- Table 1, Final Case-Weight Values—presenting raw and relative weights in descending order by case type;
- Table 2, Comparison of New and Existing District Court Case-Weight Values—listing, for comparison, 1993 case-weight values for all of the nature-of-suit and offense codes that comprised the 2004 case type categories;
- Table 3, Comparison of Total Weighted Filings Per Judgeship: Calculations Using 1993 and Final 2004 Case Weights—depicting the impact on weighted caseloads of using new weights and 1993 weights; and
- Table 4, Computation of Case Weights by Case Type.

Copies are located at Appendix Y.

Table 1 of these materials listed the final raw and relative weights for the new case types in descending order and is presented in Figure 4. Civil and criminal case types appear in separate columns to promote identification of category-specific relationships.

Table 2 compared the weights derived from the 1993 Time Study and the current study. Many of the differences between these weights are small, but differences for a handful of case types are striking. Differences are to be expected, of course, since the new weights reflect changes in case-management practices that have been implemented over the past decade. New weights for the largest criminal case-type categories—including Immigration Offenses, All Other Felonies, and the various drug offenses—tend to be smaller than the corresponding weights from the 1993 study. A notable exception to the decrease in weights for drug offenses, however, was Continuing Criminal Enterprise, which saw a substantial increase in its associated case weight. In contrast to criminal case types, weights for several civil case categories saw considerable increases. Such case types included Death Penalty Habeas Corpus, Environmental Matters, Patent, Civil Rights (Voting), Antitrust, and FOIA.

Figure 4: Final Case-Weight Values Presented to the Subcommittee for Approval

TABLE 1. FINAL CASE WEIGHT VALUES

Civil Case Type	Criminal Case Type	Number of Cases	Raw Weight (Total time) (min)	Scaled Weight (no units)[6]
Death Penalty Habeas Corpus		201	5685	12.89
Environmental Matters		1198	2113	4.79
Civil RICO		730	2108	4.78
Patent		2455	2080	4.72
	Drug Offense -- Continuing Crim Enterprise	36	1921	4.36
Civil Rights -- Voting		209	1702	3.86
Antitrust		751	1520	3.45
Freedom of Information Act		272	1351	3.06
Copyright and Trademark		5144	935	2.12
SEC, CFTC, Similar Enfremt Actn (US Plaintiff)		274	916	2.08
	Murder, Manslaughter, Homicide	281	876	1.99
SEC, Commodts, Stkhldr Suits (non-US Plaintiff)		2905	849	1.93
Civil Rights -- Other		18462	845	1.92
	All Extortion, Threats, and RICO	657	832	1.89
Other Fraud		1555	748	1.70
Civil Rights -- Employment		20079	735	1.67
Assault, Libel, and Slander		645	650	1.47
Insurance Contracts		7459	622	1.41
Medical Malpractice		1309	616	1.40
	Aggravated or Felonious Assault, Kidnapping	401	589	1.34

[6] The scaled weight of a case type is computed by dividing the raw weight for the case type by the median raw weight value for all standard civil and criminal case types. The median raw weight value is 441. Standard case types exclude Supervised Release and Probation Revocation Hearings.

Figure 4: Final Case-Weight Values Presented to the Subcommittee for Approval (continued)

Federal Judicial Center — Revised District Court Case Weights

Federal Tax Suits		1018	570	1.29
Other Contract Actions		16849	537	1.22
Banking and Finance		1316	518	1.17
Other Property Actions (real or personal)		2300	517	1.17
	Drug Offense – Manufacture	628	493	1.12
	Sexual Offenses and Pornography	968	484	1.10
	Espionage and Terrorism	12	477	1.08
	Drug Offense – Sell or Distribute	10339	471	1.07
All Other Labor		5782	452	1.02
	Firearms	5470	442	1.00
	All Other Felonies	2194	441	1.00
All Other Actions		12008	438	0.99
	All Fraud	7038	426	0.97
Personal Injury (excluding Admiralty)		12026	399	0.90
Admiralty		4103	386	0.88
	Larceny and Theft	1449	386	0.87[7]
	Drug Offense – Possession	1186	380	0.86
Interstate Commerce		603	372	0.84
ERISA		10206	369	0.84
Federal Employer's Liability		970	336	0.76
Land Condemnation		615	335	0.76
Prisoner Civil Rights / Prison Conditions (Federal)		1020	332	0.75
	Embezzlement, Forgery, and Counterfeiting	1892	329	0.75
Bankruptcy Withdrawal		970	325	0.74
	Robbery and Burglary	1245	312	0.71
Prisoner Civil Rights / Prison Conditions (State)		21838	293	0.67
Social Security		16432	277	0.63

[7] Admiralty and Larceny / Theft case types appear to have the same raw weight but different scaled weights. This anomaly is due to the rounding of the raw weight values for purposes of presentation. The scaled weight values are correct.

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Figure 4: Final Case-Weight Values Presented to the Subcommittee for Approval (continued)

Federal Judicial Center

Revised District Court Case Weights

	Drug Offense -- Import / Export	2473	270	0.61
Product Liability (excluding Admiralty)		12740	267	0.61
	Alien Smuggling	1146	252	0.57
Bankruptcy Appeal		2579	251	0.57
§2254 Habeas Corpus		22162	240	0.54
Mandamus		1236	215	0.49
	Other Immigration	10091	208	0.47
Deportation / Immigration		332	193	0.44
Forfeiture and Penalty		1898	184	0.42
Foreclosure		5240	142	0.32
§2255 Habeas Corpus		6743	141	0.32
	All Misdemeanor and Petty Offenses	3857	81	0.18
Asbestos		13402	54	0.12
Overpayment and Recovery		7630	44	0.10
	Supervised Release and Probation -- Evidentiary Revocation Hearing		96	0.22
	Supervised Release and Probation -- Non-Evidentiary Revocation Hearing		60	0.14

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Table 3 compared weighted caseloads calculated under the 1993 and the 2004 weighting systems, listing the per-judgeship weighted filings for both individual districts and the nation as a whole for calendar years 2001–2003. The total weighted caseload on the national level changed little under the new weights, registering a 1%, 4%, and 5% decrease in 2001, 2002, and 2003, respectively. When weights were applied to the caseloads of individual courts, the difference for the majority of courts was modest. In more than two-thirds of the courts, the weighted caseload changed by 10% or less in either direction each year. For a number of courts, however, the weighted caseload under the new system was a significant departure (i.e., more than 20%) from the weighted caseload calculated with 1993 weights. The magnitude and direction of the difference depended on the number and type of cases filed in the court.

At the Subcommittee meeting, we distributed a companion table to Table 3. This table ranked the courts on the basis of their 2003 weighted caseloads as computed using the new and 1993 case weights. As expected, the weighted caseload values of individual courts differed under the two weighting systems, but differences in an individual court's rank order tended to be small.

Table 4 summarized how event frequencies and time estimates combined to form the final raw weight of each case type.

Case-Weight Approval

The Subcommittee approved the weights at its June 15, 2004, meeting and adopted them for immediate use in developing their preliminary recommendations for judgeship requests as part of the 2005 biennial judgeship survey. The Subcommittee did not change the criterion used to evaluate the per-judge weighted caseload figures for courts because (1) the range of relative weights in the new system was similar to the range of the 1993 weights it replaced, and (2) the new weights had minimal impact on the national weighted caseload.

Acting on a recommendation by the Subcommittee, the Committee on Judicial Resources approved the new case weights at its biannual meeting on June 17, 2004. The Committee additionally approved the immediate use of the weights in developing judgeship recommendations.

Information for the Courts: Frequently Asked Questions and National Rankings

The Subcommittee asked us to prepare summary information about the new case weights for it to send the courts. Members asked for the main document to be formatted as a list of Frequently Asked Questions (FAQ), and made recommendations, supplemented by recommendations from the Judicial Resources Committee, on topics the document should cover.

We developed the FAQ, which reported on how the weights were developed, how they compared to previous weights, what effect the weights were likely to have on a court's weighted caseload, and how the Subcommittee uses them. We included a companion table that compared the new weights to the old weights for individual case types, and a second table that used AO caseload information to rank order the weighted caseload per judgeship for courts, under the new and old case-weight systems.

The Subcommittee chair and the Judge Advisory Group reviewed the materials, and after minor modifications, the chair sent the documents to all chief district judges with a cover memo announcing the adoption of the new weights.

The memo and its attachments appear at Appendix Z. Appendix Z additionally includes a copy of an article announcing adoption of the new case weights that appeared in the *Third Branch* (August 2004).

List of Appendix Items

These items and the electronic version of this report are available at the Federal Judicial Center's internet website (http://www.fjc.gov) or, for readers within the courts, at the FJC's intranet site (http://cwn.fjc.dcn).

A. Original FJC Proposal for an Event-Based Case-Weighting Study: Table of Design Components
B. Early Public Relations Materials Describing the New Case-Weighting Study
C. Technical Advisory Group Meeting: Participant Information Packet
D. Standard ICMS Event and Relief Code Descriptions
E. Judge Advisory Group Meeting: Participant Information Packet
F. JS-10 Monthly Report of Trials and Other Court Activity
G. CM/ECF Starter Dictionary
H. Default Time Values Listed on Circuit Worksheets for Non-Evidentiary Hearing and Conference Events
I. Sample Letter to Chief Judges of the Circuits Requesting District Judge Designations to the Circuit Meetings
J. Circuit-Based Meetings: Participant Information Packet
K. Circuit-Based Meetings: Pre-Meeting Time Estimates
L. Circuit-Based Meetings: Slide Presentation
M. Circuit-Based Meetings: Sample Report
N. National Consensus Meeting: Participant Information Packet
O. Modifications to the Initial Case-Weighting Structure
P. National Consensus Meeting: Sample Set of Binder Materials
Q. Final Time Estimates and Adjustment Percentages Used in the Calculation of the Case Weights
R. Survey of Court Docketing Practices
S. Example of Docketing Code Lists
T. Categorizing Court Docketing Codes
U. Data-Extraction Materials
V. Data-Cleaning Process
W. Data Processing and Analysis
X. Review of Preliminary Weights Material Presented to the Judge Advisory Group
Y. Final Weights Material Presented to the Statistics Subcommittee
Z. Announcement of New Weights to the Courts

The Federal Judicial Center

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About the Federal Judicial Center

The Federal Judicial Center is the research and education agency of the federal judicial system. It was established by Congress in 1967 (28 U.S.C. §§ 620–629), on the recommendation of the Judicial Conference of the United States.

By statute, the Chief Justice of the United States chairs the Center's Board, which also includes the director of the Administrative Office of the U.S. Courts and seven judges elected by the Judicial Conference.

The organization of the Center reflects its primary statutory mandates. The Education Division plans and produces education and training programs for judges and court staff, including satellite broadcasts, video programs, publications, curriculum packages for in-court training, and Web-based programs and resources. The Research Division examines and evaluates current and alternative federal court practices and policies. This research assists Judicial Conference committees, who request most Center research, in developing policy recommendations. The Center's research also contributes substantially to its educational programs. The two divisions work closely with two units of the Director's Office—the Systems Innovations & Development Office and Communications Policy & Design Office—in using print, broadcast, and on-line media to deliver education and training and to disseminate the results of Center research. The Federal Judicial History Office helps courts and others study and preserve federal judicial history. The International Judicial Relations Office provides information to judicial and legal officials from foreign countries and assesses how to inform federal judicial personnel of developments in international law and other court systems that may affect their work.

Federal Bar Association
Office of the President

LAWRENCE R. BACA
5560 Redland Drive
San Diego, CA 92115
703.919.8323
lawrence.baca@yahoo.com

September 29, 2009

The Honorable Sheldon Whitehouse
Chairman
Subcommittee on Administrative
Oversight and the Courts
Committee on Judiciary
United States Senate
Washington, DC. 20510

The Honorable Jeff Sessions
Ranking Minority Member
Subcommittee on Administrative
Oversight and the Courts
Committee on Judiciary
United States Senate
Washington, DC. 20510

Re: S. 1653, The Federal Judgeship Act of 2009

Dear Chairman Whitehouse and Senator Sessions:

On behalf of the 16,000 lawyers and judges who are members of the Federal Bar Association, I write to extend our support for S. 1653, The Federal Judgeship Act of 2009. I request that this statement be entered into the record of your Subcommittee's hearing, "Responding to the Growing Need for Federal Judgeships: The Federal Judgeship Act of 2009," scheduled for September 30.

The Federal Bar Association is the foremost national bar association devoted exclusively to the practice and jurisprudence of federal law and the vitality of the United States federal court system. We endorse S. 1653 and urge the Senate's swift approval of this measure. The legislation would establish 12 new judgeships in six courts of appeals and 51 new judgeships in 25 district courts.

A substantial number of our members are located in the federal circuits and districts affected by the legislation and are extremely supportive of the benefits that additional judgeships would provide. Our members appear before the federal bench every day. Their professional lives revolve around advocacy and the search for justice in the federal courthouse. They are becoming increasingly frustrated by the substantial delays that are occurring in the disposition of civil and

criminal cases in the federal courts. They believe that these growing delays are due increasingly to the inadequate presence of judges to address the growing dockets of cases.

Our members tell us time and again of their respect for the diligence and hard work of their federal judges in their attempt to hear and decide cases in a timely manner. But there are limits on how much the bench can accomplish with existing resources. The problem is simply that there are not enough judges. That is why we believe that Congress should promptly exercise its Constitutional authority to create additional circuit and district judgeships consistent with the recommendations of the Judicial Conference of the United States. This should be accomplished comprehensively, not incrementally, and now.

The maintenance of a sufficient number of judgeships in our federal courts is critical to the assurance of the prompt and efficient administration of justice. As you know, the last time that Congress enacted a comprehensive Article III judgeships bill was nearly two decades ago in 1990. The Federal Judgeship Act of 1990 (Public Law 101-650) established 11 judgeships for the courts of appeals and 74 additional judgeships (including 13 temporary) for the district courts. Since that time, no judgeship has been created for the courts of appeals, and 34 district judgeships have been added to respond to particular problems in certain districts. Yet caseloads in both the appellate courts and district courts have increased dramatically in the past 20 years.

The judgeships established by S. 1653 are consistent with the recommendations of the Judicial Conference, which in March 2009 recommended that Congress establish 12 new circuit appeals judgeships and 51 judgeships in 25 district courts. The Judicial Conference also recommended that five temporary district court judgeships be converted to permanent positions, and that one temporary district court judgeship be extended for an additional five years. These recommendations were based upon an exhaustive biennial review by the Judicial Conference of court caseloads and other factors to assure the adequacy of delivery of civil and criminal justice in the federal court system. That review consisted of six levels of scrutiny within the judiciary before the Judicial Conference transmitted its recommendations to Congress.

The Judicial Conference review showed that caseloads in both the courts of appeals and the district courts have grown significantly since 1990. By the end of fiscal year 2008, filings in the courts of appeals had grown by 42 percent, while district court case filings had risen by 34 percent (civil cases were up 27 percent and criminal felony cases were higher by 81 percent). Although Congress has created 34 additional judgeships in the district courts since 1999 in response to particular problems in certain districts (9 in fiscal year 2000, 10 in fiscal year 2001, and 15 in fiscal year 2003), no additional judgeships have been created for the courts of appeals. As a result, the national average circuit court caseload per three-judge panel has reached 1,104 filings compared to 773 in 1991. In the district courts, even with 34 additional judgeships, weighted filings were 472 per judgeship as of September 2008, compared to 386 per judgeship in 1991.

The caseload situation in courts where S. 1653 would establish additional judgeships is much more dramatic than indicated by national totals. According to the Judicial Conference, for the 25 district courts where the legislation would establish additional judgeships, weighted filings averaged

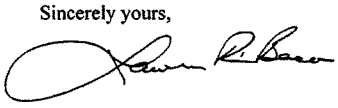
573 per judgeship and ten courts have caseloads near or above 600 weighted filings per judgeship. For the six circuit courts where the legislation establishes judgeships, adjusted filings averaged 802 per panel and two courts have caseloads near or above 1,000 per panel.

We support the creation of new judgeships necessary to exercise federal court jurisdiction with the full understanding that there will be costs involved. We are as interested as the Congress in assuring that the federal courts maximize the use of their resources to avoid the creation of additional judgeships as much as possible. We also believe that the federal courts need to continue to create efficiencies through the continuing use of a range of measures, including: temporary rather than permanent judgeships; shared judgeships; inter-circuit and intra-circuit assignment of judges; alternative dispute resolution; and technological advances to permit the assistance of judges in other districts or circuits without the need to travel.

The assurance of the prompt and efficient administration of justice depends upon an adequate number of judges on the federal bench. Indeed, justice delayed is justice denied. It is now time to provide for Congress to assure the availability of swift justice everywhere in the United States by authorizing the comprehensive creation of adequate numbers of judgeships in the federal circuit and district courts, as recommended by the Judicial Conference and embodied in S. 1653. We strongly support this legislation and urge its prompt approval by the Senate Judiciary Committee.

Thank you, for the consideration of these comments in connection with your September 30 hearing and for your leadership in oversight and support of the federal courts system.

Sincerely yours,



Lawrence R. Baca
National President

U.S. Senator Dianne Feinstein
September 30, 2009

Statement of Senator Dianne Feinstein
Hearing of the Subcommittee
on Administrative Oversight & the Courts
"Responding to the Growing Need for Federal Judgeships: The Federal Judgeship Act of 2009"

Chairman Whitehouse, I want to thank you for holding this hearing today on the growing need for federal judgeships. This is an issue of great importance to my state of California.

I do not believe that Congress has done nearly enough in recent years to ensure that our nation's federal courts have the resources they need to decide cases in a thorough and timely manner.

Despite growing caseloads across the country, Congress has not passed a comprehensive judgeship bill to address the courts' needs since 1990.

My state of California is the perfect example. Federal courts across my State are severely understaffed.

I am very pleased that Judge O'Neill is here today to discuss the situation in the Eastern District of California. This district covers Fresno, Sacramento, and much of the Central Valley of California. The District has six active judgeships, and each of its judges is handling a caseload of over 1,000 federal cases each. Businesses and civil litigants are facing delays of more than 3 years in having their disputes resolved. Despite heroic efforts by the District's judges, its senior judges, and its magistrate judges, federal law is not being enforced in a timely manner. This is unacceptable. And it is our job to fix it.

The problems in the Eastern District are unusually bad, but they are not unique.

- The Central District of California, which covers Los Angeles and Orange County, had 575 weighted federal filings per judge last year.

- The Northern District, which covers San Francisco and Silicon Valley, had 526 weighted filings per judge.

- And the Ninth Circuit, which handles appeals for the entire State, had 1,431 federal appeals filed per 3-judge panel.

All of these courts have caseloads well above the Judicial Conference's standard for when courts need more judges. Only the Southern District of California has a manageable number of cases, and that is because Senators Boxer, Kyl, Hutchison, Gramm, and I were able to work together in the 107th Congress to secure more judgeships for the border courts.

In 1990, Congress passed the "Federal Judgeship Act of 1990" to provide all of the federal courts across the country with adequate personnel to decide the cases before them. This bill was passed by a Democratic Congress and signed and implemented by President George H. W. Bush.

The situation in the federal courts in my state is dire, and I know that my state is not alone. This is a problem that only Congress can solve. I believe the time has come for us to work together, across the aisle, once again to solve the caseload problems.

I want to thank Senator Whitehouse, Senator Leahy, and all of the co-sponsors of the "Federal Judgeship Act of 2009" for their efforts, and I hope that others will join us as well.

United States Government Accountability Office

GAO

Statement for the Record, Senate Committee on the Judiciary, Subcommittee on Administrative Oversight and the Courts

For Release on Delivery
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Wednesday, September 30, 2009

FEDERAL JUDGESHIPS

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

Statement of William O. Jenkins, Jr., Director
Homeland Security and Justice

GAO-09-1050T

September 30, 2009

GAO Accountability · Integrity · Reliability

Highlights

Highlights of GAO-09-1050T, a Statement for the Record before the Senate Committee on the Judiciary, Subcommittee on Administrative Oversight and the Courts

FEDERAL JUDGESHIPS

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

Why GAO Did This Study

Biennially, the Judicial Conference, the federal judiciary's principal policymaking body, assesses the need for additional judges. The assessment is based on a variety of factors, but begins with quantitative case-related workload measures. This statement focuses on (1) whether the judiciary's quantitative case-related workload measures from 1993 were reasonably accurate; and (2) the reasonableness of any proposed methodologies to update the 1993 workload measures. This statement is based on work completed and reported in 2003 and discussed in testimony on June 17, 2008.

What GAO Recommends

In 2003, GAO recommended that the Judicial Conference, among other things, develop a methodology for measuring the case-related workload of courts of appeals judges by using methodologies that support objective, statistically reliable means of calculating the accuracy of the weights and workload measures, respectively. The Conference disagreed and stated that, among other things, GAO's report did not reflect the sophisticated methodology of the study and that the workloads of the courts of appeals entail important factors that have defied measurement. GAO believes the importance and costs of creating new judgeships requires the best possible case-related workload data to support the assessment of the need for more judges.

View GAO-09-1050T or key components. For more information, contact William O. Jenkins, Jr. at (202) 512-8757 or JenkinsWO@gao.gov.

What GAO Found

In 2003, GAO reported that the 1993 district court case weights were reasonably accurate measures of the average time demands that a specific number and mix of cases filed in a district court could be expected to place on the district judges in that district. At the time of GAO's 2003 report, the Judicial Conference was using case weights approved in 1993 to assess the need for additional district court judgeships. The weights were based on data judges recorded about the actual in-court and out-of-court time spent on specific cases from filing to disposition. This methodology permitted the calculation of objective, statistical measures of the accuracy of the final case weights.

In 2003, GAO reviewed the research design the Judicial Conference's Subcommittee on Judicial Statistics had approved for updating the 1993 district court case weights, and had two concerns about the design. First, the design assumed that the judicial time spent on a 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 databases and used to develop estimates of the judge-time spent on different types of cases. However, for event data, the research design proposed using data from two data bases that had yet to be integrated to obtain and analyze the data. Second, unlike the methodology used to develop the 1993 case weights, the design for updating the case weights included limited data on the time judges actually spent on specific types of cases. Specifically, the proposed design included data from judicial databases on the in-court time judges spent on different types of cases, but did not include collecting actual data on the noncourtroom time that judges spend on different types of cases. Instead, estimates of judges' noncourtroom time were derived from the structured, guided discussions of about 100 experienced judges meeting in 12 separate groups (one for each geographic circuit). Noncourtroom time was likely to represent the majority of judge time used to develop the revised case weights. The accuracy of case weights developed on such consensus data cannot be assessed using standard statistical methods, such as the calculation of standard errors. Thus, it would not be possible to objectively, statistically assess how accurate the new case weights are—weights on whose reasonable accuracy the Judicial Conference relies in assessing judgeship needs.

The case-related workload measure for courts of appeals judges is adjusted case filings in which all cases are considered to take an equal amount of judge time except for pro se cases—those in which one or more of the parties is not represented by an attorney—which are discounted. In our 2003 review, we found no empirical basis on which to assess the accuracy of this workload measure. Although a number of alternatives to the adjusted filings measure have been considered, the Judicial Conference has been unable to agree on a different approach that could be applied to all courts of appeal

Mr. Chairman and Members of the Committee:

I appreciate the opportunity to comment 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 last year on June 17, 2008,[2] and is focused exclusively on these workload measures. We have no views on the Judicial Conference's pending request for additional judgeships.

Biennially, the Judicial Conference, the federal judiciary's principal policymaking body, assesses the judiciary's needs for additional judgeships.[3] If the Conference determines that additional judgeships are needed, it transmits a request to Congress identifying the number, type, (courts of appeals, district court), 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 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

[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-08-925T (Washington, D.C., June 17, 2008).

[3] 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 geographic circuits, and the chief judge of the Court of International Trade. The Conference meets twice a year.

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).[4] Authorized judgeships are the total number of judgeships authorized by statute for each district court and 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 provides information on two of the objectives in our 2003 report: (1) whether the judiciary's quantitative case-related workload measures were reasonably accurate measures of district judge and courts of appeals judges' case-related workload; and (2) the reasonableness of any proposed methodologies to update the workload measures. In this statement, we discuss those two objectives first for district courts then for courts of appeals.

Our 2003 report was 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 and courts of appeals judgeships. We conducted our performance audit in April and May 2003 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate

[4] In the documentation accompanying its 2007 request for additional judgeship, the Judicial Conference notes that in 2004 it adopted a starting point of more than 430 weighted case filings per authorized judgeship with an additional judgeship.

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.

Summary

District Courts. In 2003, we reported that the methodology used to develop the 1993 district court case weights resulted in reasonably accurate measures of the average time demands that a specific number and mix of cases filed in a district court could be expected to place on the district judges in that district. At the time of our 2003 report, the Judicial Conference was using case weights approved in 1993 to assess the need for additional district court judgeships. The weights were based on data judges recorded about the actual in-court and out-of-court time spent on specific cases from filing to disposition. This methodology permitted the calculation of objective, statistical measures of the accuracy of the final case weights (e.g., standard errors).

In 2003 we reviewed the research design the Judicial Conference's Subcommittee on Judicial Statistics had approved for updating the 1993 district court case weights, and had two principal concerns about the design. First was the challenge of collecting reliable, comparable data for the analysis on in-court events from two different automated data systems, one of which had not been implemented in all district courts. The FJC established a technical advisory group to work through this issue. Second, unlike the methodology used to develop the 1993 case weights, the design for updating these case weights included limited data on the time judges actually spent on specific types of cases. Specifically, the proposed design included data from judicial databases on the in-court time judges spent on different types of cases, but did not include collecting actual data on the noncourtroom time that judges spend on different types of cases. Instead, estimates of noncourtroom time would be based on estimates derived from the structured, guided discussions of about 100 experienced judges meeting in 12 separate groups (one for each geographic circuit). Noncourtroom time was likely to represent the majority of judge time used to develop the revised case weights. The accuracy of case weights developed on such consensus data cannot be assessed using standard statistical methods, such as the calculation of standard errors. As the Federal Judicial Center acknowledged in commenting on our 2003 report,

it is not possible to objectively, statistically assess how accurate the new case weights are.[6]

Courts of Appeals. Adjusted case filings, used to measure the case-related workload of courts of appeals judges, are based on available data from standard statistical reports from the courts of appeals. Unlike the case weights used to measure district judge case-related workload, adjusted case filings are not based on any empirical data regarding the time that different types of cases required of courts of appeals judges. The adjusted filings workload measure basically assumes that all cases have an equal effect on judges' workload with the exception of pro se cases—those in which one or both parties are not represented by an attorney—which are weighted at 0.33, or one-third as much as all other cases, which are weighted at 1.0. On the basis of the documentation we reviewed, there is no empirical basis on which to base that assumption or on which to assess the accuracy of adjusted filings as a measure of case-related workload for courts of appeals judges. Although a number of alternatives to the adjusted filings measure have been considered, the Judicial Conference has not been able to agree on a different approach that could be applied to all courts of appeals.

Case Weights Are Intended to Measure Judicial Time Required to Handle Their Caseloads

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 case 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.

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

With few exceptions, such as cases that are remanded to a district court from the court of appeals, each civil and criminal case filed in a district court is assigned a case weight. For example, in the 2004 case weights, 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 filings per authorized judgeship is the total annual weighted filings divided by the total number of authorized judgeships. For example, if a district had total weighted filings of 4,600 and 10 authorized judgeships, its weighted filings per authorized judgeships would be 460. The Judicial Conference uses weighted filings of 430 or more per authorized judgeship as an indication that a district may need additional judgeships. Thus, a district with 460 weighted filings per authorized judgeship 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.

1993 Case Weights Reasonably Accurate, But Accuracy of 2004 Case Weights Cannot 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 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.

According to the 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. The 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 of and types of events, such as trials and other evidentiary hearings, in a case. The 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 data bases and report 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 data bases (one of which was new and had not been implemented in all district courts) that would have to be integrated to obtain and analyze the event data. The FJC proposed creating a technical advisory group to address this issue.

Second, the research design did not require judges to record time spent on individual cases. Actual time data would be limited to that available from existing data bases and reports on the time associated with 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 would be derived from structured, guided discussion of groups of 8 to 13 experienced district court judges in each of the 12 geographic circuits (about 100 judges in all). 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 form 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. These consensus data could not be used to calculate statistical measures of the accuracy of the resulting case weights. Thus, 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.

We noted that a time study conducted concurrently with the proposed research methodology would be advisable to identify potential shortcoming of the event-based methodology and to assess the relatively accuracy of the case weights produced using that methodology. In the absence of a concurrent time study, there would be no objective statistical way to determine the accuracy of the case weights produced by the proposed event-based methodology—a major difference with the methodology used to develop the 1993 case weights.

Accuracy of Courts of Appeals Case-Related Workload Measure Cannot Be Assessed

The principal quantitative measure the Judicial Conference uses to assess the need for additional courts of appeals judgeships is 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 three-judge panel may be considered for one or more additional judgeships. Courts of appeals generally decide cases using constantly rotating three-judge panels. Thus, if a court had 12 authorized judgeships, those judges could be assigned to four panels of three 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.[6]

Essentially, the adjusted case filings workload measure counts all case filings equally, with two exceptions. First, cases refilled and approved for reinstatement are excluded from total case filings.[7] Second, pro se cases—defined by the Administrative Office of the U.S. Courts as cases in which one or both of the parties are not represented by an attorney—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.

The current court of appeals workload measure represents an effort to improve the previous measure. In our 1993 report on judgeship needs assessment, we noted 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.[8] 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

[6] At the time of our 2003 report, the FJC had suggested that adjusted case filings may not be an appropriate measure for the D.C. Circuit Court of Appeals, 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, *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).

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

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

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 is no empirical basis or assessing the potential accuracy of adjusted case filings as a measure of case-related judge workload.

Various Proposals Have Been Considered for Changing the Court of Appeals Workload Measure

In the past decade the Judicial Conference has considered a number of proposals for developing a revised case-related workload measure for the courts of appeals judges, but has been unable to reach a consensus on any approach. As part of its assistance to the Conference in this effort, the FJC in 2001 compiled a document that reviewed previous proposals to develop some type of case weighting measure for the courts of appeals. Table 1 outlines some of these proposals and their advantages and disadvantages, as identified by the FJC. Generally, methods that rely principally on empirical data on actual case characteristics and judge behavior (e.g., time spent on cases) are more appropriate than those that rely principally on qualitative data because statistical methods can be used to estimate the accuracy of the resulting workload measure.

Table 1: Federal Judicial Conference Case Weighting Measure Proposals, 2001

Proposal	Advantages	Disadvantages
1. Estimation of case burden based on actual time required to process the case.	• The quantitative approach would be very thorough. • Empirically based data.	• Judges may not be amenable to the time-consuming task of recording the hours spent on individual cases. • Time spent gathering data could be used elsewhere.
2. Estimate of case burden based on the assessment of burden of only "certain characteristics" from an already-existing data base of factors.	• Would not be very time-consuming for judges. • Would assess the frequencies of certain "factors." • Analysis of an existing database would save time. • Can use a "wealth" of factors to get a big picture of the caseload burden.	• Difficult to agree on what factors to use • Difficult to decide if presence and absence of factors is enough information. • Database and survey accuracy may be compromised.
3. Normative assessment of cases to look qualitatively at the cases as a whole.	• Convenient to extract information from surveys or group discussions.	• Difficult to decide which factors to use. • Dependent upon the accuracy of judges' recall about the case. • Lack of empirically based data.
4. Using multiple regression to use information about the proportional mix of cases with different defined characteristics in the different circuits to account for the differences in case termination level.	• Quantitative approach to determine factors to use.	• Use of a potentially incomplete model. • Inherent statistical limits. • Cannot assess appellate burdens on a national level.
5. Using district court weights for the appellate system.	• Already available data. • Save time by using existing data.	• Little consistency between the two court systems. • Sacrifice accuracy.
6. Tallying court opinions (published and unpublished)	• Most appellate judge work leads to production of appellate opinions in chambers.	• Necessary information cannot be obtained consistently.
7. Sampling cases for approximately 3 months for a case-based study.	• Can project the results of 3 months of cases to the rest of the years.	• There is no way to anticipate possible sample sizes, so cannot make a statistical prediction.

Source: FJC documentation.

We recognize that a methodology that provides greater empirical assurance of a workload measure's accuracy will require judges to document how they spend their time on cases for at least a period of weeks. However, we believe that the importance and cost of creating new federal judgeships requires the best possible case-related workload data using sound research methods to support the assessment of the need for more judgeships.

Our 2003 Recommendations and the Judiciary's Response

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 addressed the special case characteristics of the Court of Appeals for the D.C. Circuit.

Neither of these recommendations has been implemented.

With regard to our 2003 recommendation for updating the district court case weights, the 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 assess the integrity of the resulting case weight system. 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.

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.[9] The bankruptcy court methodology used a two-phased approach. First, new case weights would be developed based on the 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 were possible, the case

[9] 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).

weights could be updated more frequently with less cost than required by a time study. We believe this approach would 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.

With regard to our recommendation 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 appeals entails important factors that have defied measurement, including significant differences in case processing techniques. We recognize that there are significant methodological challenges in developing a more precise workload measure for the courts of appeals. However, using the data available, neither we 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.

Contacts and Staff Acknowledgments

For further information about this statement, please contact William O. Jenkins Jr., Director, Homeland Security and Justice Issues, on (202) 512-8777 or jenkinswo@gao.gov.

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Statement Of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee
Hearing On "Responding To The Growing Need For Federal Judgeships:
The Federal Judgeship Act Of 2009"
Subcommittee On Administrative Oversight And The Courts
September 30, 2009

Chief Justice John Roberts has referred to our independent judiciary as a trust that every generation is called upon to preserve. Our independent judiciary is one of the crown jewels of our system of Government. We must make sure it has the resources necessary to fulfill its crucial responsibilities.

Today, the Subcommittee on Administrative Oversight and the Courts holds an important hearing on long-overdue comprehensive legislation designed to address the immediate need for additional Federal judgeships in courts with the highest workloads in the country. I thank Chairman Whitehouse for chairing this hearing and for his commitment to our justice system.

I trust that Chairman Whitehouse will have better cooperation than we had last year when I scheduled a similar hearing at the request of Republican Senators only to have it forestalled when they then raised an objection to proceeding with the hearing that they had requested.

Earlier this month, I joined Senators Whitehouse, Feinstein, Schumer, Klobuchar, Kaufman, Franken and others to introduce the Federal Judgeship Act of 2009, S.1653. This comprehensive bill would create 63 new Federal judgeships in order to address the increasing workload of the Federal judiciary. I am confident that this increase in judgeships would improve the administration of justice for litigants across the country.

The Federal Judgeship Act of 2009 is based on recommendations made this year by the Judicial Conference of the United States, and the Conference's detailed analysis of Federal caseloads. The Judicial Conference's most recent recommendations were the result of an extensive process, beginning with an assessment of district and circuit workloads. At the circuit court level, case filings per authorized judgeship are considered in conjunction with local circumstances that may have an impact on judgeship needs. In the district courts, cases are weighted to reflect the estimated time expenditure for each type of case. Workload factors such as the amount of assistance from senior and magistrate judges, unusual caseload complexity, and temporary caseload increases or decreases are also factored into the formula that resulted in the Judicial Conference's recommendations and our bill.

Last Congress, I joined Senator Hatch and 20 other Senators from both sides of the aisle to introduce similar legislation. A bipartisan majority of the Judiciary Committee voted to report the bill to the Senate last year. Unfortunately, the Senate did not act on the bill before the end of the last Congress.

When I reintroduced this bill earlier this month, I was disappointed that not a single Republican Senator would join as a cosponsor. Indeed, not one of the 18 Republican Senators whose states would benefit from an additional judgeship yet supports the bill.

It has been nearly two decades since the last comprehensive judgeship bill was enacted. Since then, weighted filings in the district and circuit courts have increased to well above acceptable standards and in some cases have approached record caseloads. The need for new judgeships is urgent because Federal courts must have adequate judicial resources in order to ensure that all Americans receive justice in a timely manner.

I understand that some partisans have decided to obstruct President Obama's appointment of judges and will object to creating any new judgeship while he is our President. Such partisanship ignores the immediate need for judges in districts in our Federal judiciary.

When we passed the last comprehensive judgeship act in 1990, we knew the President who would be nominating those judges. He was a Republican. The same is true of the bill that preceded that one when we worked in a bipartisan manner in 1984. In 1984, the Democratic minority in the Senate cooperated when we added 85 new judgeships. In 1990, the Senate Democratic majority led the effort and we added an additional 85 new judgeships. We have worked together in the past – on a bipartisan basis – to pass comprehensive judgeships bills. I urge Senate Republicans to put aside their partisanship and do what is best for the Federal judiciary and the American people by passing this long-overdue bill without further delay.

I am also unmoved by the partisanship now leading to demands that the effective date for the legislation be set three years from now. The bill is based on the Judicial Conference recommendation of current needs, not a projection of needs three years from now. The need is current, and our action and its effect should be as well. Indeed, for nearly 20 years, an immediate or nearly immediate effective date has been the precedent for comprehensive judgeships bills whether the President was a Republican or a Democrat.

This is not like the circumstance last year when the judgeship bill was being considered during a presidential election year. In an effort to take partisanship out of the equation, that bill would have been effective upon the inauguration of the new President. That is no precedent for adding partisanship into the equation and insisting on a requirement that for the next four years the problem festers so that we can enact a measure based on out of date analysis and needs. It makes no sense for Americans to wait four more years for their rights to be protected. It already takes long enough for judicial nominees to be nominated and then considered by the Senate. Adding another four year delay is ill advised. With an immediate effective date, courts will be better equipped to swiftly and effectively respond to the resource problems that threaten the administration of justice and better protect Americans' precious rights and liberties.

With today's hearing, we seek to further progress in our efforts to respond to the urgent resource needs of the Federal courts and the American people.

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United States District Court
EASTERN DISTRICT OF CALIFORNIA
U.S. COURTHOUSE
2500 TULARE STREET
FRESNO, CA. 93721

September 28, 2009

Statement in Support of Five Additional Judgeships
Eastern District of California

Summary

Despite the best efforts of the judges and staff of the Eastern District of California, assistance within the Judiciary, and cooperation with the State of California, five additional judgeships are clearly necessary to alleviate the workload of the District, which carries the heaviest caseload burden in the country.

Judgeship History

The Eastern District of California was created in 1966, when it was authorized three judgeships. It received three additional judgeships in 1978, and one temporary judgeship in 1990 that expired in 2004. Currently, the Eastern District has six district court judgeships. During most of fiscal year 2007, one of its six judgeships was vacant due to an unanticipated resignation and illness. Due to a District Judge's taking senior status in January, 2009, there remains a vacancy.

Number of Judges	
Active District Judges	6
Senior District Judges	5
Magistrate Judges	12

In December, the Senate passed S. 1327, which would have reinstated the temporary judgeship that expired in 2004. The House did not act on the bill. S. 1653 (the Federal Judgeship Act of 2009), introduced in September 2009, reflects the 2009 Judicial Conference of the United States comprehensive Article III judgeship request. It includes four new judgeships for the Eastern District and the reinstatement of one temporary judgeship.

Since 1990, Congress has authorized 14 additional temporary and permanent judgeships for the four California districts. Of the 14 judgeships, Congress authorized only one judgeship for the Eastern District; this temporary judgeship expired in 2004.

The period from 2000 to 2008 has been a time of rapid growth for the Eastern District. Already by 2003, census data shows that 18 of the top 25 fastest growing counties in California are located in the Eastern District.

The population of the Eastern District currently stands at 6.375 million, an increase of 1% during the past 12 months (Refer to Attachment A).

Overall Caseload

The Eastern District has long had one of the highest caseloads in the country based on weighted filings per judgeships. The Eastern District has the highest weighted filings per judgeship in the country.

U.S. DISTRICT COURTS
WEIGHTED AND UNWEIGHTED FILINGS PER AUTHORIZED JUDGESHIP
DURING THE 12-MONTH PERIOD ENDING JUNE 30, 2009

Ranked by Total Weighted Filings Per Authorized Judgeship

			WEIGHTED FILINGS PER JUDGESHIP				UNWEIGHTED FILINGS PER JUDGESHIP			
National Rank	District	Authorized Judges	Civil	Criminal	Supervision Hearings	TOTAL	Civil	Criminal	Supervision Hearings	TOTAL
N/A	Nation	674	355	111	4.92	471	321	143	33.66	497
Top Ten Weighted Districts										
1	CA,E	6	699	188	8.15	1095	696	233	57.83	1187
2	NY,W	4	452	224	18.38	694	429	240	130.25	799
3	TX,W	13	228	438	14.58	681	228	685	100.38	1013
4	NC,E	4	374	239	4.71	617	364	373	31.50	769
5	FL,M	15	511	101	3.93	616	472	111	27.47	611
6	CA,C	28	521	84	8.24	611	455	95	44.36	595
7	MN	7	529	77	3.87	610	532	78	27.00	636
8	IN,S	5	541	63	1.41	605	606	62	7.00	675
9	CA,N	14	515	69	6.29	591	394	91	44.86	530
10	MS,S	6	512	68	3.53	584	515	77	22.17	614
Other Ninth Circuit Courts										
18	AZ	13	274	259	16.72	549	259	403	119.00	780
21	NV	7	455	70	6.52	532	407	83	43.14	533
22	CA,S	13	250	264	13.38	527	208	426	94.77	728
23	ID	2	344	174	5.95	524	305	201	40.50	546
24	WA,W	7	406	113	5.17	524	344	164	35.43	543
36	OR	6	371	93	7.09	471	339	118	50.33	508
66	MT	3	215	138	6.99	360	197	139	46.67	382
81	HI	4	191	85	6.66	283	146	141	46.00	332
84	WA,E	4	152	102	16.56	270	153	122	116.75	391
91	AK	3	145	61	.71	207	122	70	4.67	197

NOTE: Case weights are based on the 2003-2004 district court case weighting study conducted by the Federal Judicial Center. This table excludes civil cases arising by reopening, remand, or transfer to the district by the order of the judicial panel on multidistrict litigation. This table includes defendants in all felony and class a misdemeanor cases, but includes only those petty offense defendants whose cases have been assigned to district judges. Remands and reopens for criminal defendants are excluded. Data reported for supervised release and probation hearings (both evidentiary and non-evidentiary) are obtained from the monthly reports of trials and other court activities conducted by resident and visiting judges.

Within the Ninth Circuit, it has consistently ranked first among the fifteen districts. In fiscal year ending June 30, 2009, the Eastern District had 1095 weighted filings per judgeship. The second highest district was New York Western with 694 weighted filings per judgeship.

This substantial caseload is matched by a substantial level of productivity. District Judges in the Eastern District terminated 1041 cases per judge during the 12 months ending June 30, 2009, which ranked the district first in the circuit and second in the nation for terminations. This compares to the national average of 503 terminations.

Four of its five senior District Judges maintain caseloads that exceed those of many of the nation's active judges. The fifth senior judge is in his 80's and maintains a 40% caseload. A recent independent assessment by the Ninth Circuit confirmed that all of the judicial officers, even the senior judges who are technically retired, and the staff regularly work long hours, from early in the morning, through the lunch hour and into the evenings, and frequently forego vacations in order to keep from falling further behind.

The magistrate judges are at full, legal utilization. The magistrate judges at Sacramento and Fresno perform a wide range of duties, with an emphasis on prisoner cases, civil discovery motions, settlement conferences, social security appeals, and felony preliminary proceedings. The magistrate judge at Yosemite National Park handles a full share of Fresno's prisoner petitions, as well as felony preliminary proceedings and misdemeanor and petty offense cases arising in the Park. The magistrate judge at Bakersfield handles a share of the state habeas corpus cases and social security appeals filed in Fresno, handles motions and pretrial case management duties in civil cases filed in the southern portion of the district, conducts preliminary proceedings in felony cases arising in the Bakersfield area, and disposes of petty offense and Class A misdemeanor cases at several locations. The magistrate judge at Redding handles a half share of the prisoner cases filed at Sacramento, including death penalty cases, and all motions and pretrial case management duties in civil cases filed in the northern counties of the district. He also disposes of petty offense and Class A misdemeanor cases at several locations in the northern portions of the district, and he conducts felony preliminary proceedings in felony cases in the vicinity of Redding.

Despite their hard work and amazingly high termination rate, the judges are falling behind because filings continue to exceed terminations. On the most recent Civil Justice Reform Act (case backlog) report, the court had 591civil cases pending for more than three years. This backlog is the result of the woefully insufficient number of judgeships for the Eastern District. The judges must bear the burden of this caseload, but it is the citizens in the Eastern District who must suffer the delayed administration of justice as a result of the lack of adequate judgeships for the court.

Pro Se Prisoner Litigation

Adding to the caseload burden, the Eastern District of California has the second highest number of prisoner petitions in California.

The district's prisoner and felony caseloads have grown significantly in the past five years. Prisoner cases accounted for 55% of the court's civil filings in 2008. The district ranked 1st nationally in weighted caseload, 2nd in total cases terminated, 3rd in total case filings and total cases pending per judgeship, 4th in civil cases filed, and 10th in felony filings in 2008. The court is one of ten district courts that have been declared courts with judicial emergencies due to vacant district judgeships. On January 1, 2009, in response to a request for volunteers made by an ad hoc resource committee formed by the chief judge of the Ninth Circuit Court of Appeals to

examine the caseload backlog in the Eastern District of California, approximately 1,000 of the district's pending prisoner cases were re-assigned to district judges in other district courts in the Ninth Circuit who agreed to take these cases. For the 2009 biennial judgeship survey, the court is requesting four new judgeships and re-authorization of a temporary judgeship that was lost when a district judge took senior status in 2003.

There are a total of 33 state and federal prisons within the State of California, with a total prison population of approximately 167,000 prisoners as of FY2008. Nineteen of these prisons, with roughly 100,000 prisoners, reside within the boundaries of the Eastern District.

Internal Judiciary Efforts to Alleviate Caseload

The Judiciary is bringing to bear all additional resources it can muster to assist the District. Six district judges have been designated to sit on Eastern California cases; three of these judges have come from outside of California, but within the Ninth Circuit. Chief Circuit Judge Alex Kozinski is mobilizing additional district judges assistance from within the Ninth Circuit and throughout the Federal Judiciary to meet this caseload crisis. The Judicial Council of the Ninth Circuit has also authorized $290,000 for temporary law clerks.

Additionally, Chief Judge Kozinski appointed a special "resources committee" to assist the district with research on improving internal case processing, information technology, the establishment of pro bono panels for pro se cases, and case reporting procedures. Chief Judge Anthony Ishii and the judges of the Eastern District have acted upon these recommendations.

Prisoner litigation in federal court is extremely expensive. Case backlog caused by insufficient judicial resources results in costly delays in litigation.

Request for Additional Judgeships

While these various strategies for assisting the Eastern District will alleviate the caseload burden to some extent, there is no way the combined effort can mitigate the need for the five additional judgeships, as endorsed by the Judicial Conference of the United States. It is unrealistic to expect the judges and staff of the Eastern District to maintain the pace of productivity indefinitely. It is worth noting that using the Judiciary's weighted caseload standard, the Eastern District could be authorized six additional judgeships. As the Judicial Conference of the United States has approved five additional judgeships, the Article III judges of the Eastern District of California request Congressional action to authorize those additional judgeships.

Honorable Anthony W. Ishii
Chief Judge

Hon. Garland E. Burrell

Hon. Morrison C. England, Jr.

Hon. Lawrence J. O'Neill

Hon. John A. Mendez

Attachment A

State/County Population Estimates with Annual Percent Change
January 1, 2008 and 2009

State/County	Total Population 1/1/2008	1/1/2009	Percent Change
California	37,883,992	38,292,687	1.1
Fresno Division:	*2,467,087*	*2,497,238*	1.2
Calaveras	45,885	45,987	0.2
Inyo	18,106	18,049	-0.3
Kern	814,995	827,173	1.5
Kings	153,572	154,743	0.8
Madera	150,249	152,331	1.4
Mariposa	18,297	18,306	0.0
Merced	253,471	256,450	1.2
Stanislaus	522,313	526,383	0.8
Tulare	433,764	441,481	1.8
Tuolumne	56,435	56,335	-0.2
Sacramento Division:	*4,198,865*	*4,237,837*	0.9
Placer	333,766	339,577	1.7
Alpine	1,227	1,201	-2.1
Amador	38,035	38,080	0.1
Butte	219,427	220,748	0.6
Colusa	21,811	21,997	0.9
El Dorado	178,860	180,185	0.7
Glenn	29,070	29,239	0.6
Lassen	35,956	35,550	-1.1
Modoc	9,668	9,698	0.3
Mono	13,653	13,504	-1.1
Nevada	98,874	98,718	-0.2
Plumas	20,786	20,632	-0.7
Sacramento	1,418,763	1,433,187	1.0
San Joaquin	682,316	689,480	1.0
Shasta	181,622	183,023	0.8
Sierra	3,363	3,358	-0.1
Siskiyou	45,725	45,973	0.5
Solano	424,397	426,729	0.5
Sutter	95,306	96,554	1.3
Tehama	62,179	62,836	1.1
Trinity	13,932	13,959	0.2
Yolo	198,326	200,709	1.2
Yuba	71,803	72,900	1.5
Eastern District of California	**6,665,952**	**6,735,075**	**1.0**

Circuit Court	Current Caseload	# Judges Requested	Median Case Time (Months)
2nd	1,314	2	17.5
11th	1,113	0	9.3
9th	965	5	19.4
5th	884	0	11.3
1st	641	1	13.3
7th	607	0	12
6th	598	1	14.2
4th	575	0	8.4
3rd	566	2	14.7
8th	541	1	11.4
10th	398	0	10.9
D.C	270	0	12.2

Circuit Court	Median Case Time (Months)	# Judges Requested	Caseload Per Panel Rank
9th	19.4	5	3
2nd	17.5	2	1
3rd	14.7	2	9
6th	14.2	1	7
1st	13.3	1	5
D.C.	12.2	0	12
7th	12	0	6
8th	11.4	1	10
5th	11.3	0	4
10th	10.9	0	11
11th	9.3	0	2
4th	8.4	0	8

STATEMENT OF JUDGE GEORGE Z. SINGAL
BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

Senator Whitehouse and members of the Committee, I am George Singal, District Judge for the District of Maine and Chair of the Judicial Conference Committee on Judicial Resources. The Judicial Resources Committee of the Judicial Conference of the United States is responsible for all issues of human resource administration, including the need for Article III judges and support staff in the U.S. courts of appeals and district courts. I am here today to provide information about the judgeship needs of the courts, and the process by which the Judicial Conference of the United States determines those needs.

It has been nearly two decades since Congress passed comprehensive judgeships legislation. To enable the judiciary to continue serving litigants efficiently and effectively, the judicial workforce must be expanded. I would therefore like to thank Senator Leahy for introducing S. 1653, the Federal Judgeship Act of 2009. I would also like to thank Senator Whitehouse and Senator Leahy for scheduling this hearing. The Judicial Conference supports S. 1653, which reflects the Article III judgeship recommendations of the Judicial Conference.

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 2009. Consistent with the findings of that survey and the deliberations of my Committee, the Conference recommended that Congress establish 63 new judgeships in the courts of appeals and district courts. The Conference also recommended that five temporary district court judgeships be established as

permanent positions and that one temporary district court judgeship be extended for an additional five years. Appendix 1 contains the specific recommendation as to each court. All of the judgeships recommended by the Conference would be provided by S. 1653. For many of the courts, the recommendations, and the bill, reflect needs developed since the last omnibus judgeship bill was enacted in 1990.

Survey Process

In developing recommendations for consideration by Congress, the 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; the Conference makes the final recommendations on judgeship needs. Before a judgeship recommendation is transmitted to Congress, it undergoes consideration and review at six levels within the Judiciary, by: 1) the judges of the court making a request (if the courts does not request a judgeship, the Conference does not consider recommending a judgeship for that court); 2) the Subcommittee on Judicial Statistics; 3) the judicial council of the circuit in which the court is located; 4) the Subcommittee on Judicial Statistics, in a further and final review; 5) the Committee on Judicial Resources; and 6) the Judicial Conference. In the course of the 2009 survey, the courts requested 77 additional judgeships, permanent and temporary. Our review procedure reduced the number of recommended judgeships to 63.

In the course of each judgeship survey, requests from courts recommended for additional judgeships in the prior survey are re-considered, taking into account such factors as the most current caseload data 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 standard based on caseload. 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, their ages, and levels of activity;
- 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.

Courts requesting additional judgeships are specifically asked about their efforts to make use of all available resources. (See Appendix 3.)

The standard used by the Conference as its starting point in the district courts is 430 weighted filings per judgeship after accounting for the additional judgeship(s) that would be recommended. But the workload exceeds 500 weighted filings per judgeship in 20 of the district courts in which the Conference is recommending an additional judgeship, and seven courts exceeded 600 weighted filings per judgeship.

In the courts of appeals, the starting point used by the Conference is 500 adjusted filings per panel. In each circuit court in which the Conference is recommending additional judgeships, the caseload levels substantially exceed the standard, and other factors bearing on workload have been closely considered.

In 2009, four circuits exceeded 800 adjusted filings per panel. Two of these courts did not request an additional judgeship. The case mix and case management techniques in the circuits in which additional judgeships are recommended differ significantly from the case mix and case management practices in the circuit courts that did not request additional judgeships. In the Fifth and Eleventh Circuits (which did not seek additional judgeships) for instance, criminal and prisoner petition appeals were approximately 60 percent of all appeals filed, while they were only about 30 percent in the Second and Ninth Circuits (which did seek additional judgeships). The Second and Ninth Circuits have also experienced dramatic

increases in appeals of decisions by the Board of Immigration Appeals. Case management practices vary as well. The circuits' individual rules regarding how cases are designated for oral argument, for example, affect the percentage of cases that receive oral argument in each circuit, which also affects 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

The last comprehensive judgeship bill for the U.S. courts of appeals and district courts was enacted in 1990. Case filings since then have risen dramatically.

Compared to fiscal year 1991, by June, 2009, filings in the courts of appeals had grown by 38 percent, while case filings in the district courts rose 31 percent, as civil cases were up 22 percent while criminal felony filings rose 91 percent. Although Congress created additional judgeships in the district courts in recent years in response to particular problems in certain districts, no additional judgeship has been created for the courts of appeals. As a result, the national average caseload per three-judge panel has reached 1,067. Were it not for the assistance provided by senior and visiting judges, the courts of appeals would not have been able to keep pace.

Even with some additional district judgeships, the number of weighted filings per judgeship in the district courts has reached 471-- clearly above the Judicial Conference standard for considering recommendations for additional judgeships. I

have provided at Appendix 4 a more detailed description of the most significant changes in the caseload since the last comprehensive judgeship bill.

Although the national figures provide a general indication of system-wide changes, the situation in courts where the Conference has recommended additional judgeships is much more dramatic. For example, there are 20 district courts with caseloads exceeding 500 per judgeship. The district courts in which the Conference is recommending additional judgeships (viewed as a group) have seen a growth in weighted filings per judgeship from 427 in 1991 to 575 in June 2009--an increase of 35 percent.

The national data and the combined data for courts requesting additional judgeships provide general information about the changing volume of business in the courts. The Conference's recommendations are not, however, premised on this data concerning courts as a group. Judgeships are authorized court-by-court rather than nationally. So the caseload data most relevant to the judgeship recommendations are those that relate to each specific court in which the Conference is recommending an additional judgeship. The Legislative Affairs staff of the Administrative Office of the U.S. Courts has previously provided detailed justifications for the additional judgeships in each court.

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. The *Long Range Plan for the Federal Courts* (in Recommendation 15) recognizes that growth in the judiciary

must be carefully limited to the number of new judgeships that are necessary to exercise federal court jurisdiction. 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 combined with the other factors would suggest are now required.

Again, the Judicial Conference of the United States is grateful for the introduction of S. 1653, the Federal Judgeship Act of 2009, which reflects the recommendations of the Judicial Conference and is supported by the Conference.

Appendix 1

ADDITIONAL JUDGESHIPS OR CONVERSION OF EXISTING JUDGESHIPS RECOMMENDED BY THE JUDICIAL CONFERENCE
2009

CIRCUIT/DISTRICT	AUTHORIZED JUDGESHIPS	JUDICIAL CONFERENCE RECOMMENDATION
U.S. COURTS OF APPEALS		**9P, 3T**
FIRST	6	1P
SECOND	13	2P
THIRD	14	1P, 1T
SIXTH	16	1P
EIGHTH	11	1T
NINTH	29	4P, 1T
U.S. DISTRICT COURTS		**38P, 13T, 5T/P, 1T/E**
ALABAMA, MIDDLE	3	1T
ARIZONA	13	1P, 1T, T/P
CALIFORNIA, NORTHERN	14	4P, 1T
CALIFORNIA, EASTERN	6	4P, 1T
CALIFORNIA, CENTRAL	28	4P, 1T
COLORADO	7	1P
FLORIDA, MIDDLE	15	4P, 1T
FLORIDA, SOUTHERN	18	3P
IDAHO	2	1T
INDIANA, SOUTHERN	5	1P
IOWA, NORTHERN	2	1T
KANSAS*	6	T/P
MINNESOTA	7	1P, 1T
MISSOURI, EASTERN	8	T/P
NEBRASKA	3	1T
NEW JERSEY	17	1P
NEW MEXICO	7	1P, T/P
NEW YORK, EASTERN	15	1P, 1T
NEW YORK, SOUTHERN	28	1P, 1T
NEW YORK, WESTERN	4	1P
OHIO, NORTHERN	12	T/E
OREGON	6	1P
SOUTH CAROLINA	10	1P
TEXAS, EASTERN	8	1P, T/P
TEXAS, SOUTHERN	19	2P
TEXAS, WESTERN	13	4P
VIRGINIA, EASTERN	11	1T
WASHINGTON, WESTERN	7	1P

P = PERMANENT; T = TEMPORARY; T/P = TEMPORARY MADE PERMANENT
T/E = EXTENSION OF TEMPORARY

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

Appendix 2

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, with final recommendations on judgeship needs approved by the 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 on Judicial Resources using the most recent caseload data. During each judgeship survey, the Conference reconsiders prior, but still pending, recommendations based on more recent workload 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 caseload 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 Subcommittee on Judicial Statistics. 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 recommendation. 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 on Judicial Resources. 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 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 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 system[1] designed to measure judicial workload, along with a variety of other factors, to assess judgeship needs. The Conference and its Committee review all available data on the caseload 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 an additional judgeship*. This caseload level is used only as a guideline and is 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.

B. The caseload of the individual courts is reviewed to determine if there are any factors present to 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 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 weighted filings per judgeship. The Committee sometimes relaxes this approach in the case of a small court, where the addition of a judgeship would drop the caseload per judgeship substantially below the 430 level. In some instances the Committee also considers the pending caseload per judgeship as an additional factor supporting an additional temporary judgeship.

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[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.

Appendix 3

ACTIONS TO MAXIMIZE USE OF JUDGESHIPS

In addition to the conservative and systematic processes described above for evaluating judgeship needs, given the current climate of fiscal constraint, the judiciary is continually looking for ways to work more efficiently without additional resources. As a part of the normal judgeship survey process or as a separate initiative, the judiciary has used a variety of approaches to maximize the use of resources and to ensure that resources are distributed in a manner consistent with workload. These efforts have allowed us to request fewer additional judgeships than the increases in caseload would suggest are required. Among the more significant methods in use are:

(1) **Surveys to review requests for additional permanent and temporary judgeships and extensions or conversions of temporary judgeships to permanent:**
As described previously, surveys are conducted biennially of all Article III judgeship needs. To reduce the number of additional judgeships requested from Congress, the Judicial Conference has recently adopted more conservative criteria for determining when to recommend creation of additional judgeships in the courts of appeals and district courts.

(2) **Recommending temporary rather than permanent judgeships:**
Temporary, rather than permanent, judgeships are recommended in those instances where the need for additional judgeships is demonstrated, but it is not clear that the need will exist permanently.

(3) **Development of a process to recommend not filling vacancies:**
In March 1997, the Judicial Conference approved a process for reviewing situations where it may be appropriate to recommend elimination of a district judgeship or that a vacancy not be filled. The Judicial Conference includes this process in its biennial surveys of judgeship needs for recommending to the Executive and Legislative Branches that specific vacant positions be eliminated or not be filled. A similar process has been developed and is in use for the courts of appeals.

(4) **Use of senior judges:**
Judicial officer resource needs are also met through the use of Article III judges who retire from active service to senior status. Most senior Article III judges perform substantial judicial duties; over 400 senior judges are serving nationwide.

(5) **Shared judgeships:**
Judgeship positions have been shared to meet the resource needs of more than one district without the cost of an additional judgeship.

(6) **Intercircuit and intracircuit assignment of judges:**
To furnish short-term solutions to disparate judicial resource needs of districts within and between circuits, the judiciary uses intercircuit and intracircuit assignments of Article III judges. This program has the potential to provide short-term relief to understaffed courts.

(7) **Use of Magistrate Judges:**
Magistrate judges serve as adjuncts to the district courts, supplementing the work of the Article III judges. Use of magistrate judges on many routine court matters and proceedings allows for more effective use of Article III judges on specialized court matters.

(8) **Use of alternative dispute resolution:**
Since the late 1970s and with increasing frequency, courts use various alternative dispute resolution programs such as arbitration, mediation, and early neutral evaluation as a means of settling civil disputes without litigation.

(9) **Use of technology:**
The judiciary continually explores ways to help align caseloads through technological advancements, where judges can assist other districts or circuits without the need to travel.

Over the last 20 years, the Judicial Conference has developed, adjusted, and refined the process for evaluating and recommending judgeship needs in response to congressional concerns. In addition, some adjustments have been made because the Conference recognizes that there cannot be indefinite growth in judicial officer resources and is concerned about continuing growth. This issue is recognized in Recommendation 15 of the Long Range Plan for the Federal Courts, which acknowledges the need for growth in the judiciary to be carefully controlled so that creation of new judgeships is limited to that number necessary to exercise federal court jurisdiction. The Judicial Conference is constantly evaluating the need to control growth and the need to seek resources that are appropriate to the workload. In an effort to place that policy in effect, the Conference has requested far fewer judgeships than the caseload increases would suggest are now required.

Appendix 4

CASELOAD CHANGES SINCE LAST JUDGESHIP BILL

A total of 34 additional district court judgeships have been created since 1991, but five 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 38 percent and 31 percent, respectively. Specific categories of cases have seen dramatic changes over the last 18 years. 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 38 percent, over 16,000 cases, since 1991.
- Appeals of criminal cases have increased 39 percent since 1991.
- The most dramatic growth in criminal appeals has been in immigration appeals, which increased from 145 in 1991 to 1,644 in 2009.
- Appeals of decisions in civil cases from the district courts have risen 11 percent since 1991.
- The most dramatic growth in civil appeals has been in prisoner appeals where case filings are up 52 percent since 1991.
- Appeals involving administrative agency decisions have fluctuated over the years, but have nearly quadrupled, growing from 2,859 in 1991 to 9,513 in 2009. The increases began in 2002 due to appeals of decisions by the Board of Immigration Appeals (BIA). Dramatic increases in BIA appeals occurred in the Second and Ninth Circuits.
- Original proceedings have grown from 609 in 1991 to 3,635 in 2009, 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 nearly 77,000 cases, a 31 percent increase since 1991.
- The civil caseload has fluctuated over the past 18 years, but has increased 22 percent overall since 1991.

- The most dramatic growth in civil filings has been in cases related to personal injury product liability which nearly quadrupled, growing from 10,952 in 1991 to 43,055 in 2009. Such filings have involved breast implant cases, a large number of cases related to an oil refinery explosion, and many multi-district litigation cases involving pharmaceutical products.

- Protected property rights cases rose 68 percent between 1991 and 2009. Trademark, patent, and copyright filings all showed growth since 1991.

- Civil rights filings increased steadily after the Civil Rights Act of 1990 was enacted. Although cases have declined from their peak in 1997, civil rights filings still remain 67 percent above the 1991 level.

- The number of social security cases filed in 2009 was 56 percent above the number filed in 1991.

- Prisoner petitions increased 23 percent between 1991 and 2009. They rose heavily through the first half of the 1990's, rising 61 percent between 1991 and 1996, due primarily to a 57 percent increase in prison civil rights cases. Motions to vacate sentence and habeas corpus petitions were also significantly higher. Prison litigation reform was enacted in 1996, and prison civil rights filings have since fallen and are now seven percent below the number of cases filed in 1991. Habeas corpus petitions, on the other hand, have increased 72 percent since 1991.

- Criminal felony case filings have increased 91 percent since 1991 and the number of criminal felony defendants is 65 percent higher.

  - The largest increase, by far, has been in immigration filings which rose from 1,992 in 1991 to 24,605 in 2009.

  - Firearms filings more than doubled between 1991 and 2009, an increase of over 4,000 cases.

  - The number of drug-related filings in 2009 was 38 percent above the number filed in 1991.

  - The number of fraud cases has increased 14 percent from 5,931 in 1991 to 6,746 in 2009.

  - Filings related to drug, immigration, firearms, and fraud offenses comprise approximately 84 percent of all felony cases filed.

  - Homicide, robbery, embezzlement, and forgery and counterfeiting filings have all declined since 1991.

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

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[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.

Statement of

The Honorable Sheldon Whitehouse

United States Senator
Rhode Island
September 30, 2009

Statement of Senator Sheldon Whitehouse
Responding to the Growing Need for Federal Judgeships: The Federal Judgeship Act of 2009
September 30, 2009

One of the primary responsibilities of the Senate Judiciary Committee – and particularly of this Subcommittee on Administrative Oversight and the Courts – is to make sure the federal judiciary has the tools and the resources to perform its crucial role in our constitutional structure. Today's hearing takes up that responsibility by considering the need for federal judgeships in district and circuit courts across the country. We all recognize the importance of the federal judiciary in the proper functioning of our democracy and we all want to ensure that the courts have the resources they need to protect our liberties and administer justice.

The confirmation of Justice Sonia Sotomayor to the United States Supreme Court was the focus of great attention and much media coverage. That is understandable given the importance of our Supreme Court, but we must never forget that most of the judicial business in our federal system never comes close to the Supreme Court. Every day, Americans from all walks of life come to federal district court to vindicate their legal rights. The rule of law depends on the prompt and proper resolution of those cases. Justice delayed is often justice denied, so district courts must be able to process cases in a timely manner. Similarly, swift redress from a circuit court is not a matter of politics or controversy, but of simple justice and effective government. Courts must have resources adequate to meet their high purpose. We in Congress must ensure that they do not lack the tools for their constitutional role.

The Federal Judgeship Act of 2009, which was introduced by the Chairman of the Judiciary Committee, Senator Leahy, would fulfill that responsibility. That bill reflects the recommendations made by the Judicial Conference in March of 2009. It would be the first comprehensive judgeships legislation since 1990; a period which has seen significant expansion in the workload of the federal courts. It provides for 12 new Circuit Court judgeships and 51 new District Court judgeships. These recommendations are very similar to the 2007 recommendations that passed out of committee last year by a bipartisan vote of fifteen to four. The Federal Judgeship Act of 2009 should expect similar support from both sides of the aisle. I hope that the Judiciary Committee will consider and pass it soon.

The numbers underscore the need for action. On average, there are 573 so-called "weighted filings" in the District Courts for which new judgeships are recommended; well above the 430

"weighted filings" needed to trigger a judgeship recommendation by the Judicial Conference. For the six circuit courts where new judgeships are recommended, there are an average of 802 "adjusted filings" per panel, well above the 500 "adjusted filings" per panel measure used for judgeship recommendations.

Of course, the Courts do not simply consider mere statistics in making their judgeship recommendations. They also are careful to consider all the resources available to a district or circuit court, including senior and visiting judges who can contribute to sharing the workload, and the use of magistrate judges within statutory limits. Given the care and conservatism with which they have been developed, the Judicial Conference's recommendations deserve the utmost consideration. It is telling, for example, that while 77 new judgeships were requested by courts across the nation, the Judicial Conference has recommended 63 judgeships to Congress.

Congress has repeatedly put off dealing with the courts' growing workload. Now is the time to act, and I commend Chairman Leahy for his leadership on the issue. The federal judiciary is a beacon of principle and justice to the rest of the world. We must keep it that way.

Today we will hear from Judge Singal of the District of Maine who is appearing on behalf of the Judicial Conference and will explain the 2009 judgeship recommendations made by that body. We also will hear from Judge O'Neill of the Eastern District of California, a district facing an overloaded docket despite the best efforts of the active, senior, and magistrate judges. I know that this has been a district of great concern to Senator Feinstein, as it demonstrates the kind of pressures put on judges and the delays facing litigants as workloads spiral out of control. Finally, we will hear from Judge Tjoflat, a judge on the Eleventh Circuit, and its former chief judge. I welcome all the witnesses and look forward to their testimony. Thank you all for being here today.