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Proposed Judgeship Bill

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MEMORANDUM

TO: The Senate and the House of Representatives

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RE: Executive Summary of Article III Judgeships Memo

DATE: November 7, 2017

I. Introduction

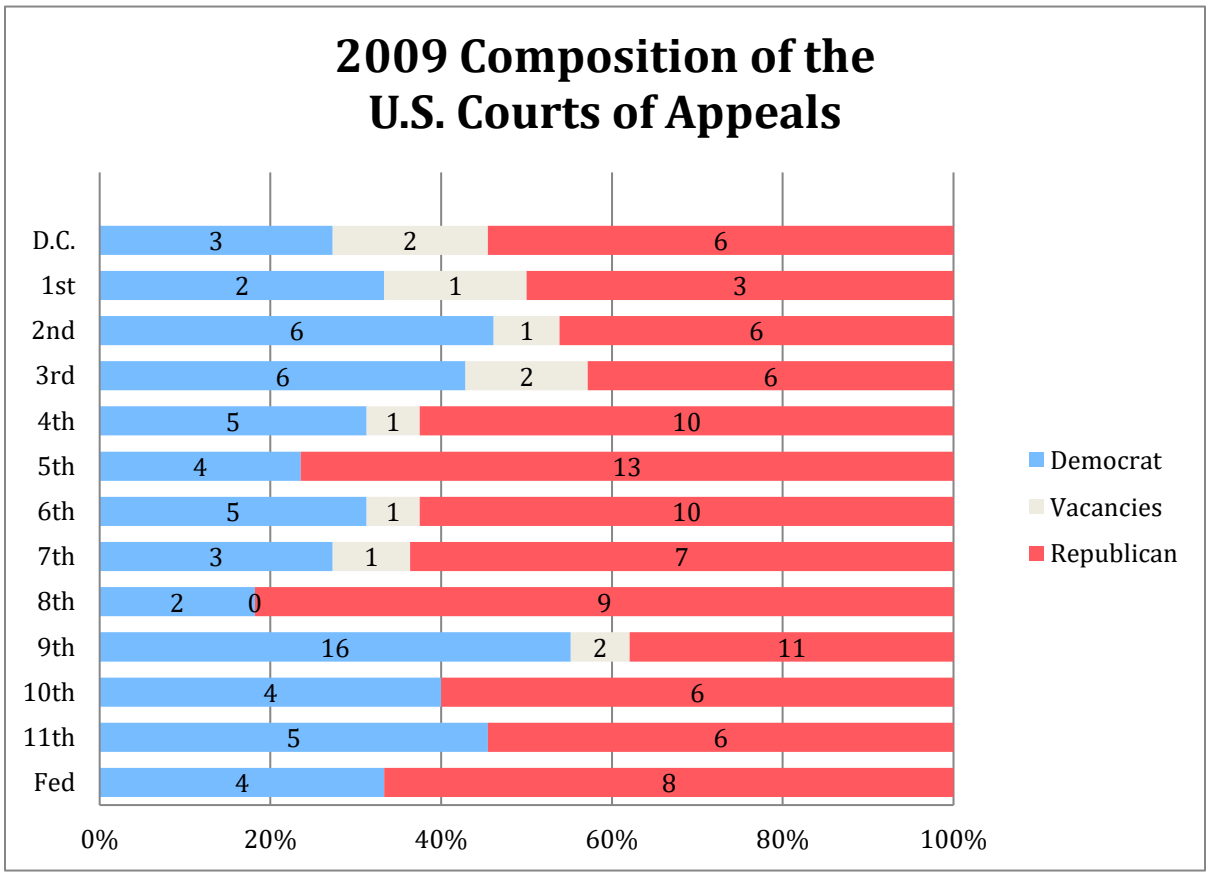
Over the past twenty-five years, the caseloads of federal district and circuit courts have grown to unprecedented levels such that it is widely acknowledged that they are now experiencing a "crisis in volume." Moreover, Congress has not passed a new omnibus judgeship bill since 1990, yet federal district court filings have increased 32.5%, from 265,290 to 351,451, and federal circuit court filings have increased 46.9%, from 40,898 to 60,099, since that time. Instead of enacting a long overdue judgeship bill, Congress has chosen to authorize in piecemeal fashion only a 4% increase in district judgeships and no increase in circuit court judgeships since the last omnibus judgeship bill was passed. The consequence of this has been disastrous for the administration of justice, and particularly for the quality of appellate justice litigants receive when they come before the circuit courts. Given Congress's failure to authorize more judgeships, the courts of appeals have had to give themselves additional capacity by delegating much of their workload to central staff and law clerks, limiting oral argument, and issuing unpublished opinions in the majority of cases. With Republican control over the federal government now, the 115th Congress has a rare opportunity to remedy this grave problem by passing a judgeship bill that would greatly expand the size of the circuit and district courts. Furthermore, it could accomplish this in a cost-effective manner by abolishing 158 of the most powerful administrative law judges and replacing them with Article III Administrative Law Judges; this would also help restore the separation of powers and rule of law to agency adjudications. In doing so, Congress could achieve another important reform: undoing the judicial legacy of President Barack Obama.

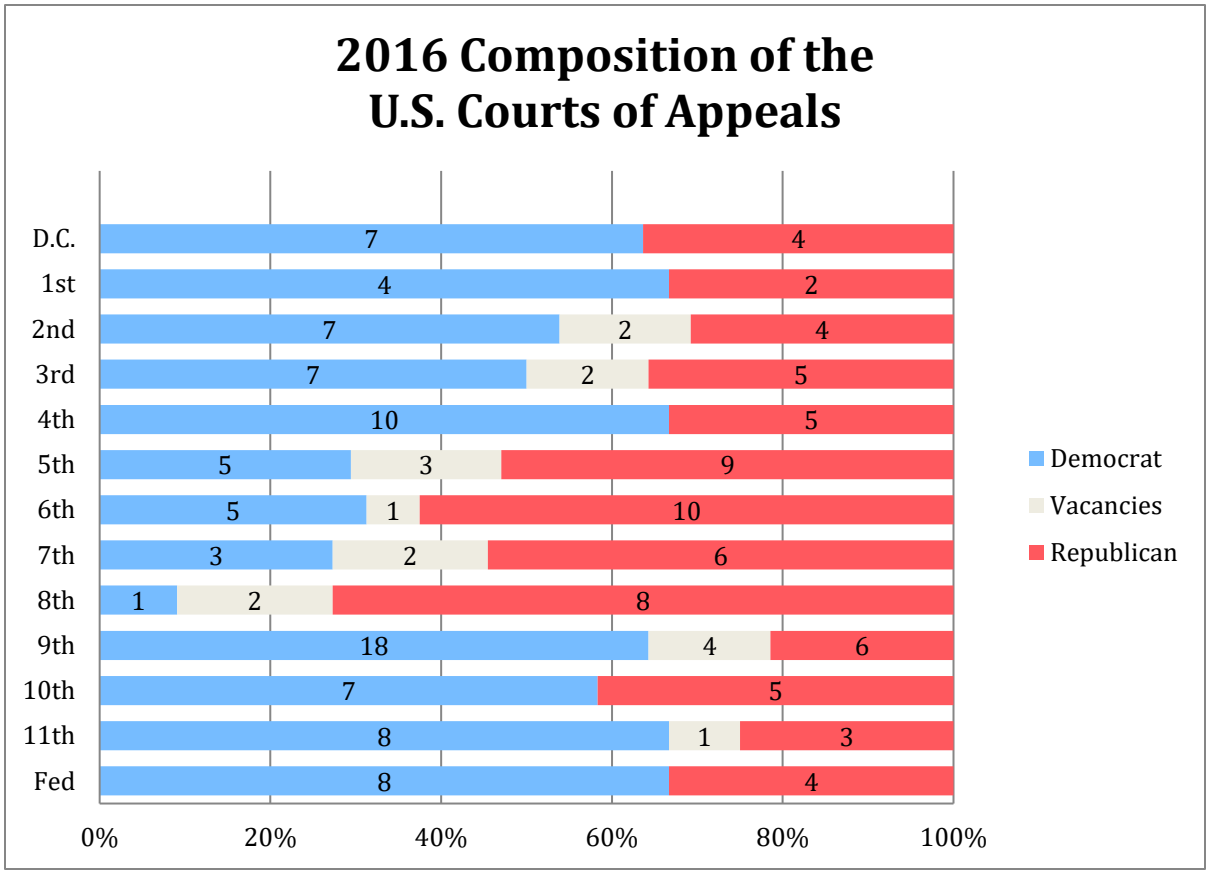
II. Undoing President Barack Obama's Judicial Legacy

During his eight years in office, President Barack Obama appointed 55 of the current 179 appeals court judges (including the Federal Circuit).[1] The two charts bellow[2] illustrate the effect this has had on the composition of the federal courts of appeals. In 2009 when President Obama first took office, ten out of the 13 federal courts of appeals had a majority of

[1] Lawrence Hurley, *Obama's Judges Leave Liberal Imprint on the* Law, Reuters, http://www.reuters.com/article/us-usa-court-obama-idUSKCN1110BC.
[2] *Factbox: Cases where Obama judges on appeals courts left a mark*, Reuters, http://www.reuters.com/article/us-usa-court-obama-cases-factbox-idUSKCN1110BK.

active judges that were appointed by Republican presidents, two courts had an equal number of judges appointed by Republican and Democratic presidents, and only 1 court—the Ninth Circuit—had a majority of judges appointed by Democratic presidents. This was accomplished, in part, by the refusal of Senate Democrats to confirm Bush nominees between 2001-2003 and 207-2009 when the Democrats had a majority in the Senate. Another major factor was the unprecedented use by Senate Democrats of the filibuster for lower federal court nominees. Tellingly, Senate Democrats abolished the filibuster of lower federal court nominees once Obama was in the White House. As a direct result of these highly partisan and unprecedented tactics, a sufficient number of Republican-nominated judges retired and were replaced with Obama nominees such that most of the courts of appeals now have a majority of judges appointed by a Democratic president; nine courts of appeals have a majority of judges appointed by a Democratic president and only four courts of appeals—the Fifth, Sixth, Seventh, and Eighth Circuits—have a majority of judges appointed by a Republican president. This has led to dramatic changes in the jurisprudence among several of the circuit courts.





When President Barack Obama entered the White House in 2009, the Fourth Circuit was one of the most conservative circuit courts in the country.[3] Eight years later, Democratic appointees hold a 10-5 majority on the 4th U.S. Circuit Court of Appeals, and the court has produced some of the most activist liberal opinions in recent years. For example, on July 29, 2016, when a three-judge panel on the Fourth Circuit comprising two Obama appointees—Judge Henry F. Floyd[4] and Judge James A. Wynn Jr.[5]—and one Clinton appointee—Diana Gribbon Motz[6]—struck down North Carolina's voter identification law, holding that it had violated the Fourteenth Amendment because it was motivated by

[3] *Factbox: Cases where Obama judges on appeals courts left a mark*, Reuters, http://www.reuters.com/article/us-usa-court-obama-cases-factbox-idUSKCN1110BK.
[4] *Judge Henry F. Floyd*, United States Court of Appeals for the Fourth Circuit, http://www.ca4.uscourts.gov/judges/judges-of-the-court/judge-henry-f-floyd.
[5] *Judge James A. Wynn, Jr.*, United States Court of Appeals for the Fourth Circuit, http://www.ca4.uscourts.gov/judges/judges-of-the-court/judge-james-a-wynn-jr-.
[6] *Judge Diana Gribbon Motz*, United States Court of Appeals for the Fourth Circuit, http://www.ca4.uscourts.gov/judges/judges-of-the-court/judge-diana-gribbon-motz.

"discriminatory racial intent."[7] In doing so, the panel reversed the decision of a George W. Bush-appointed district judge, which had upheld the law.[8]

The election law at issue in the case was passed in 2013.[9] Among other things, the law required voters to show government-issued photo ID, shortened the length of early voting from seventeen to ten days, and ended same-day registration.[10] In reversing the district court's judgment, the panel was required to show that the lower court's findings were "clearly erroneous," notwithstanding the fact that the district court's opinion totaled 485 pages and had prompted the panel to "commend" the district court for the "thoroughness" of its opinion.[11] Still, the Fourth Circuit held the district court's findings were "clearly erroneous" even though African-American electoral participation in North Carolina had increased after the passage of the law, the court could not point to any evidence of a discriminatory purpose, and the plaintiffs could not produce any person who had been denied access to the vote because of the law.[12] Moreover, several other states have had similar laws on the books for years, and the Supreme Court had upheld a very similar Indiana law as constitutional in *Crawford v. Marion County Election Board* in 2008.[13]

Ignoring these inconvenient facts, the court's opinion turned on a flimsy "totality of the circumstances" rationale that did not rely on any evidence that the law was motivated by a racially discriminatory purpose or that the law had prevented African Americans from voting.[14] The case has been derided as an example of judicial overreach and as a "particularly zealous display of judicial deception."[15] As the National Review's editorial board put it: "The Fourth Circuit went out of its way to ignore evidence, impugn the motives of North Carolina's legislature, and concoct specious legal rationales to forward a political agenda."[16]

The D.C. Circuit is another circuit court where the balance of power has been changed. Before President Obama took office, conservatives enjoyed a 6-3 majority on the court. However, after Senate Democrats eliminated the filibuster and helped Obama force through four appointments to the court, Democratic appointees now have a 7-4 lead on the court. Like the Obama appointees on the Fourth Circuit, his appointees on the D.C. circuit have taken advantage of their new majority on that court to steer the law in a liberal direction.

For example, on June 14, 2016 a three-judge panel of the U.S. Court of Appeals for the D.C. Circuit issued a 2-1 opinion upholding the Federal Communications Commission's (FCC)

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[7] N. Carolina State Conf. of NAACP v. McCrory, 831 F.3d 204 (4th Cir. 2016).
[8] N. Carolina State Conf. of the NAACP v. McCrory, 182 F. Supp. 3d 320 (M.D.N.C. 2016).
[9] *McCroy*, 831 F.3d at 214.
[10] *Id.* at 217.
[11] *Id.* at 214.
[12] The Editors, *Restore North Carolina's Sensible Voter-ID Law*, National Review, http://www.nationalreview.com/article/438810/north-carolina-voter-id-law-should-be-restored
[13] *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008); George Leef, *The Vote Fraud Problem is Real and the Fourth Circuit Just Made it Worse*, Forbes, http://www.forbes.com/sites/georgeleef/2016/08/18/the-vote-fraud-problem-is-real-and-the-fourth-circuit-just-made-it-worse/3/#5463c64e5169
[14] *McCroy*, 831 F.3d at 220.
[15] National Review, *supra* note 9.
[16] *Id.*

decisions to compel broadband providers to follow its so-called "net neutrality" rules.[17] In doing so, the D.C. Circuit upheld the adequacy of the FCC reasoning to reclassify broadband access as a common carrier service under Title II of the Communications Act, even though it flew in the face of decade-long policy the FCC had in which broadband providers were deemed to be outside the scope of Title II regulation.[18] The opinion was written by Bill Clinton-appointee, Judge David S. Tatel, and was joined by Obama-appointee, Judge Sri Srinivasan, over the dissent of Ronald Reagan appointee, Judge Stephen Williams.

This case is another instance of the administrative state run amok. The court's rubber stamp approval of the FCC's reclassification scheme "treats modern-day Internet service providers (ISPs) as if they were monopoly-era common carriers."[19] In doing so, the FCC refused to perform any cost benefit of its "net neutrality" rules that have been described as "draconian," nor did it choose to engage with the important economic issues underlying its decision.[20] Still, a bare majority of judges appointed by Democratic presidents abdicated their responsibility to assess whether the FCC's about-face on its decade-long broadband policy was truly justified. Instead, they chose to facilitate the lawlessness that has characterized the administrative state under Obama's presidency. Judge Williams gave voice to these criticisms in his dissent where he explained how the FCC's reclassification decision was "arbitrary and capricious" and permitted the agency to behave like an out-of-control "bicyclist who rides now on the sidewalk, now the street, as personal convenience dictates."

III. The Need for a New Judgeship Bill Can be Justified by The Crisis in Volume

a. Caseloads have reached unprecedented levels

One of the most straightforward ways for Republicans to address this problem is to make the case for a new judgeship bill that would enable the President to appoint a sufficient number of new judges that would help to change the balance of power on each of the circuit courts back to a conservative majority. This memorandum helps make that case by focusing on the problem of the federal courts' caseloads and unpublished opinions.

It is well established among virtually all who study or practice before the federal courts that the federal judiciary has been experiencing a "crisis in volume" for several years now.[21] Since the last comprehensive judgeship bill for Article III courts was enacted in 1990—the

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[17] U.S. Telecom Assn. v. Fed. Commun. Commn., 825 F.3d 674 (D.C. Cir. 2016)
[18] *Id.*
[19] Hal Singer, *Court Lets FCC Ignore Economics In Net Neutrality Ruling; Congress Must Ensure That It Can't Ever Again*
http://www.forbes.com/sites/halsinger/2016/06/15/in-open-internet-ruling-the-d-c-circuit-defers-to-an-economics-free-agency/#496374f51f7d
[20] *Id.*
[21] *See e.g.*, Commission on Structural Alternatives for the Federal Courts of Appeals, Final Report 14 (1998) [hereinafter Structural Alternatives Report]. Daniel J. Meador, Appellate Courts: Staff and Process in the Crisis of Volume (1974); Report of the Federal Courts Study Committee at 6 (1990) [hereinafter FCSC Report]; Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change (1975) (also known as the Hruska Commission) [hereinafter Hruska Commission].

Judicial Improvements Act of 1990[22]—case filings in the district and appellate courts have grown to unprecedented levels. From fiscal year 1990 to fiscal year 2016,[23] the number of civil cases filed in U.S. district courts increased from 217,879 to 290,430, reflecting a 33.3% increase in those filings.[24] Criminal case filings have also dramatically increased since 1990. From fiscal year 1990 to fiscal year 2016, the number of criminal cases filed in U.S. district courts increased from 47,411 to 61,021, reflecting a 28.7% increase in criminal filings.[25] Thus, from 1990 to 2016, the combined total of all civil and criminal case filings in U.S. district courts increased from 265,290 to 351,451, reflecting a 32.5% increase in all filings to the district courts. Filings in the U.S. circuit courts of appeals (excluding the Federal Circuit) have also grown by a staggering amount over the same period of time. Between fiscal year 1990 and fiscal year 2016, the total number of appeals filed in the circuit courts increased from 40,898 to 60,099, reflecting a 46.9% increase in total appeals.[26]

b. Congress has Not Enacted an Omnibus Judgeship Bill Since 1990

By any measure, the federal bench is long overdue for a comprehensive judgeship bill. From 1961 to 1990, judgeship bills created 510 judgeships over twenty-nine years.[27] In comparison, in the 26 years from 1990 to 2016, Congress has authorized only 34 judgeships.[28] Despite the explosive growth in federal district and appellate caseloads over the years, the Judicial Improvements Act of 1990 remains the last comprehensive judgeship bill to have been passed by Congress. That bill created 85 new federal judgeships—11 appellate and 74 district court judgeships—reflecting an 11% increase in total authorized Article III judgeships up to that point in time.[29] Since that time, Congress has authorized only 34 additional district court judgeships in response to problems with particular districts (9 in fiscal year 2000, 10 in fiscal year 2001, and 15 in fiscal year 2003), and has not authorized any additional circuit court judges. In other words, despite a 32.5% increase in district court filings and a 46.9% increase in appellate court filings since 1990, there has been only a 4% increase in district judgeships and no increase in appellate court judgeships despite multiple omnibus judgeship bills being introduced in Congress during that time.

Over the past two decades, omnibus judgeship bills have been introduced in nearly every Congress since the 105th Congress, but none were ever enacted. For example, in 1997, the Federal Judgeship Act of 1997 was introduced; it would have added 12 permanent and 5 temporary court of appeals judgeships, as well as 24 permanent and 12 district court

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[22] Pub. L. No. 101-650, December 1, 1990.
[23] Refers to the preceding 12-month period ending on June 30th.
[24] These figures are derived from Judicial Facts and Figures published by the Administrative Office of the U.S. Courts at http://www.uscourts.gov/statistics-reports/analysis-reports/judicial-facts-and-figures.
[25] *Id.*
[26] *Id.*
[27] Pub. L. No. 87-36, May 19, 1961 (63 District + 10 Circuit = 73 total); Pub. L. No. 89-372, March 18, 1966 (In 1966 35 District + 10 Circuit = 45 total); Pub. L. No. 90-347, June 18, 1968 (61 District + 9 Circuit = 70 total); Pub. L. No. 95-486, October 20, 1978 (117 District + 35 Circuit = 152 total); Pub. L. No. 98-353, July 10, 1984 (61 District + 24 Circuit = 85 total); Pub. L. No. 101-650, December 1, 1990 (74 District + 11 Circuit = 85 total).
[28] Timothy M. Tymkovich, *Statement Before the Subcommittee on Bankruptcy and the Courts*, Judicial Conference of the United States (September 10, 2013).
[29] *Id.*

judgeships,[30] but the bill failed to pass.[31] During the 110th Congress, Senator Leahy introduced S. 2774, the Federal Judgeship Act of 2008. That bill would have added 12 permanent seats to the U.S. circuit courts of appeals and 38 permanent seats to U.S. district courts across the country.[32] It would also have made permanent five temporary district court judgeships.[33] It did not pass then, nor did it pass when it was reintroduced in the 111th Congress as the Federal Judgeship Act of 2009.[34]

The last comprehensive judgeship bill to be introduced in Congress was the Federal Judgeship Act of 2013, and it, too, was never enacted.[35] The bill would have added five permanent judgeships and one temporary judgeship for the courts of appeals and 65 permanent and 20 temporary judgeships for the district courts.[36] All of the bill's proposed judgeships were based on the recommendations of the Judicial Conference—the national policy-making body for the federal courts.[37] The Judicial Conference conducts a biennial survey to assess judgeship needs. In written testimony submitted at a congressional hearing for the legislation in 2013, the Chair of the Committee on Judicial Resources, Judge Timothy Tymkovich, stated that the Conference's "recommendations reflect needs that have existed since the last omnibus judgeship bill was enacted in 1990."[38] In 2015, the Judicial Conference once again submitted its recommendations. This time it recommended Congress to authorize 5 permanent judgeships for the Ninth Circuit Court of Appeals as well as 68 permanent judgeships and 9 conversions of temporary to permanent judgeships for the district courts.[39]

The Judicial Conference recommendations are still too low compared to the increase in district court and circuit court filings. As previously mentioned, judgeship bills created 510 judgeships over 29 years between 1961 to 1990; yet, the Conference has only requested 82 new judgeships to make up for the nearly flat-line growth of judgeships during the last 26 years. Later, this memo discusses what accounts for the Conference's unusually low recommendations.

IV. Unpublished Opinions: An Atrocious Symptom of The Caseload Problem

a. The growth of the practice

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[30] https://www.congress.gov/bill/105th-congress/senate-bill/678/text
[31] The Third Branch, End of the 105th Congress Resolves Legislative Action, http://www.uscourts.gov/ttb/nov98ttb/105congres.html.
[32] The introduction of the "Federal Judgeship Act of 2008," U.S. Senator Patrick Leahy of Vermont, https://www.leahy.senate.gov/press/the-introduction-of-the-federal-judgeship-act-of-2008.
[33] *Id.*
[34] S. 2774 (110th): Federal Judgeship Act of 2008**,** https://www.govtrack.us/congress/bills/110/s2774/details; S. 1653 (111th): Federal Judgeship Act of 2009, govtrack, https://www.govtrack.us/congress/bills/111/s1653
[35] Federal Judgeship Act of 2013, S. 1385, 113th Cong. §§ 2-3 (2013), https://www.congress.gov/113/bills/s1385/BILLS-113s1385is.pdf, *archived at* http://perma.cc/5J6B-L4NB
[36] *Id.*
[37] *Id.*
[38] Tymkovich, *supra* note 4, at 6.
[39] Judicial Conference Judgeship Recommendations, http://www.uscourts.gov/sites/default/files/2013%20Judicial%20Conference%20Judgeship%20Recommendations%20%28pdf%29.

To respond to this growing crisis in the volume of caseloads, United States courts of appeals have adopted measures to reduce the time judges must spend on each case.[40] These measures include using staff attorneys to screen cases, eliminating oral argument in many cases, relying on law clerks to draft opinions, and reducing the publication of opinions.[41] This memo focuses on the last of these pernicious developments.

Writing in the Georgetown Law Review, Erica S. Weisgerber provides the following definition of unpublished opinions:

> Unpublished opinions are opinions that a court has designated as having non-binding precedential effect. They are written resolutions to specific cases, prepared exclusively for the involved parties, and they are intended to have no binding precedential effect--or even persuasive effect, for some jurisdictions--on future cases. The text of such opinions is usually sparse, containing only a minimal recitation of the facts and a limited description of the law. These opinions are generally unpolished and less carefully crafted than published opinions.[42]

As Tables A and Table B illustrate below, the use of unpublished appellate opinions has been steadily increasing each year.[43] For example, in 1997, 76.5% of all circuit court opinions were unpublished; that number has grown almost every year and reached a high of 88.2% in 2013 before dipping down to roughly 87% over the next two years. The situation is even more troubling in particular courts. For example, in 1997, 88.4% of the Fourth Circuit's opinions were unpublished. That number has grown over the years so that a full 93.8% of the Fourth Circuit's opinions were unpublished by 2015. The situation is about as bad in the Eleventh Circuit. In 1997, 86.3% of its opinions were unpublished; by 2015, 92.4% of the Eleventh Circuit's opinions were unpublished. The other circuits where the rate of unpublished opinions exceeded 90% by 2015 were the Third, Fifth, Sixth, and Ninth circuits, bringing the total number up to six circuits—*a majority of the numbered courts of appeals*—where 90% of opinions are unpublished; that is a sobering statistic. Virtually every commentator who has studied the issue agrees that the staggering growth in caseloads has been the central engine fueling circuit courts' rampant use of unpublished opinions over the years.[44]

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[40] Martha Dragich Pearson, *Citation of Unpublished Opinions As Precedent*, 55 Hastings L.J. 1235 (2004)
[41] Erica S. Weisgerber, *Unpublished Opinions: A Convenient Means to an Unconstitutional End*, 97 Geo. L.J. 621 (2009)
[42] *Id.*
[43] These figures are derived from Judicial Facts and Figures published by the Administrative Office of the U.S. Courts at http://www.uscourts.gov/statistics-reports/analysis-reports/judicial-facts-and-figures.
[44] *See generally* Structural Alternatives Report, supra note 1, at 22-23 ("For the most part, the decline in oral argument and publication is attributable to the influx of cases involving unrepresented litigants pursuing relatively simple appeals, many of which present the same issues. As the tables show, the percentage of cases with counsel that receive argument or published opinion is generally considerably higher."); Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 Brook. L. Rev. 685, 701-02 (2001) ("As the number of dispositions began to increase, however, and the production of new volumes of the official reports began to accelerate, voices within the judiciary began to question whether it was necessary to publish in every case.").

Table A: U.S. Courts of Appeals—Percent of Unpublished Opinions In Each U.S. Court of Appeals (Excluding the Federal Circuit) From 1997 to 2005

	1997	**1998**	**1999**	**2000**	**2001**	**2002**	**2003**	**2004**	**2005**
TOTAL	76.5	74.9	78.1	79.8	80.4	80.5	79.9	81.0	81.6
D.C.	62.4	56.7	62.6	59.8	64.2	58.1	56.6	51.0	57.9
FIRST	48.7	50.0	45.4	58.3	62.2	45.4	39.2	45.5	57.2
SECOND	72.9	70.1	71.0	77.5	78.2	78.5	75.0	76.1	78.3
THIRD	83.9	85.4	81.0	83.6	85.2	84.3	84.3	84.4	85.8
FOURTH	88.4	90.6	90.1	90.5	91.5	91.8	91.2	90.8	91.8
FIFTH	77.7	71.0	80.7	82.7	85.9	84.6	87.4	89.7	87.1
SIXTH	81.9	79.5	81.9	82.3	82.4	82.3	80.0	81.8	84.3
SEVENTH	51.8	49.4	56.7	56.5	60.2	58.5	57.1	56.9	56.6
EIGHTH	55.0	58.1	60.3	66.0	66.2	67.1	60.5	62.3	59.0
NINTH	82.0	83.6	84.2	84.1	81.9	83.9	84.2	87.2	89.0
TENTH	73.9	72.3	75.8	76.5	72.4	76.8	77.5	75.8	73.8
ELEVENTH	86.3	81.5	86.3	88.2	88.3	87.9	87.1	87.8	89.9

Table B: U.S. Courts of Appeals—Percent of Unpublished Opinions In Each U.S. Court of Appeals (Excluding the Federal Circuit) From 2006 to 2015

	2006	**2007**	**2008**	**2009**	**2010**	**2011**	**2012**	**2013**	**2014**	**2015**
TOTAL	84.1	83.5	81.8	83.2	84.0	85.0	81.4	88.2	87.7	87.0
D.C.	59.9	56.7	58.3	58.5	62.3	62.3	40.7	54.0	54.1	50.5
FIRST	61.7	61.9	58.1	61.9	65.1	62.5	58.5	65.3	64.0	61.6
SECOND	87.3	87.7	86.7	89.2	88.3	88.7	84.8	88.4	90.3	89.3
THIRD	87.1	88.4	89.7	89.3	89.8	90.9	87.3	93.8	92.3	92.8
FOURTH	93.7	93.0	92.3	93.7	93.0	94.3	88.8	93.9	93.8	93.8
FIFTH	88.8	89.8	86.9	86.8	87.4	88.6	79.4	91.4	90.6	91.8
SIXTH	85.7	81.4	82.1	82.3	83.6	87.4	81.9	90.5	91.9	90.1
SEVENTH	64.4	55.0	48.9	59.1	59.8	54.2	55.7	66.5	63.4	62.8
EIGHTH	62.9	62.8	63.0	67.0	71.8	67.4	69.4	76.0	75.2	74.8
NINTH	90.0	89.6	86.6	87.9	86.9	88.6	87.6	91.9	92.2	91.5
TENTH	75.3	73.6	58.3	70.4	77.5	76.9	79.6	81.9	79.1	79.8
ELEVENTH	90.0	89.3	81.8	91.0	89.6	90.7	87.4	94.0	92.8	92.4

b. The Two-Track System of Appellate Justice

It is also important to understand that the vast expansion in the use of unpublished opinions takes place within a larger context of the overall transformation of the circuit courts' response to the caseload crisis. William M. Richman and William L. Reynolds, two of the country's foremost experts on federal court administration, have discussed these issues at length in their scholarship.[45] They, and others, document how circuit courts used to hear oral argument

[45] *See e.g.*, William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 Cornell L. Rev. 273 (1996);William M. Richman, *Much Ado About the Tip of an Iceberg*, 62 Wash. & Lee L. Rev. 1723 (2005); William L. Reynolds & William M. Richman, *The New Certiorari*

in nearly every case and that judges, working alone, used to write fully reasoned, published opinions, but that this is no longer the case.[46] Now, oral argument and formal publication are the exception, not the rule.[47] Clerks and other staff screen appeals to determine how much time the judges should allocate to each case, and these "para-judicial personnel" recommend whether oral argument should be heard and whether a full, published opinion should be written in a case.[48] As such, not only have these staff members taken over much of the judicial process of reading briefs and writing draft opinions, but they also make the crucial decision about which opinions the judge should devote more of his attention to. Accordingly, "an effective right to appeal error to the circuit courts no longer exists"; thus, Richman and Reynolds argue that circuit courts have effectively transformed themselves into "certiorari courts," in violation of their statutory mandate.[49]

The result of all this has been that the overall quality of the work of the circuit courts has significantly deteriorated.[50] As judges spend significantly less time on unpublished opinions and those opinions continue to make-up an ever-greater share of each court's output, this finding should be unsurprising. In a much-cited article, Judge Reinhardt of the Ninth Circuit confirmed this when he wrote, "[t]hose who believe we are doing the same quality work that we did in the past are simply fooling themselves."[51] Richman and Reynolds describe how this transformation has created a "two-track system of justice" in the appellate courts: "important cases (usually measured by monetary value) and powerful litigants receive greater judicial attention than less important cases."[52] Thus, in some cases, judges play a very active role by listening to oral argument and working hard to prepare opinions that are ultimately published.[53] However, in the vast majority of cases, like appeals involving the denial of social security benefits, the judge's law clerks and staff read the briefs, recommend for or against hearing oral argument, and write the first draft of an opinion that is not likely to be published.[54] Perhaps unsurprisingly, the "overwhelming majority" of scholarly literature on unpublished opinions is highly critical of the practice, although it is not without its defenders.[55] These scholars variously charge that

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Courts, 80 Judicature 206 (1997); William L. Reynolds & William M. Richman, *The Non-Precedential Precedent-Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 Colum. L. Rev. 1167 (1978).

[46] William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition, 81 Cornell L. Rev. 273 (1996).*

[47] *Id.*

[48] *Id.* at 287-288 ("Far more significant, however, has been the exponential growth in the numbers and role of central staff--a group unheard of three decades ago. *This growth is the direct result of caseload pressures*: "[T]he caseload per judge has risen to the point where very few judges, however able and dedicated, can keep up with the flow without heavy reliance on law clerks, staff attorneys, and sometimes externs too." The judicial system pays a significant price for that delegation, however, because inappropriate delegation of quintessentially judicial tasks has become the norm.") (emphasis added).

[49] *Id.* at 273. 28 U.S.C. s 1291 (1994) ("the courts of appeals ... shall have jurisdiction of appeals from all final decisions of the district courts of the United States.").

[50] Richman & Reynolds, *supra* note 26, at 275.

[51] Stephen Reinhardt, A Plea to Save the Federal Courts--Too Few Judges, Too Many Cases, 79 A.B.A. J., Jan. 1993, at 52 [hereinafter Too Few, Too Many].

[52] Richman & Reynolds, *supra* note 26, at 275.

[53] *Id.*

[54] *Id.*

[55] Pearson, *supra* note 7, at 1237; *see also*, Scott E. Gant, *Missing the Forest for A Tree: Unpublished Opinions and New Federal Rule of Appellate Procedure 32.1*, 47 B.C. L. Rev. 705, 706 n. 5 (2006) (citing the following sources

unpublished opinions permit appeals courts to suppress precedent, lead to insufficient attention dedicated to opinion writing, limit judicial accountability, and ultimately undermine the legitimacy of the entire judicial system, which erodes the rule of law.[56]

Moreover, there is a substantial probability that the practice of unpublished opinions is unconstitutional. In *Anastasoff v. United States*,[57] the Eighth Circuit considered an appeal by a taxpayer, Anastasoff, in which the district court had deemed her refund claim for overpaid taxes as untimely. Although a prior Eight Circuit decision had considered but rejected the "same legal argument," Anastasoff argued that the court was not bound by that decision because it was unpublished.[58] In an opinion by judge Richard Arnold, the panel rejected Anastasoff's argument and deemed unconstitutional the part of the Eight Circuit's rule on unpublished opinions that designated them nonprecedential. Judge Arnold reasoned that the nonprecedential status of unpublished opinions "expands the judicial power beyond the limits set by Article III by allowing us complete discretion to determine which judicial decisions will bind us and which will not. Insofar as it limits the precedential effect of our prior decisions, the Rule is therefore unconstitutional."[59] Several law review articles have similarly argued that unpublished opinions are unconstitutional because they impermissibly expand the judicial power granted by Article III.[60]

Responding to the wave of scholarship and controversy over unpublished opinions that followed the *Anastasoff* case, the Supreme Court adopted Federal Rule of Appellate Procedure 32.1 in 2006. The rule requires all circuits to allow litigants to cite unpublished opinions issued on or after January 1, 2007.[61] However, Rule 32.1 does not actually solve the problem of unpublished opinions because it does not require courts to designate unpublished opinions *precedential*. It only requires courts to permit litigants to *cite* to unpublished opinions.[62] Thus, courts are still permitted to ignore their unpublished decisions, and there is no evidence to suggest they are expending more effort on them or according them greater precedential weight.

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as part the general literature of critics and proponents of the practice of unpublished opinions: Richard S. Arnold, *Unpublished Opinions: A Comment*, 1. J. App. Prac. & Process 219 (1999); Stephen R. Barnett, *From* Anastoff *to* Hart *to* West's Federal Appedix: *The Ground Shifts Under No-Citation Rules*, 4 J. App. Prac. & Process 1 (2002); Douglas A. Berman & Jeffrey O.Cooper, *In Defense of Less Precedential Opinions: A Reply to Chief Judge Martin*, 60 Ohio St. L. J. 2025 (1999); Danny J. Boggs & Brian P. Brooks, *Unpublished Opinions* & *the Nature of Precedent*, 4 Green Bag 2d 17 (2000); Richard B. Cappalli, *The Common Law's Case Against Non Precedential Opinions*, 76 S. Cal L. Rev. 755 (2003); Charles E. Carpenter, Jr., *The No-Citation Rule for Unpublished Opinions: Do the Ends of Expediency for Overloaded Appellate Courts Justify the Means of Secrecy?*, 50 S.C.L.Rev. 235 (1998).

[56] Weisgerber, *supra* note 21, at 623.

[57] Anastasoff v. United States, 223 F.3d 898, 900-04 (8th Cir.), *vacated as moot*, 235 1054 (8th Cir. 2000).

[58] *Id.*

[59] *Id.* at 905

[60] *See e.g.*, Weisgerber, *supra* note 21, at 623;
Penelope Pether, *Constitutional Solipsism: Toward A Thick Doctrine of Article III Duty; or Why the Federal Circuits' Nonprecedential Status Rules Are (Profoundly) Unconstitutional*, 17 Wm. & Mary Bill Rights J. 955 (2009).

[61] Fed. R. App. P. 32.1. ("A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written disposition that have been (i) designated as 'unpublished,' 'not for publication,' 'non-precedential,' 'not precedent,' or the like; and (ii) issued on or after January 1, 2007").

[62] *Id.*

V. The Judicial Opposition to an Omnibus Judgeship Bill

Scholars generally agree that the "obvious solution" to fixing the caseload crisis and reducing abusive practices like unpublished opinions and limited oral argument is to increase the number of federal appellate judgeships.[63] They also agree that among the major barriers to enacting such meaningful reform for the past twenty-five years has been political intransigence, particularly during periods of divided government.[64] However, Richman and Reynolds demonstrate that the "judicial establishment"—defined as the federal judiciary and its administrative apparatus—is ultimately to blame for the lack of judicial capacity that has plagued the circuit courts for the past two decades.[65] Little else explains the minimal requests for appellate judgeships by the Judicial Conference for the past 25 years, as well as individual judges, circuits, and federal court committees that have all advocated against substantial increases to the judiciary's size.[66]

a. The Judicial Establishment's Opposition to More Judgeships is Misguided

As Table C[67] below illustrates, the Judicial Conference's judgeship requests for the courts of appeals has been steadily decreasing since 1997, particularly from 2007 to 2015. Neither the pattern of unfulfilled requests nor the Conference's reports illuminate why, although caseloads have grown significantly almost every year since 1997 and no federal appellate judgeships have been authorized since 1990, the Judicial Conference appears to be requesting fewer and fewer judges for the past two decades. For example, every appellate judgeship request since 2007 has been lower than the previous request: a request for fifteen judgeships were made in 2007; twelve in 2009; nine in 2011; six in 2013; and, five in 2015. The Judicial Conference, however, suffers from a severe bias, which causes it not to ask for the creation of as many new judgeships as the nation needs. The prestige and power associated with being an Article III federal judge goes down if a large number of new federal court judgeships are created. This causes the Judicial Conference to continuously ask for the creation of fewer new judgeships than we really need.

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[63] *See generally* Scott E. Gant, *Missing the Forest for A Tree: Unpublished Opinions and New Federal Rule of Appellate Procedure 32.1*, 47 B.C. L. Rev. 705, 706 n. 5 (2006); Richard B. Cappalli, *The Common Law's Case Against Non Precedential Opinions*, 76 S. Cal L. Rev. 755 (2003); William L. Reynolds & William M. Richman, *The New Certiorari Courts,* 80 Judicature 206 (1997).

[64] David R. Stras & Shaun M. Pettigrew, *The Rising Caseload in the Fourth Circuit: A Statistical and Institutional Analysis*, 61 S.C. L. Rev. 421 (2010) ("None of these reform measures, however, has taken hold because of political or practical difficulties. Instead, the basic appellate structure in the federal court system has remained largely--though not completely--unchanged since 1960.")

[65] Richman & Reynolds, *supra* note 26, at 299-300 ("Individual circuits have passed resolutions urging Congress not to create new judgeships. The powerful Judicial Conference routinely requests only a small percentage of the judgeships required to satisfy staffing models. National judicial planning and study groups also have inveighed against substantial increases. Thus, the Judicial Conference Committee on Courts Administration and Case Management recommended that federal judgeships (district and circuit) be limited to one-thousand, a number that would permanently assure inadequate capacity in the Court of Appeals. Similarly, the Judicial Conference Committee on Long Range Planning, while rejecting a numerical ceiling, favored "controlled" growth in judgeships "only after other appropriate alternatives have been exhausted.").

[66] *Id.*

[67] These figures are derived from Judicial Facts and Figures published by the Administrative Office of the U.S. Courts at http://www.uscourts.gov/statistics-reports/analysis-reports/judicial-facts-and-figures.

Table C: Judicial Conference Requests for Appellate Judgeships since 1997. P = Permanent judgeship request. T = Temporary judgeship request

	1997	1999	2001	2003	2005	2007	2009	2011	2013	2015
Ninth	6P	2P, 3T	N/A	5P, 2T	5P, 2T	5P, 2T	4P, 1T	4P, 1T	4P, 1T	5P
Eighth			N/A		1T	2P	1T			
Sixth	2P	2P, 1T	N/A	1P	1P	1P	1P	1P	1P	
Fifth	1P									
Third			N/A			2P	1P, 1T	1P		
Second	2P	2P	N/A	2P	2P	2P	2P	2P		
First	1P	1P	N/A	1P	1P	1P	1P			
Total	12P	7P, 4T	N/A	9P, 2T	9P, 3T	13P, 2T	9P, 3T	8P, 1T	5P, 1T	5P

This decrease in judgeship requests is related to the "two-track" system of justice that circuit courts have developed in response to the caseload crisis, as discussed previously.[68] Since caseloads have relentlessly grown for the past twenty-five years with no proportionate increase in federal judgeships, judges have had to generate additional appellate capacity on their own by delegating ever-greater parts of the judicial process to central staff and law clerks, writing lower quality unpublished opinions, and limiting oral argument. Still, that only accounts for how circuit judges have been able to manage their caseloads for the past twenty-five years while begging the question of why circuit courts have mostly been content to permit the steady decline in the administration of appellate justice.

b. Reasons for the Opposition

Among the primary reasons for the judicial establishment's historic stated reasons for opposition to greatly expanding the judiciary has been its worry that doing so will lead to a reduction in the quality of judges and the formidable costs involved. But none of those reasons holds up under scrutiny, as others have demonstrated.[69] Take, for example, the judicial quality justification: As of 2015, the number of licensed lawyers in the United States is 1,300,705,[70] and assume Congress wanted to double the size of each circuit court. After deducting the 865 authorized federal judgeships currently occupied by all federal judges (assuming zero vacancies), there would still be roughly 7,261 lawyers available to choose from for *each* newly authorized judgeship. It defies logic and common sense to assume that among those 7,261 available lawyers, there would not be a single one willing and able to become a federal appellate judge

[68] Stras & Pettigrew, *supra* note 44, at 421 ("Nevertheless, despite ever-expanding caseloads, the dominant rhetoric in recent years has shifted from warnings of an impending "crisis"[18] to more moderate concerns surrounding the 'challenges' and 'stresses' facing the federal courts. The shift in rhetoric likely derives largely from the ability of the circuit courts to accommodate caseload growth through changes in personnel and procedures.").

[69] Richman & Reynolds, *supra* note 26, at 305.

[70] ABA Lawyer Demographics, https://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer-demographics-tables-2015.authcheckdam.pdf

who would not also be at least as good as the current average judge sitting on a circuit court today. But even assuming the average circuit court judge declines in quality as a result of doubling or even tripling the size of the judiciary, those who fear such a decline conflate a decline in the average quality of *judges* with a decline in the quality of *appellate justice*.[71] As of now, any number of statistics indicates that the circuit courts are only able to perform a small fraction of their workload with any sort of care and craftsmanship. If doubling or tripling the appellate capacity of the circuit courts came at the cost of a slight decrease in the quality of the average judge, that would still seem to be an extremely good trade-off if it meant that the practice of unpublished opinions was almost entirely eliminated, oral argument was offered in the majority of cases, and judges regained control over the judicial process from their staff and law clerks.

Many in the judicial establishment, as well as many in Congress, oppose expanding the judiciary because of the formidable costs involved.[72] But they mistakenly focus on absolute numbers without considering the relative cost of an expanded judiciary as well as the benefits that would accrue from that investment. A CBO report from 2011 indicated that the cost of a new judgeship would be approximately $1,000,000 in startup cots and $770,000 annually in support expenses.[73] Thus, to double the size of circuit courts would cost $179,000,000 the first year and $137,830,000 for each subsequent year. Undoubtedly, that is a lot of money. But as a percent of the entire federal budget ($3.54 trillion),[74] it is not much. As it stands, the entire federal judiciary costs 6.78 billion dollars. Thus to double the size of the federal appellate bench would add only about 2% to the entire federal judicial budget in the first year, which is about 0.0047% of the entire federal budget.

It is clear that the federal judiciary can certainly be expanded at relatively little cost to the quality of the judiciary and fiscally; therefore, it should be vastly expanded from what it is now to address the crisis in the volume of caseloads.

VI. The Optimal Number Judgeships

a. Circuit Court Judgeships

The optimal number of active circuit court judgeships is at least double the current number of 167 authorized judgeships (excluding the Federal Circuit), and more likely between 2.5x and 3x the current number. This optimal number is based on the Judicial Conference's staffing model as well as on what federal court experts have written on the subject.

According to the Judicial Conference's own staffing model, the desired workload of a circuit court judge is not more than 255 merits dispositions per circuit judge. This number is referred to as the participation rate.[75] Reynolds and Richman explain how to calculate the

[71] Richman & Reynolds, *supra* note 26, at 300.
[72] *Id.* at 305.
[73] George Everly, III & Michael L. Shenkman, *District Judges As Investments*, 53 Harv. J. on Legis. 59 (2016)
[74] 2016 United States Federal Budget Estimate, http://federal-budget.insidegov.com/l/119/2016-Estimate.
[75] Gordon Bermat Et Al., Federal Judicial Center, Imposing a Moratorium on the Number of Federal Judges: Analysis of Arguments and Implications 9 (1993) [hereinafter Moratorium].

optimal number of judgeships applying this standard:[76] First, multiply the number of merits dispositions by three because each merits disposition is decided by a panel of three judges and requires three judicial votes (see Judicial Votes Needed in Table D). Second, divide the number calculated in step one by the number of currently authorized, active judgeships -- this will yield the participation rate among the current number of authorized, active judgeships (see Participation Rates in Table D). Third, divide the number of judicial votes needed – the statistic calculated in step one – by 255 in order to yield the optimal number of active judgeships (see Optimal Number of Active Judgeships in Table D). These calculations can be made for each circuit, or for total amounts aggregated from all of the circuits.

Table D: Optimal Number of Active Judgeships Per Circuit

	2016 Merits Dispositions[77]	Judicial Votes Needed	Number of Currently Authorized Active Judgeships	Participations Rates	Optimal Number of Active Judgeships	Judgeships Deficit or (Surplus)
D.C.	570	1,710	11	155	7	(4)
FIRST	941	2,823	6	470	11	5
SECOND	2,622	7,866	13	605	31	18
THIRD	2,246	6,738	14	481	26	12
FOURTH	4,874	14,622	15	975	57	42
FIFTH	4,484	13,452	17	791	53	36
SIXTH	3,250	9,750	16	609	38	22
SEVENTH	2,098	6,294	11	572	25	14
EIGHTH	2,419	7,257	11	660	28	17
NINTH	6,709	20,127	29	694	79	50
TENTH	1,571	4,713	12	393	18	6
ELEVENTH	4,763	14,289	12	1,190	56	44
TOTAL	**36,547**	**109,641**	**167**	**7,595**	**429**	**262**

As Table D illustrates, the Judicial Conference's staffing model suggests that the number of circuit judges (excluding the Federal Circuit) should be more than double (2.5x) what it is now (429 v. 167 judges). Perhaps unsurprisingly, the model predicts which courts have had the hardest time keeping up with their workload as indicated by the percent of unpublished opinions they issue. For example, the model calls for the largest increase of circuit court judgeships to occur on the Ninth Circuit Court of Appeals (50 judgeships – see Judgeships Deficit or Surplus Column I Table D). As discussed previously, the Ninth Circuit suffers from one of the highest rates of unpublished opinions issued among all of the circuits (91.5% in 2015 – See Table B). The second greatest increase the model calls for is the creation of 44 judges on the Eleventh Circuit, which issues the second highest rate of unpublished opinions among the circuit courts (92.4% in 2015). Finally, the third greatest increase the model calls for is the creation of 42 judgeships on the Fourth Circuit. As mentioned previously, the Fourth Circuit suffers from *the*

[76] William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 Cornell L. Rev. 273, 298 n.126 (1996)

[77] These figures are derived from Judicial Facts and Figures published by the Administrative Office of the U.S. Courts at http://www.uscourts.gov/statistics-reports/analysis-reports/judicial-facts-and-figures.

highest rate of unpublished opinions issued among all of the circuit courts, as of 2015 (93.8%). It is a testament to the predictive capabilities of the Judicial Conference's staffing model that it is able to predict, with such a degree of accuracy, which circuit courts must rely on unpublished opinions to a greater extent because they suffer from a greater deficit of needed judgeships than other courts. It is also a sad commentary on the Conference's misaligned priorities that it consistently refuses to request a sufficient number of new judgeships to provide any of the circuit courts with meaningful relief.

Moreover, the model is consistent with the increase in judgeships that others have independently called for over the years. For example, in 1993, Judge Reinhardt wrote, "[m]y proposal is simply that Congress double the size of the courts of appeals. I base this not on studies or statistics, but on practical knowledge and experience. I think that the current system of determining when new judges will be added on the basis of workload surveys has led us all down the wrong track. A totally fresh look is required."[78] It is worth noting that in 1993 – the year Judge Reinhardt made his proposal -- 48,474 cases were filed in the courts of appeals, whereas in 2016, 60,099 cases were filed in the courts of appeals.[79] That reflects a 23.9% increase in case filings since 1993 and, as already mentioned; there have been no additional circuit court judgeships authorized during that time. Thus, Judge Reinhardt's intuitive sense for how many circuit court judgeships should be created, closely tracks the Judicial Conference's staffing model after taking into account the 23.9% increase in case filings that have occurred since the time he made his proposal.

Others have echoed Judge Reinhardt's proposal by calling for a dramatic increase in the size of the circuit court judgeships. For example, Richman and Reynolds used the staffing model to call for a 67% increase in circuit court judgeships in 1992 -- only two years after the last omnibus judgeship bill was passed.[80] Writing several years later in 2005, Richman stated that the number of circuit court judgeships would need to increase by "two or three times as great as the current roster of less than 170" in order for the courts to keep up with their workloads.[81] Similarly, writing in 2009, Erica Weisgerber called for doubling the size of authorized judgeships on each circuit court.[82]

And yet, as Table C (above) illustrates, the Conference has been woefully inadequate at requesting such an expansion. The Judicial Conference's stated reason for not requesting as many judges as its own staffing model seems to require is that, in the words of a 1993 Federal Judicial Center report:

> The [Judicial Conference] also consults with judges and court managers, who may argue that filing data underestimate the true

[78] Stephen Reinhardt, *A Plea to Save the Federal Courts*: Too Few Judges, Too Many Cases, 79 A.B.A. J. 52, 53 (1993)
[79] *Judicial Business*, U.S. Courts Administrative Office, http://www.uscourts.gov/sites/default/files/federaljudicialcaseloadstatistics2002judicialbusiness_0.pdf (providing statistics for fiscal years 1993, 1998, 2001, and 2002).
[80] Richman & Reynolds, *supra* note 2.
[81] William M. Richman, *Much Ado About the Tip of a Iceberg*, 62 Wash. & Lee L. R. 1723, 1726 (2005).
[82] Erica S. Weisgerber, *Unpublished Opinions: A Convenient Means to an Unconstitutional End*, 97 Geo. L.J. 621 (2009)

> judicial burden in a court or conversely that, **despite the need for additional judgeships based on formula**, **the court does not desire the additional judgeships because it believes any benefits they would provide are outweighed by their costs in efficiency and collegiality (This latter argument is most often made by appellate courts.).**[83]

The above excerpt is tantamount to an admission by the judicial establishment that it has been willing to suppress much-needed requests for additional judgeships – particularly appellate judgeships -- in order to preserve certain cultural features of an elite judiciary of the few, such as greater collegiality. As has been discussed before, this memo takes the position that while collegiality on the bench may be a value worth striving for, it should not come at all cost. Rather, it should be recognized as one among several competing values that should be taken into account when judgeship requests are made, and it should not be given undue importance as appears to have been the case.

b. District Court Judgeships

According to the Judicial Conference's own staffing model, the desired workload of a district judge is not more than 400 *weighted filings* per year.[84] Table E illustrates the optimal number of district court judgeships for each federal district by applying this standard. To determine the optimal number of active judgeships for each district, one must: (1) determine the number of judicial votes needed in each district by multiplying the current number of authorized active judgeships for that district by the actual weighted filings per judgeship; and, (2) divide the number of judicial votes needed [the product from step 1] by 400. The result from step 2 will yield the optimal number of active judgeships needed for each judicial district.

As Table E indicates, the total optimal number of active district court judgeships should be 858 – 185 more than the current total of 673 judgeships. This does not mean that each judicial district is operating at or beyond capacity. Rather, it means that the federal judicial system at the district level – as a whole -- is operating beyond its capacity to properly adjudicate all claims brought before it per the Judicial Conference's own staffing model. Some judicial districts, like the Western District of Pennsylvania, have an excess of district court judges because the weighted filings per judgeship for that district are less than 400. For example the weighted filings per judgeship for the Western District of Pennsylvania are 300, yielding an optimal number of 8 judgeships as opposed to the current authorized number of 10 judgeships for that district; hence, it has an excess of two judgeships. On the other hand, some judicial districts suffer from a significant shortage of district judgeships per the staffing model. For example, the model indicates that no judicial district in either California or Texas currently has enough district court judgeships. Indeed, the judicial districts of California have a cumulative deficit of 27 district judges and the judicial districts of Texas have a cumulative deficit of 38 district judges per the staffing model.

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[83] Moratorium, *supra* note 1, at 9 (emphasis added).
[84] *Id.*

The overall deficit of 185 judges means that the current number of authorized judgeships would have to increase by 27.5% (185/673) to ensure that no judicial district had more than 400 weighted filings per judgeship. Although the Judicial Conference has never recommended the creation of as many district judgeships as ought to be created based on its staffing model, the recommendations it has made in the past implicitly confirm the accuracy of that model. For example, in its most recent biennial judgeship recommendation report, the Conference recommended the creation of 68 additional district judgeships. Although short of the 185 districts judgeships its staffing model suggests should be created, it is interesting to note that the Conference's recommendation for new judgeships largely maps on to what its staffing models prescribes. For example, in 2015, the Judicial Conference recommended that a total of 24[85] new district judgeships should be created in the various judicial districts of California—nearly the identical number the Judicial Conference's staffing model indicates should be created (27). Moreover, the Conference characterizes districts that surpass its standard of 400 weighted filings per judgeship as constituting a judicial emergency,[86] which it takes into account when making its recommendations.[87]

Table E: Optimal Number of District Court Judgeships Per District

District	Current Number of Authorized Active Judgeships	Weighted Filings Per Judgeship	Judicial Votes Needed	Optimal Number of Active Judgeships	Judgeships Deficit or (Surplus)
Total	**673**	**484**	**325,732**	**858 (sum of column)**	**185**
DC	15	178	2,670	7	(8)
ME	3	294	882	3	-
MA	13	348	4,524	12	(1)
NH	3	258	774	2	(1)
RI	3	230	690	2	(1)
PR	7	473	3,311	9	2
CT	8	307	2,456	7	(1)
NY, N	5	370	1,850	5	-
NY, E	15	576	8,640	22	7
NY, S	28	450	12,600	32	4
NY, W	4	512	2,048	6	2
VT	2	289	578	2	-
DE	4	547	2,188	6	2
NJ	17	602	10,234	26	9
PA, E	22	353	7,766	20	(2)

[85] http://www.uscourts.gov/sites/default/files/2013%20Judicial%20Conference%20Judgeship%20Recommendations%20%28pdf%29.

[86] http://www.uscourts.gov/judges-judgeships/judicial-vacancies/judicial-emergencies/judicial-emergency-definition

[87] https://www.judiciary.senate.gov/imo/media/doc/9-10-13TymkovichTestimony.pdf

PA, M	6	446	2,676	7	1
PA, W	10	300	3,000	8	(2)
MD	10	474	4,740	12	2
NC, E	4	606	2,424	7	3
NC, M	4	420	1,680	5	1
NC, W	5	375	1,875	5	-
SC	10	511	5,110	13	3
VA, E	11	424	4,664	12	1
VA, W	4	356	1,424	4	-
WV, N	3	392	1,176	3	-
WV, S	5	2,694	13,470	34	29
LA, E	12	403	4,836	13	1
LA, M	3	370	1,110	3	-
LA, W	7	392	2,744	7	-
MS, N	3	289	867	3	-
MS, S	6	336	2,016	6	-
TX, N	12	591	7,092	18	6
TX, E	8	1,125	9,000	23	15
TX, S	19	551	10,469	27	8
TX, W	13	672	8,736	22	9
KY, E	5.5	294	1,617	5	-
KY, W	4.5	387	1,742	5	1
MI, E	15	364	5,460	14	(1)
MI, W	4	427	1,708	5	1
OH, N	11	355	3,905	10	(1)
OH, S	8	420	3,360	9	1
TN, E	5	476	2,380	6	1
TN, M	4	467	1,868	5	1
TN, W	5	379	1,895	5	-
IL, N	22	436	9,592	24	2
IL, C	4	371	1,484	4	-
IL, S	4	422	1,688	5	1
IN, N	5	375	1,875	5	-
IN, S	5	601	3,005	8	3
WI, E	5	370	1,850	5	-
WI, W	2	475	950	3	1
AR, E	5	455	2,275	6	1
AR, W	3	383	1,149	3	-
IA, N	2	519	1,038	3	1
IA, S	3	351	1,053	3	-
MN	7	671	4,697	12	5
MO, E	8	400	3,200	8	-
MO, W	6	511	3,066	8	2
NE	3	478	1,434	6	3
ND	2	446	892	3	1

SD	3	394	1,182	3	-
AK	3	197	591	2	(1)
AZ	13	588	7,644	20	7
CA, N	14	502	7,028	18	4
CA, E	6	814	4,884	13	7
CA, C	28	542	15,176	38	10
CA, S	13	555	7,215	19	6
HI	4	205	820	3	(1)
ID	2	501	1,002	3	1
MT	3	396	1,188	3	-
NV	7	513	3,591	9	2
OR	6	453	2,718	7	1
WA, E	4	272	1,088	3	(1)
WA, W	7	481	3,367	9	2
CO	7	507	5,549	9	2
KS	6	709	4,254	11	5
NM	7	595	4,165	11	4
OK, N	3.5	272	952	3	-
OK, E	1.5	352	528	2	1
OK, W	6	301	1,806	5	(1)
UT	5	401	2,005	6	1
WY	3	191	573	2	(1)
AL, N	8	334	2,672	7	(1)
AL, M	3	397	1,191	3	-
AL, S	3	336	1,008	3	-
FL, N	4	523	2,092	6	2
FL, M	15	618	9,270	24	9
FL, S	18	683	12,294	31	13
GA, N	11	507	5,577	14	3
GA, M	4	397	1,588	4	-
GA, S	3	454	1,362	4	1

c. The Minimum Number of Circuit and District Judgeships Congress Should Approve

In total, the staffing model indicates that Congress should ideally authorize 447 new Article III judgeships to ensure that each district court and circuit court has the capacity to fairly and efficiently adjudicate the cases that come before it. However, given that the current political dynamic in Washington makes it unlikely that Congress would approve such a large increase, we propose that Congress at a minimum authorize the largest percentage increase of district judgeships and circuit judgeships that it has authorized in the past. A review of all judgeships bills Congress has enacted throughout the country's history reveals that the largest judgeship bill enacted in the past for both district judgeships and circuit judgeships was the Omnibus Judgeship

Act of 1978 (Omnibus Act), which was passed during the Carter Administration.[88] As Tables F and G indicate below, the Omnibus Act increased the number of authorized circuit court judgeships by 36.1% and the number of district court judgeships by 29.7%. Applying those percentages to today's numbers indicates that Congress should – at a minimum – authorize 61 new circuit judgeships (167 * 36.1%) and 200 district court judgeships (673 * 29.7%).

TABLE F: LARGEST NUMBER OF CIRCUIT JUDGESHIPS EVER CREATED

Year	Legislation	Citation	Authorized Circuit Judgeships Before Legislation	Authorized Circuit Judgeships Before Legislation	Circuit Court Judgeships Created	% Increase
1978	**Omnibus Judgeship Act of 1978**		**97**	**132**	**35**	**36.1%**
1984			132	156	24	18.2%
1990			156	167	11	7.1%
1966			78	88	10	12.8%
1961			68	78	10	14.7%
1968			88	97	9	10.2%
1891			10	19	9	90%
1869			0	9	9	N/A

TABLE G: LARGEST NUMBER OF DISTRICT JUDGESHIPS EVER CREATED

Year	Legislation **Carter Omnibus Judgeship Bill**	Citation	Authorized District Judgeships Before Legislation	Authorized District Judgeships Before Legislation	District Court Judgeships Created	% Increase
1978			**394**	**510, 1T**	**117**	**29.7%**
1990			563, 8T	632, 13T	74	13%
1984			510	563, 8T	61	12.0%
1961			241	301, 2T	62	25.7%
1966			301	337, 3T	39	13%
1954			212	238, 2T	28	13.2%
1922			97, 1T	118, 1T	21	21.4%

[88] Omnibus Judgeship Act of 1978, Pub. L. No. 95-486, 92 Stat. 1629 (1978) (amending 28 U.S.C. §§ 44, 133 (1979)).

VII. The Administrative Law Judge Problem

In addition to the problem of unpublished opinions sketched above, another scandal plagues the administration of justice litigants in America face today – the problem of administrative law judges (ALJs). The Administrative Procedure Act created ALJs to conduct trial-like hearings in administrative adjudicative proceedings.[89] Their duties include issuing subpoenas, ruling on offers of proof, receiving evidence, holding settlement conferences, ruling on procedural requests, making findings of fact and conclusions of law and making or recommending an initial determination about the resolution of disputes.[90]

One cannot overstate the threat posed by ALJs to the rule of law, and in particular, to the separation of powers under our Constitution. Despite the fact that ALJs functionally act like trial judges in the judicial branch and have similar powers, they are in fact executive branch employees of federal agencies. But whereas Article III judges are appointed in accordance with the Appointments Clause, enjoy salary and tenure protections during times of "good behavior," and cannot be reversed by the executive branch, ALJs do not enjoy those same protections. Instead, they are hired by the very agencies whose cases against private individuals or entities they adjudicate; they can have their salaries reduced and be removed from office for "good cause," and they can be reversed by the very agencies that employ them and whose cases they adjudicate.[91] This represents a collapse of the separation of powers understood by the framers of the Constitution to be necessary for securing the independence of the judiciary.[92] This is especially problematic when one considers the fact that there are a total of 1,770 ALJs altogether.[93] To put that number in perspective, there are only 870 authorized Article III judgeships, including Supreme Court and Federal Circuit judgeships.

This paper is concerned with the ALJs residing in federal agencies wielding significant regulatory control over the country's economy and who have the power to issue substantial civil monetary penalties against private individuals or entities. There are a total of 158 such ALJs spread throughout 20 different executive branch agencies in the administrative state (See Table H below). That is still a substantial number considering that there are only 673 Article III district court judgeships. Moreover, those ALJs occupy their posts in some of the most powerful agencies in the country, such as, the Department of Labor, Federal Energy Regulatory Commission, Environmental Protection Agency, and the Securities and Exchange Commission. In order to redress the serious separation of powers problems posed by ALJs, this paper recommends abolishing those ALJs and replacing them with Article III Administrative Law judges.

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[89] P.L. 95-251, 92 Stat. 183 (1978).
[90] 5 U.S.C. §§ 554, 556-557; Vanessa K. Burrows, Cong. Research Serv., RL 34607, Administrative Law Judges: An Overview 1 (2010).
[91] Kent Barnett, *Resolving the ALJ Quandary*, 66 Vanderbilt Law Review 799 (2013).
[92] For example, in Federalist No. 78 Alexander Hamilton expounded on the virtues of tenure protections for Article III judges. Without such protections, he argued, "there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws."
[93] *Authorized Judgeships*, United States Courts, http://www.uscourts.gov/sites/default/files/allauth.pdf

Table H: ALJs to be Converted to Article III Judges

Agency	AL-3	AL-2	AL-1	Total Number of ALJs On Board
Consumer Financial Protection Bureau (CFPB)	1	0	0	1
Department of Agriculture (USDA)	1	1	0	2
DHHS/ Food and Drug Administration (FDA)	2	0	0	2
Department of the Interior (DOI)	8	1	0	9
Department of Justice/Drug Enforcement Administration (DEA)	2	0	0	2
Department of Labor (DOL)	33	7	1	41
Department of Transportation/Office of the Secretary (DOT)	2	1	0	3
Environmental Protection Agency (EPA)	3	1	0	4
Federal Communications Commission (FCC)	1	0	0	1
Federal Energy Regulatory Commission (FERC)	12	1	0	13
Federal Maritime Commission (FMC)	2	0	0	2
Federal Mine Safety Health and Review Commission (FMSHRC)	14	0	1	15
Federal Trade Commission (FTC)	1	0	0	1
International Trade Commission (USITC)	6	0	0	6
National Labor Relations Board (NLRB)	30	3	1	34

National Transportation Safety Board	3	0	0	3
Occupational Safety and Health Review Commission	11	1	0	12
Office of Financial Institution Adjudication	2	0	0	2
Securities and Exchange Commission	4	1	0	5
TOTAL	138	17	3	**158**

It is important to note that these particular ALJs are far more consequential than other ALJs who preside over benefit or entitlement cases in agencies like the Social Security Administration or the Office of Medicare and Medicaid Hearings. As Table I (below) indicates, the 158 ALJs that are the focus of this proposal have the power to impose substantial civil monetary penalties against private individuals or entities operating in virtually every sector of the economy.

Table I: Nature of Cases ALJs Listed in Table A Adjudicate

Agency	Claims adjudicated
Consumer Financial Protection Bureau	CFPB ALJs preside over formal Bureau hearings and may order a violator of its rules to provide redress by compensating those affected by the violation. In some cases, the Bureau may provide compensation from the Bureau's Civil Penalty Fund, which comes from penalties that the Bureau obtains in enforcement actions against other entities and individuals.[94]
Department of Agriculture	USDA ALJs adjudicate issues arising from fifty statutes administered by agencies within the Department. They issue initial decisions and orders in adjudicatory proceedings, approve of consent decisions entered into by parties, and decide appeals of debarments and suspensions.[95]
DHHS/ Food and Drug Administration	FDA ALJs adjudicate hearings arising under CFR Title 21, Part 17, and sections of the Federal Food, Drug, and Cosmetic Act, which authorize the FDA to impose civil money penalties on individuals or entities.[96]
Department of the Interior	DOI ALJs decide civil penalty assessments under various wildlife and resource protection laws, certain cases involving the Indian Self-Determination and Education Assistance Act (ISDA), contests of mining claims, Alaska Native allotment applications, and other asserted interests in Federal land.[97]
Department of Justice/Drug Enforcement Administration	DEA ALJs conduct formal hearings in connection with enforcement and regulatory cases brought by the DEA under the Controlled Substances Act (21 U.S.C. § 801, et seq) and its regulations (21 C.F.R. § 1300, et seq).[98]
Department of Labor	DOL ALJs preside over hearings concerning labor-related matters. The Department's administrative law judges hear and decide cases arising from over sixty labor-related statutes and regulations covering such diverse subjects -as, civil rights, child labor violations, minimum wage disputes, and enforcement actions involving the working conditions of migrant farm laborers.[99]
Department of Transportation/Office of the Secretary	DOT ALJs conduct hearings in civil penalty proceedings in cases including discrimination against passengers, violation of travel agent regulations, improper shipment of hazardous

[94] *Payments to Harmed Consumers*, Consumer Financial Protection Bureau, https://www.consumerfinance.gov/about-us/payments-harmed-consumers/.
[95] *United States Department of Agriculture*, Office of Administrative Law Judges, https://www.oaljdecisions.dm.usda.gov/.
[96] *Guidelines: ALJ Decisions in FDA Cases Under 21 C.F.R. Part 17*, HHS.GOV, https://www.hhs.gov/about/agencies/dab/different-appeals-at-dab/appeals-to-board/guidelines/fda/index.html
[97] *DOL Office of Administrative Law Judges*, U.S. Department of the Interior,
[98] *DEA Office of Administrative Law Judges*, Drug Enforcement Administration, https://www.dea.gov/ops/oalj.shtml
[99] *DOL Office of Administrative Law Judges*, United States Department of Labor, https://www.oalj.dol.gov/ALJMISSN.HTM

	material, passenger misconduct on airlines, airlines' and motor carriers' failure to comply with regulations concerning inspection, maintenance, and hours of service
Environmental Protection Agency	EPA ALJs conduct hearings and render decisions in proceedings between the EPA and persons, businesses, government entities, and other organizations that are regulated under environmental laws.[100] Most enforcement actions initiated by the EPA are for the assessment of civil penalties.[101]
Federal Communications Commission	FCC ALJs are responsible for conducting hearings ordered by the Commission, which has the authority to issue civil monetary penalties, revoke broadcasting licenses, and deny licensing renewal applications.[102]
Federal Energy Regulatory Commission	FERC ALJs preside over hearings and conduct investigations as directed by the Commission, which has the authority to regulate the interstate transmission of electricity, natural gas, and oil and imposes civil penalties.[103]
Federal Maritime Commission	Federal Maritime Commission ALJs resolve cases involving alleged violations of the Shipping Act and other laws within the Commission's jurisdiction.[104] The FMC monitors agreements among ocean common carriers and marine terminal operators to regulate their transportation costs and services.[105]
Federal Mine Safety Health and Review Commission	The FMHRC enforce regulations issued by the DOL covering health and safety in the nation's mines by issuing citations and orders to mine operators. FMHRC ALJs adjudicate disputes under the Mine Act, including the determination of penalties. Most cases deal with civil penalties assessed against mine operators and address whether the alleged safety and health violations occurred as well as the appropriateness of proposed penalties.[106]
Federal Trade Commission	The FTC ALJ performs the initial adjudicative fact-finding in the Commission's administrative complaint proceedings. These proceedings may arise under the consumer protection statute of the FTC Act, which permit FTC ALJs to issue cease and desist

[100] *EPA OALJ*, United States Environmental Protection Agency, https://www.epa.gov/aboutepa/about-office-administrative-law-judges-oalj
[101] *Id.*
[102] *FCC OALJ*, Federal Communications Commission, https://www.fcc.gov/administrative-law-judges
[103] *About FERC*, Federal Energy Regulatory Commission, https://www.ferc.gov/about/ferc-does.asp
[104]
[105] *About the FMC*, Federal Maritime Commission, http://www.fmc.gov/about/about_fmc.aspx
[106] *About FMHRC*, Federal Mine Safety and Health Review Commission, https://www.fmshrc.gov/about.

	orders against individuals or entities that are alleged to be in violation of the FTC ACT or its attendant regulations.[107]
International Trade Commission	USITC investigates the effects of dumped and subsidized imports on domestic industries and conducts global safeguard investigations. The Commission also adjudicates cases involving imports that allegedly infringe intellectual property rights.[108]
National Labor Relations Board	NLRB ALJs hear, settle and decide unfair labor practice cases nationwide.[109] After a Regional Director issues a complaint in an unfair labor practice case, an NLRB Administrative Law Judge hears the case and issues a decision and recommended order, which can then be appealed to the Board in Washington.[110]
National Transportation Safety Board	NTSB ALJs conduct formal hearings and issue initial decisions on appeals by airmen filed with the Safety Board. The NTSB serves as the "court of appeals" for any airman, mechanic or mariner whenever action is taken by the Federal Aviation Administration or the U.S. Coast Guard Commandant, or when civil penalties are assessed by the FAA.[111]
Occupational Safety and Health Review Commission	OSHRC ALJs adjudicate workplace safety and health disputes between the DOL and employers. Cases arise from inspections conducted by the Occupational Safety and Health Administration (OSHA), which is a part of the Department of Labor.[112]
Office of Financial Institution Adjudication	OFIA ALJs are charged with overseeing the administration of enforcement proceedings of the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve Board (FRB), the FDIC, and the National Credit Union Administration (NCUA).[113]
Securities and Exchange Commission	SEC ALJs conduct hearings in proceedings initiated by the Commission against individuals alleged to have violated one or more securities laws such as, the Securities Act of 1933, Securities Exchange Act of 1934, and/or the Sarbanes-Oxley

[107] *A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority*, Federal Trade Commission, https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority.
[108] *United States International Trade Commission*, United States International Trade Commission, https://www.usitc.gov/press_room/about_usitc.htm.
[109] *Division of Judges*, National Labor Relations Board, https://www.nlrb.gov/who-we-are/division-judges
[110] *Cases & Decisions*, National Labor Relations Board, https://www.nlrb.gov/cases-decisions
[111] *NTSB Administrative Law Judges*, National Transportation Safety Board, https://www.ntsb.gov/legal/alj/Pages/default.aspx.
[112] *About OSHRC*, Occupational Safety and Health Review Commission, http://www.oshrc.gov/about/how-oshrc.html
[113] *FDIC Law, Regulations, Related Acts*, Federal Deposit Insurance Corporation, https://www.fdic.gov/.

	Act of 2002.[114]

a. Separation of Power Problems in ALJ Selection

One manner in which ALJs constitute an affront to the separation of powers established under the Constitution concerns the way they are appointed. Unlike Article III judges, the President does not nominate nor does the Senate confirm ALJs. In fact, the President is likely not involved, even indirectly, when an agency selects a particular ALJ, nor is the Senate able to provide a check on the process as it does for Article III judges. Instead, yet another agency -- the Office of Personal Management (OPM) -- develops and administers standards for the selection of the roughly 1,800 ALJs that conduct formal adjudications across the entire administrative state. Those standards generally require ALJ candidates to be licensed attorneys with a minimum of seven years of experience and to pass an examination that tests their ability to draft a legal opinion and analyze legal issues. Based on an evaluation of each candidate's experiences, examination scores, and veteran statuses, the candidates with the highest scores are placed on a list, and each agency may then select from the three candidates ranked the highest at any given time; this is known as the "Rule of Three."

The ALJ selection process raises separation of powers concerns not present in confirmation process of Article III judges. For example, unlike Article III judges, which are *judicial branch* officers nominated by the President, who sits atop the *executive branch*, and confirmed by the Senate, which provides a *legislative branch* check, no similar checks and balances occur with the selection of Article III judges. Instead, it is the executive branch agency *itself* that selects the ALJ – another executive branch official. Although OPM may adopt selection standards independent of any particular agency's input, each agency ultimately makes the final decision about which ALJs it will hire, and the Rule of Three permits it some discretion to choose an ALJ that it believes will help it carry out its enforcement agenda.

The troubled history of the Rule of Three offers a good example of the lengths to which agencies will go to ensure they can select the ALJs most sympathetic to its agenda. In the past, agencies sought to circumvent the Rule of Three through a "selective certification process," which enabled them, "upon a showing of necessity" and approval of the OPM, to appoint "specially certified" ALJ candidates without regard to their OPM ranking. Eventually, OPM yielded to criticism alleging that selective certification enabled agencies to hire ALJs with a more "pro-enforcement attitude," and it ended the practice. Nevertheless, agencies continue to seek waivers from the OPM to practice selective certification and have appealed to Congress to permit them to do so. Moreover, ALJs appear to agree that the Rule of Three provides no guarantee of independence. In a 2008 report to then President-elect Obama, the Federal Administrative Law Judges Conference issued a damning indictment against the OPM, complaining that it "sought to reward ALJs based on an agency's political goals" and that "OPM . . . has sought to undermine ALJs independence and downgrade ALJs' level of experience and competence" through the selection process.

[114] *The Laws That Govern the Securities Industry*, U.S. Securities And Exchange Commission, https://www.sec.gov/answers/about-lawsshtml.html

b. ALJ Separation of Power Problems at the Agency

Beyond the problems associated with their selection, ALJs continue to pose separation of power problems once they begin their tenure at their respective agencies. For example, although the APA specifies that ALJs may not "be responsible to or subject to the supervision" of an agency employee who conducts investigations or prosecutions for the agency,[115] ALJs may still be responsible to the head of an agency, even though the agency head sets policy and oversees investigations and prosecutions.[116] Agency heads also have the authority to reverse both the factual and legal findings in an ALJ decision,[117] although they must defer to an ALJ's witness-demeanor observations and consider the initial decision on administrative appeal.[118] Beyond this formal power to reverse parts of ALJ decisions, one survey reported that more than a quarter of all ALJs held the perception that agencies informally pressure them on how to rule in cases.

ALJ independence is also compromised at the agency in the way ALJs may be removed from office. Under the APA, ALJs are subject to removal and other disciplinary proceedings, such as, suspension and a reduction in grade and pay for *good cause*.[119] Although agencies can only remove and discipline ALJs for good cause as determined by the Merit Systems Protection Board (MSPB), the good cause standard is highly ambiguous.[120] It has variously been used to remove ALJs for extensive absences, failing to set hearing dates, and for having a "high rate of significant errors."[121] In *Soc. Sec. Admin* v. *Goodman*, the MSPB articulated the differences between the good cause standard governing ALJs' removal and the good behavior standard under which Article III judges maintain their life tenure. Article III judges may only be impeached for failing to meet the "good behavior" standard as a result of committing treason, bribery, or high crimes and misdemeanors; however, the MSPB states that "the good cause standard is not equivalent to the good behavior standard."[122] Moreover, the MSPB explicitly stated that "the [MSPB] can consider whether the evidence, of poor performance or of misconduct, establishes good cause for the proposed disciplinary action."[123] The fact that poor performance may constitute good cause to remove an ALJ from office makes plain that the good cause standard is a much easier standard to overcome than the good behavior standard Article III

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[115] 5 U.S.C. § 554(d)(2) (ALJs may not "be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.").
[116] 5 U.S.C. § 554(d)(2)(C) (exempting "agency or a member or members of the body comprising the agency" from the separation-of-functions provisions of § 554(d)(2)); Kent H. Barnett, Resolving the ALJ Quandry, 66 Vand. L. Rev. 797, 807 (2013)
[117] *See* § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.")
[118] Kent H. Barnett, *Resolving the ALJ Quandry*, 66 Vand. L. Rev. 797, 807 (2013) (citing James P. Timony, Disciplinary Proceedings Against Federal Administrative Law Judges, 6 W. New Eng. L. Rev. 807, 811 (1984)).
[119] 5 U.S.C. § 7521 (b).
[120] Barnett, *supra* note 5, at 807; *Soc. Sec. Admin., Dept. of Health and Human Services v. Goodman*, 19 M.S.P.R. 321, 325 (M.S.P.B. 1984) (The phrase 'good cause' is susceptible of more than one interpretation. Congress was aware of this ambiguity. However, it neither defined the phrase, nor expressed an intention regarding its necessary interpretation.).
[121] *Id.* (quoting Vanessa K. Burrows, Congr. Research Serv., Administrative Law Judges: Judges: An Overview 2 (2010)).
[122] *Goodman*, 19 M.S.P.R. at 826.
[123] *Id.*

judges are subject to. This standard opens the door to agency officials exerting pressure on ALJs via the threat of a poor evaluation if ALJs do not yield to such pressure. It is perhaps unsurprising then that agencies brought more than twenty actions against ALJs between 1946 to 1992 whereas only fifteen Article III judges have been impeached in more than two hundred years.

Moreover, ALJs can be removed *even without good cause* as a result of a reduction-in-force (RIF) action conducted by the Office of Personnel Management (OPM), an independent agency that manages the civil service of the federal government.[124] RIF actions are the elimination of employee positions, including ALJs, for reasons such as a result of reorganization, lack of work, or shortage of funds.[125] The law provides that the OPM must take into account the following four factors of an ALJ when conducting a RIF: (1) tenure of employment; (2) veterans' preference; (3) length of service; and (4) performance ratings. Thus, in an RIF action, an ALJ could potentially be let go as a result of his or her performance evaluations by agency officials, even when such evaluations would not otherwise constitute good cause. This contrasts significantly with the protections afforded to Article III judges who, under the Constitution, cannot be removed for any reason other than failing to meet the very low bar imposed by the good behavior standard.

Above all else, perhaps the greatest threat to ALJ independence lies beyond the formal differences in protections accorded ALJs and Article III judges inscribed into law, and instead with the structural fact that ALJs are ultimately employees of the agencies that hired them and housed therein. Roscoe Pound described this as the "worse feature" of agency adjudication because such a structure produces "an emotional interest in the result [of an adjudication] which precludes objective and impartial action as surely as the pecuniary interest which has always been held to disqualify . . . . In some administrative proceedings this combination of [executive and judicial] roles has led to procedures little short of scandalous."[126]

c. Proposal – Abolishing the Administrative Law Judges and Replacing Them With Article III Administrative Law Judges Would Redress ALJ Separation of Power Concerns and Alleviate District Court Caseloads.

Abolishing the 158 ALJs listed in Table A and turning them into Article III Administrative Law judges nominated by the president and confirmed by the senate would provide an elegant solution to not only the separation of powers problems discussed above, but also to the problem of caseload pressures afflicting the district courts discussed earlier in this paper. If ALJs were converted to Article III Administrative Law judges, they would be nominated and confirmed in accordance with the Appointments Clause, thereby eliminating the bias concerns that come with ALJs being selected by the very agencies whose cases they adjudicate. The framers struck the proper balance between accountability and independence through the Appointments Clause, and it is about time that the judges who adjudicate agency actions at the fact-finding stage were subject to it. Similarly, eliminating statutory ALJs and replacing them with Article III Administrative Law judges would eliminate the independence

[124] 5 U.S.C. § 7521 (b).
[125] https://www.opm.gov/policy-data-oversight/workforce-restructuring/reductions-in-force/
[126] 2 Roscoe Pound, Jurisprudece 442–43 (1959

concerns that arise from agencies' authority to dock ALJs' pay or remove them altogether under the APA's good cause standard. Finally, this solution would eliminate altogether the "emotional interest" that Roscoe Pound identified as prevalent in a system where ALJs are housed in the same agencies whose enforcement actions they adjudicate.

Replacing the statutory ALJs with Article III ALJ's would simultaneously provide much needed relief to judicial districts across the country that would receive those judges and benefit from sharing their caseload burdens with them. Recall that in Part II, this paper proposed increasing the number of district court judges by at least as great a percentage as Congress did through Jimmy Carter's Omnibus Judgeship Bill in 1978; that yielded a proposed increase of 200 district judgeships. The most efficient and cost-effective way for Congress to do that would be to convert the 158 ALJs discussed in this paper to Article III ALJ's. The new Administrative Law judges would hear the same types of cases as the judges in the judicial districts to which they would relocate, and all of the judges would share in the caseload of the district, including all agency adjudications that would be brought before them. Granted, adjudications that were previously handled exclusively by the fired stator ALJs would now add to district courts' caseloads, but that burden would be offset by the substantially greater relief the new Administrative Law judges could provide to district courts' existing dockets.

Another advantage of this proposal is that it would ensure there is enough appellate capacity for litigants in an agency case to enjoy an automatic right of review in the circuit courts of appeals. Presently, that is not a right that all parties to agency adjudications enjoy. Too often, individuals who are party to an agency adjudication must first appeal to the agency itself, then possibly to a D.C. district court, and then perhaps to the D.C. Circuit Court of Appeals, since most agency litigation occurs in the District of Columbia. This proposal would enable Congress to ensure that the judicial districts that receive the new Article III judgeships would also take a proportional number of agency cases that would have previously been litigated in agency adjudications in the District of Columbia. Because each case that would have formerly been an agency adjudication would now be tried by an Article III judge and retain an automatic right of appellate review, this added appellate burden would be spread proportionally by all of the circuits that were the beneficiaries of the new district judgeships created in those circuits. And assuming Congress adopted this paper's earlier proposal to increase the number of circuit court judgeships by at least 36%, the circuit courts would have the additional capacity necessary to hear these new appeals.

It is important to note that this would not substantially reduce the workload of the D.C. Court of Appeals – nor should it. Out of all the circuit courts, the D.C. Circuit has the most experience deciding administrative law cases, and it could remain that way under this proposal. Congress could statutorily guarantee that the District of Columbia remains the primary venue for most agency actions. It could, for example, specify that all SEC, FERC, and DOL cases – or whichever other agency cases it chooses -- must continue to be litigated in the District of Columbia. Accordingly, it would need to ensure that the District of Columbia remains the primary beneficiary of the new Article III judgeships that would be created. Moreover, granting an automatic right of appellate review for all decisions made in agency cases would substantially increase the number of agency disputes that the D.C. Circuit hears -- even if it lost some to other circuits -- because most initial agency adjudications do not presently enjoy such an automatic

right. In fact, simply based on caseload statistics, a compelling case can be made that the D.C. Circuit should disproportionately bear the burden of the new appeals that would result from this proposal. Recall from Table D that the D.C. Circuit is the only federal circuit court that may currently have *too many* judges according to the Judicial Conference staffing model. According to that model, the optimal number of active D.C. Circuit judgeships is 7 although it currently has 11 authorized active judgeships. Thus, Congress should statutorily ensure that the D.C. Circuit continues to hear the majority of administrative law appeals; moreover, because virtually all executive agencies are headquartered in the District of Columbia, and because the D.C. Circuit attracts the top judicial talent in the country and has the most experience with administrative law cases, parties to an agency dispute would likely benefit if Congress let the D.C. Circuit's docket -- and judgeships -- grow to a multiple of what it is now.

d. The Rule of Law is Worth The Cost

It should be apparent that this proposal provides a cost effective method to pay for much of the new expenditures it seeks. Rather than simply asking for more judgeships, this proposal would cover the cost of the vast majority of new district judgeships it seeks by eliminating quasi-judicial officials that the government is already paying for – ALJs – and replacing them with Article III judgeships. Recall that the Judicial Conference staffing model and the precedent of the Omnibus judgeship bill suggested that a reasonable number of new district judgeships to be created would be 185. Converting 158 ALJs into those judges would mean that Congress could locate money that is already being spent to cover most of the cost associated with adding the 185 district court judges that this proposal seeks.

To be sure, ALJs do not receive the same pay as Article III judges. As Table J (below) and Table K (below) demonstrate, even the highest paid ALJs (AL-1 ALJs) get paid less than the lowest tier of Article III judges – district judges. Still, even assuming that ALJs get paid the lowest possible rate for their level (this paper assumes Al-3 ALJs get paid $108,000) that still represents a substantial portion of the new district court salaries that could be paid through funds currently being expended on the 158 ALJs that would be abolished. Table L demonstrates that it would only cost the federal government roughly $11 million dollars to replace those ALJ with Article III district judges.

Table J: 2017 ALJ Salaries[127]	
Level	Rate
AL-3/A	$108,100
AL-3/B	$116,300
AL-3/C	$124,700
AL-3/D	$133,000
AL-3/E	$141,500
AL-2	$149,600
AL-1	$161,900

Table K. 2017 Article III Judge Salaries[128]	
Level	Rate
District Judges	$205,100
Circuit Judges	$217,600
Associate Justice	$251,800
Chief Justice	$263,300

[127] *Pay & Leave*, OPM.GOV, https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/17Tables/exec/html/ALJ.aspx.
[128] *Judicial Compensation*, United States Courts, http://www.uscourts.gov/judges-judgeships/judicial-compensation.

Table L: Cost of Converting ALJs to Article III District Court Judges						
Agency	AL-3	AL-2	AL-1	Current Cost	Cost to Convert to District Judge	Difference
Consumer Financial Protection Bureau	1	0	0	$108,100	$205,100	$97,000
Department of Agriculture	1	1	0	$257,700	$410,200	$152,500
DHHS/ Food and Drug Administration	2	0	0	$216,200	$410,200	$194,000
Department of the Interior	8	1	0	$864,800 + $149,600 = $1,014,400	$1,845,900	$831,500
Department of Justice/Drug Enforcement Administration	2	0	0	$216,200	$410,200	$194,000
Department of Labor	33	7	1	$3,567,300 + $1,047,200 + $161,900 = $4,776,400	$8,409,100	$3,632,700
Department of Transportation/Office of the Secretary	2	1	0	$216,200 + $149,600 = $365,800	$613,300	$247,500
Environmental Protection Agency	3	1	0	$486,200	$820,400	$334,200
Federal Communications Commission	1	0	0	$108,100	$205,100	$97,000
Federal Energy Regulatory Commission	12	1	0	$1,297,200 + $149,600 = $1,446,800	$2,666,300	$1,219,500
Federal Labor Relations Authority	2	1	0	$216,200 + $149,600 = $326,200	$615,300	$289,100
Federal Maritime Commission	2	0	0	$216,200	$410,200	$194,000
Federal Mine Safety Health and Review Commission	14	0	1	$1,513,400 + $161,900 = $1,675,300	$3,076,500 -	$1,401,200
Federal Trade Commission	1	0	0	$108,100	$205,100	$97,000

International Trade Commission	6	0	0	$648,600	$1,230,600	$582,000
National Labor Relations Board	30	3	1	$3,243,000 + $448,800 + $161,900 = $3,853,700	$6,973,400	$3,119,700
National Transportation Safety Board	3	0	0	$324,300	$615,300	$291,000
Occupational Safety and Health Review Commission	11	1	0	$1,189,100 + $149,600 = $1,338,700	$2,461,200	$1,122,500
Office of Financial Institution Adjudication	2	0	0	$216,200	$410,200	$194,000
Securities and Exchange Commission	4	1	0	$432,400 + $149,600 = $582,000	$1,025,500	$443,500
TOTAL	138	17	3	$17,959,000	$29,327,300	**$11,368,300**

e. The Total Cost

Of course, it would be ideal if Congress would create all of the judgeships this proposal seeks to ensure that litigants receive the full administration of justice they are entitled to. As previously discussed, this would entail creating 27 ($205,100 * 27 = $5,537,700) additional district court judgeships in addition to the 158 ALJs ($11,368,300 – calculated above) that would be converted, as well as creating 61 new circuit judgeships ($217,600 * 61 = $13,273,600) for a total cost of $30,179,600. That would seem to be a lot of money, but when one considers that the Government Accountability Office estimates the final cost of the new Air Force One to be $3.2 billion dollars[129] and the budget for the National Endowment of the Arts was $147,949,000 in 2016,[130] $30 million is a small price to pay to restore some semblance of the rule of law in this country.

XII. Conclusion

The 115th Congress should make it a priority to pass a new omnibus judgeship bill when the new session of Congress begins. The federal judiciary is long overdue for new judgeships given how much caseloads have grown since 1990, when the last omnibus judgeship bill was passed. Authorizing new judgeships would substantially help to reduce abusive practices the

[129] *Trump says Air Force One Boeing Order Should be Cancelled*, BBC News, http://www.bbc.com/news/world-us-canada-38221579

[130] *National Endowment for the Arts Appropriations History*, National Endowments for the Arts, https://www.arts.gov/open-government/national-endowment-arts-appropriations-history

courts have adopted to cope with their caseloads, such as issuing unpublished opinions. Moreover, Congress could expedite the creation of new judgeships by abolishing 158 powerful ALJs and replacing them with Article III district court judges that would help to alleviate the the caseload burden of afflicting judicial districts across the country. In doing so, Congress would extinguish serious separation of power problems that ALJs pose, and also help to undo the damage done to the rule of law by President Obama's lower federal court appointments over the past eight years.