"The Need for New Lower Court Judgeships, 30 Years in the Making"

Hearing Before the Subcommittee on Courts, Intellectual Property, and the Internet Of the House Committee on the Judiciary

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Chairman Johnson, Ranking Member Issa, and distinguished members of the Subcommittee:

Thank you for the opportunity to testify today regarding the need for additional judgeships on the federal courts of appeals. My name is Marin Katherine Levy, and I am a Professor of Law at the Duke University School of Law. My research and teaching over the past twelve years have focused on judicial administration and the federal courts of appeals. I have published over a dozen scholarly works on these topics, several of which were coauthored with federal appellate judges.

I am sure that I do not need to stress to this Subcommittee the importance of the federal courts of appeals in the functioning of our judicial system, and our government more generally. According to recent statistics provided by the Administrative Office of the U.S. Courts, the thirteen courts of appeals collectively decided more than 50,000 appeals in 2019.[1] By contrast, the Supreme Court decided far fewer than 100 appeals in each of its past two terms.[2] The key point is that the federal courts of appeals are effectively the

[1] Specifically, the courts of appeals together terminated 50,050 appeals. This figure was arrived at by combining two data tables from the Administrative Office of the U.S. Courts. The first notes that the U.S Courts of Appeals (excluding the U.S. Court of Appeals for the Federal Circuit) together terminated 48,811 appeals in 2019. *See U.S. Courts of Appeals – Cases Commenced, Terminated, and Pending During the 12-Month Periods Ending December 31, 2018 and 2019*, ADMIN. OFF. OF THE U.S. CTS., tbl.B, https://www.uscourts.gov/statistics/table/b/statistical-tables-federal-judiciary/2019/12/31. The second notes that the U.S Court of Appeals for the Federal Circuit terminated 1,239 appeals by judges in 2019. *See U.S. Court of Appeals for the Federal Circuit – Appeals Filed, Terminated, and Pending During the 12-Month Period Ending December 31, 2019*, ADMIN. OFF. OF THE U.S. CTS., tbl.B-8, https://www.uscourts.gov/statistics/table/b-8/statistical-tables-federal-judiciary/2019/12/31.

[2] In fact, the Supreme Court released 61 merits opinions in October Term 2019. *See* SCOTUSBLOG, FINAL STAT PACK FOR OCTOBER TERM 2019 (2020), https://www.scotusblog.com/wp-content/uploads/2020/07/Final-Statpack-7.20.2020.pdf. It released 72 merits opinions in October Term 2018. *See* SCOTUSBLOG, FINAL STAT PACK FOR OCTOBER TERM 2018 (2019), https://www.scotusblog.com/wp-content/uploads/2019/07/StatPack_OT18-7_30_19.pdf.

courts of last resort for tens of thousands of litigants across the country. It is therefore critical that they have sufficient resources, including, first and foremost, a sufficient number of judges. Based upon my research, I believe that Congress should authorize new judgeships for the courts of appeals to keep pace with higher caseloads—as it has done, traditionally with bipartisan support, nearly thirty times before.[3]

What follows, first, is a brief description of the expansion of the courts of appeals over time. My testimony then turns to the main cause for the expansion: a rising caseload that at points has been so significant as to warrant the phrase "crisis in volume" at the courts of appeals.[4] I further stress that the caseload is markedly above where it was in 1990—the last time Congress authorized new judgeships.[5] Finally, I discuss the stakes of an understaffed judiciary, including an increase in the percentage of cases that will go without the traditional judicial process: oral argument, decision by a panel of judges (rather than review first by staff attorneys), and a published opinion explaining the court's reasoning.

The History of Expansion at the Federal Courts of Appeals

The history of the federal courts of appeals is, at its core, a history of expansion.

Just over one hundred years after the First Judiciary Act,[6] Congress created the modern courts of appeals.[7] In 1891 the Circuit Court of Appeals Act (known as the Evarts Act) gave life to nine intermediate appellate courts that would take appeals from the federal district courts and be reviewed by the Supreme Court.[8] But Congress did not stop there. Only two years after the Evarts Act, Congress added another court—what would eventually be called the United States Court of Appeals for the District of Columbia Circuit.[9] The Tenth and Eleventh Circuit Courts of Appeals were later created in 1929[10] and

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[3] *See Chronological History of Authorized Judgeships - Courts of Appeals*, ADMIN. OFF. U.S. CTS., https://www.uscourts.gov/judges-judgeships/authorized-judgeships/chronological-history-authorized-judgeships-courts-appeals.

[4] *See, e.g.*, Henry J. Friendly, *Averting the Flood by Lessening the Flow*, 59 CORNELL L. REV. 634, 634–35 (1974); DANIEL J. MEADOR, APPELLATE COURTS: STAFF AND PROCESS IN THE CRISIS OF VOLUME (1974); *see also* Bert I. Huang, *Lightened Scrutiny*, 124 HARV. L. REV. 1109, 1112 & n.9 (2011) (noting that the "crisis in volume" literature dates back to the 1960s, and citing the sources noted above as well as first citing Ruth Bader Ginsburg, *Reflections on the Independence, Good Behavior, and Workload of Federal Judges*, 55 U. COLO. L. REV. 1, 7–13 (1983); then citing Lewis F. Powell, Jr., *Are the Federal Courts Becoming Bureaucracies?*, 68 A.B.A. J. 1370, 1371 (1982); and then citing Charles Alan Wright, *The Overloaded Fifth Circuit: A Crisis in Judicial Administration*, 42 TEX. L. REV. 949, 949 (1964)).

[5] *See* Marin K. Levy, *The Promise of Senior Judges*, *The Promise of Senior Judges*, 115 NW. U. L. REV. 1227, 1234 n.33 (2021) (noting that the 1990 Judgeship Bill was the last major expansion of the courts of appeals, in which Congress created eleven new circuit judgeships and citing The Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 202(a), 104 Stat. 5089, 5098–99).

[6] *See* Judiciary Act of 1789, ch. 20, 1 Stat. 73.

[7] *See* Judiciary Act of 1891, ch. 517, 26 Stat. 826.

[8] *See id.*

[9] *See* Act of Feb. 9, 1893, ch. 74, 27 Stat. 434, 434–35.

[10] Specifically, in 1929 Congress created the United States Court of Appeals for the Tenth Circuit. *See* Act of Feb. 28, 1929, ch. 363, 45 Stat. 1346, 1346–47.

1980,[11] respectively. And the United States Court of Appeals for the Federal Circuit followed in 1982,[12] out of what had earlier been the Court of Customs and Patent Appeals.[13]

Critically, it is not only the number of courts that has grown over time, but also the number of judges who sit on each court. Before the passage of the Evarts Act, Congress had created dedicated "circuit judges," one for each circuit, to sit, alongside district judges and Supreme Court Justices, on the then-nine circuit courts (the precursors to the modern courts of appeals).[14] One additional circuit judge was later bestowed upon the Second Circuit alone in 1887.[15] To this stable of ten judges, Congress authorized the addition of nine more—again, one for each of the then-nine circuits—through the Evarts Act itself in 1891.[16]

Over the next hundred years, Congress authorized new judgeships both frequently and consistently, with nearly thirty such authorizations, spread out across every decade save one.[17] During this time, the total number of appellate judges expanded from the original 19 to 179.[18] What follows is a table, based upon data from the Administrative Office of the U.S. Courts, which details the expansion of the thirteen courts of appeals from 1891 to the present.[19]

[11] In 1980, Congress created the United States Court of Appeals for the Eleventh Circuit out of the old Fifth Circuit. *See* Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, § 2, 94 Stat. 1994, 1994.

[12] *See* Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, §§ 101, 165, 96 Stat. 25, 25, 50.

[13] *See* Act of Mar. 2, 1929, ch. 488, 45 Stat. 1475.

[14] *See* An Act to Amend the Judicial System of the United States, ch. 22, § 2, 16 Stat. 44, 44–45 (1869).

[15] *See* Act of Mar. 3, 1887, ch. 347, 24 Stat. 492.

[16] *See* Judiciary Act of 1891, ch. 517, §§ 1–2, 26 Stat. 826, 826–27 (1891).

[17] *See Chronological History of Authorized Judgeships - Courts of Appeals*, *supra* note 3. The only decade in which judges were not added to the bench between 1891 and 1990 is the 1910s. *Id.*

[18] *See id.*

[19] *See* ADMIN. OFF. OF THE U.S. CTS., *Authorized Judgeships*, https://www.uscourts.gov/sites/default/files/allauth.pdf. Note that, unlike Table 2, these figures do not include the Court of Claims or the Court of Customs and Patent Appeals.

Table 1: Authorized Circuit Judgeships, 1891 – Present

Calendar Year	Authorized Circuit Judgeships
1891	19
1893	22
1894	23
1895	25
1899	28
1902	29
1903	30
1905	32
1922	33
1925	35
1928	36
1929	41
1930	45
1935	46
1936	47
1937	49
1938	54
1940	57
1942	58
1944	59
1949	65
1954	68
1961	78
1966	88
1968	97
1978	132
1982	144
1984	168
1990	179

The expansion of the courts of appeals ended with the Civil Justice Reform Act of 1990, which created eleven new circuit judgeships.[20] Despite the fact that Congress regularly authorized new judgeships for the courts of appeals for the first hundred years of those courts' existence, it has now held them at the same size for thirty years.[21]

[20] *See* Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 202(a), 104 Stat. 5089, 5098–99.

These expansions of the federal bench have generally been in response to expanding caseloads. As I have chronicled in several articles, the courts of appeals have faced a rapidly rising caseload for much of their collective life.[22] In 1892, just one year after the courts were formed, there was an average of 44 filings per judgeship per annum.[23] That number had jumped to 73 by 1950 (even while the number of judgeships had grown from 19 to 75) and jumped again to 137 by 1978 (when the number of judgeships stood at 144).[24] It is no wonder that throughout this time, judges and scholars alike referred to the "crisis" in volume at the courts of appeals.[25] Only a little over a decade later, in 1990, filings per judgeship had risen to 237.[26]

Although the expansion of the federal bench halted in 1990,[27] the caseload expansion did not. In 1997, it reached 300 filings per judgeship.[28] It then reached a high-water mark in 2005 with 400 filings per judgeship,[29] before beginning to recede somewhat in the years that followed. The annual caseload has stabilized over the past few years, and today it stands at about 284 filings per judgeship—still nearly fifty more cases per judge

[21] It is worth noting that while the overall size has held constant at 179 judgeships, one of those judgeships was transferred from the D.C. Circuit to the Ninth Circuit, effective January 21, 2009. *See* Court Security Improvement Act of 2007, Pub. L. No. 110-177, § 509(a), 121 Stat. 2534, 2543.

[22] *See, e.g.*, Marin K. Levy, *Judging Justice on Appeal*, 123 YALE L.J. 2386, 2393–2402 (2014) (reviewing WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, INJUSTICE ON APPEAL: THE UNITED STATES COURTS OF APPEALS IN CRISIS (2012)); Marin K. Levy, *Judicial Attention as a Scarce Resource: A Preliminary Defense of How Judges Allocate Time Across Cases in the Federal Courts of Appeals*, 81 GEO. WASH. L. REV. 401, 407-409 (2013) [hereinafter "Levy, *Judicial Attention as a Scarce Resource*"]; Marin K. Levy, *The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts*, 61 DUKE L.J. 315, 320–25 (2011) [hereinafter "Levy, *The Mechanics of Federal Appeals*"].

[23] *See* COMM'N ON STRUCTURAL ALTS. FOR THE FED. CTS. OF APPEALS, FINAL REPORT 14 (1998).

[24] *See id.*

[25] *See supra* note 4.

[26] *See supra* note 23, at 14.

[27] *See supra* 5 and accompanying text.

[28] *See* COMM'N ON STRUCTURAL ALTS. FOR THE FED. CTS. OF APPEALS, FINAL REPORT, *supra* note 23, at 14.

[29] This figure was arrived at by combining two data tables from the Administrative Office of the U.S. Courts. The first table notes that there were 70,003 filings during the twelve-month period ending December 31, 2005 in the U.S. Court of Appeals (excluding the U.S. Courts of Appeals for the Federal Circuit). *See U.S. Courts of Appeals – Appeals Commenced, Terminated, and Pending During the 12-Month Periods Ending December 31, 2005 and 2006*, ADMIN. OFF. OF THE U.S. CTS., tbl.B, https://www.uscourts.gov/statistics/table/b/statistical-tables-federal-judiciary/2006/12/31. The second notes that there were 1,552 appeals filed in this same timeframe in the U.S. Court of Appeals for the Federal Circuit. *See U.S. Courts of Appeals for the Federal Circuit – Appeals Filed, Terminated, and Pending During the 12-Month Period Ending December 31, 2006*, ADMIN. OFF. OF THE U.S. CTS., tbl.B-8, https://www.uscourts.gov/sites/default/files/statistics_import_dir/B08Dec05.pdf. The two figures combined—71,555—divided by the number of federal appellate judgeships—179—equals approximately 400 filings per judgeship.

than in 1990.[30] It is worth noting that in some circuits this figure is much higher. In the Ninth Circuit, for example, there are just over 350 filings per judgeship.[31]

What follows is a table, based upon data from the Commission on Structural Alternatives for the Federal Courts of Appeals as well as the Administrative Office of the U.S. Courts, which details the rise in filings per judgeship at the courts of appeals over time.[32]

Table 2: Authorized Circuit Judgeships and Filings Per Judgeship, 1892 – Present

Calendar Year	Circuit Judgeships	Filings	Filings Per Judgeship
1892	19	841	44
1930	55	3,532	64
1950	75	5,443	73
1964	88	6,736	77
1978	144	19,657	137
1984	168	32,616	194
1990	179	42,364	237
1997	179	53,688	300
2019	179	50,887	284

[30] This figure was arrived at by combining two data tables from the Administrative Office of the U.S. Courts. The first notes that there were 49,421 filings during the twelve-month period ending December 31, 2019 in the U.S Courts of Appeals (excluding the U.S. Court of Appeals for the Federal Circuit). *See U.S. Courts of Appeals – Cases Commenced, Terminated, and Pending During the 12-Month Periods Ending December 31, 2019 and 2020*, ADMIN. OFF. OF THE U.S. CTS., tbl.B, https://www.uscourts.gov/statistics/table/b/statistical-tables-federal-judiciary/2019/12/31. The second notes that there were 1,466 appeals filed in this same timeframe in the U.S. Court of Appeals for the Federal Circuit. *See U.S. Court of Appeals for the Federal Circuit – Appeals Filed, Terminated, and Pending During the 12-Month Period Ending December 31, 2020*, ADMIN. OFF. OF THE U.S. CTS., tbl.B-8, https://www.uscourts.gov/statistics/table/b-8/statistical-tables-federal-judiciary/2019/12/31. The two figures combined—50,887—divided by the number of federal appellate judgeships—179—equals approximately 284 filings per judgeship.

[31] This figure was arrived at by taking the number of filings in the U.S. Court of Appeals for the Ninth Circuit in 2019—10,191—and dividing it by the number of authorized judgeships for that court—29. *See U.S. Courts of Appeals – Cases Commenced, Terminated, and Pending During the 12-Month Periods Ending December 31, 2019 and 2020*, ADMIN. OFF. OF THE U.S. CTS., tbl.B, https://www.uscourts.gov/statistics/table/b/statistical-tables-federal-judiciary/2019/12/31.

[32] *See* COMM'N ON STRUCTURAL ALTS. FOR THE FED. CTS. OF APPEALS, FINAL REPORT, *supra* note 23, at 14 (providing the figures for the years 1892 through 1997, and noting that the years 1930–1978 combine the Court of Customs and Patent Appeals and Court of Claims, and that appellate filings and judgeships for 1984–1997 include the U.S. Court of Appeals for the Federal Circuit); *supra* note 30 and accompanying text (providing figures for the present based upon data from the Administrative Office of the U.S. Courts).

The key point is that the filings per judgeship have grown considerably over time, including since the federal courts of appeals were last expanded. Specifically, the caseload metric today is nearly four times what it was in 1950, and more than twice was it was in 1978. And it remains markedly above where it was in 1990—an increase of approximately 20% or 8,523 new cases for the courts of appeals to contend with each year.

In short, if we pull these two strands of history together, we can see that as caseloads climbed through the course of the twentieth century, Congress consistently responded by authorizing new judgeships to take up the workload—until 1990. Before thirty years ago, these responses were routine and traditionally bipartisan (indeed, the Omnibus Judgeship Act of 1978, which created thirty-five new judgeships for the courts of appeals,[33] had bipartisan cosponsorship[34]). This past pattern of practice was critical to the functioning of the courts given that, as the next Section details, the courts and the judicial process they provide suffer when under stress.

The Effects of Appellate Courts Under Pressure

As the demands on the courts of appeals have grown while their judicial resources have not, the circuits have been forced to relieve the pressure by changing how they evaluate and resolve cases.[35] These adaptive practices have come at the expense of the traditional model of appellate decisionmaking.[36]

First, following a 1964 decision by the Judicial Conference that only opinions of "general precedential value" must be published,[37] the circuits created their own plans for

[33] Act of Oct. 20, 1978, Pub. L. No. 95-486, 92 Stat. 1629.

[34] *See Cosponsors: H.R.7843 – 95th Congress (1977-1978)*, CONGRESS.GOV, https://www.congress.gov/bill/95th-congress/house-bill/7843/cosponsors?searchResultViewType=expanded (last visited Feb. 21, 2021).

[35] *See* JOE S. CECIL & DONNA STIENSTRA, FED. JUDICIAL CTR., DECIDING CASES WITHOUT ARGUMENT: AN EXAMINATION OF FOUR COURTS OF APPEALS 8 (1987).

[36] *See* Carl Tobias, *The New Certiorari and a National Study of the Appeals Courts*, 81 CORNELL L. REV. 1264, 1268 (1996).

[37] *See* THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS 127 (1994) (citing ADMIN. OFFICE OF THE U.S. COURTS, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 11 (1964)).

disposing of cases through unpublished opinions.[38] Soon, these short unpublished opinions became the most common form of case disposition.[39] Second, starting in 1968 with the Fifth Circuit, courts began to move away from the default that oral argument would be offered in most, if not all, cases.[40] A 1979 amendment to Federal Rule of Appellate Procedure 34 formalized this change, authorizing the resolution of an appeal without oral argument when the panel determined that the case was frivolous, had already been "authoritatively decided," or when the decisionmaking process "would not be significantly aided by oral argument."[41] Third, starting in 1973, courts began receiving funding for staff law clerks to assist with certain classes of cases.[42] By 1982, Congress authorized the creation of staff attorney offices within the courts to defray the workload further.[43]

Today, the courts rely heavily upon these methods, which form the backbone of federal appellate docket management. To begin, the vast majority of cases terminated on the merits are disposed of via unpublished opinion or order. According to the most recent Annual Report of the Director of the Administrative Office of the U.S. Courts, of the 32,086 cases terminated on the merits during the twelve-month period ending September 30, 2019, a total of 28,216 or 87% were decided by unpublished opinion or order.[44] In some circuits, including the Third, Fourth, Ninth, and Eleventh, that figure exceeded 90%.[45]

Likewise, the courts of appeals now forgo oral argument in most appeals. Of the same 32,086 cases that were terminated on the merits in the twelve-month period ending September 30, 2019, only 6,056 or approximately 19% received oral argument.[46] If we expand the scope to include all cases that were terminated, including on procedural grounds (for a total of 47,889 cases), then fewer than 13% were heard at oral argument.[47] By way of comparison, if one looks back to the 1991 Annual Report of the Director—just after the last expansion of the federal appellate bench—of the 23,071 cases terminated on the merits, 10,321 or 45% were heard at oral argument.[48] Even if all terminated cases from the

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[38] *See* William L. Reynolds & William M. Richman, *Limited Publication in the Fourth and Sixth Circuits*, 1979 DUKE L.J. 807, 808 (citing ADMIN. OFFICE OF THE U.S. COURTS, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 12–13 (1974)).

[39] *See* Reynolds & Richman, *supra* note 38, at 808. Specifically, the percentage of opinions published by the circuits was 48.4% in 1973 and 37.2% in 1977. *Id.* (citing ADMIN. OFFICE OF THE U.S. COURTS, 1977 ANNUAL REPORT OF THE DIRECTOR 3 (1977)).

[40] *See* JOE CECIL & DONNA STIENSTRA, FED. JUDICIAL CTR., DECIDING CASES WITHOUT ARGUMENT: A DESCRIPTION OF PROCEDURES IN THE COURTS OF APPEALS 2 (1985).

[41] FED. R. APP. P. 34(a)(2); 28 U.S.C. app. Rule 34(a) (Supp. III 1980).

[42] *See* Levy, *Judicial Attention as a Scarce Resource*, *supra* note 22, at 415-16 (citing *Staff Attorney Offices Help Manage Rising Caseloads*, USCOURTS.GOV, host4.uscourts.gov/newsroom/stffattys.htm).

[43] *See id.*

[44] *See* ADMIN. OFFICE OF THE U.S. COURTS, *Judicial Business of the United States Courts: 2019 Annual Report of the Director*, tbl.B–12, https://www.uscourts.gov/sites/default/files/data_tables/jb_na_app_0930.2019.pdf.

[45] *See id.*

[46] *See id.* at tbl.B-1.

[47] *See id.*

[48] *See* ADMIN. OFFICE OF THE U.S. COURTS, *Judicial Business of the United States Courts: 1991 Annual Report of the Director*, tbl.B–1. Note that this table reported figures for the twelve-month period ending December 31, 1991.

time period are considered, including those terminated on procedural grounds, the figure is 10,321 out of 41,905, or about 25%.[49]

Finally, the federal courts of appeals now rely on staff attorneys, particularly to review cases that will not go to oral argument.[50] Based upon my own qualitative study of five of the courts of appeals from 2011, I learned that staff attorneys often draft a proposed order and accompanying memorandum about a particular case, to be reviewed by the deciding panel.[51] Although the courts do not provide figures on the percentage of cases terminated on the merits that are prepared by staff attorneys, my study suggests that the percentage is sizeable.[52]

Several scholars have documented the concerns that attend truncated review—including that many litigants will not believe that they had a meaningful opportunity to be heard and will therefore question the fairness and legitimacy of the procedural process.[53] Furthermore, there are risks not just to process values but also to accuracy. Scholars and judges alike have suggested that as caseloads rise, the same degree of attention cannot be paid to every appeal, which may ultimately affect case outcomes.[54]

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In sum, the courts of appeals serve as the backstop within the federal judiciary, acting as the courts of last resort for the majority of litigants. It is imperative that these courts be provided the necessary resources to carry out their critical function. For the first hundred years of the courts' existence, Congress consistently did just that by adding seats to the federal appellate bench to keep pace with a rising caseload. This practice stopped in 1990, though the caseload has continued to grow and courts have had to rely on case management strategies that come at the expense of traditional appellate review. Congress should return to its earlier practice and authorize new judgeships for the courts of appeals, consistent with their caseload needs—for the courts and all who come to them for the just resolution of appeals.

Thank you.

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[49] *See id.*

[50] *See* Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 ARIZ. ST. L.J. 1, 6–7 (2007).

[51] *See* Levy, *The Mechanics of Federal Appeals*, *supra* note 22, at 345–46.

[52] *See id.* at 346–54.

[53] *See generally* Merritt E. McAlister, *"Downright Indifference": Examining Unpublished Decisions in the Federal Courts of Appeals*, 118 MICH. L. REV. 533 (2020); WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, INJUSTICE ON APPEAL: THE UNITED STATES COURTS OF APPEALS IN CRISIS (2012); BAKER, *supra* note 37.

[54] *See, e.g.*, Huang, *supra* note 4, at 1127–37 (finding evidence for the claim that docket pressure can alter the nature of appellate scrutiny and, specifically, that a court that experienced a surge in caseload began to reverse district court rulings less often); RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 345 (1996) (noting that "one consequence of the heavy caseload pressures on the courts of appeals has been an increase in the deference paid by those courts to the rulings made by district judges").