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# Adding Judges: Issues in Federal Courts' Governance

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## ADDING JUDGES: ISSUES IN FEDERAL COURTS' GOVERNANCE

Ronald A. Cass

### **Abstract**

*Periodically, proposals are advanced for expanding federal courts, adding new judgeships to the courts of appeals, the district courts, or even the Supreme Court. Arguments respecting the size of the Supreme Court are rare, as the Court's size has been relatively constant throughout the nation's history and unchanged for more than a century and a half. Expansion of other federal courts, however, is proposed far more often and has occurred in fits and starts. Additions to the courts of appeals and, even more, to the district courts are at times helpful in allowing courts to function more efficiently.*

*Yet, proposals to add judgeships to these courts should be assessed with care, as expansions can create problems that are more significant than the problems they solve. The most important considerations should be that courts operate consistently with the rule of law, that they interpret and apply rules in a predictable fashion in keeping with the text of the Constitution and laws, and that the courts' decisions allow others to understand the principled bases for applications of the laws. These aspects of judicial operation can be impeded by adding judgeships, especially to appellate courts where collegial decision-making becomes more difficult—and consistency less likely—as the number of judges whose views must be coordinated grows.*

*Before deciding whether to add judgeships, the political branches should review the way that courts currently function, the changes in technology, personnel, and organization that have altered judicial functioning, and the degree to which courts have maintained a pace of case dispositions that is responsive to needs of litigants and respect for the law. A look at these factors at present counsels extreme caution, making it very unlikely that expanding the courts of appeals is justified and likely that, while a few district courts merit expansion, that number is not as large (and the need not as pressing) as currently being advocated by some groups.*

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*Ronald A. Cass\**

## INTRODUCTION

To an extraordinary degree, Americans respect judges and trust them—and judicial processes in general. While the great bulk of legal decisions are unremarkable, a few become fodder for public attention. The United States Supreme Court is the primary focus of public and political commentary about judicial decisions and more broadly about the United States courts. Public debates about who should sit on the Court are well-known, and when openings on the Court occur, these become intense and, for short periods, ubiquitous. More rarely, political debate turns to the size and composition of the Court, almost always as the result of irritation with a particular decision or set of decisions—and almost always to no avail.

Despite public interest in those debates, changes in the other federal courts are more common, and for that reason debates over their size and composition may be more meaningful. While not divorced from reactions to particular court decisions, changes in the size and shape of the federal courts below the Supreme Court also respond to other considerations and should be analyzed accordingly. That is the focus of this essay.

Recently, proposals have been tabled for expanding the number of authorized positions for federal judges. In March 2021, the Judicial Conference of the United States (JCUS) put forward a proposal for adding 88 permanent positions to the federal courts (79 new positions plus 9 temporary

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judicial positions that would become permanent). This would increase authorized circuit and district court judgeships by 10 percent immediately.

The JCUS proposal is not the only plan being discussed for adding new judicial positions and certainly is not the only plan that has been advanced over the past 30 years. Professors, politicians, commentators, and individual judges, at fairly regular intervals, have recommended expanding the number of federal judgeships.<sup>1</sup> Just as often as these plans have been put forward, other professors, politicians, commentators, and judges have stepped up to dispute them.<sup>2</sup>

Inevitably the politics of the day will frame the question as whether new judgeships should be added *now*—and, if so, how many and in which specific courts. The more important question, however, is what considerations should guide policy-makers in deciding what judicial resources are appropriate in which courts. Answering that question allows the debate over what to do at any given moment to be over the application of principles to facts.

## I. JUDGESHIPS BY THE NUMBERS: OVERVIEW

The U.S. Constitution gives considerable leeway to Congress to decide how to organize the federal courts. Article III defines the basic requirements for a matter to fall within the judicial power of the United States, the manner in which judges are appointed, and critical procedural protections for the judiciary (life tenure and irreducible pay).<sup>3</sup> The Constitution also commits specific matters to the original jurisdiction of the Supreme Court. As for the

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<sup>1</sup> See, e.g., Steven G. Calabresi & Shams Hirji, *Proposed Judgeship Bill*, NW. UNIV. PRITZKER SCH. OF LAW, Public Law & Legal Theory Working Paper No. 17–24 (Nov. 17, 2017); Stephen Reinhart, *Too Many Cases, Too Few Judges*, ABA J. 52 (Jan. 1993). See also Todd Ruger, *Lawmakers in Both Parties Push to Add Judges to Overworked Federal Courts*, ROLL CALL, March 16, 2021, available at <https://www.rollcall.com/2021/03/16/lawmakers-in-both-parties-push-to-add-judges-to-overworked-federal-courts/>.

<sup>2</sup> See, e.g., William H. Pryor, Jr., *Conservatives Should Oppose Expanding the Federal Courts*, NY TIMES, Nov. 29, 2017, available at <https://www.nytimes.com/2017/11/29/opinion/conservatives-expanding-federal-courts.html>; Gerald Bard Tjoflat, *More Judges, Less Justice: The Case Against Expansion of the Federal Judiciary*, 79 ABA J. 70 (no. 7, July 1993); J. Harvie Wilkison III, *The Drawbacks of Growth in the Federal Judiciary*, 43 EMORY L.J. 1147 (1994). See also Harry T. Edwards, *The Rising Work Load and Perceived “Bureaucracy” of the Federal Courts: A Causation-Based Approach to the Search for Appropriate Remedies*, 68 IOWA L. REV. 871, 919 (1983) (*Bureaucracy*).

<sup>3</sup> U.S. CONST., Art. III, §§ 1–2.

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remainder of the judiciary, however, the Constitution says only that it is to be constituted of “such inferior Courts as the Congress may from time to time ordain and establish.”<sup>4</sup> How many courts, of what type, with what jurisdiction, composed of how many judges—all of this is left to Congress to decide.

*A. A Brief Review of Federal Jurisdiction and Organization*

Starting with the first Judiciary Act,<sup>5</sup> Congress created a system of geographically distributed district courts as first-level trial courts and similarly distributed circuit courts, which had dual roles as both original trial courts and courts of review for certain challenges to district court decisions.<sup>6</sup> The circuit courts originally were composed of one district judge and two Supreme Court justices charged with “riding circuit.” Circuit duties imposed significant hardships on the justices, whose diligence on this score diminished rapidly, compromising parts of the first Judiciary Act’s plan. Experience and changing politics also led to alteration of other aspects of the initial design for the federal courts. Over time, Congress expanded federal courts’ jurisdiction over its original grant, including increased provision for cases concerning “civil rights, habeas corpus, and patent and copyright,”<sup>7</sup> altered the amount in controversy requirement, and eventually created a full system of intermediate appellate courts (circuits of the United States Court of Appeals).<sup>8</sup>

Over the succeeding century and a quarter, Congress made incremental changes in the organization and subjects within the jurisdiction of the federal courts—adding or subtracting matters a bit at a time—but hit on a plan for the courts that generally seems to have worked. That plan was laid out

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<sup>4</sup> U.S. CONST., Art. III, § 1.

<sup>5</sup> Act to Establish the Judicial Courts of the United States, 1st Cong., 1st Sess., 1 Stat. 73 (Sep. 24, 1789) (*Judiciary Act of 1789*).

<sup>6</sup> Among the voluminous literature on the original plan and history of the organization of the federal courts, see, e.g., Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499 (1990); William R. Casto, *The First Congress’s Understanding of Its Authority over the Federal Courts’ Jurisdiction*, 26 BC L. REV. 1101 (1985); Michael G. Collins, *The Federal Courts, the First Congress, and the Non-Settlement of 1789*, 91 VA. L. REV. 1515 (2005).

<sup>7</sup> RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 28–29 (Foundation Press 2015).

<sup>8</sup> See, e.g., FALLON, ET AL., *supra* note 7, at 20–33.

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in the Evarts Act of 1891<sup>9</sup> and basically set the pattern for what has followed, even though there have been further changes. Many of the decisions made over time respecting the shape of the federal judiciary plainly reflected both principled assessments of and political reactions to particular substantive issues—including judgments respecting what issues were not suited for state courts because they implicate broad national effects or might be subject to parochial influence, and what issues require changes in trial court resources or appellate processes to promote more certain or more uniform applications of law.

*B. Judgeships, Population, and Economy: Connected, Not Correlated*

As for the judiciary's numbers, Congress assigned 6 seats to the Supreme Court for its first 18 years, 7 for the next 30 years, and 9 for the next 185 years (and counting), except for a five-year dalliance with 10 justices in the 1860s.<sup>10</sup> The number of district and circuit court judgeships has increased over time, as the size of the population, the economy, and demands for judicial attention have grown. But the increase has not been dramatic during long periods nor a straight-line derivation from changes in population and economic growth, even though those changes have been relevant to demands on the judiciary.

Thus, for example, between 1789 (following the first Judiciary Act's creation of the lower federal courts)<sup>11</sup> and 1889 (shortly before passage of the Evarts Act of 1891 which created the template for our current arrangement of district and circuit courts)<sup>12</sup> the number of district court judgeships rose from 13 to 59, an increase to roughly 4½ times the original number over the period of a century.<sup>13</sup> During that same time frame, the U.S. population increased to more than 16 times its 1789 number,<sup>14</sup> and the U.S. economy

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<sup>9</sup> Act to Establish Circuit Courts of Appeal and to Define and Regulate the Jurisdiction of the Courts of the United States, 51st Cong., 2d Sess., 26 Stat. 826 (Mar. 3, 1891) (*Evarts Act*).

<sup>10</sup> Administrative Office of the United States Courts, *Authorized Judgeships 1789 to Present*, ADMIN. OFFICE OF THE COURTS, available at <https://www.uscourts.gov/sites/default/files/allauth.pdf> (*Authorized Judgeships*).

<sup>11</sup> *Judiciary Act of 1789*, *supra* note 5.

<sup>12</sup> *Evarts Act*, *supra* note 9.

<sup>13</sup> See *Authorized Judgeships*, *supra* note 10, at 1–3.

<sup>14</sup> See ER Services, *United States Population Chart*, US History II (OS Collection),

grew to a figure approximately 80 times its original size.<sup>15</sup>

From 1891 to 1971—an 80-year period starting with the reorganization of the federal judiciary and going through two World Wars along with vast expansions of government associated with the New Deal and Great Society programs—the district and circuit courts went from 83 authorized judgeships (64 on the district courts and 19 on the circuit courts) to 491 authorized judgeships (394 on the district courts and 97 on the circuit courts).<sup>16</sup> This raised the total for district and circuit judgeships to a figure roughly six times the 1891 total. This compares to a population growth to just under 3.25 times the 1891 figure and an increase in real GDP to about 14 times as large as in 1891.<sup>17</sup>

The current figures stand at 852 authorized judgeships for district and circuit courts, with 179 active judgeships authorized on the circuits of the U.S. Court of Appeals, 663 on the district courts, and an additional 10 temporarily authorized district judgeships to accommodate special needs.<sup>18</sup> This represents an increase to a number about 1.67 times the figure from 60 years earlier, while U.S. population is just a bit over 1.6 times what it was in 1971,<sup>19</sup> and U.S. GDP is 3.72 times as large.<sup>20</sup>

## II. JUDGES, JUDICIAL SELECTION, AND THE RULE OF LAW

Rising population size and a growing amount of economic activity (as measured in real GDP) could be expected to contribute to rising legal activity in the nation generally, including in federal courts, and certainly have

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<https://courses.lumenlearning.com/suny-ushistory20s2xmaster/chapter/united-states-population-chart/#footnote1> (*Population Chart*).

<sup>15</sup> See Louis Johnston & Samuel H. Williamson, *What Was the U.S. GDP Then?*, MEASURINGWORTH (2021), <https://www.measuringworth.com/datasets/usgdp/result.php> (results for real U.S. GDP, 1790 to 1890).

<sup>16</sup> See *Authorized Judgeships*, *supra* note 10, at 3–6.

<sup>17</sup> See Johnston & Williamson, *supra* note 15 (results for real U.S. GDP); *Population Chart*, *supra* note 14.

<sup>18</sup> See *Authorized Judgeships*, *supra* note 10, at 6–8.

<sup>19</sup> See Eric Jensen, *Census Bureau Provides Population Estimates for Independent Evaluation of Upcoming Census Results*, US DEPT. OF COMMERCE, CENSUS BUREAU, Dec. 15, 2020, <https://www.census.gov/library/stories/2020/12/census-bureau-provides-population-estimates-for-independent-evaluation-of-upcoming-census-results.html#:~:text=The%20tabulation%20of%20the%20official,1%2C%202020%20of%20332.6%20million>; *Population Chart*, *supra* note 14.

<sup>20</sup> See Johnston & Williamson, *supra* note 15 (results for real U.S. GDP).



done so.<sup>21</sup> Yet, as the figures given in Part I above demonstrate, the correlations of changes in either of these variables with changes in the number of judgeships is extremely weak, with judgeships sometimes rising at a faster pace than population, other times much slower, and always rising more slowly than economic activity, but in no particular proportion. Given the weakness of these correlations, this Part asks what considerations should govern decisions respecting additional judgeships.

*A. Judgeships: Looking Behind the Bench*

One initial word of caution is in order. Efforts to address questions respecting the federal judiciary should be rooted in understanding not only *how many* judges are needed but also *what type* or types of judges are needed to serve public interests.

1. Judging and the Rule of Law: Picking Judges

The essential predicate for the judiciary, first and foremost, is that it implements the rule of law—it interprets and applies laws made by others (the Constitution and congressionally enacted statutes) in ways that are predictable based on the laws themselves.<sup>22</sup> To do that, judges must be independent of political influence and have the inclination and skills needed to do the jobs relevant to their assignment—at the trial court level, to supervise trials and manage litigation and, at the appellate level, to work with other judges to decide disputes over legal questions.<sup>23</sup> These are matters of structure, professional ability, and personal disposition.<sup>24</sup> Put differently, to

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<sup>21</sup> See, e.g., Robert C. Clark, *Why So Many Lawyers? Are They Good or Bad?*, 61 *FORDHAM L. REV.* 275 (1992).

<sup>22</sup> See, e.g., RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW* 89–90 (Oxford Univ. Press 1998); RONALD A. CASS, *THE RULE OF LAW IN AMERICA* 2–19 (Johns Hopkins Univ. Press 2001) (RULE OF LAW); FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 80–81 (Univ. of Chicago Press 1994); MICHAEL OAKESHOTT, *The Rule of Law*, in *ON HISTORY AND OTHER ESSAYS* 1, 1 (Liberty Fund 1983); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 *U. CHI. L. REV.* 1175, 1179–80 (1989) (*Law of Rules*).

<sup>23</sup> See, e.g., Brett M. Kavanaugh, *The Judge as Umpire: Ten Principles*, 65 *CATH. U. L. REV.* 683, 685–86, 689–90, 692 (2016).

<sup>24</sup> See, e.g., CASS, *RULE OF LAW*, *supra* note 22, at 23–97; Richard A. Epstein, *The Independence of Judges: The Uses and Limitations of Public Choice Theory*, 1990 *BYU L. REV.* 827 (1990); John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 *NYU L. REV.* 962 (2002).

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make the federal judicial system work, the judges appointed must have the commitment to behave in ways consistent with their assigned roles, the skill set that is required for each judge's role, and the temperament to perform the work in each court's particular context, including working collaboratively with other judges in appellate work and with the other court personnel and litigants in trial settings.

These requirements are not simply a list of attributes handed to the President to guide his appointments, although they are useful in that endeavor. More than simple guideposts to selecting nominees, the requirements also are instructive on how confirmation should proceed and how large a judiciary is appropriate to the goal of judges adhering to and promoting the rule of law. The *wrong process* for appointing and confirming judges or the wrong structures for political interactions with the judiciary can undermine prospects for a good fit with ideals for judges' functioning in accordance with goals for the rule of law.<sup>25</sup>

So, too, a judiciary that is the *wrong size* will find it more difficult to support the rule of law. Appointing too many judges inevitably requires at least a degree of compromise on the search for people of the right character and skill.<sup>26</sup> As with picking members of any team, one starts with the people thought to best embody the qualities desired—think back, for instance, to common experience with choosing teams for any elementary school game.

Sports usually provides handy illustrations, but the principle is the same for any select group. The point is not that the qualities sought can be easily and simply identified, with any selection process easily picking the best first. Ask any football fan about Tom Brady, who was the 199th pick in the National Football League's draft for the class of 2000, but is widely regarded as the most successful quarterback in NFL history, with more individual Super Bowl wins than the total for any *team*. But even admitting the imprecision of evaluations of quality, the more one expands the number

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<sup>25</sup> See, e.g., Ronald A. Cass, *Property Rights and the Rule of Law*, in THE ELGAR COMPANION TO PROPERTY RIGHT ECONOMICS 222-248 (Enrico Colombatto ed., Edward Elgar Pub. 2004); Scalia, *Law of Rules*, *supra* note 22. This point has been understood from the very inception of our constitutional system. See, e.g., THE FEDERALIST NOS. 76-81 (Alexander Hamilton).

<sup>26</sup> See, e.g., Jon O. Newman, *Are 1,000 Federal Judges Enough?: Yes, More Would Dilute The Quality*, NY TIMES, May 17, 1993, at A17, available at <https://www.nytimes.com/1993/05/17/opinion/dialogue-are-1000-federal-judges-enough-yes-more-would-dilute-the-quality.html?>

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who are to be selected, the greater the risk that the average level of quality will at some point start to decline. A Brady certainly will exist with better skills than predicted, but that doesn't mean that the criteria for prediction are fatally flawed or that the median selection (or the selections as a class) will be just as good when picking 3,000 athletes as when picking 300. Again, the same principle holds for selecting judges.

## 2. Clarity, Consistency, and Coordination in Collegial Enterprises

Of course, the desired attributes for judges are not all-or-nothing items on a mechanical check-list but products of difficult judgments about matters of degree. Anyone who has been involved in these decisions can attest to the difficulty of the judgments and the number of times a choice has been altered by one or another small detail that emerges in the vetting process.<sup>27</sup> And while too few judges may leave the courts with so much work that they find it difficult to do it right, too many judges on any court can have equally—or perhaps worse—consequences.

This last point has been made forcefully by Judge Gerald Tjoflat, among others. Judge Tjoflat, a long-serving judge on the U.S. Court of Appeals for the Eleventh Circuit, responded to a proposal from Ninth Circuit Judge Stephen Reinhardt to double the number of federal appellate judges while leaving the number of district court judges where it was. Judge Tjoflat pointed out that a principal responsibility of appellate judges is to assure—or at least to improve—clarity and consistency of interpretations of law within a circuit.<sup>28</sup> This means both addressing divergent legal interpretations from district judges and collaborating with colleagues on the circuit court to determine what the circuit's preferred approach will be. But as the number of judges on an appellate court increases, the number of different combinations of judges on panels that make the court's decisions rises exponentially.

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<sup>27</sup> The author has served on the Special Nominating Committee for Selection of Justices for the Supreme Judicial Court of the Commonwealth of Massachusetts, the Standing Committee on the Federal Judiciary of the American Bar Association, and as a Liaison to the ABA's Standing Committee on the American Judicial System and to its Standing Committee on Judicial Independence, as well as serving as an informal adviser to individuals involved in similar selection processes and as a friend to many who have gone through the process at every level.

<sup>28</sup> See Tjoflat, *supra* note 2, at 70, 72–73.

As Judge Tjoflat explains, as a court increases from the size, say, of the Eleventh Circuit (then with 11 active judges)<sup>29</sup> to that of the Ninth Circuit (then with 28 active judges), the number of possible panel combinations rises from under 200 to over 3,200—and with Judge Reinhardt's proposed increase would have approached 28,000!<sup>30</sup>

Even assuming that the judges on all of the panels that would be possible on a court of that size labor mightily to maintain consistent approaches, the difficulty of making decisions in more complex matters where the law's precise meaning is less well-determined inevitably means that having a larger number of judges will reduce the clarity and consistency of the decisions within the circuit. More important, the problems that come from having less clarity and less consistency within a circuit will be manifested well below the size of appellate courts Judge Reinhardt, or more recently Professor Steven Calabresi,<sup>31</sup> envisioned.

Many judges over the last century and more have expressed reservations similar to Judge Tjoflat's, opining that the more judges are added to an appellate court (beyond a relatively modest number), the less collegial, less efficient, and less well-functioning the court becomes.<sup>32</sup> For a handy commonplace analogy, consider the process of picking a restaurant to eat at. Imagine undertaking this ordinary task for a group of 3 people, or a group of 6, 9, 18, or 36. How much more difficult does the task become as the group expands? How much harder is it to find a suitable rule to guide decision as the group size grows?

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<sup>29</sup> Although Judge Tjoflat uses the 11-judge figure, *see id.*, at 72, that number in active service at the time was one shy of the 12 authorized judgeships for the 11th Circuit at the time.

<sup>30</sup> *See id.*, at 72. Indeed, even the single judge added to the Ninth Circuit after Judge Tjoflat's article was written brought the number of combinations past 3,650—meaning that at the circuit's current size, *each* additional judge *increases* the number of combinations of judges on that circuit's panels by *more than the total number of combinations* (in fact more than double the total) that the Eleventh Circuit has and roughly 19 times the total number of combinations possible in the First Circuit.

<sup>31</sup> *See* Calabresi & Hirji, *supra* note 1.

<sup>32</sup> Among others, Chief Justices Charles Evans Hughes and William Rehnquist, Justices Joseph Story and Felix Frankfurter, and Judges Harry Edwards, Edith Jones, Irving Kaufman, Jon Newman, James Oakes, William Pryor, and J. Harvie Wilkinson have expressed these views. *See, e.g.*, Edwards, *Bureaucracy*, *supra* note 2; Newman, *supra* note 26; Pryor, *supra* note 2; Tjoflat, *supra* note 2, at 70–73; Wilkinson, *supra* note 2. *See also* Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982) (discussing the general difficulty of achieving consistency with larger groups of decision-makers, with particular reference to the Supreme Court).

The difficulty of managing a larger group to reach consistent decisions and to make group discussions function well is primarily a problem for appellate courts, both because of their mission and the collegial manner in which they make decisions. This means that Congress should be especially cautious about expanding the number of circuit judgeships.

Yet, problems of reduced consistency and, hence, clarity of law within a court's domain also affect district courts. Even at the district court level, having more judges makes consistency less readily attainable. Certainly, adding judges across a wider set of district courts—across a number of districts within one state or one regional circuit—has an even more pronounced impact on reducing consistency and clarity (as the mechanisms for addressing differences in interpretation and application of law are relatively few and weak apart from appeals to the circuit).

### 3. Risks to the Common Enterprise of Judging

Beyond these relatively clear and obvious effects of adding judges to the federal courts, there is another cost that should be considered: the risk that judges will have a diminished perception that they are engaged in a common endeavor with all of the judges participating cooperatively in an important, law-bound enterprise. This effect comes not just because having more judges reduces the perception of collegiality among the judges and increases the difficulty of making law bind as clarity and consistency declines. It follows as well from feeling that judicial selection and confirmation—and more pervasively the behavior of the judiciary—becomes politicized when judges are treated as players in a political conflict. While increasing the size of courts itself does not necessarily treat the courts as political, some types and magnitudes of expansion of the judiciary would. This issue is discussed further in Section II.C., below.

#### *B. Judgeships: A Litigant-Side View*

Obviously, what judges think and how adding to their number affects them is only one part of what should be examined. Another critical focus must be how the number and distribution of judges affects litigants (actual and potential). People and entities with disputes that do or might come before the federal courts have interests that can be grouped under headings of

quality, cost, and speed.

1. Quality Concerns: Judicial Craft

Quality consists in getting matters right, in interpreting and applying the law in sensible and predictable ways, and in providing guidance for future litigants that is meaningful. Crafting tests for the application of the law that are understandable takes both legal skill and a mindset that prizes clear thinking and careful attention to the elements of legal reading and writing.<sup>33</sup> Justice Antonin Scalia used to chide other judges and justices for reasoning he felt came up short on these measures. Famously, this provided grist for Scalian epigrams, such as his description of a balancing test as less like an actual balance that juxtaposes two sides of a scale and “more like judging whether a particular line is longer than a particular rock is heavy.”<sup>34</sup> Scalia’s concern for how judges should decide disputed questions of law also provided the basis for two serious books on legal reasoning and legal interpretation, among his other writings.<sup>35</sup>

Whatever other attributes judges should have, getting matters right, adhering to predictable rules, and articulating them clearly rank at the top of the list of qualities lawyers should want in a judge. In fact, doubts about the likelihood of getting a judge who fits these criteria is a frequently mentioned factor when lawyers opt out of the judicial system and turn to arbitration or other alternative dispute resolution vehicles.<sup>36</sup> For example, litigants describe the value of having decision-makers who understand the technical aspects of both the law and the technologies at issue in intellectual property disputes as important to their preference for particular dispute resolution

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<sup>33</sup> See, e.g., BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (Yale Univ. Press 1921); FREDERICK SCHAUER, *THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING* 171–79 (Harv. Univ. Press 2009); Ronald A. Cass, *Quality and Quantity in Constitutional Interpretation: The Quest for Analytic Essentials in Law*, 46 *EUR. J.L. & ECON.* 183 (2018); Paul D. Clement, *Why We Read the Scalia Opinion First*, 101 *JUDICATURE* 52, 53–55 (Spring 2017).

<sup>34</sup> *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in judgment).

<sup>35</sup> See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (Amy Guttmann ed., Princeton Univ. Press 1997); ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (West Pub. Co. 2012).

<sup>36</sup> See, e.g., HOWARD M. HOLTZMANN & JOSEPH E. NEUHAUS, *A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY* 3–4 (Wolters-Kluwer 1995).

options, especially those (like arbitration and mediation) that allow substantial control of the decision-maker's selection.<sup>37</sup>

## 2. Litigation Cost Control

Two other concerns of litigants are the cost and speed of getting matters presented to and resolved by the courts. The cost of litigation in large part is a function of its value. Simply put, the greater the amount that is at stake, the more litigants will spend fighting over it.<sup>38</sup> Of course, the rules that define the way litigation unfolds, the assignment of burdens of production and persuasion, and the methods available for accessing and testing information held by others and presenting the information to the decision-maker have significant implications for the costs of different proceedings. That is the basis for so much attention to rules of discovery, for example.<sup>39</sup> But the costs of legal contests (in different courts or different arbitration fora) cannot be taken as free-standing matters unrelated to the choices litigants make—and those choices will be determined in significant measure by the stakes.

Even so, judges who understand the rules of procedure and who have good practical judgment respecting what sort of leeway to give attorneys and where to draw the line against excessive gamesmanship can keep a lid on costs to some degree. Changes in rules respecting the plausibility of civil complaints' assertions and the evidentiary showings required to move forward with litigation may play a role in reducing costs of federal civil litigation.<sup>40</sup> Some judges (and potential judges) may be more supportive of these changes than others, and expectations on this score may explain different degrees of enthusiasm from members of the plaintiffs' and defendants' bars. But the contribution of an individual judge to higher or lower litigation costs

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<sup>37</sup> See, e.g., Kevin M. Lemley, *I'll Make Him an Offer He Can't Refuse: A Proposed Model for Alternative Dispute Resolution in Intellectual Property Disputes*, 37 AKRON L. REV. 287, 314–17 (2004).

<sup>38</sup> See, e.g., Christopher R. Drahozal & Keith N. Hylton, *The Economics of Litigation and Arbitration: An Application to Franchise Contracts*, 32 J. LEGAL STUD. 549 (2003); Emery G. Lee & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765, 769–76 (2010).

<sup>39</sup> See, e.g., *Costs and Burdens of Civil Discovery: Hearing Before the Subcomm. on Constitution of the S. Comm. On the Judiciary*, 112th Cong., 1st Sess., Dec. 13, 2011, available at <https://www.govinfo.gov/content/pkg/CHRG-112hhrg71623/html/CHRG-112hhrg71623.htm>.

<sup>40</sup> See, e.g., *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

is probably less easily determined than other matters and certainly is easily subject to overestimation.

### 3. Speedy Resolution

The third aspect of what litigants want in judging is speed. This is probably the aspect that is most correlated with public discussion of how many judges should sit on the federal courts. And it also is the quality most emphasized in various proposals to expand the number of judgeships, on both the district court and circuit court levels. For example, in recent hearings on the possible need for more judges, Representatives Hank Johnson and Darrell Issa both made the issue of delays in judicial decisions the central argument in favor of adding new judgeships.<sup>41</sup> Others who have argued for expanding the number of judgeships, including the JCUS, have made the case in terms of the workload for judges, at least obliquely making the issue about the speed with which litigation can be resolved.<sup>42</sup> This argument is worth taking seriously, and will be addressed in detail in Part III below. Respecting the *selection* of judges, however, as apart from the *number* of judges, it is generally desirable from the litigants' standpoint to have people on the bench who are serious, diligent, and efficient enough to resolve disputes expeditiously.<sup>43</sup>

#### C. *Bad Addition: Increasing Politicization of the Courts*

Politicians and pundits often criticize specific judges or specific decisions through a political lens, seeing judges as extensions of the sort of political combat that is daily fare for politicians and pundits. Judges are identified in these discussions by reference to the political party of the person who appointed them, and their decisions are categorized as supporting one

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<sup>41</sup> See Andrew Kragie, *Reps. Want to Add Lower Court Judges, But Divided on How*, LAW360, Feb. 24, 2021, available at <https://www.law360.com/articles/1358026/rep-want-to-add-lower-court-judges-but-divided-on-how>.

<sup>42</sup> See, e.g., Administrative Office of the Courts, *Judiciary Seeks New Judgeships, Reaffirms Need for Enhanced Security*, Mar. 16, 2021, available at <https://www.uscourts.gov/news/2021/03/16/judiciary-seeks-new-judgeships-reaffirms-need-enhanced-security>; Reinhart, *supra* note 1; Ruger, *supra* note 1.

<sup>43</sup> See, e.g., AMERICAN BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: SPEEDY TRIAL AND TIMELY RESOLUTION OF CRIMINAL CASES (3d ed., Am. Bar Ass'n 2006); Michael Heise, *Justice Delayed?: An Empirical Analysis of Civil Case Disposition Time*, 50 CASE W. RES. L. REV. 813, 814–15 (2000); Benjamin Weiser, *Judge's Decisions Are Conspicuously Late*, NY TIMES, Dec. 6, 2004, available at <https://www.nytimes.com/2004/12/06/nyregion/judges-decisions-are-conspicuously-late.html?>



or the other side of on-going political conflict.<sup>44</sup> Many scholars who write about the courts, especially the Supreme Court, follow suit, constructing models of judging based on evaluation of judges and decisions arrayed along a simple, linear, liberal-conservative line-up.<sup>45</sup>

Yet, for other scholars and commentators who write about the American judiciary, the more serious question is not whether there are divisions among the judges and justices but why the divisions are so modest. For the federal courts of appeals, panel decisions are unanimous more than 95% of the time, even on courts often portrayed as riven by political differences.<sup>46</sup> Unanimity is also the most common outcome for the Supreme Court, with only one or two dissents in many other instances—despite the fact that the Court takes a tiny proportion of litigated cases, selected largely because those cases have the least clear, least consistent legal framework governing the dispute.<sup>47</sup>

The explanation for this degree of law-boundedness on the federal

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<sup>44</sup> See, e.g., Brandon Bartels, *It Took Conservatives 50 Years to Get a Reliable Majority on the Supreme Court: Here Are 3 Reasons Why*, WASH. POST, Jun. 29, 2018, <https://perma.cc/V4L5-T42D>; Linda Greenhouse, *The Supreme Court's Power Play Against Labor*, NY TIMES, Mar. 1, 2018, <https://perma.cc/93E7-M4DK>; Linda Greenhouse, *Will Politics Tarnish the Supreme Court's Legitimacy?*, NY TIMES, Oct. 26, 2017, <https://perma.cc/XY72-CLR6>; Giovanni Russonello, *Roberts Sides with Liberals, Again*, NY TIMES, Jun. 30, 2020, available at <https://www.nytimes.com/2020/06/30/us/politics/supreme-court-abortion-roberts.html>.

<sup>45</sup> See, e.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 86–96 (Cambridge Univ. Press 2002); Tracey E. George & Lee Epstein, *On the Nature of Supreme Court Decision Making*, 86 AM. POL. SCI. REV. 323, 324–27 (1992).

<sup>46</sup> See, e.g., CASS, *RULE OF LAW*, *supra* note 22, at 35–45, 72–97, 150–51; *The District of Columbia Circuit: The Importance of Balance on the Nation's Second Highest Court*, Hearing Before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. On the Judiciary, 107th Cong. 45–54 (2002) (statement of Ronald A. Cass, Dean of Boston University School of Law) (noting unanimity of results in more than 98 percent of decisions from the D.C. Circuit, a court often described as deciding highly politicized cases and reflecting political influence on the judiciary); Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335, 1358–60 (1998) (providing a similar argument based on experience as a member of that court) (*Collegiality*). See also Kavanaugh, *supra* note 23, at 690 (explaining the manner in which collegial decision-making inclines panels toward cooperative resolutions).

<sup>47</sup> See, e.g., CASS, *RULE OF LAW*, *supra* note 22, at 63–65. During the Court's 2019 October Term, more than one-third of the Court's decisions were unanimous, and two-thirds had two or fewer dissenting votes. See *Supreme Court Cases, October Term 2019–2020*, BALLOTPEdia, [https://ballotpedia.org/Supreme\\_Court\\_cases,\\_October\\_term\\_2019-2020](https://ballotpedia.org/Supreme_Court_cases,_October_term_2019-2020) (cases and votes listed on site, calculation by author). See also STEPHEN J. BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 110 (Vintage Books 2005).

courts is that the judges and justices are committed to deciding cases under the law. That is the core of the collegial exercise they are devoted to, even if they criticize colleagues on occasion for straying off what they see as the better path.<sup>48</sup> In difficult cases, different approaches to interpreting the law, different methodologies for resolving interpretive conflicts, may lead to divergent conclusions about a case, but the commitment to law-bound decision-making remains critical to the proper functioning of the courts.

Increasing judgeships, however, can risk making courts seem more political. Some of the arguments for large increases in the number of judges in fact are predicated boldly on calls for changing judicial decisions that are disfavored for political reasons or, at best, for reasons that correspond closely with political judgments. Professor Calabresi, for example, called for a large expansion of the judiciary in large part to overturn the impact of President Barack Obama's judicial appointments.<sup>49</sup> Similarly, Democrats who are calling for the addition of four new seats to the Supreme Court have just as plainly explained that proposal as a means to reverse past or predicted future decisions in ways the proponents hope will result in outcomes that better fit their political preferences.<sup>50</sup> Even before that proposal was announced, the late Justice Ruth Bader Ginsburg and Justice Stephen Breyer had denounced the idea of adding positions to the Supreme Court as likely to appear politically motivated and to make the Court seem more political to the general public.<sup>51</sup>

The justices' warnings are sound. An appearance of politically-motivated addition of judgeships to the federal courts threatens courts along three fronts. *First*, it makes politicians even more likely to inject political

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<sup>48</sup> See, e.g., Edwards, *Collegiality*, *supra* note 46; Kavanaugh, *supra* note 23; Newman, *supra* note 26; Tjoflat, *supra* note 2; Wilkinson, *supra* note 2.

<sup>49</sup> See Calabresi & Hirji, *supra* note 1, at 1–5.

<sup>50</sup> See, e.g., Jess Bravin, *Democratic Lawmakers Present Plan to Expand Supreme Court*, WALL ST. J., Apr. 15, 2021, available at <https://www.wsj.com/articles/group-of-democratic-lawmakers-to-present-plan-to-expand-supreme-court-11618447336>.

<sup>51</sup> See, e.g., Ronn Blitzer, *Flashback: Ruth Bader Ginsburg Opposed Court-Packing, Said "Nine Seems to be a Good Number"*, FOX NEWS, Apr. 14, 2021, available at <https://www.foxnews.com/politics/flashback-ruth-bader-ginsburg-opposed-court-packing>; John Fritze, *"Think Long and Hard": Supreme Court Justice Stephen Breyer Pushes Back on "Court-Packing"*, USA TODAY, Apr. 7, 2021, available at <https://www.usatoday.com/story/news/politics/2021/04/07/supreme-court-justice-stephen-breyer-warns-against-packing-bench/7116124002/>; Jeff Mordock, *"Bad Idea": Justices Fear Appearance of Partisanship with Court Expansion*, WASH. TIMES, Apr. 16, 2021, at A1.

calculations into the process of selecting and confirming judges. After all, if the reasons for expanding the number of judgeships are, at least in part, to influence expected outcomes, there is every reason to make that the focus of judicial confirmations as well. *Second*, politically-motivated or apparently politically-motivated expansions of the judiciary will reduce public confidence that the judiciary functions apolitically and in keeping with the rule of law. Fear of that risk largely explains the defeat of FDR's infamous Court-packing plan. *Third*, in combination with changes associated with the first two problematic effects of politically-inspired expansions of the judiciary, such programs can diminish judges' sense of shared, collegial engagement in judging under law.<sup>52</sup>

The point here is not that every suggestion to expand the number of judgeships is political, although much of the demand for expansion may be intertwined with political considerations. The more important point is that, even if expanding the judiciary is justified on entirely politics-neutral ground, too great an expansion still risks looking political, coloring appointments as a result, and reducing trust in the courts because of it.

The same problem affects calls for increasing the number of judges in order to make the bench more representative of different demographic characteristics. As above, it is possible that calls for a more representative judiciary could be based on something other than preferences for particular decisions' outcomes. Instead, it may be based on a sense that—at least in some special cases—people of different backgrounds may have increased sensitivity to certain factors relevant to judicial decisions based on their own personal experience and that these different sensitivities might influence assessment of either factual or legal matters.<sup>53</sup>

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<sup>52</sup> See, e.g., Tjoflat, *supra* note 2..

<sup>53</sup> Social science research on whether and how much personal characteristics influence judicial decision-making is mixed. See, e.g., Claire Lim, Bernardo Silveira & James M. Snyder, Jr., *Do Judges' Characteristics Matter? Ethnicity, Gender, and Partisanship in Texas State Trial Courts*, 18 AM. L. & ECON. REV. 302 (2016) (finding insignificant impact of personal characteristics); Jeffrey J. Rachlinski & Andrew J. Wistrich, *Judging the Judiciary by the Numbers: Empirical Research on Judges*, 13 ANN. REV. L. & SOC. SCI. 203 (2017) (finding significant effects of personal characteristics in some categories of cases). Moreover, the implications of any finding of effects from personal characteristics are far from clear, given the ways in which behavior of legislators, litigants, and others will adjust.

The problem with arguments of this variety is not merely that they seldom are supported by meaningful data. More important, even if the arguments are credited on their own terms, they undervalue the core element of law-bound judging. As with more boldly political bases for expanding the judiciary, this approach to setting the size of the judiciary and the selection of judges risks making the judiciary appear to be more like another political-representative branch of government than a branch that embodies the value of judicial decision-making in keeping with the rule of law. Changes along this dimension could undermine both the appropriate functioning of the courts and the public's sense of courts' legitimacy. These are serious risks that are worth taking seriously.

### III. ASSESSING NEEDS: A CRITICAL LOOK AT THE DATA GAME

The arguments most assiduously advanced in support of expanding the number of federal court judgeships—certainly, the arguments taken most seriously outside the realm of pure politics—center around increased difficulties in timely processing of cases, backed by data respecting increasing caseloads for the federal courts. Examining those arguments reveals serious reasons to doubt the need to add judgeships. At the very least, this examination provides substantial basis for taking a modest approach to the issue rather than rushing to expand the judiciary.

#### A. *The Courts of Appeals: Increased Efficiency Has Short-Circuited Claimed Needs*

##### 1. Counting Cases vs. Resolving Cases: Crisis in the Courts?

The most glaringly flawed arguments concern the need for additional judges on circuits of the U.S. Court of Appeals. Advocates of expanding judgeships repeatedly have asserted that there is a crisis due to the rising number of cases.<sup>54</sup> While the appellate caseload increased from the 1960s

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*See, e.g.*, Eric A. Posner, *Does Political Bias in the Judiciary Matter? Implications of Judicial Bias Studies for Legal and Constitutional Reform*, 75 U. CHI. L. REV. 853 (2008).

<sup>54</sup> *See, e.g.*, Reinhart, *supra* note 1. *See also* Calabresi & Hirji, *supra* note 1, at 1 (referring to the “crisis of volume” in the district and circuit courts); Marin K. Levy, *The Need for New Lower Court Judgeships, 30 Years in the Making*, 117th Cong., 1st Sess., Hearing before Subcomm. on Courts, Intellectual Property, and the Internet, of HR Comm. on Judiciary, Feb. 24, 2021, available at <https://docs.house.gov/meetings/JU/JU03/20210224/111237/HHRG-117-JU03-Wstate-LevyM-20210224-U1.pdf> (exploring the rise in volume at various points and discussing times in which that

through the 1990s, it leveled off after that, and the number of cases has declined significantly over the past decade.<sup>55</sup> In fact, the number of cases in the federal courts of appeals in 2020 was almost ten percent below the number in 2000.<sup>56</sup>

In trying to determine how to manage the business of the courts and assess the resources (and resource allocations) needed, the Administrative Office of the United States Courts and the Judicial Conference of the United States recognized that simple counts of the number of cases were less useful than statistics that took account of the breakdown of cases by case type (roughly correlated to the cases' variation along lines of complexity, difficulty, and time-commitment required).<sup>57</sup> If other indicators suggested that the courts of appeals were unable to process cases with the speed that had been typical in prior years, careful examination of changes in case composition would be needed to uncover the sources of increasing delay and to identify proper solutions. As discussed below, the data at present do not suggest a slowdown that would require this inquiry.

Even trying to account for variation in caseloads by paying attention to the types of cases will not provide an easy metric for assessing how well courts are handling their current caseloads. It is critical to appreciate that assessments based on caseload may yield rough measures of the *expected* time taken to dispose of cases, but these often will diverge significantly from

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constituted a crisis).

<sup>55</sup> See Administrative Office of the United States Courts, *Statistical Tables for the Federal Judiciary—Table B1, U.S. Courts of Appeals*, ADMIN. OFFICE OF THE COURTS, Dec. 31, 2020, available at <https://www.uscourts.gov/statistics/table/b-1/statistical-tables-federal-judiciary/2020/12/31> (*U.S. Courts of Appeals, 2020*).

<sup>56</sup> See ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS: JUDICIAL BUSINESS OF THE UNITED STATES COURTS, 2000—STATISTICS & REPORTS, *Table B, U.S. Courts of Appeals* (2000), available at [https://www.uscourts.gov/sites/default/files/statistics\\_import\\_dir/boosepoo.pdf](https://www.uscourts.gov/sites/default/files/statistics_import_dir/boosepoo.pdf); Administrative Office of the United States Courts, *Statistical Tables for the Federal Judiciary—Table B1, U.S. Courts of Appeals*, ADMIN. OFFICE OF THE COURTS, Dec. 31, 2020, available at <https://www.uscourts.gov/statistics/table/b-1/statistical-tables-federal-judiciary/2020/12/31> (*U.S. Courts of Appeals, 2020*).

<sup>57</sup> See, e.g., David K. Maurer, Dir. Homeland Security & Justice, Gen'l Accountability Off., *Federal Judgeships: The General Accuracy of District and Appellate Judgeship Case-Related Workload Measures*, 113th Cong., 1st Sess., Statement to Subcomm. on Bankruptcy and the Courts, of HR Comm. on Judiciary, Sep. 10, 2013, available at <https://www.gao.gov/assets/gao-13-862t.pdf> (*Workload Measures*).

the *actual* time taken, as represented in the courts' case termination statistics, particularly the median times for terminations. This provides an important caution counterpoint to calls for increasing judgeships based on data that simply reflect the number of cases, a caution that needs to be joined with the understanding that cherry-picking caseload figures from specific years or specific courts can present a misleading impression of courts in crisis.

Instead of seeing steadily rising termination times in recent years, the courts of appeals have been closing cases (completing their work) more rapidly in the past decade—the time frame most relevant to assessing proposals to increase the number of judgeships now to deal with the courts' assertedly excessive workload. While the data on case terminations do not show a perfectly consistent trend year by year, the median time for deciding cases in the federal courts of appeals has been less for *every* year in the past decade (2011–2020) than it was in the decade's first year.<sup>58</sup>

**Table 1: Terminations — Medians by Circuits 2011–2020**<sup>59</sup>

Circuit	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
D.C.	10.8	10.3	12.3	13.7	13.3	12.6	12.2	11.5	10.7	10.5
First	11.6	10.7	11.4	12.1	12.9	11.1	13.4	13.4	13.0	12.8
Second	12.1	12.0	10.6	10.5	10.3	10.6	10.6	10.9	12.2	12.6
Third	9.2	7.5	5.9	7.1	8.3	6.5	8.1	7.9	9.6	8.5
Fourth	7.9	5.3	5.0	5.2	5.3	3.9	5.5	5.4	5.7	6.5
Fifth	9.8	9.0	9.3	8.9	9.4	8.8	10.2	9.4	9.1	9.9
Sixth	15.5	13.2	9.8	9.0	8.6	7.8	8.3	7.4	7.6	7.9
Seventh	9.4	8.1	7.8	7.0	7.1	6.4	8.1	8.4	8.7	8.8
Eighth	6.7	5.5	5.6	6.1	5.0	5.7	7.8	6.8	8.0	5.5
Ninth	16.8	14.9	13.1	12.4	14.3	15.1	12.5	11.2	10.8	13.0
Tenth	9.0	8.1	8.0	8.4	8.0	6.4	8.3	8.5	9.6	10.0
Eleventh	8.3	7.3	7.5	7.2	7.4	4.3	8.3	7.6	7.7	7.7
<b>All Circuits</b>	<b>10.8</b>	<b>9.6</b>	<b>8.9</b>	<b>8.4</b>	<b>8.6</b>	<b>7.4</b>	<b>9.0</b>	<b>8.5</b>	<b>8.9</b>	<b>9.3</b>

<sup>58</sup> See ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 2010 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS at 15–18 (2010); *U.S. Courts of Appeals, 2020*, *supra* note 55; Table 1, below, *Terminations — Medians by Circuits 2011–2020*.

<sup>59</sup> Table based on information provided by Administrative Office of the United States Courts.

If the comparison is with the time taken 30 years earlier, the difference is even more dramatic. In 1990, the federal courts of appeals' median time to close cases was 15.7 months, a number approximately 69% higher than in 2020 and more than twice the time taken by the courts of appeals in FY 2016.<sup>60</sup> These data suggest that something is happening that should blunt the sense of crisis, something that explains what certainly appears to be a rising efficiency in the courts' handling of appellate filings that has more than compensated for the courts' caseload. Moreover, a look at where circuits rank in terms of the median time taken from filing of a notice of appeal or docketing to final disposition shows no relation at all to the number of cases in the circuit.

**Table 2: Filings and Median Times to Termination — FY 2020<sup>61</sup>**

<b>Circuit</b>	<b>Number</b>	<b>Median Time (Months)</b>
Eighth	2,281	6.1
Fourth	2,768	6.2
Eleventh	3,237	7.4
Sixth	3,000	7.9
Third	1,996	8.5
Seventh	1,360	9.0
<b>All Circuits</b>	<b>30,071</b>	<b>9.1</b>
Fifth	3,710	9.4
Tenth	1,234	10.1

<sup>60</sup> Calculations based on information provided by Administrative Office of the United States Courts. See ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL JUDICIAL WORKLOAD STATISTICS, 1990, at 17–25 (Dec. 31, 1990); Administrative Office of the United States Courts, *Federal Judicial Caseload Statistics, 2016—Table B, U.S. Courts of Appeals, Cases Commenced, Terminated, and Pending*, ADMIN. OFFICE OF THE COURTS, Mar. 31, 2016, available at [https://www.uscourts.gov/sites/default/files/data\\_tables/fjcs\\_b\\_0331.2016.pdf](https://www.uscourts.gov/sites/default/files/data_tables/fjcs_b_0331.2016.pdf); *Table—Courts of Appeals Terminations, Medians 2011–2020*, *supra* note 58; *U.S. Courts of Appeals, 2020*, *supra* note 55.

<sup>61</sup> Table based on information provided by Administrative Office of the United States Courts.

D.C.	466	11.1
Ninth	6,680	12.5
First	887	12.6
Second	2,452	12.8

The data here, as well, are at odds with the story that sharply increased case filings have overwhelmed courts of appeals' ability to make timely decisions.

## 2. Increasing Efficiency in the Courts of Appeals

Although the reduction in time taken for deciding appeals is not susceptible to a single, all-encompassing explanation, the most obvious—and most compelling—explanation for the appearance of greater efficiency on the part of the U.S. Courts of Appeals is that in fact there has been an increase in efficiency on the part of the U.S. Courts of Appeals. This is an example of the wise observation attributed to Yogi Berra: you can tell a lot just by looking.

### i. Efficiency-Enhancing Technology

One cause of the increase in efficiency—again, something that should be obvious—is that the technology used by the judiciary has improved.<sup>62</sup> Like much of the rest of the world, especially in advanced economies such as the United States, the federal courts have access to better computing, better word processing, better electronic research facilities, and better communications services.<sup>63</sup> All of this allows the people working on managing cases, researching and writing opinions, and coordinating the work with one another to be more efficient, to do their work faster, to work better collaboratively, and to be productive in a far greater variety of places and settings than was the case a decade or two or three ago. And, as with the intersection of these changes with the rest of the world, there is no reason to

<sup>62</sup> See, e.g., Pryor, *supra* note 2.

<sup>63</sup> For explanation of some of the changes in information and communication technologies, see, e.g., Makada Henry-Nicke, Kwado Frimpong & Hao Sun, *Trends in the Information Technology Sector*, BROOKINGS INST., Mar. 29, 2019, available at <https://www.brookings.edu/research/trends-in-the-information-technology-sector/>; Sol Rogers, *The Role of Technology in the Evolution of Communication*, FORBES, Oct. 15, 2019, available at <https://www.forbes.com/sites/solrogers/2019/10/15/the-role-of-technology-in-the-evolution-of-communication/?sh=79f11520493b>.



think that improvements in the relevant technologies have reached an end.<sup>64</sup>

ii. Efficiency Enhancement: Support Personnel

In addition to efficiency-enhancing changes in technology, courts (and those who use them) have benefitted from improvements in the number and range of support personnel. Judges on the courts of appeals now routinely hire three or four clerks, many of them with experience as lawyers, economists, statisticians, or in other professional work that can be helpful to review of case-related submissions and to assisting in the judges' opinion-writing tasks as well.<sup>65</sup> This is a major change from the days, not so long ago, when judges had only clerical help and one or perhaps two clerks fresh out of law school. (Of course, clerical assistance was a critical resource when everything the judge produced had to be typed and re-typed each time there was a change or an error was discovered.)

In addition to the support personnel working for individual judges, many circuit courts of appeals employ large professional staffs to help process motions respecting dismissal, deal with criminal sentencing issues, and provide special attention to cases involving pro se litigants.<sup>66</sup> The change in court personnel has especially profound implications for efficiency when viewed in combination with improved technology, which increases the value of these assistants, both individually and in combination.

iii. Existing Additional Judicial Personnel: Senior Judges

Yet another source of efficiency enhancement represented in inter-tem-

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<sup>64</sup> See, e.g., David Rotman, *We're Not Prepared for the End of Moore's Law*, MIT TECHNOLOGY REV., Feb. 24, 2020, available at <https://www.technologyreview.com/2020/02/24/905789/were-not-prepared-for-the-end-of-moores-law/> (explaining both predictions of a slowing rate of increased transistors on silicon wafers and predictions about continued avenues for technological advances). This is a separate question from the rate at which improvements will occur and the value streams associated with those improvements.

<sup>65</sup> See, e.g., Gregg Costa, *Clerking to Excess? The Case Against Second (and Third and Fourth Clerkships)*, 102 JUDICATURE 22 (Fall/Winter 2018); Newman, *supra* note 26.

<sup>66</sup> See, e.g., Administrative Office of the United States Courts, Press Release: *Staff Attorney Offices Help Manage Rising Caseloads*, ADMIN. OFFICE OF THE COURTS, Feb. 17, 2004, available at <http://www.nonpublication.com/stffattys.htm>.

poral comparisons of judicial output—and another reason for taking a cautious approach to crediting pleas for additional judgeships—is the greater use of other judges, not included in the count of authorized judgeships, to hear and decide appeals. There are 179 positions for active judgeships on the federal courts of appeals, but there also are an additional 114 Senior Circuit Judges as of this writing. If each Senior Judge carries just 25% of the caseload typical for an active judge (many carry much more), this corps of Senior Judges adds an additional one-sixth to the courts of appeals' available judicial capacity. That is the equivalent of creating 30 new judgeships, given the current number of authorized judgeships.

iv. Reallocating Resources to More Legally Challenging Cases

Another reason that the courts of appeals have been increasingly efficient in resolving cases has been the redistribution of judicial resources toward producing precedential opinions only in a subset of cases. This process has been criticized as exalting managerial interests of judges over fairness to litigants, but the current allocation of judicial resources is more reasonably characterized as enhancing both the quality of judicial decisions and fairness to litigants.

The allocation of resources is a function that every organization performs, whether carefully planned and publicly acknowledged or by inattention. It is sensible to use the court's central resources of judicial attention to assure that the cases that fit least clearly within the confines of established law are decided and explained in ways that make legal rules clear and consistent.<sup>67</sup> Cases for which the governing legal principles are readily identified and not seriously in doubt should be resolved in a manner that is expeditious and that also provides attention to factual issues that are in dispute, but that also recognize the greater ability of front-line fact-finders to make that set of judgments. Resolving cases more quickly by giving the right sort of attention to each category of cases also provides a process that serves the interests of the participants, without denying anyone his or her "day in court."<sup>68</sup>

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<sup>67</sup> See, e.g., Pryor, *supra* note 2.

<sup>68</sup> For a more general review of this subject, outside the immediate context of allocation of judicial resources presented here, see, e.g., Robert G. Bone, *Rethinking the "Day in Court" Ideal and Non-party Preclusion*, 67 NYU L. REV. 193 (1992).

v. Not All Cases Are Alike: Why Appearances Can Be Deceiving

Finally, the apparent increase in efficiency also may reflect changes in the way cases are counted. One change that was made in the 1990s in the statistics kept by the Administrative Office of the U.S. Courts provided for treating successive habeas corpus petitions as independent case filings. This doubtless contributed to the appearance of large increases in the cases coming before the courts while also reducing the average time taken for disposition of cases by circuits with large numbers of such filings.

These record-keeping changes appear to have been responses to enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).<sup>69</sup> In particular, the AEDPA changed the standard for use of federal habeas petitions to review criminal convictions in state courts, providing that the writ would issue only if the state court's decision was found to be "contrary to, or involved an unreasonable application of, clearly established Federal law."<sup>70</sup> Court decisions in the succeeding decade interpreted this as a significantly stricter standard than had applied before the AEDPA.<sup>71</sup> It is not clear whether (and how much) those decisions moderated the effects of the change in reporting that followed AEDPA's enactment. And, even if decisions clarifying the scope of federal habeas review did alter the impact of changing how cases are counted (affecting filings and termination efficiency), those effects on the data at times doubtless have been swamped by other changes in the case law that open new avenues for successive habeas filings.<sup>72</sup>

It is not necessary to reach a firm conclusion on the magnitude of the effects produced by this particular change in data collection and categorization to appreciate that the possible impact reporting changes might have

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<sup>69</sup> The AEDPA was enacted as Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code).

<sup>70</sup> 28 U.S.C. § 2254(d)(1) (2006).

<sup>71</sup> See, e.g., Knowles v. Mirzayance, 556 U.S. 111, 121–23 (2009); Wright v. Van Patten, 552 U.S. 120, 125–26 (2008) (per curiam); Schriro v. Landerigan, 550 U.S. 465, 473, 478 (2007); Carey v. Musladin, 549 U.S. 70, 76–77 (2006); Rompilla v. Beard, 545 U.S. 374, 380 (2005); Lockyer v. Andrade, 538 U.S. 63, 75–76 (2003); Williams v. Taylor, 529 U.S. 362, 411 (2000).

<sup>72</sup> See, e.g., Welch v. United States, 136 S. Ct. 1257 (2016); Johnson v. United States, 136 S. Ct. 12 (2015); United States v. Booker, 543 U.S. 220 (2005); Apprendi v. New Jersey, 530 U.S. 466 (2000).

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had provides another reason for caution in making alterations to the federal courts—especially alterations, such as adding judges, that have long-lasting effects. Any decisions on the structural components of the judicial system should rest on solid information, not on perceptions that might reflect bureaucratic adjustments in recordkeeping rather than actual changes in the performance of the courts.

### Summary

Ultimately, when one looks at the changes in operation of the courts of appeals—the evolution of technology, personnel, and management—the sense of crisis should evaporate. The feeling that things are not so bad as the Chicken Littles declare should be buttressed by noting that we are not today observing a mass exodus of federal circuit judges who are simply too overburdened by work to press on.

Moreover, it is crucial to keep in mind the special reasons for hesitation when considering adding to the courts of appeals. There are both serious costs to the functioning of this collegial enterprise from adding judgeships and more readily available (and less risky) options for addressing temporary needs through reassignment of judges on short-term bases. It is fitting that the JCUS's recent recommendations request only two additional judgeships for one appellate court, the Ninth Circuit, and even that request (downsized from the JCUS's last prior request of five judges for that court, more than double the request being made now) may prove unnecessary or unwise. Specific judgment on that score, however, is outside the scope of this essay.

### *B. The District Courts: Needs, Wants, and Whiffs*

The picture for district courts is different, but also merits scrutiny. The discussion below is not in the form of argument that no additional judgeships for district courts are sensible nor that specific additions proposed by JCUS should be denied. Instead, the discussion is designed to raise issues that should be considered before additional judgeships are created and to give examples of proposals that seem on their face justified or curiously out of keeping with the available data.

#### 1. Criteria for Evaluating Adding Judgeships to District Courts

District courts differ from courts of appeals primarily because most of

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what district judges do involves individual decisions on case management, trial supervision, and resolution of legal questions. Risks to a collegial enterprise exist in the sense that all the legal decisions of district judges affect the pattern of law within that district or the circuit in which the judge sits, even if the district judges' decisions do not bind other judges. Any additional judgeship does impose some potential costs on the collective enterprise. But independent decision-making and lack of precedential control are major distinctions between the district courts and the circuit courts.

Nonetheless, several factors should be examined before accepting any proposed expansion. Accepting the asserted bases of responding to increased caseloads and increased delay in case resolution suggests the following inquiries:

*First*, where do courts rank relative to other courts on measures of caseloads, especially weighted-filings?

*Second*, where there is a concern over a particularly heavy caseload in a given district—especially where a caseload has risen considerably—is the change over the period of time examined part of a pattern of continuous growth in cases relative to other courts or only a relatively recent phenomenon?

*Third*, what explains the change in caseload?

On the last of these considerations, those who are charged with reviewing requests for additional judgeships should ask a series of further questions on the explanation for what has been observed: (1) Was an increase in cases caused by a change in the law that could be expected to have the same effect on cases into the future? (2) Was a recent increase in cases caused by a temporary change in policy or practice, as with a surge in immigration that affects districts close to the border? (3) Has there been growth in population and other drivers of litigation (something that might be expected to continue and to support continued growth in demand for federal courts' time and attention)? (4) Finally, have positive effects on case termination efficiency that might be associated with changes in technology, support personnel, and use of magistrate judges or senior judges already been fully ex-

ploited, or are there additional efficiencies that changes along these dimensions might provide?

This last measure is particularly difficult to make sense of on the fly, as it were; the only information readily available is the comparison of civil case termination times (overall and for tried cases) with the national median. Given the differences among civil cases and the number of different variables that affect case terminations for civil cases, these figures are merely notional as to the efficiency of a particular district and the burden the judges face in handling both the overall set of cases and those involving civil trials. While the case termination times are noted below, they are not given the same weight as case termination information at the appellate level or as other information relevant to burdens (current and expected) at the district court level.

## 2. Cases Considered

A few examples from the JCUS proposal may help clarify the way the considerations suggested above might assist evaluation of the case for adding judges, although they only look at a subset of more accessible data from among the considerations suggested.<sup>73</sup>

First, consider the JCUS request for one additional judge for the Northern District of Florida. In 2019, ND-FL ranked in the top 10 districts in the nation in terms of filings (3d) and weighted filings (5th). Its absolute number of filings and weighted filings and rank relative to other districts have been rising over the past 30 years (not at a constant pace, but on a fairly discernable upward trajectory), and the population and economy in the area have been on a similar upward trajectory, suggesting a continuing need for additional resources. These considerations on their own seem to support the JCUS request. One other consideration is more ambiguous. The district is one of the most efficient in terminating civil cases, with a median of 5.6 months for all cases and 27.1 months for tried cases, compared to the national medians of 9.9 months overall and 51 months for tried cases.<sup>74</sup>

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<sup>73</sup> Calculations in this section are based on information provided by Administrative Office of the United States Courts for fiscal years 1990, 1995, 2000, 2005, 2010, 2015, and 2019. 2019 is used as the most recent year for comparison purposes because of the effects of the COVID-19 pandemic on trials and trial court activities during 2020.

<sup>74</sup> The figure for ND-FL tried case terminations is taken from 2018, although the national median

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In almost the same vein, JCUS recommended increasing judgeships in Arizona. Again, the absolute and weighted filings for this district place this in the top cohort of federal districts, ranking 6th in total filings and 7th in weighted filings. The relative position of the AZ court has not changed appreciably over time—it ranked 7th in weighted filings in 1995 and 9th in 2010—but it retains one of the heaviest caseloads in the nation. It also is in a state and district that has a rising population and growing economy (also trends that have been maintained for years), making it likely that demand for court resources there will continue. As for civil case terminations, this district ranks among the less speedy both in cases overall (11.7 months) and tried cases (58.5 months). Whether the demands faced by this district justify a nearly 40% increase in judgeships is a different question, but adding judgeships in a district such as this seems easily supported.

In contrast, consider the Northern District of Alabama and the District of Kansas. JCUS recommended converting a temporary position to a permanent one for both courts. However, in 2019, D-KS ranked 74th among the 94 federal judicial districts for both total filings and weighted filings and has not been above the bottom third of all districts in filings or above the bottom half in weighted filings in the past 30 years. ND-AL is a bit more deserving, but just barely. It ranked 71st in filings and 65th in weighted filings in 2019. While these figures are below the district's rankings in most other years, it has almost never been inside the top third of districts in either category, save for one time on total filings more than 25 years ago. These calculations alone should be enough to make any additional permanent judicial positions questionable. Finally, D-KS has the third slowest case terminations for tried cases (ranking 92d of 94 districts) and 93d in overall time for case terminations. These figures merit inquiry into whether there are efficiencies to be had in case management without adding additional personnel.

Another example of a questionable use of resources is the JCUS recom-

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is from 2019. There were no figures available for ND-FL on this measure for 2019. The overall civil case termination figure, however, is from 2019.

mentation to add two new, permanent judgeships to the 15 positions already allocated to the Eastern District for New York. ED-NY does rank in the top third of all districts in both filings (25th place) and weighted filings (27th place) as of 2019, but its position relative to other districts has been dropping in the more important weighted filings category, going from 19th in 1995 to 24th in 2010 to 27th in 2019. That does not suggest a pressing, much less a growing, need. It certainly does not suggest a need that merits a permanent addition of judicial personnel looking to the future. And the fact that New York's population has declined over the past decade, and that the rate of decline has accelerated in the past five years, further undercuts an assumption that there is a need to be met or that this is a good investment of judicial resources. Further, ED-NY ranks reasonably well in terms of its overall civil case termination time (8.2 months compared to the national median of 9.9 months) but near the bottom of the list in time taken for tried cases (ranking 87th). If there is a basis for adding two judgeships to ED-NY, it is not apparent from the most relevant and easily accessed data.

#### Summary

Fortunately, the Administrative Office of the U.S. Courts for many years has been assembling data that are useful to analysis of the need for allocating judicial resources to particular federal district courts. Looked at in context—both at the data over time rather than simply those gathered for a single year and viewed together with other data indicative of rising or declining need for judges' attention—the data should be able to make a conclusive case that additional judges are needed before moving to expand the ranks of judges for a given district. It is far from apparent that this is the case across the board for current JCUS recommendations.

#### CONCLUSION

There is special need for caution in adding judgeships to the federal courts. This enterprise carries risks of politicizing the courts and diminishing the appearance, if not the reality, of adherence to the rule of law. Moreover, even the core, data-based arguments for expansion expose the need for caution, given degree of variation in the data over time and the differ-



ence for appellate courts in particular between *caseloads* and case *terminations* as evidence of the need for judges to increase the speed with which cases are resolved. Congress should *only* add judgeships to a court where there is (1) a demonstrated need based on the difficulty of speedy resolution of cases, (2) a continuous trend of rising delays not explicable on other bases, and (3) sound reasons to believe that the explanation for the occurrence and projected continuation of difficulty effecting reasonable times for case terminations makes improvement from additional judges worth the associated risks. If America is to remain a nation that trusts judges, those who design the judiciary should assure that its expansion is driven by sound reasons and takes account of the real costs adding judges can bring.