

Statement of the Constitutional Accountability Center

Hearing on “The Need for New Lower Court Judgeships, 30 Years in the Making”

**Subcommittee on Courts, Intellectual Property, and the Internet
United States House of Representatives
February 24, 2021**

The Constitutional Accountability Center (CAC) is a non-partisan think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution’s text, history, and values. We work in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring meaningful access to the courts, in accordance with constitutional text and history, and a fair, impartial, and fully functioning federal judiciary. We are certain that expanding the lower courts could powerfully improve the chances that people will receive timely justice in our nation’s federal judicial system and therefore ask that you exercise Congress’s constitutional power to create, and appropriate funding for, additional judgeships in the federal district and circuit courts.

The Constitution guarantees all persons the ability to vindicate their rights in court. When the Constitution was drafted, the promise of access to federal courts was at the heart of a new system of government accountable to the people. In Article III, the Framers created the federal judiciary as a co-equal branch of government vested with the power of expounding what the law means in the context of cases and controversies.¹ Article III’s grant of judicial power was viewed as critical to enforce the Constitution’s limits and maintain the supremacy of federal law.² In designing the federal judiciary, the Framers sought to ensure that the power of the federal courts was co-extensive with Congress’s legislative power under Article I. However, in recent years, Congress has weakened the power of the federal judiciary by not providing for staffing sufficient to ensure this co-equal branch of government can meet the challenge of rising caseloads. As a result, judges are overworked, and litigants can experience long delays when seeking justice. These delays undermine justice, equality, and confidence in our judicial system.

The courts play a critical role in people’s lives and in our society. From the air they breathe to the water they drink, from protecting their rights to holding bad actors accountable, the judiciary affects the lives of people in this country every day. In particular, the lower courts play a crucial role. The Supreme Court decides very few cases a year. The roughly 7,000-8,000 petitions for Supreme Court review each year

¹ *Osborn v. Bank of the United States*, 2 U.S. (9 Wheat.) 738, 818-19 (1824) (arguing that Article III enforced the “great political principle” that “[a]ll governments which are not extremely defective in their organization, must possess, within themselves, the means of expounding, as well as enforcing, their own laws”).

² See Randy E. Barnett, *The Original Meaning of the Judicial Power*, 12 Sup. Ct. Econ. Rev. 115, 117 (2004) (arguing that “the original meaning of the ‘judicial power’ in Article III, included the power of judicial nullification”).

amount to less than 2% of the cases filed in our federal lower courts, and of these petitions, the high court grants certiorari in roughly 80, meaning approximately 1%.³ Thus, annually, the Supreme Court hears .02% of the cases filed in our federal courts. So, for the vast majority of federal court litigants, a decision in district court or a decision in one of 13 courts of appeals is the end of the line.

Because of the important role the courts play, ensuring the judiciary has adequate capacity to dispense equal justice is a critical congressional role in the constitutional design created by the Framers. Congress has the enumerated constitutional power and obligation through the Necessary and Proper Clause to ensure the federal judiciary is equipped to carry out its Article III mandate to dispense fair and impartial justice.⁴ Doing so ensures that all those who walk through the courthouse doors to vindicate their rights in court can do so in a timely fashion. Congress has exercised this constitutional power and fulfilled its ongoing constitutional duty several times since the creation of our modern judicial system in 1891.⁵

However, Congress has not significantly increased the number of federal judgeships since 1990,⁶ making the last 30 years one of the slowest periods of judicial expansion in modern history,⁷ even as our nation grew by a third in population.⁸ The stasis in lower court size is not indicative of lessened demands placed upon our judicial system. In fact, reality is quite the opposite. Since 1990, the number of cases filed in the federal courts of appeal and district courts has increased by approximately 40 percent.⁹ As of March 31, 2020, there were nearly 30,000 civil cases pending for more than *three years*—99 percent of those cases were before a federal district court judge.¹⁰ This is nearly double the figure from 2011.¹¹ From 1960 to 1990, Congress passed six comprehensive judgeship bills—each one increasing the size of the judiciary by at least 12 percent, with no more than eight years between laws. Our current 30-year period of neglect requires a much greater response.¹²

³ *Federal Judicial Caseload Statistics 2019*, UScourts.gov (last visited Feb. 19, 2021), <https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2019>; *Supreme Court Procedure*, SCOTUSblog (last visited Feb. 19, 2021), <https://www.scotusblog.com/reference/educational-resources/supreme-court-procedure/>.

⁴ U.S. const, art. I, § 8, cl. 18.

⁵ Act of Mar. 3, 1891, ch. 517, 26 Stat. 826.

⁶ Elizabeth B. Wydra, *There's More to Repairing Federal Courts Than Supreme Court Expansion*, The Hill (Feb. 10, 2021), <https://thehill.com/opinion/judiciary/538176-theres-more-to-repairing-federal-courts-than-supreme-court-expansion>.

⁷ *Table: Authorized Judgeships*, UScourts.gov, <https://www.uscourts.gov/sites/default/files/allauth.pdf>.

⁸ *Resident Population of the United States from 1980 to 2020*, Statista (last visited Feb. 19, 2021), <https://www.statista.com/statistics/183457/united-states--resident-population/>.

⁹ *The Federal Bench – Annual Report 2019*, UScourts.gov (last visited Feb. 19, 2021), <https://www.uscourts.gov/statistics-reports/federal-bench-annual-report-2019>.

¹⁰ *March 2020 Civil Justice Reform Act*, UScourts.gov (last updated Mar. 31, 2020), <https://www.uscourts.gov/statistics-reports/march-2020-civil-justice-reform-act>.

¹¹ *Civil Justice Reform Act: Report of Motions Pending More Than Six Months, Bench Trials Submitted More Than Six Months, Bankruptcy Appeals Pending More Than Six Months, Social Security Appeal Cases Pending More Than Six Months, and Civil Cases Pending More Than Three Years on March 31, 2011* at 3 (Mar. 2011), https://www.uscourts.gov/sites/default/files/statistics_import_dir/CJRAMarch2011.pdf.

¹² Letter from Alliance for Justice et al., to Senator Lindsay Graham, Chairman, and Senator Dianne Feinstein, Ranking Member, Senate Judiciary Committee (Dec. 7, 2020), <https://aboutblaw.com/Ut1>.

To help determine what that response should be, we start by looking to the Judicial Conference of the United States, which was established by statute to be the official, non-partisan, policy-making body of the federal courts. The Judicial Conference assesses judicial workload through calculating “weighted filings” for district courts and “adjusted filings” for appellate courts, calculations that consider not only the number of cases, but their complexity.¹³ And based on such calculations, the Judicial Conference makes recommendations for future judgeships. In its March 2019 report to Congress, the Judicial Conference (headed by Chief Justice John Roberts) recommended the creation of 5 new permanent appellate judgeships, 65 new permanent district court judgeships, and the conversion of 8 district court judgeships from temporary to permanent status¹⁴—only a 9 percent increase in the total number of permanent Article III judgeships. According to prior research and congressional testimony by the Judicial Conference, this recommendation likely understates the actual need.¹⁵ Despite the modest nature of the recommendation, Congress has failed to act.

Congress cannot ignore this problem any longer. Our courts cannot deliver justice efficiently without a sufficient number of judges to adequately serve the American people. The federal judiciary, on behalf of its judges and litigants, is asking for help and Congress is the only body with the power to provide it. Congress should answer that call.

¹³ *Judicial Emergency Definition*, UScourts.gov (last accessed Feb. 19, 2021), <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/judicial-emergencies/judicial-emergency-definition>.

¹⁴ Barry J. McMillion, Cong. Research Serv., RL45899, *Recent Recommendations by the Judicial Conference for New U.S. Circuit and District Court Judgeships: Overview and Analysis* 12 (Sept. 3, 2019), https://www.everycrsreport.com/files/20190903_R45899_ec24a05f6d227b4e272b2ff5de0359ac5d3e80b7.pdf.

¹⁵ *Joint Statement of Judge Lawrence F. Stengel, Chair, Comm. on Judicial Resources of the Judicial Conference of the United States et al., Before the Subcommittee on Courts, Intellectual Property, and the Internet of the H. Comm. On the Judiciary*, 115th Cong. (June 21, 2018), https://www.uscourts.gov/sites/default/files/testimony_for_congressional_hearing_-_examining_the_need_for_new_federal_judges_0.pdf.