

**Chairman's Report  
On the Appropriate Allocation of  
Judgeships in the  
United States Courts of Appeals**



**U.S. Senate Judiciary Subcommittee  
on Administrative Oversight and the Courts  
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## TABLE OF CONTENTS

### I. General Findings

- a. Introduction and Methodology
- b. Appropriateness of Judicial Formulae to Calculate Judgeship Needs
- c. Case Disappearance, Consolidation and Case Law Maturity
- d. Importance of Appellate Court Collegiality
- e. Case Management - Screening Programs, En Banc Hearings and Oral Argument
- f. Alternative Dispute Resolution - Settlement and Mediation Programs
- g. The Use of Senior and Visiting Judges
- h. The Use of Staff Attorneys and Law Clerks
- i. Non-Case Related Judicial Activities and Travel
- j. Other Efficiencies - Temporary Judgeships and 2-Judge Panels
- k. Limiting the Expansion of Federal Jurisdiction and Access to the Federal Courts
- l. Conclusion

### II. Specific Circuit Court Analyses

- a. First Circuit
- b. Second Circuit
- c. Third Circuit
- d. Fourth Circuit
- e. Fifth Circuit
- f. Sixth Circuit
- g. Seventh Circuit
- h. Eighth Circuit
- i. Tenth Circuit
- j. Eleventh Circuit
- k. District of Columbia Circuit
- l. Federal Circuit



## GENERAL FINDINGS

### **Introduction and Methodology**

Over the past two and one half years, the Senate Judiciary Subcommittee on Administrative Oversight and the Courts has conducted a series of oversight hearings on the state of the federal courts of appeals. One of the main goals of these hearings was to evaluate the appropriate allocation of judgeships, and to explore arguments for and against increasing the total number of federal judges. Another goal was to identify and discuss areas of improvement in the productivity of the federal judiciary. The Subcommittee received testimony on the nature of the circuits' caseload, the status of judicial vacancies, court programs and other management efforts designed to handle increases in workload, as well as new ways by which to enhance court output. Judges presented statistical data on case filings, terminations, backlog, oral argument, court schedules and procedures. Judges also explained their philosophy in regard to what they believe is the proper size of the federal judiciary and the optimum number of judgeships for a court, and elaborated on what they believe to be the proper administration of justice in light of increased case filings.

To assist the Subcommittee in its effort to seek greater efficiencies within the federal court system, Subcommittee Chairman Charles Grassley (R-IA) requested that the General Accounting Office ("GAO") conduct two studies relevant to the workload for the courts of appeals. The first GAO study<sup>1</sup> collected information on non-case related travel of Article III judges for the period of January 1995 through September 1997 for those courts which were requesting new judgeships. The study included dates of travel, purpose and number of workdays required. This information is highly relevant in determining whether circuit courts can complete their work by taking fewer non-case related trips and participating in fewer non-case related functions. The second GAO study<sup>2</sup> collected information on senior judges, the caseload they complete, and how their work ultimately impacts the workload of active federal judges. This information shows to what extent senior judges can be utilized to alleviate some of the burdens of the federal courts.

This section constitutes the Subcommittee's general findings and recommendations; specific findings and recommendations for individual circuits can be found in the attached sections dedicated to individual circuits. In compiling this Report, the Subcommittee analyzed the testimony of the judges and the data provided to the Subcommittee at the Judiciary hearings on the federal circuit courts.<sup>3</sup> In addition to the two GAO reports on judicial travel and senior

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<sup>1</sup> Federal Judiciary: Information on Noncase-Related Travel of Article III Judges in 6 Circuits and 34 Districts (GAO/GGD-98-67R, March 9, 1998).

<sup>2</sup> Federal Judiciary: Information on Cases Assigned to Senior Judges in Fiscal Year 1997 in Four Circuit Courts of Appeals (GAO/GGD-98-17R, Nov. 30, 1998).

<sup>3</sup> These Subcommittee hearings were held on October 17, 1995 (District of Columbia Circuit); February 5, 1997 (Fourth Circuit); June 9, 1997 (Fifth and Eleventh Circuits); September 5, 1997 (Second and Eighth Circuits); November 19, 1997 (First, Third and Federal

judges, the Subcommittee also incorporated information from the reports on the results of the Subcommittee's 1996 Judicial Questionnaire sent to judges of the federal district and appellate courts, the 1997 Federal Judicial Center Mediation and Conference Programs in the Federal Courts of Appeals source book, and the 1997 Judicial Conference Annual Report of the Director. Statistical information was drawn from the hearing submittals and publications of the Administrative Office of the U.S. Courts. As of January 1, 1999, the Subcommittee updated the data on the present number of active and senior judges and judicial vacancies by speaking with circuit court offices for their most recent data.<sup>4</sup>

In addition, the Report quotes or paraphrases certain judges' Subcommittee testimony. While specific cites to hearing testimony and submittals have not been included in the Report, these materials are the source of every quote or paraphrase (unless otherwise identified), and every attempt was made to accurately represent what was conveyed to the Subcommittee. Moreover, the statistical data and court management information in each specific circuit court section varies in terms of quantity and detail, depending on what was provided to the Subcommittee.<sup>5</sup>

### **Appropriateness of Judicial Formulae to Calculate Judgeship Needs**

Based on statistical formulae utilized by the federal judiciary, in March 1997 the Judicial Conference sent Congress a request for 17 additional judgeships - 12 permanent judges and 5 temporary judges - for the circuit courts of appeal. The five appellate courts which initially requested additional permanent judgeship positions included the First, Second, Fifth, Sixth and Ninth Circuits.<sup>6</sup> Following the withdrawal of the Fifth Circuit's request, the Judicial Conference

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Circuits); June 15, 1998 (Tenth Circuit); and June 25, 1998 (Seventh Circuit). Because of scheduling problems, the Sixth Circuit submitted testimony and answers to questions in writing. These materials on the Sixth Circuit are available from the Subcommittee. In addition, the Subcommittee did not hold a hearing on the Ninth Circuit in light of the fact that the Commission on Structural Alternatives to the Ninth Circuit was charged with preparing a report on the circuits, concentrating on the organizational structuring of the Ninth Circuit. This report was released on December 8, 1998. Consequently, an analysis of the Ninth Circuit has not been included in this report.

<sup>4</sup> Because of the fluid nature in court statistical information as judges take senior status, retire completely or die, the current number of circuit court active and senior judges and judicial vacancies, as well as other data, may have changed as of the time of the printing of this Report.

<sup>5</sup> Unfortunately, the circuits as well as the Administrative Office of the U.S. Courts do not maintain much of the information or statistics that the Subcommittee requested in a uniform fashion. This makes it more difficult for Congress and the public to compare the circuits and to grasp fully the meaning of these statistics on a national scale.

<sup>6</sup> Subsequently, the Fifth Circuit withdrew its request for one additional permanent judgeship. This occurred after the GAO had been directed to study non-case related judicial

is currently seeking 11 permanent and 5 temporary judgeships in these four circuit courts of appeal.<sup>7</sup>

The Judicial Conference utilizes statistical formulae to calculate district and appellate court judgeship needs. At present, the appellate court formula provides that all case filings are counted equally, with two exceptions. First, cases refiled and approved for reinstatement are excluded from total case filings. Second, pro se cases are deducted from total case filings and weighted at 0.33 each for an adjusted case filing amount.<sup>8</sup> The District of Columbia Circuit is excluded from this formula because the Judicial Conference believes that court's caseload to be "significantly different" from other circuit courts.

There is little consensus regarding the proper measure of need for judges, and whether the statistical formulae currently utilized by the Judicial Conference are an effective means for calculating the appropriate number of judges for the federal courts of appeal. While many judges felt that the Judicial Conference formulae appropriately calculate federal judge resources, a number of judges felt there are significant problems with the current methods of calculation. Judge Higginbotham of the Fifth Circuit went so far as to testify that the current formulae are "flawed" and "suspect on their face." In fact, a purely formulaic approach to judicial staffing needs ignores important fundamental questions, as Chief Judge Wilkinson of the Fourth Circuit testified, such as how many judges actually constitute an optimal size for a circuit court; whether there is a certain point at which the addition of new judges creates more work for a circuit court than it resolves; whether efficiencies can be employed to eliminate unnecessary growth in judgeships; and whether there should be priorities in the exercise of federal jurisdiction and the creation of new federal criminal offenses and civil causes of action.

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travel for the federal courts requesting additional judgeships.

<sup>7</sup> At no time has the Judicial Conference suggested budgetary offsets with respect to this request. As discussed below, the Congressional Budget Office considers the creation of judgeships without budgetary offsets to violate Senate Rules.

<sup>8</sup> According to Chief Judge Gibbons of the District Court for the Western District of Tennessee and Chair of the Judicial Conference's Committee on Judicial Resources, the Judicial Conference employs a "formal, systematic methodology" for evaluating judgeship needs when it develops recommendations for additional judges. She explained that the appellate court formula is based on appellate court experience as to what they believe are the most appropriate measures. This includes basing the evaluation on current case filings, removing appeals that have been reinstated after procedural default, weighting the pro se appeals at .33 and all other appeals at 1.0, and after adjustments for removing the appeals and applying the appropriate case weighting have been done, applying a standard of 500 appeals per panel to the adjusted filings. The process also considers geographic factors, the median time from filing to disposition, and the impact of legislation to reduce federal jurisdiction. Judge Gibbons noted that the Judicial Conference will only conduct an evaluation of judgeship needs where a majority of judges on a court feels that more resources are required.

The use of mechanical formulae as a benchmark for federal judgeship needs has significant drawbacks. As stated by Judge Wilkinson, a formula geared to the number of merit dispositions per judgeship “sets the judiciary on a course of unexamined growth, acting as a ratchet for expansion of judges.” Further, in certain cases where the statistical formula calculates that a court requires more judges, it is clear that the creation of additional judgeships is just not necessary. For example, Judge Higginbotham testified that the judicial formula calculating 28 judges for the Fifth Circuit “simply defies common sense and lacks credibility”, particularly in light of the fact that the overwhelming majority of judges on the Fifth Circuit oppose more judges for their court. Just as Chief Judge Seymour of the Tenth Circuit suggested, courts should approach growth cautiously and ask for fewer judgeships than indicated by the statistical data.

A formula should also be used to decrease judgeships if this same formula is utilized to increase the size of a court. For example, the significant decline in case filings and high case consolidation rates make it evident that the District of Columbia Circuit would be over-staffed were the court to have a full complement of 12 judges, and even the filling of the eleventh judgeship position is not necessary. In fact, the Subcommittee’s calculations determined that when the Judicial Conference formula is applied to the District of Columbia Circuit 1995 case filing data, the court would have been entitled to only 9.5 judges. The federal judiciary should refrain from requesting that vacancies be filled where the evidence demonstrates a court is functioning efficiently with its current number of judges and, therefore, judgeships could be eliminated. For example, in addition to the District of Columbia Circuit, testimony and statistical evidence shows that the Fourth Circuit is functioning efficiently with its current number of judges, even with two judicial vacancies. At the time of the Subcommittee’s hearing into the state of the Fourth Circuit, the Fourth Circuit had the fastest disposition time of any circuit. It should be noted that, in regard to using the statistical formula to decrease judgeship positions, Chief Judge Martin of the Sixth Circuit felt that if the procedure for obtaining new judgeships could be made “less cumbersome and time consuming”, there might be a greater willingness to eliminate judgeships completely when appropriate. Nevertheless, he believed the Judicial Conference would be willing to recommend that vacant judgeships be left unfilled where the caseload so indicates if this issue were to be addressed.

Some judges criticized the elements comprising the statistical formulae for calculating judgeship needs. Judges noted that the current appellate formula does not, for the most part, distinguish between cases which consume a large quantity of judge time from cases which are not time-consuming, nor is the formula based on time studies. For example, several judges believed that prisoner petitions by their very nature require far less time for disposition. Judge Higginbotham pointed out that appellate court dockets are dominated by prisoner petitions, with some circuits having more than 40% of their total workload attributable to them. He noted that prisoner petitions are handled at the district court level primarily by magistrate judges, and at the appellate level they can be effectively handled by staff counsel and disposed of with relatively little judicial time because they do not command the “complexity” or “substance” of other appeals. Judge Higginbotham argued that, because prisoner petitions represent an increasing percentage of the appellate docket where an expanding docket is measured simply by increasing numbers, it follows that the increase in number of cases does not necessarily correspond to an

increased workload. He believed that the number of cases “may go up exponentially, but the actual workload imposed upon the court does not follow correspondingly.”

Judge Wilkinson argued that if one were to closely analyze the Fourth Circuit’s filings at the time of the Subcommittee hearing, 897 of the 1491 filings were prisoner petitions which could be effectively handled without a full court process. Specifically, he questioned the judgement of permitting state prisoner petitions to dictate the size of the federal judicial system. In addition, former Chief Judge Tjoflat of the Eleventh Circuit believed that other categories of cases besides prisoner petitions could receive similar or lesser weights to the 1/3 filing weights where statistical formulae are used to calculate judgeship needs.

When the Department of Justice testified before the Subcommittee on the District of Columbia Circuit, then-Associate Attorney General of the United States John Schmidt indicated that the best measure of when a court requires additional judges is how long it takes, after an appeal is filed with a court, to reach a final decision on the merits. While this is generally accurate, a better overall measure of a circuit court’s efficiency is the time interval from submission of a case to the court to final disposition. Judge Wilkinson expressed the view that the time from filing of the notice of appeal to final disposition was the most important for a litigant, as it constitutes the overall time a court takes to resolve a case. While Judge Martin testified that the examination of the time period from oral argument or submission on the briefs to final decision is important, he did not agree that it was the best or only measure relevant when making judicial resource determinations.

Judge Jones of the Fifth Circuit testified that the number of participations per active judge in opinions, in addition to the number of appeals terminated on the merits, was another way to measure the increase in court workload. Other judges argued that the results of median times of completion were not an accurate statement of their judgeship needs. For example, Chief Judge Winter of the Second Circuit felt that the Second Circuit’s short disposition time did not mean that they do not need more judges. Both Judge Wilkinson and Judge Martin doubted that weighting (except for prisoner and pro se cases) or time studies could provide a reliable basis for any formula measuring judgeship needs. Rather, Judge Wilkinson indicated that the last attempt to collect judicial time studies proved “unproductive”, primarily because judge time spent on particular categories of cases could not easily be weighted. As a result, Judge Wilkinson was of the opinion that the “difficulty of finding any kind of objective or reliable basis for the formula is another reason why it should not be regarded as a critical yardstick for judicial growth.”

Positions taken by some judges advocating the formulaic approach actually support the argument that the formulae are “suspect” and should not be relied on when calculating actual judgeship needs. For example, some judges felt that it was virtually impossible to predict the degree of difficulty or the time required to dispose of a case on the basis of case type, and thus cases (with the exception of pro se cases) should be weighted equally. But just as certain cases may take longer to process, others may also prove to be relatively easy to resolve.

Other judges argued that appellate judges need to be given adequate time to seriously ponder the

decisions and justifications for their decisions, rather than just function as processors of cases that come before them, and that this consideration needs to be factored into any formula for calculating judgeship needs. It is true that judges should not abdicate their decision-making responsibilities by processing cases without giving them the requisite time to carefully analyze and make sound judicial determinations. Each individual case is important and should be reviewed by the judicial branch in a responsible manner. At the same time, judges should make the best use of their time and resources, and should employ innovative means and methods by which to process cases in light of established case law and difficulty of decision-making for certain kinds of cases.

Judge Tjoflat and other judges suggested that adding more judges to a court would only provide “temporary relief because with the creation of additional judgeships comes additional litigation and an increased backlog of cases.” Consequently, the resulting backlog can only create a demand for more judges, and “the cycle repeats itself over and over.”

Finally, when a request for new judgeships is sent to Congress, and there is no unanimity on the part of judges of the court requesting the new judgeships, dissenting views should also be forwarded to Congress for consideration.

### **Case Disappearance, Consolidation and Case Law Maturity**

Judges argued that the statistical formulae are also defective in that they do not take into account issues such as case disappearance, consolidation and case law maturity. The current formulae assess judgeship needs based on the number of cases filed, not cases which are actually decided by a judge or ultimately disposed of by the court. Consequently, many of the cases which settle or are voluntarily dismissed are counted when considering whether new judgeships are needed. Judge Higginbotham explained that although many appeals are filed with a circuit court, a large number never get past the clerk’s office and actually “disappear” from the docket because plaintiffs never submit papers. Because these cases are simply treated as a notice of appeal and require no further court attention, they should not be factored into any formula. Moreover, similar cases are usually consolidated into single cases, which results in fewer procedural and substantive motions to be considered by a court. Based on these considerations, Judge Higginbotham argued that a “mechanical” calculation of case numbers can be “misleading” because of the resulting diminished workload prior to oral argument.

In addition, there appears to have been a decline in cases of “complexity and substance” in the courts of appeal. Even though prisoner petitions and other cases receive the attention they deserve, Judge Higginbotham and Judge Jones felt that the number of “truly complex” cases has diminished, particularly because many issues repeatedly appear before the court for consideration. Judge Tjoflat testified that the Eleventh Circuit has fewer oral arguments because “the law in the criminal law area is fairly settled and the need for oral argument is much less.” He explained that most of those cases were disposed of on a summary calendar, but not because they were given “less thought” than orally argued cases. Rather, “when a court has a stable and clear rule of law, it is easier for the judges to handle and decide a case, and there is less error in

the record.” Judge Jones testified that cases being generated by the sentencing guidelines will eventually become easier to dispose of because the law is being clarified as many of the complex and difficult issues are reviewed. These factors should be taken into account when determining the appropriate allocation of judgeships.

### **Importance of Appellate Court Collegiality**

An overwhelming majority of judges agreed that it is absolutely necessary to cultivate a collegial court in order to maintain coherent jurisprudence and consistent case law in the circuit. Judge Seymour determined that an increase in court size “can have a decidedly negative effect on collegiality, coherence of case law, and effective administration.” Judge Wilkinson stated that unchecked expansion would change the basic character of the federal judicial system into a bureaucracy which would “destroy the humane values that inhere in collegial decision-making.” In fact, appellate judges function quite differently from district judges. District judges can essentially operate independently, whereas appellate judges must maintain a stable and clear rule of law in the circuit. This fundamental difference necessarily places constraints on the size of an appellate court because, naturally, a larger court makes coherent decision-making more difficult. Judge Tjoflat testified that some scholars maintain that a “perfect” appellate court size is 7 or 9 judges, and when a court size reaches 10 to 11 judges, “you have an exponential increase in the tension on the court on the ability of the law not to be certain.” Judges claimed that there is a marked decrease in collegiality when an appeals court is staffed with more than 11 or 12 judges. Chief Judge Posner of the Seventh Circuit thought that with 11 judges, the Seventh Circuit was “at the limit of what a court ought to be” in terms of size.

Not only is there a loss in collegiality the larger a court becomes, there also is an increase in work required by judges to maintain consistency in the law. Judge Wilkinson felt that more judges would not lighten the burdens of a court, but would actually aggravate these burdens further. He argued that if the Fourth Circuit were to increase its size, the current practice of circulating opinions to the full court would be hampered and would result in more intra-court correspondence, monitoring of colleague work, and scheduling delays before litigants could be heard by the court. In Judge Tjoflat’s experience with the Fifth Circuit’s complement of 26 judges before the circuit was split, a substantial amount of time was spent maintaining the clarity and stability of law because that court had become “too unwieldy” and “it was a nightmare.” He explained that every time a new judge is added, the judicial work day is actually diminished because the new judge’s work requires monitoring in order to maintain coherent decision-making. Because of this unintended result, the old Fifth Circuit’s judges ultimately concluded that they could no longer function at that size and still maintain stability in the rule of law. Judge Tjoflat claimed that his court now completes more than twice as much business with 12 judges as the old Fifth Circuit did with 26 judges. He also claimed that the rule of law in the circuit is much clearer and, as such, it keeps litigation to a minimum.

The appellate courts should maintain maximum collegiality to best manage their caseload and retain a coherent body of circuit law. To this end, court size should be held to a minimum and the creation of new judgeships should be approached with extreme caution.

## **Case Management - Screening Programs, En Banc Hearings and Oral Argument**

While there are considerable similarities in the core aspects of court management, there are also significant differences in the way circuits manage their daily operations. According to former Chief Judge Sloviter of the Third Circuit, these differences reflect each circuit's culture, and specifically a circuit's particular history, geography, caseload and bar practice. However, an overview of the various circuits indicates that effective case management and court processes can play an important role in increasing the speed of judicial decision-making, while maintaining the highest quality of justice.

Although Judge Higginbotham felt that some apparent delays were attributable to the "inherent structure of the system", it is clear that changes to a court's case management can significantly impact the output and ultimate success of a court in getting its work done in a timely and efficient manner. For example, screening programs conducted by judges and staff have had an extremely beneficial influence on the number of cases and the amount of time spent on cases by judges. Judge Higginbotham testified that the actual number of cases requiring prolonged court attention can diminish considerably because certain kinds of cases can be handled effectively in conference calendar after staff counsel and 3-judge panel review. In the Fifth Circuit's screening program, staff attorneys analyze prisoner cases and a few other categories of cases, then prepare memoranda for 3-judge panels. The 3-judge panels decide whether cases should go to oral argument, be resolved by non-argument disposition by an argument calendar, or be disposed of in chambers. Judge Jones confirmed that this screening process greatly improves the administration of justice and eases the flow of cases in the court. Chief Judge Torruella of the First Circuit explained that under the Civil Appeals Management Program ("CAMP") utilized by his and several other circuits, counseled civil appeals are reviewed by a staff attorney to narrow and clarify issues, resolve procedural issues without resorting to formal motions, and identify jurisdictional defects. Judge Torruella testified that CAMP has been very successful in reducing the number of cases that have to be decided, and has been the First Circuit's "biggest item" in terms of achieving cost savings and efficiencies.

Other courts prefer to utilize judges rather than staff attorneys as screeners. Judge Seymour testified that when the Tenth Circuit implemented its judge screening process, the number of cases fully briefed and ready for calendaring dropped from almost 1,000 in 1989 to between 200-300 in 1990. She felt that the judges' input up front regarding the status and direction of appeals, prior to any staff review, constituted a far more effective use of staff and judicial resources than if staff had conducted the initial screening. Judge Seymour attributed the bulk of the Tenth Circuit's success in handling its caseload to this judge screening program. Judge Sloviter testified that the Third Circuit conducts no advance screening by staff attorneys, except for counseled and pro se cases; rather, counseled cases are sent straight to 3-judge panels for review, while pro se cases are reviewed by pro se panels. She also argued that this initial judge input was a more efficient process because it reduces the duplication which occurs in other courts where different judges or panels decide which cases are submitted and which cases are argued.

Judges discussed other court operations and case disposal mechanisms that produce significant