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ESSAY

ASSESSING JUDGESHIP NEEDS IN THE FEDERAL COURTS OF APPEALS: POLICY CHOICES AND PROCESS CONCERNS

Arthur D. Hellman*

In March 2003, the Judicial Conference of the United States, the policymaking body of the federal judiciary, requested that Congress create eleven new judgeships for the federal courts of appeals. This recommendation could not have come as a surprise to anyone. No new federal appellate judgeships have been created for almost fifteen years; since then, caseloads have continued to climb. But one aspect of the recommendation might have aroused some puzzlement. The Conference based its request, in part, on a workload measure known as “adjusted filings.” Four courts of appeals were included in the request—but there was no mention at all of the two courts with the highest adjusted filings in the nation, the Fifth Circuit and the Eleventh Circuit.

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This omission raises two questions, one obvious and one that lurks below the surface. The obvious question is: Why is the Judicial Conference not seeking additional judgeships for courts which, by its own standard, would appear to need them more acutely than any other? Pursuit of this inquiry leads to the second question: Does the process used by the Judicial Conference in formulating its recommendations provide sufficient information to enable Congress to carry out its responsibility for creating judgeships when needed?

Those questions are the principal focus of this Essay. However, before turning to them, it will be helpful to explain why the Judicial Conference request is justified as far as it goes. That in turn will require some discussion of a report by the General Accounting Office that expresses concerns about the standard used by the Conference in formulating its recommendations.

The Essay has two purposes. First, I hope to promote an informed debate among the judges and lawyers of the Fifth and Eleventh Circuits over the policies adopted by those two courts of appeals to deal with their increased caseloads. Second, I seek to persuade the Judicial Conference that opening up the process by which it assesses judgeship needs will benefit not only Congress but also the judiciary.

I. THE JUDICIAL CONFERENCE REQUEST

The Judicial Conference asked Congress to create eleven new judgeships for the federal courts of appeals: one for the First Circuit, two for the Second Circuit, one for the Sixth Circuit, and seven for the Ninth Circuit (five permanent, two temporary).¹ A bill has been introduced in the Senate to implement this request.² At this writing, no bill has been

1. News Release, Administrative Off. of the U.S. Cts., *Judicial Conference Asks Congress to Create 57 New Judgeships* (Mar. 18, 2003) (Attachment A) (available at http://www.uscourts.gov/Press_Releases/303judconf.pdf) (accessed Oct. 31, 2003; copy on file with Journal of Appellate Practice and Process). The Conference also asked Congress to create forty-six additional judgeships for the federal district courts. Details of the district court request will not be discussed in this Essay.

2. *Federal Judgeship Act of 2003*, S. 920, 108th Cong. (2003).

introduced in the House.³ However, in June 2003 the Subcommittee on Courts, the Internet, and Intellectual Property of the House Judiciary Committee held an oversight hearing on “The Federal Judiciary: Is there a Need for Additional Federal Judges?”⁴ At that hearing, Judge Dennis Jacobs, the chair of the Judicial Conference Committee on Judicial Resources, urged the Subcommittee to “give full and favorable consideration to the draft bill submitted by the Judicial Conference” to implement the request.⁵

I too believe that Congress should move speedily to enact the Judicial Conference recommendations into law. There are two reasons for this conclusion. First, the process followed by the Judicial Conference assures that a request will not be submitted to Congress unless there is strong evidence of the need for additional judgeships in a particular circuit. Second, my own studies of the federal appellate courts leave no doubt in my mind that additional judgeships are warranted. Indeed, the Judicial Conference request may understate the need.

A. The Judicial Conference Process

As Judge Jacobs explained in his testimony at the House hearing, the Judicial Conference does not request additional appellate judgeships solely on the basis of any formula, nor is it sufficient that a particular court of appeals believes that new judgeships are needed. Rather, the Judicial Conference follows an elaborate process involving multiple stages of review and a variety of criteria both quantitative and non-quantitative. The process is generally referred to as the “Biennial Survey of Judgeship Needs.”

3. One pending bill would implement the Judicial Conference recommendation for seven additional judgeships for the Ninth Circuit. See *Ninth Circuit Court of Appeals Reorganization and Judgeship Act of 2003*, H.R. 2723, 108th Cong. (2003) (summary available at <http://www.house.gov/simpson.hr2723.pdf>) (accessed Oct. 20, 2003; copy on file with Journal of Appellate Practice and Process).

4. Subcomm. on Cts., the Internet, & Intellectual Property, H.R. Jud. Comm., *Federal Judiciary: Is There a Need for Additional Federal Judges?: Hearing on March 2003 Recommendations of Judicial Council of the United States*, 108th Cong. (June 24, 2003) [hereinafter *Judgeships Hearing*].

5. *Id.* at 15 (statement of Judge Jacobs). The other witnesses at the hearing were William Jenkins, Jr., representing the General Accounting Office, and the author of this Essay.

Judge Jacobs provided a concise summary of the Biennial Survey process:

(1) Each court of appeals seeking an additional judgeship submits a detailed justification to the Subcommittee on Judicial Statistics.

(2) The Subcommittee reviews and evaluates the request and prepares a preliminary recommendation.

(3) The preliminary recommendation is sent to the requesting court for comment and to the appropriate circuit judicial council for review.

(4) The response from the court and the recommendation of the judicial council are reviewed by the Subcommittee in the light of updated caseload data.

(5) The Subcommittee prepares recommendations for the Committee on Judicial Resources.

(6) The Committee's recommendations are submitted to the Judicial Conference for final approval and transmission to Congress.⁶

A key element in the Biennial Survey is the statistical standard of 500 adjusted filings per three-judge panel. The adjustment reflected in this standard is twofold. First, reinstated cases are subtracted from the total. Second and more important, pro se appeals are counted as one-third of a case.⁷ Unless adjusted filings total 500 or more per panel, the Judicial Conference will not recommend new judgeships for a court. But a high level of adjusted filings will not, by itself, support a recommendation. As Judge Jacobs told the House subcommittee, the standard is "the starting point in the process, not an end point."⁸

I will have more to say about the Biennial Survey process in Part III,⁹ but one point deserves mention here. In testimony before another House Judiciary subcommittee in 2002, Judge Jacobs reported that in the judgeship needs survey of 2000, the

6. *Id.* at 10. The description in the text is based on Judge Jacobs's written summary as well as the body of his statement. The former is not included in the hearing record, but is on file with the author. For the sake of readability I have omitted quotation marks, but most of the language is drawn from Judge Jacobs's submissions.

7. For further discussion of the "discounting" of pro se appeals, see *infra* Part I(B).

8. *Judgeships Hearing*, *supra* n. 4, at 10 (statement of Judge Jacobs).

9. See *infra* at 261-64.

various federal courts requested a total of seventy-eight additional judgeships (some permanent, others temporary). But in the course of the various stages of review, “that number was eventually reduced to the sixty-three initially recommended by the Judicial Conference in July 2000.”¹⁰ This means that almost one out of five judgeships requested by the individual courts did not make it through the review process to the request submitted to Congress.¹¹ This strikes me as strong evidence that the review process is serious and rigorous.¹²

Further evidence can be found in the documentary material that the Judicial Conference furnished to Congress in support of its requests.¹³ The detailed analysis of caseload trends, court practices, and available judgepower instills confidence that the recommendations are justified. For example, in explaining the recommendation for seven additional judgeships for the Ninth Circuit, the Judicial Conference acknowledged the extensive contribution of the court’s twenty-one senior judges, but pointed out that the majority of these judges were “75 years of age or older, including seven that [were] at least 80 years old.”¹⁴ The report thus made clear that the Ninth Circuit currently has more judgepower than its authorized allocation might suggest—but that this condition could not be expected to continue long into the future.¹⁵

10. Subcomm. on the Constitution, H.R. Jud. Comm., *A Judiciary Diminished Is Justice Denied: The Constitution, the Senate, and the Vacancy Crisis in the Federal Judiciary: Hearing on Causes and Effects of Judicial Vacancy Crisis*, 107th Cong. 103 (Oct. 10, 2002) (statement of Judge Jacobs) [hereinafter *Vacancy Hearing*].

11. Judge Jacobs did not give a breakdown of district court and court of appeals requests.

12. In his testimony in 2003, Judge Jacobs presented a similar account of the review procedure for the 2003 survey, but the effect of the process is harder to assess because of intervening action by Congress to create some new district-court judgeships. See *Judgeships Hearing*, *supra* n. 4, at 10 (statement of Judge Jacobs).

13. This material was not included in the record of the hearing held in June 2003. It is on file with the author and with the House Judiciary Committee.

14. Jud. Conf. of the U.S., *U.S. Courts of Appeals 2003 Biennial Judgeship Survey, Preliminary Recommendations—Ninth Circuit* 1-2 (2003).

15. The supplementary materials also noted that, as of 2002, five active judges of the Ninth Circuit were eligible for senior status, and “one additional judge [would become] eligible in each of the next four years.” *Id.* at 2. The Judicial Conference should perhaps have made explicit what is implicit in this account: There is no way of knowing whether judges who are eligible for senior status will take advantage of the opportunity. At the time of the House hearing, three active judges of the Ninth Circuit had been eligible to take

B. Justifications for the Request and the GAO Study

In concluding that the Judicial Conference request for eleven new appellate judgeships is fully warranted, I also rely on my own research into the work of the federal courts of appeals. No new judgeships have been created for any federal court of appeals since 1990. During that time, federal appellate caseloads have continued to grow. For example, from 1991 through 2002, filings nationwide increased from 43,027 to 57,555.¹⁶ In concrete terms, this means that four appeals are being filed today for every three that were filed when Congress last created new judgeships. Federal appellate judges were not underworked fifteen or twenty years ago, and it would seem almost self-evident that caseload growth on this scale must require additional judgepower.

Against this background, the General Accounting Office (GAO), in a report published in May 2003, raised some questions about the statistical methods used by the Judicial Conference in formulating its requests for new appellate judgeships.¹⁷ The report focused on two aspects of the Judicial Conference approach: the weight of one-third given to pro se appeals and the use of 500 "adjusted filings" per three-judge panel as the base standard.¹⁸

With respect to the first point, it is true that the Judicial Conference did not carry out empirical research to determine the judge time required by pro se cases as distinguished from counseled appeals. In an ideal world with no limit on resources,

senior status for four years or more. See Congressional Quarterly, *2002 Judicial Staff Directory* 1218, 1226, 1275 (Paul Wayne Walker, ed., 19th ed., CQ Press 2002) (showing birthdates of Judges Pregerson, Reinhardt, and Tashima).

16. These figures are taken from the Annual Reports of the Administrative Office of the United States Courts. See Administrative Off. of the U.S. Cts., *2002 Annual Report of the Director: Judicial Business of the United States Courts* 73 tbl. B (U.S. Govt. Printing Off. 2002); Administrative Off. of the U.S. Cts., *1992 Annual Report of the Director* 130 tbl. B (U.S. Govt. Printing Off. 1992) [hereinafter *[Year] Annual Report*]. The 1992 Annual Report is used for the 1991 figure because in 1992 the Administrative Office began the current practice of reporting federal judicial caseloads on the basis of the federal government fiscal year, October 1 to September 30. See *id.* at 56.

17. *Judgeships Hearing*, *supra* n. 4, at 29-54 (reprinting GAO report). The report was prepared at the request of Chairman Lamar Smith of the Subcommittee on Courts, the Internet, and Intellectual Property of the House Judiciary Committee.

18. See generally *id.*

such an undertaking would no doubt be valuable. But in the real world of limited resources, I do not think it is necessary. When an appeal is filed by a lawyer on behalf of a client, professional norms as well as ethical obligations generally assure that the appeal will have sufficient merit to require more than a de minimis amount of judge time. That assurance is lacking when an appeal is filed by a litigant (generally a non-lawyer) acting for himself. The three-to-one ratio applied by the Judicial Conference strikes me as a reasonable (if unscientific) effort to quantify the difference.

Moreover, we do have some empirical data about the relative demands on judge time of pro se and counseled cases. A few years ago, the Federal Judicial Center (FJC), the research arm of the federal judiciary, carried out a study of case management practices for the Commission on Structural Alternatives for the Federal Courts of Appeals (White Commission).¹⁹ In contrast to the statistical tables issued by the Administrative Office of United States Courts (AO), the FJC did offer some detailed breakdowns of pro se and counseled cases. Two are of particular interest in the context of case weighting.

One of the most time-consuming responsibilities of an appellate judge is writing an opinion for publication.²⁰ The Federal Judicial Center study indicates that in 1998, only four percent of pro se appeals received a published opinion, while thirty-eight percent of counseled cases did so.²¹ Interestingly, the percentage for pro se appeals varied widely among the circuits. One circuit, the Fourth, appears to have a policy of not publishing opinions in pro se cases.²² At the other end of the spectrum, two circuits (the D.C. and Seventh Circuits) published opinions in nine percent of pro se cases.²³

Another useful proxy for judge time is oral argument. The FJC study tells us that fifty-seven percent of the counseled appeals received oral argument in 1998, while only six percent

19. Judith A. McKenna, Laural L. Hooper & Mary Clark, *Case Management Procedures in the Federal Courts of Appeals* (Fed. Jud. Ctr. 2000) [hereinafter *FJC Study*].

20. See *infra* Part I(C) at 250-51.

21. *Id.* at 19 tbl. 11.

22. *Id.*

23. *Id.*

of the pro se cases were argued orally.²⁴ Here too there was wide variation among the circuits, with one circuit—the Second—allowing oral argument in almost one-third of its pro se cases.²⁵

Based on this information, the weight of one-third for pro se appeals certainly seems justified. Indeed, one might argue that pro se appeals should be discounted even more. However, for several reasons, I do not suggest this step. First, as already noted, the circuits vary greatly in their treatment of pro se cases. It would not be desirable to penalize circuits that are more generous in allocating time to pro se appeals. Second, further discounting of pro se appeals might become a self-fulfilling prophecy, leading judges (even unconsciously) to pass too hurriedly over some appeals that after further study would be seen to have merit.²⁶ Finally, appearances matter. The judiciary should take care not to give the impression that one class of litigants is being accorded second-class status. (Even the current weighting may have that effect, but the very fact that the available data would justify heavier discounting gives some legitimacy to the practice.)

The second focus of the GAO study is the baseline figure of 500 adjusted filings per three-judge panel. In response, Judge Jacobs pointed out that “all of the requests for additional circuit judgeships are for courts in which adjusted filings per panel are 583 and higher.”²⁷ Thus, the workloads of the four courts “transcend any deviations that superior fine-tuning could correct.”

I agree with Judge Jacobs’s observation, but I am not certain that it fully addresses the concern expressed by the GAO report. The GAO appears to be saying, not simply that the standard could be made more precise, but that “there is no empirical basis for assessing” whether the standard is accurate

24. *Id.* at 11 tbl. 6 The report does not give the figure for pro se appeals, but it can be calculated from the data that are included. I have attempted to replicate the FJC study using the Federal Judicial Center’s Integrated Database. *See id.* at 3 n. 4.

25. The Second Circuit’s policy is routinely to allow oral argument in all cases, including all pro se cases, unless the pro se litigant is incarcerated. *See id.* at 70.

26. This is admittedly speculative, and the phenomenon is perhaps more likely to be reflected in institutional arrangements than in individual judges’ handling of particular cases. In any event, the other concerns discussed in the text are more than sufficient to suggest caution about further discounting of pro se appeals.

27. *Judgeships Hearing*, *supra* n. 4, at 49 (Letter of Judge Jacobs to GAO).

at all. In other words, the GAO seems to be asking: Why 500 adjusted filings per three-judge panel? Why not 400? Why not 600?

The GAO itself offers part of the answer:

At the time the current measure was developed and approved, using the new benchmark of 500 adjusted case filings resulted in judgeship numbers that closely approximated the judgeship needs of the majority of the courts of appeals, as the judges of each court perceived them. The current court of appeals case-related workload measure principally reflects a policy decision using historical data on filings and terminations.²⁸

Perhaps more to the point, the benchmark resulted in judgeship numbers that approximated either actual allocations or actual allocations plus a modest increase for most of the circuits.

In my view, the use of a historically based approach is quite defensible. Traditionally, Congress has been reluctant to expand the Article III judiciary any more than necessary. No new appellate judgeships have been created for more than a decade. Under these circumstances, it would make little sense for the Judicial Conference to come up with requests that deviated sharply from existing allocations. For example, if the Judicial Conference were to assert that one or more circuits should have double the number of judgeships they now have, its request would be met with incredulity.²⁹ At the same time, in view of the substantial increase in volume of appeals over the last two decades, it would be equally incredible to say that the regional circuits are overstaffed.

The historical approach may be troublesome in one respect: It takes as a given the procedural shortcuts that the courts of appeals have adopted since caseloads began to grow at a prodigious rate in the late 1960s. Professors William Reynolds and William Richman have argued that these changes in the

28. *Id.* at 38 (GAO Report).

29. This is not to say that the idea is out of bounds. Some respected academics and judges have called for a "radical expansion of the circuit bench." William M. Richman & William L. Reynolds, *Studying Deck Chairs on the Titanic*, 81 Cornell L. Rev. 1290, 1307 (1996); Stephen Reinhardt, *Developing the Mission: Another View*, 27 Conn. L. Rev. 877, 880 (1995). Moreover, if a court forgoes judgeship requests during an extended period of caseload growth, the accumulated needs may indeed justify a substantial increase in the size of the court. *See infra* Part II, at 253.

appellate process have transformed the federal courts of appeals “into certiorari courts dispensing justice unequally.”³⁰ While I believe that this argument is greatly overstated,³¹ there can be no doubt that judges today are deciding cases at a rate that would have been unthinkable thirty or forty years ago.³² By taking 500 adjusted filings per panel as the baseline, the Judicial Conference effectively cuts off any possibility of even partially returning to the norms of an earlier era. I think this is regrettable, but, as already indicated, I see no realistic possibility that Congress would endorse a substantial expansion in the federal appellate bench.

C. Assessing the Appellate Baseline

In supporting the request for additional appellate judgeships, I do not rely on the historical approach alone. Although the available data are not as complete or detailed as one would like, they do allow us to get a good sense of what the Judicial Conference standard means in practice. Viewing the standard in this way, I am confident that the Judicial Conference has indeed taken a conservative approach in assessing court requests for new positions.

As it happens, the circuit whose workload most closely approximates the Judicial Conference’s starting point is my own, the Third. In 2002, the Third Circuit’s adjusted filings were 529 per panel—about five percent more than the level that would allow consideration of a request for new judgeships.³³ (In fact, the Judicial Conference has not recommended any additional judgeships for the Third Circuit. It will remain a court of fourteen active judges.)

The 2002 Judicial Caseload Profile shows that the court’s adjusted filings of somewhat more than 500 per panel translated

30. William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 Cornell L. Rev. 273, 277 (1996).

31. For a partial response, see Carl Tobias, *The New Certiorari and a National Study of the Appeals Courts*, 81 Cornell L. Rev. 1264 (1996).

32. See e.g. Charles Alan Wright, *The Overloaded Fifth Circuit: A Crisis in Judicial Administration*, 42 Tex. L. Rev. 949, 957-62 (1964).

33. This figure is based on my own calculation, using the Judicial Conference formula.

into 381 terminations on the merits per active judge.³⁴ “Terminations on the merits” comprise the cases actually decided by the judges after oral argument or submission on the briefs. The figure thus excludes procedural terminations that require no judicial action. Further, this particular statistic does not count participations by senior judges and visiting judges. It is thus a useful starting point for considering what the baseline means as a measure of the day-to-day responsibilities of the judges in regular active service.

We know from other AO data that the Third Circuit issues a published (i.e., precedential) decision in about sixteen percent of its merits decisions.³⁵ (Here and elsewhere in this analysis, numbers have been rounded.) This means that each active judge participates in about sixty cases that are decided by a published opinion. Most cases, of course, are heard and considered by three-judge panels, with one judge writing the opinion for the court. If we assume that the active judges participate in a roughly equal basis in the court’s work, we can calculate that each active judge would be responsible for authoring twenty opinions and reviewing forty opinions written by other judges. In fact, a series of Westlaw searches yields almost precisely those numbers—on the average, twenty authored opinions and sixty-four participations per judge in “reported” cases.³⁶

What about the other eighty-four percent of the decisions? The court distinguishes between counseled and pro se appeals. Starting on January 1, 2002, non-precedential opinions in counseled cases have been posted on the court’s web site and made available to Westlaw and LEXIS. Westlaw searches indicate that in the course of that first year under the new procedure, each active judge participated in an average of 150 counseled cases that yielded a written non-precedential decision.³⁷

34. Administrative Office of the United States Courts, *Federal Court Management Statistics: Judicial Caseload Profile 2002* (Admin. Off. of the U.S. Cts. 2002) (showing Courts of Appeals data) (available at <http://www.uscourts.gov/cgi-bin/cmsa2002.pl>) (accessed Oct. 21, 2003; copy on file with Journal of Appellate Practice and Process).

35. *2002 Annual Report*, *supra* n. 16, at tbl. S-3.

36. For this search, I used the CTA3R database and the queries “ju(Alito),” “pa(Alito),” “ju(Becker),” “pa(Becker),” etc.

37. For this search, I used similar queries in the “CTA3U” database.

Finally, there are the unpublished decisions in pro se appeals. It appears that in the course of a year an active judge will participate in the adjudication of 170 such cases.³⁸ The AO describes these as “reasoned” dispositions, which are defined as “opinions and orders that expound on the law as applied to the facts of each case and that detail the judicial reasons upon which the judgment is based.”³⁹ Only a handful of the Third Circuit’s dispositions on the merits are issued “without comment.”⁴⁰

With this information, we can begin to measure the individual judges’ labors that correspond to the Judicial Conference benchmark of 500 adjusted filings per panel. To do this, we must first take account of the judges’ obligations other than the disposition of argued and submitted cases. These include committee work, Judicial Conference activities, motions, and petitions for rehearing. Let us assume that each judge spends the equivalent of three weeks each year on these activities. (That is probably a conservative estimate.) Each judge will also sit on an oral argument calendar during seven weeks of the year; those weeks will be largely unavailable for other judicial activities. Finally, let us assume that each judge will take two weeks of vacation. This leaves no more than forty weeks for work on argued and submitted cases.⁴¹ For purposes of analysis, it is helpful to divide these forty weeks into twenty two-week periods.

In each two-week period, the judge must complete a substantial opinion “for publication.” At a recent congressional hearing, Judge Alex Kozinski of the Ninth Circuit described the intense, in-depth work that goes into the writing of a published opinion:

38. This figure was calculated as follows. From the 381 terminations per active judge I subtracted first the sixty cases with a published opinion, then the 150 counseled cases with an unpublished opinion.

39. See e.g. *2002 Annual Report*, *supra* n. 16, at tbl. S-3.

40. See *id.*

41. In fact, the judges probably have considerably less than forty weeks to work on argued and submitted cases; they must also prepare for their argument calendars. Judge William Bryson of the Federal Circuit recently estimated that he spends a week to a week and a half reading briefs in preparation for each week of sitting. *Twenty Questions for Circuit Judge William Curtis Bryson of the U.S. Court of Appeals for the Federal Circuit*, How Appealing’s 20 Questions (available at <http://20q-appellateblog.blogspot.com>) (interview posted Sept. 2, 2003; Question 5) (accessed Oct. 21, 2003; copy on file with Journal of Appellate Practice and Process).

A published opinion must set forth the facts in sufficient detail so lawyers and judges unfamiliar with the case can understand the question presented. At the same time, it must omit irrelevant facts that could form a spurious ground for distinguishing the opinion. The legal discussion must be focused enough to dispose of the case at hand, yet broad enough to provide useful guidance in future cases. Because we normally write opinions where the law is unclear, we must explain why we are adopting one rule while rejecting others. We must also make sure that the new rule does not conflict with precedent, or sweep beyond the questions fairly presented.⁴²

While some opinions will require only a few days' work, others will require much more than that. And because the court publishes an opinion in only one-sixth of its cases, there is no chaff—no routine affirmances to bring down the average.

In the course of the two-week period, the judge must also give close attention to two other precedential cases in which another panel member is writing the opinion. Even without the burden of authorship, the responsibilities are substantial. Each participating judge must examine the relevant materials, both legal (precedents, legislative history, scholarly commentary, and the like) and factual (particularly the record of the proceedings in the lower court). Each judge must think carefully about the issues and their implications for future cases. And each judge must do his or her best to assure that the opinion articulates the holding and the rationale in a way that lawyers and other judges can understand and apply.

Finally, the judge must also participate in about sixteen cases that will not become precedential. In these cases, the judge need not worry about the precise phrasing of the opinion or the implications of the ruling for the future development of the law. But we would certainly want the judge to study the law and the record in sufficient depth to be confident that the outcome is correct and that the panel has not overlooked prejudicial error or unfairness in the court below.

42. Subcomm. on Cts., the Internet, & Intellectual Property, H.R. Jud. Comm., *Unpublished Judicial Opinions: Hearing on Limited Publication and Noncitation of Opinions*, 107th Cong. 12 (June 27, 2002) (statement of Judge Kozinski).

The numbers in this analysis are not precise. But they are solid enough to justify the conclusion that the Judicial Conference baseline of 500 adjusted filings per panel is at least reasonable. Indeed, if anything, it may err on the side of underestimating judgeship needs. According to the Federal Judicial Center study, the Third Circuit is one of only three circuits that hear oral argument in less than half of the counseled appeals.⁴³ And the Third Circuit is second lowest in the percentage of counseled cases that are decided by published opinion.⁴⁴ To the extent that these percentages reflect the pressure of caseloads, one might argue that the addition of one or two judges would enable the court to better serve the legal community of the circuit.

D. A Better Approach

In his response to the GAO report, Judge Jacobs asserted that the standard of 500 adjusted filings “has served the judiciary’s needs for developing the baseline for considering requests for additional appellate judgeships.”⁴⁵ For the reasons I have given, I agree that fine-tuning the measures of workload used by the Judicial Conference is not likely to assist Congress in determining whether to create new Article III judgeships. At the same time, I think that the system does not serve Congress as well as it could. What is needed is not greater precision in the statistics, but rather a wider range of non-quantitative information, including the views of lawyers and other citizens.

In Part III of this Essay I offer some suggestions for opening up the process used by the Judicial Conference in formulating its judgeship recommendations. A more open process, I believe, will provide significant benefits to the judiciary as well as to Congress. Before presenting those suggestions, however, I will discuss developments in the Fifth and Eleventh Circuits—developments that point up the need for rethinking the Judicial Conference’s current approach.

43. *FJC Study*, *supra* n. 19, at 11 (tbl. 6).

44. *Id.* at 19 (tbl. 11).

45. *Judgeships Hearing*, *supra* n. 4, at 50 (letter from Judge Jacobs to GAO).

II. THE MISSING CIRCUITS

To anyone who follows the work of the federal courts of appeals, the most striking aspect of the Judicial Conference request is something that is not there—a recommendation for new judgeships for the Fifth and Eleventh Circuits. In all four courts of appeals on the Judicial Conference list, as Judge Jacobs pointed out, adjusted filings are well above the minimum of 500. The figures range from a low of 583 (in the Sixth Circuit) to a high of 870 (in the Ninth Circuit).⁴⁶ But if we look at the Fifth Circuit, we find that adjusted filings in 2002 were just short of 1000—double the baseline for consideration of a judgeship request. And in the Eleventh Circuit, adjusted filings totaled an astounding 1112 per panel.⁴⁷

To put these figures in context, the most conservative of the Judicial Conference appellate recommendations is the request for the Second Circuit. With two additional judges, and assuming no increase in the volume of appeals, the Second Circuit's adjusted filings would drop to 614 per panel.⁴⁸ Under that standard, the Fifth Circuit would be entitled to as many as twenty-eight judgeships rather than the seventeen it has now. Under that same standard, the Eleventh Circuit could grow from twelve active judges to twenty-two, almost doubling its size.⁴⁹ Yet the Judicial Conference did not recommend a single additional judgeship for either court.

The absence of a request for the Eleventh Circuit is particularly remarkable. The Eleventh Circuit was created in

46. The figures are given in the chart attached to the press release issued by the Administrative Office on March 18, 2003, announcing the Judicial Conference judgeship request. See News Release, *supra* n. 1.

47. These figures represent my own calculations, based on the Judicial Conference formula.

48. This is the figure given in the detailed justification material that the Administrative Office provided to each member of the Judiciary Committee. See *supra* n. 13.

49. Adjusted filings in the Fifth Circuit in 2002 were 5,643. The figure for the Eleventh Circuit was 4,448. (Again, these are my own calculations.) In an interview in 2003, Judge Stanley F. Birch, Jr., of the Eleventh Circuit stated: "Given our caseload the Administrative Office of the [United States] Courts has suggested that we could request an additional 12-14 judges based on its workload statistics." See *Twenty Questions for Circuit Judge Stanley F. Birch, Jr. of the U.S. Court of Appeals for the Eleventh Circuit*, How Appealing's 20 Questions (available at <http://20q-appellateblog.blogspot.com>) (interview posted Oct. 7, 2003; Question 12) (accessed Oct. 21, 2003; copy on file with Journal of Appellate Practice and Process) [hereinafter *Birch Interview*].

1981 when Congress divided the former Fifth Circuit into two new circuits.⁵⁰ At that time the Eleventh Circuit was a court of twelve judges and 2,556 filings. Today, the Eleventh Circuit is still a court of twelve judges. But filings are now 7,472—almost three times what they were when the court was established. Yet the Eleventh Circuit is not even mentioned in the Judicial Conference submission.

The explanation for this apparent anomaly lies in an important aspect of the Judicial Conference process that I have not yet mentioned. The Subcommittee on Judicial Statistics—the body that initiates the Biennial Survey—will not recommend any additional judgeships for a court of appeals unless a majority of the active judges of the court submit a request. If additional judgeships appear to be justified by workload statistics but no judgeships are requested, the court is required to explain its position, but as far as I am aware, that explanation is final and is not subject to review by any entity within the Judicial Conference. Further, it appears that one recognized explanation is that the court is opposed to adding judges notwithstanding its increased workload.

For more than a decade, the Fifth and Eleventh Circuits have taken the position that they want to remain “small,” or perhaps more accurately that they do not want to become larger than they already are.⁵¹ Under the existing Judicial Conference system, that determination stands as an absolute bar to any recommendation by the Judicial Conference for new judgeships, no matter how strongly the Judicial Conference’s own standard might suggest that at least some new positions are needed.

The judges of these two circuits have offered several reasons why they resist expanding the size of their courts. Primary among these is the concern that adding judges will lead

50. See Arthur D. Hellman, *Deciding Who Decides: Understanding the Realities of Judicial Reform*, 15 L. & Soc. Inquiry 343 (1990). For a more detailed account, see Deborah J. Barrow & Thomas G. Walker, *A Court Divided: The Fifth Circuit Court of Appeals and the Politics of Judicial Reform* (Yale U. Press 1988).

51. In the early 1990s the Fifth Circuit requested one additional judgeship. See e.g. *Report of the Proceedings of the Judicial Conference of the United States* 57 (Sept. 12, 1990). The request was later dropped. In 2002, the chief judge of the Eleventh Circuit stated without elaboration: “Although the Court leads the nation in number of cases per judge in most categories, twelve judges are enough.” *Vacancy Hearing*, *supra* n. 10, at 90 (letter of Chief Judge J.L. Edmondson).

to a decline in the “coherence and uniformity of the law.”⁵² A leading proponent of this view is the former chief judge of the Eleventh Circuit, Gerald B. Tjoflat. Judge Tjoflat believes that as a court grows larger, “the clarity and stability of the circuit’s law suffers.”⁵³ That, in turn, “increases litigiousness and complicates the disposition of cases.”⁵⁴

For two reasons, I am skeptical about this line of argument. First, over the last decade and a half, I have carried out extensive empirical research on the largest of the federal appellate courts, the Ninth Circuit. This research does not support the claim that the Ninth Circuit has been unable to maintain consistency in its decisions.⁵⁵ Nor does it validate the criticisms of the Ninth Circuit’s “limited en banc court,” unique among the federal courts of appeals.⁵⁶ I have also undertaken a comparative study to test the hypothesis that “unpredictability attributable to disarray in circuit law is more prevalent in the Ninth Circuit than in other circuits.”⁵⁷ Once again, the data do not support the hypothesis.⁵⁸ Overall, this research “seriously undermines—if it does not indeed topple—one of the principal pillars of the argument that adding to the number of judges on an appellate court inevitably brings instability and incoherence in panel decisions.”⁵⁹

52. Gerald B. Tjoflat, *More Judges, Less Justice*, 79 ABA J. 70, 71 (July 1993) (quoting Judge Irving Kaufman).

53. *Id.* at 70.

54. *Id.* at 71. In his *How Appealing* interview, Judge Birch of the Eleventh Circuit said:

[A]dditional judges would hinder our efficient operation rather than help it. Given our caseload the Administrative Office of the Courts has suggested that we could request an additional 12-14 judges based on its workload statistics. As a court we have almost unanimously rejected adding even a single more judge. A collegial court operates most efficiently and effectively by remaining as small as possible.

Judge Birch then cited the article by Judge Tjoflat quoted above. See *Birch Interview*, *supra* n. 49 (Question 12).

55. For a summary of the research, with citations to detailed reports, see Arthur D. Hellman, *Dividing the Ninth Circuit: An Idea Whose Time Has Not Yet Come*, 57 Mont. L. Rev. 261, 274-80 (1996).

56. See Arthur D. Hellman, *Getting It Right: Panel Error and the En Banc Process in the Ninth Circuit Court of Appeals*, 34 U.C. Davis L. Rev. 425, 452-66 (2000) [hereinafter Hellman, *Getting It Right*].

57. Arthur D. Hellman, *Precedent, Predictability, and Federal Appellate Structure*, 60 U. Pitt. L. Rev. 1029, 1090 (1999).

58. *Id.* at 1088-1100.

59. *Id.* at 1100.

Yet even if these studies are not persuasive, I believe that the judges' position is problematic for a more fundamental reason. The judges' concern is focused on what has been called "the law-declaring function of appellate courts."⁶⁰ That function is certainly important; indeed, I have devoted much of my academic career to studying it. Nevertheless, that function is secondary. The primary function of the federal courts of appeals is to do justice—and to be seen as doing justice—in the individual cases and controversies that come before them. Professor Paul Carrington made the point eloquently almost thirty years ago:

Uniformity and even-handedness are important goals of any legal system. Certainly, we should strive for stability and resist erratic decision-making. But, I submit, this is not nearly as important to the welfare of the republic as the qualities of visibility and personal responsibility Even a very excellent government can abide some unevenness . . . in the treatment of like cases. But a very excellent government cannot abide indifference and unconcern for the plight of individual litigants. We cannot afford to treat citizens approaching the highest accessible levels of our government as if they were customers at a bargain counter shoe sale. If it is necessary in order to assure visibility and personal responsibility of circuit judges for individual outcomes, we can bear a lot of non-uniformity. Hence, I begin by urging the Commission to make this priority clear in its report. Let us be certain that we have enough resources to provide a decently visible and appropriately personal appellate process, and then address the question of uniformity.⁶¹

I fear that the judges of the Fifth and Eleventh Circuits, in their zeal to protect the law-declaring function of their courts, may not be giving sufficient attention to the effect of their policy on the quality of appellate decisionmaking. As the Commission on Structural Alternatives for the Federal Courts of Appeals (White Commission) recognized in its Final Report, there comes a point at which the streamlining of procedures begins to

60. Commission on Structural Alternatives for the Federal Courts of Appeals, *Final Report* 47 (1998) [hereinafter *White Commission Report*].

61. 2 Commission on Revision of the Federal Court Appellate System, *Hearings*, Second Phase 954-55 (1975) (statement of Prof. Paul D. Carrington).

compromise “the appearance of legitimacy of the appellate process [and] the quality of appellate justice.”⁶² When individual judges are deciding cases at the rate of 750 or more each year—as is happening in the Fifth and Eleventh Circuits—one must wonder whether that point has been reached.⁶³

I have no doubt that the judges of the Fifth and Eleventh Circuits believe that they are giving adequate attention to the cases that come before them and that they have not compromised any of the essential functions of an appellate court. But I am not confident that judges can necessarily recognize when they have gone too far in relying on procedural shortcuts or when they have begun to delegate responsibilities that they should be undertaking themselves. For example: Do the judges too readily accept the drafts of precedential opinions prepared by their law clerks? Do panel members sign on to the authoring judge’s opinion without carefully scrutinizing the statements of law or the rationale? Do the second and third judges on a screening panel defer too much to the judge who initially reviewed the case? These are not lapses that occur overnight. Change is gradual and incremental, as judges imperceptibly find themselves adopting practices that they would have rejected when caseload pressures were less exigent.

Is there any way of determining whether judges on a particular court of appeals have gone too far in delegating the performance of their Article III functions? I do not think we will find any “smoking gun.” But one possible indicator is the ratio of central staff attorneys to active judges. On this point the Federal Judicial Center report provides the most recent information available.⁶⁴ That report indicates that in most of the circuits the ratio of staff attorneys to active judges is no more than two to one. Only two circuits do not follow this pattern. The Fifth Circuit, with seventeen authorized judgeships, employs fifty-five staff attorneys at court headquarters in New

62. *White Commission Report*, *supra* n. 60, at 25.

63. The figures given in the Federal Court Management Statistics for 2002 are 758 for the Fifth Circuit and 843 for the Eleventh Circuit. The Fifth Circuit’s figure is almost exactly double what it is in the Third Circuit. *Federal Court Management Statistics: Judicial Caseload Profile 2002*, *supra* n. 34. For a discussion of what the Third Circuit figure means in practice, see *supra* Part I(C).

64. *FJC Study*, *supra* n. 19, at 6, 107, 189.

Orleans. The Eleventh Circuit, with twelve authorized judgeships, employs a total of forty-one staff attorneys. The ratio of staff attorneys to judgeships in both circuits is thus more than three to one.

It would be wrong to jump to conclusions based on this one set of data, but there is more. First, I assume that the judges have their full complement of “elbow clerks”; currently, each active judge may hire four clerks to work in his or her chambers.⁶⁵ Thus, the twelve active judges of the Eleventh Circuit are supervising, directly or indirectly, a corps of almost ninety law clerks and staff attorneys. Second, the Fifth and Eleventh Circuits rank among the lowest in the percentage of counseled cases that receive oral argument.⁶⁶

In his statement at the House hearing, Judge Jacobs offered one explanation of why the Conference was not requesting additional judgeships for the Fifth and Eleventh Circuits. He said:

The case mix in the circuits where the Conference is recommending additional judgeships differs significantly from the courts that did not request additional judgeships. For example, criminal and prisoner petition appeals were approximately 60 percent of all appeals filed in the Fifth and Eleventh Circuits (which did not seek additional judgeships), but only about 35 percent in the Second and Ninth Circuits (which did).⁶⁷

This explanation is not persuasive. In suggesting that the “case mix” is significantly different in the Fifth and Eleventh Circuits, Judge Jacobs points to only two categories of cases, one of which consists of prisoner petitions. But more than ninety percent of the prisoner petitions in both circuits were filed by prisoners acting pro se.⁶⁸ Pro se appeals are already discounted

65. Under Judicial Conference rules, an active judge may have four law clerks and one secretary or three law clerks and two secretaries. Administrative Office of the United States Courts, *The Guide to Judiciary Policies and Procedures* vol. 3, § D, ch. 1, pt. A, ex. A-1 (Admin. Off. of the U.S. Cts. 1999) (revised Jan. 15, 2003). I am assuming that with modern word processing, most judges opt to have four law clerks.

66. See *FJC Study*, *supra* n. 19, at 11 (tbl. 6). The Fifth Circuit does hold oral argument in more than half of its counseled cases. *Id.*

67. *Judgeships Hearing*, *supra* n. 4, at 11 (statement of Judge Jacobs).

68. The Fifth Circuit had 3,227 prisoner cases in 2002; of these, 3,000 were filed pro se. For the Eleventh Circuit, the figure was 2,561 out of 2,763. The data are given in Table

in the figures on adjusted filings. As for criminal cases, I would not assume a priori that counseled criminal appeals require less judge time than counseled appeals in civil matters. Finally, even if there are some differences in the case mix, it is hard to see how they could account for the enormous disparity in the recommended complement of judges.

Having said that, I recognize that there may be circumstances, not reflected in case management data, that make the volume of appeals more manageable in the Fifth and Eleventh Circuits than an equivalent volume would be elsewhere in the nation. Perhaps the docket is more homogenous in subject matter, so that the judges encounter a higher proportion of cases with familiar issues than do their counterparts in other circuits. Perhaps there is less disagreement among the judges, so that panel members need spend little time in writing dissents, negotiating the language of majority opinions, or exchanging memos on whether to rehear cases en banc.⁶⁹

These hypotheses are appropriate subjects for research. But even if these circumstances exist, I must admit to some doubts that they would adequately explain the extremely high per-judge disposition rate in the Fifth and Eleventh Circuits. Further, some members of the two courts have voiced concerns similar to those I have expressed. In 1992, Judge (now Chief Judge) Carolyn Dineen King of the Fifth Circuit acknowledged that “the sheer volume [of cases] has had an adverse impact on the number of decisions that we can fairly claim have been fully considered and understood.”⁷⁰ In 1997, then-Chief Judge Joseph W. Hatchett of the Eleventh Circuit described in detail the consequences of the procedures adopted by his court and

B-9 of the Annual Report of the Director of the Administrative Office of the U.S. Courts (available at <http://www.uscourts.gov/judbus2002/appendices/b09sep02.pdf>) (accessed on Oct. 21, 2003; copy on file with Journal of Appellate Practice and Process).

69. Judge Jacobs alluded to this point. After commenting that “there are very big differences between circuit courts,” he observed that “because we sit on panels, it matters if [a court] is ideologically divided. It matters if the judges get along with each other.” *Judgeships Hearing*, *supra* n. 4, at 68 (testimony of Judge Jacobs).

70. Carolyn Dineen King, *A Matter of Conscience*, 28 Hous. L. Rev. 955, 958 (1991). (Although the article has a publication date of 1991, it is based on a speech delivered in 1992.)

concluded that “litigants of this circuit would be better served if this court had [two or three more] active judges.”⁷¹

Nevertheless, I am not suggesting that Congress should take immediate action to create additional judgeships for these courts. What I do suggest is that the issue should be the subject of public discussion. The Biennial Survey of Judgeship Needs conducted by the Judicial Conference provides a perfect opportunity—or rather, it would provide that opportunity if the process were more open.

III. PROCESS AND ACCOUNTABILITY

The omission of the Fifth and Eleventh Circuits from the Judicial Conference judgeship request is troubling in itself. What makes it even more problematic, in my view, are issues of process and accountability. After explaining why this is so, I will offer suggestions for revising the process not only in those circuits but throughout the federal judicial system.

The Fifth and Eleventh Circuits have opted, quite self-consciously, to deal with caseload growth by accepting ever-increasing workloads for individual judges and by cutting back on the traditional elements of the appellate process. That is as much a policy choice as deciding whether to divide the Ninth Circuit. As Judge King has written, “[W]hen Congress acquiesces in a decision by a court not to add judges and when, by any normal measures, more judges are needed, Congress is itself making a decision as to the kind of justice that the court will dispense.”⁷²

The issue of whether to divide the Ninth Circuit has been the subject of public debate in many forums. Law review articles, news stories, and op-ed pieces have focused on every aspect of the Ninth Circuit’s work. The White Commission devoted almost all of its attention to the question of whether the Ninth Circuit or its court of appeals should be reorganized into two or more separate units. In contrast, the counterpart issues in the Fifth and Eleventh Circuits remain invisible. The policy

71. Joseph W. Hatchett, Chief Judge, U.S. Ct. of Appeals for the 11th Cir., Speech, *State of the Circuit* 11 (1997) (copy of transcript on file with author).

72. King, *supra* n. 70, at 962.

decision by those courts to remain “small” has occasioned virtually no public discussion and almost certainly is unknown to the vast majority of lawyers and other interested citizens in the regions they serve.

I recognize that the high profile of the Ninth Circuit results to some degree from controversies that have nothing to do with judicial administration. But I also believe that the absence of debate about the Fifth and Eleventh Circuits can be attributed in part to the process followed by the Judicial Conference in formulating the judgeship requests that it submits to Congress. There are two aspects of the process that are problematic in isolation; they are even more so when one considers their combined effect.

First, the process takes place entirely within the confines of the judiciary. For example, the request for two additional judgeships for the Second Circuit Court of Appeals was considered by the members of that court, by the Judicial Council of the Second Circuit (a body that is composed only of judges), and by the Judicial Conference and its committees. No one else had an opportunity to express views, to question assumptions, or to seek additional justifications or explanations for the conclusions reached at the various stages of the process. Until the Judicial Conference issued its press release on March 18, 2003, only a handful of people outside the judiciary knew that a recommendation was being considered. Even then, no details were forthcoming. Although the Judicial Conference supported its recommendation with a cogent, in-depth analysis, almost no one has seen that documentation.⁷³

Second, under the current system, if a majority of the active judges of a circuit prefer to keep their court “small,” that determination stands as an absolute barrier to any consideration of the possible need for new judgeships for that court. This “triggerlock” manifests itself in several ways. If a court, in response to the initial query from the Judicial Conference’s Statistics Subcommittee, requests no additional judgeships, the trail of documentation ceases. Not only is there no public discussion, there is no discussion even within the Judicial Conference and its committees. The impressive compilation of

73. See n. 13, *supra*.

data and analysis that accompanies a recommendation for new judgeships has no counterpart in the case of circuits that do not seek new judgeships, whether or not the Judicial Conference standard suggests that new judgeships are warranted.

A particularly unfortunate aspect of the current system is that if a majority of the judges on a court do not initiate a request for additional judgeships, Congress has no opportunity to hear from members of the court who take a different view. For example, Judge King of the Fifth Circuit made clear in 1992 that she thought her court needed additional judges.⁷⁴ Since that time, adjusted filings in the Fifth Circuit have increased more than twelve percent.⁷⁵ Recent comments indicate that Judge King continues to believe that additional judgeships are needed for her court.⁷⁶ But there is no hint of that view in the materials that the Judicial Conference submitted to Congress.

The process concerns I have identified are not limited to the Fifth and Eleventh Circuits. For more than twenty-five years, Congress has been considering proposals to divide the Ninth Circuit and create a new Twelfth Circuit. In 1995, the Senate Judiciary Committee reported out one such bill.⁷⁷ In 1998, the White Commission urged Congress to divide the Ninth Circuit into three semi-autonomous “adjudicative divisions” that would “capitalize on the benefits of smaller decisional units.”⁷⁸ But as far as one can tell from published materials, the Biennial Survey proceeded as though these proposals did not exist. The Judicial Conference simply recommended seven new appellate

74. See King, *supra* n. 70, at 962.

75. It is not possible to use the current formula to calculate adjusted filings before 1993 because that is the first year in which the Administrative Office published data on pro se appeals. From 1993 to 2002, adjusted filings in the Fifth Circuit increased twelve percent. (Author’s calculation.)

76. Judge King now chairs the Judicial Conference’s executive committee. In March 2003, she offered some telling comments in support of the Conference’s recommendations for additional appellate judgeships. She noted that circuit judges must often write 225 to 250 opinions a year; they must also sign on to another 450 opinions authored by other panel members. The judges can carry such a workload, Judge King said, only by “heavy reliance on staff and by writing shorter opinions, often a one-line opinion saying ‘affirmed.’” Under those circumstances, she added, holding judges accountable is difficult. See David F. Pike, *Judicial Conference Requests Help for Busy Bench Officers*, L.A. Daily J. 1 (Mar. 19, 2003). The figures cited by Judge King suggest that she was referring to her own court.

77. S. Rep. 104-197 (Dec. 21, 1995).

78. *White Commission Report*, *supra* n. 60, at 47.

judgeships for the Ninth Circuit. The documentation submitted by the Conference in support of the request makes no mention of the possibility of restructuring the circuit or the court of appeals.

If the process had been more open, this issue would not have gone unnoticed. Proponents of reorganization would have called attention to the White Commission's conclusion that "the law declaring function of appellate courts requires groups of judges smaller than the present Ninth Circuit Court of Appeals."⁷⁹ They would have asked: If the present court, with twenty-eight authorized judgeships, is too large, does it make sense to add seven new judgeships, creating a court of thirty-five active judges? Or would it be preferable to take the occasion to divide the circuit? If so, how should the circuit be split? Opponents of circuit division would have responded by explaining the flaws in the White Commission's diagnosis.⁸⁰

By an accident of timing, a hearing was held by a House Judiciary subcommittee on one circuit-reorganization proposal in July 2002, during the early stages of the Biennial Survey. The Ninth Circuit's Chief Judge, Mary M. Schroeder, told the Subcommittee that the court's "greatest need" was for "additional judgeships."⁸¹ But there was no discussion by witnesses or Subcommittee members of the judgeship request that was then being considered by the Judicial Conference's Statistics Subcommittee.⁸² Congress thus lost an opportunity to consider the full range of options for dealing with caseload growth in the western states.

At the other end of the spectrum, the Court of Appeals for the District of Columbia Circuit has twelve authorized

79. *Id.*

80. For detailed exposition of the flaws, see generally Hellman, *Getting It Right*, *supra* n. 56; Arthur D. Hellman, *The Unkindest Cut: The White Commission Proposal to Restructure the Ninth Circuit*, 73 S. Cal. L. Rev. 377 (2000); and Procter Hug, Jr., *The Commission on Structural Alternatives for the Federal Courts of Appeals' Final Report: An Analysis of the Commission's Recommendations for the Ninth Circuit*, 32 U.C. Davis L. Rev. 887 (1999). For a response to criticisms of the White Commission proposal, see Pamela A. Rymer, *How Big Is Too Big?* 15 J. L. & Politics 383 (1999).

81. Subcomm. on Cts., the Internet, & Intellectual Property, H.R. Jud. Comm., *Hearing on H.R. 1203: Ninth Circuit Court of Appeals Reorganization Act of 2001* at 10 (July 23, 2002) (statement of Judge Schroeder).

82. I do not fault Judge Schroeder or any of the other participants in the hearing for not discussing the request. In July 2002, no information about the pending Biennial Survey had been made public.

judgeships—more than twice the number it would be entitled to under the adjusted filings standard. The Judicial Conference has developed a process “for reviewing situations where it may be appropriate to recommend elimination of a . . . [court of appeals] judgeship or that a vacancy not be filled,”⁸³ and a few years ago, the Statistics Subcommittee asked the Federal Judicial Center to study the D.C. Circuit’s caseload. The study concluded that, because of administrative agency appeals that are unique to the D.C. Circuit, the need for additional judgeships should not be measured by the standard applied to other circuits.⁸⁴ But nothing in the material submitted by the Judicial Conference to Congress indicates whether it considered the possibility of recommending a downsizing of the D.C. Circuit.⁸⁵ Here, too, Congress would benefit from hearing the full range of views that a public debate would generate.

IV. SUGGESTIONS FOR REFORM

Each circuit presents a different set of circumstances. But whatever the issues that might be the subject of controversy, I believe that a more open process for the Biennial Survey would provide more of the information that Congress should have in order to carry out its responsibility for overseeing the administration of justice in the federal courts. A more open process would also aid the judiciary in achieving its policy objectives.

I offer two principal suggestions. First, the process should be made more public, with an opportunity for participation by interested members of the legal community. Second, a negative response by a majority of active judges on a court of appeals to

83. *Judgeships Hearing*, *supra* n. 4, at 18 (statement of Judge Jacobs). The quoted language refers to district courts, but Judge Jacobs explained that a similar process has been developed for the courts of appeals. *Id.*

84. This summary is based on the description in the GAO Report. See *Judgeships Hearing*, *supra* n. 4, at 38-39 (GAO Report). The study has not been published, and it is not listed in the FJC’s current catalog of publications.

85. At the House hearing, in response to a question, Judge Jacobs briefly referred to the “special and unusual case mix” of the D.C. Circuit. *Judgeships Hearing*, *supra* n. 4, at 68 (testimony of Judge Jacobs). In November 2003, Senators Charles Grassley and Jeff Sessions introduced a bill to eliminate one of the judgeships on the circuit. See S. 1921, 108th Cong. (2003).

the initial query from the Subcommittee on Statistics should not stand as an absolute barrier to consideration of new judgeships for court.

What follows is a sketch of how a revised process might work. The description refers to the formulation of judgeship requests for the courts of appeals. However, the proposal could be modified for use at the district court level also.

A. Provisional Response

The process would begin, as it does today, with a request from the Subcommittee on Statistics asking individual courts to evaluate their need for additional judgeships or for the filling of vacancies. Each court would prepare its response, as is done now. However, instead of sending a final response to the Subcommittee, the court would prepare a draft response. The draft would be posted on the court's website along with an announcement inviting comments from bar associations and interested citizens.

B. Explanatory Material

To supplement its draft response, the court would post or link to material that would help outsiders to assess the court's provisional conclusions. This material would include

- a description of the Judicial Conference process, including the numerical standard and other criteria used in evaluating court requests;
- information about the workload and case management practices of the particular circuit;
- the comparative statistical profiles that are now made available to the courts to help in formulating their requests; and
- other comparative data that would give members of the legal community a perspective on the practices of the particular circuit.

But most of the material would be explanatory. Thus, if the court is requesting additional judgeships, it would provide the justification, including the anticipated consequences for the judiciary and for litigants if the request is not met. In the unlikely event that the court's request is not supported by the standard of 500 adjusted filings, the court would explain why the standard is inapplicable.

Especially if a circuit is requesting two or more additional positions, it would be useful for the court to explain how it would use the additional judgepower. For example, would the court allow oral argument in a larger proportion of its cases? Would it dispose of more cases with precedential opinions, or write at greater length in "unpublished" dispositions? Or would the court concentrate on reducing the time between the filing of an appeal and the disposition of the case?

If the court's workload statistics appear to justify an increase in the number of judgeships, but the court is not requesting any new positions, the court would set out the factors that influenced its decision. For example, are the contributions of senior or visiting judges so extensive as to offset the excessive workload? Do statistics overstate the true burdens on the judges because of the nature of the cases? Or does the court oppose any increase in size, irrespective of other considerations?

C. Inclusion of Competing Views

If the judges are divided in their views, both positions should be reflected in the court's response. I would not insist that the court identify the judges taking the competing positions, or even that it give the numerical division. (My own preference would be to provide that information, but I can understand why judges might view this as personalizing the controversy—for example, if the chief judge is a member of the minority within the court.)

D. Opportunity to Comment

Interested persons and organizations would be given sixty days, perhaps ninety or even 120, in which to submit their

comments. Ideally, comments would be posted on the court's web site as they are received, so that others can agree or disagree.

E. Later Stages

At the end of the comment period, the court would reconsider its position in light of the comments and would formulate a final version of its response. This final version (including minority views within the court) would go to the Statistics Subcommittee along with a summary of the comments received. This material too would be posted on the court's web site. Thereafter, the process would follow the course it does today, with two important differences.

1. No "Triggerlock"

First, the absence of a request supported by a majority of the active judges would not necessarily stand as an absolute barrier to consideration of a possible recommendation for additional judgeships. For example, if adjusted filings are well above the standard, and a substantial minority within the court believes that additional judgeships are needed, a recommendation might be forthcoming. I doubt this would happen often, but it is at least possible that the minority's arguments will be more persuasive (to the Judicial Conference or to Congress) than those of the majority.

2. Public Announcements

Second, the conclusions and recommendations at each later stage of the Judicial Conference process would be posted on the websites of the particular court and that of the Federal Judiciary. Even though there would be no formal opportunity for further comment, there is no reason why interested members of the legal community should not know how the Judicial Conference is dealing with these important issues. Further, on rare occasions, outsiders may have useful information or insights that will assist the Conference at the next step of the process.

V. ASSESSING THE PROPOSAL

I can anticipate three objections to the proposal sketched here. First, it may be said that a public comment period would prolong the process through which judgeship requests are developed. That is probably true, though it may be possible to compress some existing stages and thus keep the schedule close to what it is today. In any event, Congress has not been acting on judgeship requests every two years, or even every four years. If the consequence is to establish a three- or four-year cycle, that may be no more than bowing to reality. Unexpected surges in caseload in particular courts can always be dealt with through special requests and court-specific legislation, as in the 2002 Department of Justice Authorization Act.⁸⁶

Second, it may be argued that very few members of the legal community have any interest in the details of judgeship needs. Perhaps so, but the value of comments lies not in their quantity but in their quality. Bar associations in several circuits have an admirable history of thoughtful participation in debates over court structure and process. Moreover, a paucity of comments could itself be significant. Specifically, if lawyers of the Fifth and Eleventh Circuits, after being fully informed about how their courts of appeals have chosen to cope with the demands of increased caseload, voice no objection, Congress might well view that as strong evidence that the status quo is acceptable.

Third, it may be said that the proposed system would add to the burdens of the judges who take part in the process. But the principal changes involve publicizing material that is already prepared for a limited audience and listening to comments from interested persons outside the judiciary. These strike me as rather modest burdens.

On the other side of the balance, I believe that making the process more open and allowing broader participation would have three important benefits.

86. See Pub. L. 107-273, § 312 (Nov. 2, 2002), 2003 U.S.C.C.A.N. (116 Stat.) 1758, 1786. Each of the new judgeships in this bill was recommended by the Judicial Conference. See *The End of the 107th Congress: Budget in Limbo*, Third Branch 1, 11 (Admin. Off. of the U.S. Cts. Dec. 2002).

First, Congress would get more of the information that it needs in order to carry out its constitutional responsibilities for the administration of justice in the federal courts. This information would not be limited to the consideration of judgeship requests; it would also aid Congress in dealing with a wide range of legislative issues, including modification of court structure and allocation of resources.

Second, the judges would get information that would help them in making the policy judgments that fall within the province of the judiciary. Judgeship requests implicate every aspect of court operations, particularly the use of non-Article III personnel and the various forms of interaction with litigants, lawyers, and citizens. Comments from the legal community on a court's provisional response to the Statistics Subcommittee would illuminate these issues and assist the courts in designing rules and internal operating procedures.

Finally, by involving the legal community in the formulation of judgeship requests, the courts can build a constituency that will help them in gaining support for their initiatives in Congress. For example, the documentation that the Judicial Conference has submitted in connection with its judgeship recommendations stands as a powerful argument for additional resources. I am confident that local bar associations and others in the legal community would use their influence to assist the judiciary in securing those resources—if they knew about the need and had participated in the process that led to the requests.

VI. CONCLUSION

I share the view expressed in the Long Range Plan for the Federal Courts that “[t]he growth of the Article III judiciary should be carefully controlled so that the creation of new judgeships, while not subject to a numerical ceiling, is limited to that number necessary to exercise the jurisdiction conferred on the federal courts.”⁸⁷ But the caseload of the courts continues to grow, and Congress continues to add to their jurisdiction. If we

87. Committee on Long Range Planning, Judicial Conference of the United States, *Long Range Plan for the Federal Courts* 38 (Jud. Conf. of the U.S. 1995) (Recommendation 16).

wish to maintain the quality of the justice administered by the courts, there is no alternative but to create some new judgeships.

The Judicial Conference of the United States has asked Congress to create eleven judgeships for four of the federal courts of appeals. This is a modest request that is fully justified by the increase in appellate caseloads over the last decade and a half. For that reason, Congress should act speedily to create the judgeships. Looking to the longer term, I urge the Judicial Conference to consider modifications of its process that will allow for broader participation in the formulation of judgeship requests. A more open process will benefit not only Congress but the judiciary itself.

