

Testimony by Nan Aron, President, Alliance for Justice
United States House of Representatives
Committee on the Judiciary
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Mr. Chairman, thank you very much for this opportunity to address a very important topic: the ability of our federal courts—the envy of the world—to efficiently, effectively, and fairly administer justice for the people of the United States.

The committee has posed the question, “Are More New Judges Always the Answer?” I’m not sure I can speak to the word “always,” but I can say without hesitation that *today*, with more than one of ten judgeships vacant, with caseloads rising rapidly, and with the complexity of litigation increasing, the answer to your question is yes, more judges are the answer. In fact, we strongly concur with the judgment of the Judicial Conference of the United States and the Chief Justice of the United States that additional judgeships should be created in many parts of the country in order to ensure that the Constitution’s promise of justice is fulfilled.

But the need for Congress to create new judgeships aside, we believe the first step in resolving the crisis in our courts is to fill all the *existing* district and circuit court seats.

As of today, there are 91 total vacancies—74 in district courts and 17 in circuit courts. Astonishingly, there are more empty judgeships now than when President Obama took office, almost five years ago. In fact, just among the states that are home to members of this committee, there are a total of 66 open seats. Strikingly, 34 of those are considered “judicial emergencies” by the Administrative Office of the United States Courts, meaning those courts are so overwhelmed that they can no longer function properly. In fact, 92 percent of all judicial emergencies in the country are located in states represented on this committee.

This crisis is not an abstract problem. It has real-world consequences for real people. When your constituents go to court, they face a judicial system that is overburdened, overworked, understaffed, and underfunded. Cases are delayed interminably. Judges complain they can’t spend the time they need on individual cases to render the best possible opinions. Decisions are rushed. Because of burgeoning criminal caseloads, which must take priority, civil actions are shoved aside. Small businesses can’t get resolution to problems that tie their enterprises in knots. Contract disputes go unresolved. Individuals seeking justice for discrimination, or fraud, or disputes with banks or businesses or the government, are left hanging, often for years.

Every American deserves their day in court. The Constitution explicitly says one of its major purposes is to “establish Justice.” Every American has a right to expect that the remedies that the law provides are available to them in a reasonable time, and not dangled out as some faint hope that might someday be within reach, assuming a judge can even be found to hear their case.

But the issues of dysfunction and delay, of overwork and too few resources, become even more disturbing the higher up in the federal system you go. In the circuit courts of appeals the cases are bigger, the stakes are higher, and the consequences for all of us are more significant.

And that fact is doubly true for the U.S. Court of Appeals for the D.C. Circuit.

There are currently three vacancies out of 11 seats on the court that is often described as the second most important in the country. The court, the importance of which is rivaled only by the Supreme Court, shouldn't be forced to do its job with 27 percent of its seats empty. It's like telling a football team they can only use eight players on Sunday, instead of 11. The country can ill-afford to have this critical component of our judicial system send less than a full team into the game.

These are the facts: The D.C. Circuit handles some of the most complex, lengthy, sensitive litigation in the federal courts. Its cases are characterized by long trials, multiple plaintiffs and defendants, armies of lawyers, massive records, and long, technical opinions. Those indisputable facts alone make it essential to fully staff this court. In fact, I recall in 2003, when, just like today only eight seats were filled, Senator Orrin Hatch called that a "crisis situation."

The D.C. Circuit is the federal appeals court that most closely oversees the actions of federal agencies on topics like the environment, consumer protections, workers' rights, banking regulations, and other vital issues. It digs deeply into central disputes over how the government functions. As Chief Justice John G. Roberts, Jr., himself a former member of the D.C. Circuit, explained in a 2005 lecture—"What Makes the D.C. Circuit Different?"—the court has a "special responsibility to review legal challenges to the conduct of the national government." And, despite its name, its decisions reach far beyond the District of Columbia, to touch every single American in every corner of the country. It makes no sense to shortchange the court that handles some of the toughest cases with the biggest impacts.

But in addition to the special nature of its cases, the plain fact is that the court's workload has increased significantly in recent years.

In 2003, when John Roberts was confirmed to the ninth seat on the D.C. Circuit, there were 1,001 pending cases. In 2005, when President Bush put forward Janice Rogers Brown and Thomas Griffith for the tenth and eleventh seats, there were 1,313 pending cases. And today, the trend upward continues, with 1,479 pending cases.

With only eight of 11 seats filled, the caseload is currently at 185 cases per active judge. In 2005, when John Roberts moved up to the Supreme Court—his seat is *still* vacant, by the way—1,313 cases were divided among the full complement of 11 judges. That represented 119 cases per judge. Even if all three open seats were filled tomorrow, the cases per active judge will be 134.

The federal judges who have the clearest view of the problem have the clearest answers. Tenth Circuit Judge Timothy Tymkovich, who was appointed by President George W. Bush, heads up the Judicial Conference committee that makes recommendations to Congress on the number of judges needed in the federal system. He recently testified before a Senate Judiciary subcommittee about the D.C. Circuit, and spoke of what he called "the uniqueness of their caseload." He noted, for instance, that the court has "something like 120 administrative appeals

per judgeship panel, versus about 28 for the other Courts of Appeals.” He was clear that the way the D.C. Circuit is evaluated must be different from other courts, and concluded unequivocally that “we haven’t seen any reason to reevaluate” the size of the court.

Former D.C. Circuit Chief Judge Pat Wald has explained why that’s so, writing that “The D.C. Circuit hears the most complex, time-consuming, labyrinthine disputes over regulations with the greatest impact on ordinary Americans’ lives ... These cases can require thousands of hours of preparation by the judges, often consuming days of argument, involving hundreds of parties and interveners, and necessitating dozens of briefs and thousands of pages of record—all of which culminates in lengthy, technically intricate legal opinions.”

Given the stresses on the D.C. Circuit and the importance of its legal mission, we’re pleased that President Obama put forward a full slate of outstanding, highly qualified nominees, which the Senate is now considering. Nominating qualified men and women for vacant judgeships isn’t some kind of illegitimate act, as some have inferred. Every president does exactly the same thing. When there are vacancies on the federal bench the president is required to nominate new judges, subject, of course, to the advice and consent of the Senate. Article II, section 2 of the Constitution is very clear on this matter. It’s not a negotiable point. The president cannot ignore his constitutional obligations, and neither should the Senate.

I’d like to conclude my testimony by referring to those obligations.

I would respectfully submit that the committee’s question, “Are More New Judges Always the Answer,” misses the point. The Constitution makes a promise to the American people that our government will function in a way that will “establish Justice.” Justice cannot be established, and the rule of law cannot be made manifest, if the federal court system is unable to function because it is starved of judges and resources.

It is the absolute obligation of Congress and the president to ensure that the third branch of government is healthy and fully able to do its job. When your constituents walk into a federal courthouse, they should enter knowing that everything possible has been done to ensure that they have access to the finest judicial system and set of laws in the world. Regrettably, that is not true now. It’s not true in the district courts, in the appellate courts, and especially not in the D.C. Circuit.

Mr. Chairman, new judges, whether those named to fill existing vacancies, or those chosen to serve in entirely new seats, are indeed the answer if the question we ask is: will justice be done in the United States of America?

Thank you and I am eager to answer your questions.