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

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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. It is an honor to be here.

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 in our Government as a whole.

According to the Administrative Office of the U.S. Courts, the thirteen courts of appeals collectively decided more than 50,000 appeals in 2019.

By contrast, the Supreme Court decided just 61 cases in October Term 2019, only 50 of which were from federal courts.

Accordingly, the courts of appeals have effectively become the 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.

And it's my belief, based upon years of research, that they currently do not.

By way of history, when the modern courts of appeals were created in 1891 by the famed Evarts Act, they began with just 19 judges.

And then, over the next hundred years, Congress – consistently and frequently – authorized new judgeships for those courts.

Indeed, as I detail in my written testimony, Congress expanded the courts nearly 30 times over the decades that followed, eventually growing the regional circuit courts and the Federal Circuit to 179 judges by 1990.

The reason for this regularized expansion is plain: Congress grew the courts to try to keep pace with a dramatically rising caseload.

In 1950, when the great Learned Hand was on the bench, there were just under 5,500 filings in the federal courts of appeals or 73 per active judgeship.

By the late 1970s, the case filings had nearly quadrupled.

And they doubled again by 1990, to just over 40,000.

Throughout this time, Congress added judgeships again and again, including in several Omnibus Judgeship Bills –

In 1978, during the Carter administration, Congress created 35 circuit court judgeships;

In 1984, during the Reagan administration, Congress created 24 more;

And in 1990, during the Bush administration, Congress created yet 11 more.

And through these Congressional interventions, the number of filings per judgeship, though it continued to climb, was kept somewhat in check.

By 1990, it was 237 per year – importantly, below, a benchmark that the Judicial Conference had set of 255.

Unfortunately, though, Congress has not added a single judgeship since that time.

But the caseload has risen still.

In 2019, there were just under 51,000 cases filed in the federal courts of appeals – an increase of approximately 20% above where we were in 1990.

This puts us at 284 filings per judgeship.

And in certain circuits, that figure is higher –

Indeed, it is currently

Over 350 per judgeship in the Ninth Circuit.

410 per judgeship in the Fifth Circuit.

And 450 per judgeship in the Eleventh Circuit.

As I'm happy to talk about more during questions, we know what happens when we ask courts to do more without concurrently giving them more resources to do it.

Courts must adapt, which means relying more heavily on case management strategies, and in particular

- Sending a smaller percentage of cases to oral argument
- Having a larger percentage of cases go first to Staff Attorney Offices for consideration
- And then ultimately having a larger percentage of cases resolved by short, in some circuits cursory, unpublished decisions.

To provide one illustration, just after the last court expansion, in 1991, 45% or close to one half of all cases decided on the merits received oral argument.

Today that figure is less than half – only 1 in 5 cases, decided on the merits, are heard before a panel of three judges.

As we know, truncated review has its effects: It can leave parties feeling like they did not have their day in court.

Moreover, judges and scholars have raised accuracy concerns in addition to process-based ones.

The courts should not be put in this position.

In sum, 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.