



Federal Judgeship Act of 2009

September 25, 2009

Executive Summary

On Wednesday, September 30, 2009, the Senate Committee on the Judiciary, Subcommittee on Administrative Oversight and the Courts, will hold a hearing on S. 1653, the Federal Judgeship Act of 2009. The Act creates new permanent and temporary federal appellate and district court judgeships. While we encourage Congress to create new judgeships if there is a clear and demonstrable need for them, we are concerned that S. 1653 could bring partisan politics into the process of creating judgeships. The Senate Judiciary Committee should ascertain the true need for additional judgeships before assuming the cost for new judgeships. It should also delay the effective date for any new judgeships until after the next presidential election.

I. Introduction

On September 8, 2009,¹ Senator Patrick Leahy introduced S. 1653, the Federal Judgeship Act of 2009 ("Act").² Effective upon enactment,³ the Act would add nine permanent and three temporary judgeships to the United States Circuit Courts of Appeals.⁴ The newly created permanent judgeships would be as follows: one for the First Circuit, two for the Second Circuit, one for the Third Circuit, one for the Sixth Circuit, and four for the Ninth Circuit.⁵ The newly created temporary judgeships would be one each for the Third, Eighth, and Ninth Circuits.⁶ The Act would also add thirty-eight permanent and thirteen temporary judgeships to various United States District Courts,⁷ convert five existing temporary United States District Court judgeships into permanent positions, and extend one existing temporary position.⁸

¹ See Press Release, Senator Patrick Leahy, Leahy Introduces Bill to Authorize Federal Judgeships (Sept. 8, 2009), available at <http://leahy.senate.gov/press/200909/090809c.html>.

² Federal Judgeship Act of 2009, S. 1653, 111th Cong. (2009).

³ *Id.* § 5.

⁴ *Id.* § 2.

⁵ *Id.* § 2(a).

⁶ *Id.* § 2(b).

⁷ *Id.* § 3.

⁸ *Id.* § 3(c).

II. History of Judgeship Bills

Since the Constitution came into effect, Congress has modified the federal judiciary in many ways through the creation of lower courts and the authorization of judgeships. The last comprehensive judgeships act passed in 1990.⁹ Although Congress has authorized additional district court judgeships and extended temporary judgeships since 1990,¹⁰ it remains that “judgeship needs have been addressed piecemeal, first in 1999 with the creation of nine judgeships in the omnibus appropriations act, and again in 2000 when [ten] new Article III judgeships were included in the Commerce, Justice, State, the Judiciary and Related Agencies Appropriations Act.”¹¹

Over the past decade, judgeship bills have been introduced in nearly every Congress since the 105th Congress, but have all died before being enacted.¹² For example, in 1997, Senator Leahy introduced the Federal Judgeship Act of 1997,¹³ which would have added, effective upon date of enactment, permanent and temporary court of appeals and district court judgeships.¹⁴ Senator Grassley, then-chair of the Senate Judiciary Subcommittee on Administrative Oversight and the Courts, “requested that the General Accounting Office review the basis upon which the Judicial Conference made its request for Article III and bankruptcy judgeships” in the proposed legislation, and held hearings in which judges were called to “testify on the need for new judgeships and the use of current resources.”¹⁵ The bill ultimately failed to pass.¹⁶

During the 110th Congress, Senator Leahy introduced S. 2774, the Federal Judgeship Act of 2008. Upon introducing the bill, Senator Leahy observed that

“Without a comprehensive bill, Congress has proceeded to authorize only a few additional district court judgeships and extend temporary judgeships when it could. For instance, in 2002 we were able to provide for 15 new judgeships in the Department of Justice authorization bill. However no additional circuit court judgeships have been created since 1990 despite their increased workload. . . . Our Federal judges are working harder than ever, but in order to maintain the integrity of the Federal courts and the promptness that justice demands, judges must have a manageable workload.”¹⁷

⁹ See Leahy Introduces Bill to Authorize Federal Judgeships, *supra* note 1.

¹⁰ *Id.*

¹¹ The Third Branch, Judicial Conference Again Asks for New Judgeships to Meet Court Needs, <http://www.uscourts.gov/ttb/feb01ttb/page2.html> (last visited Sept. 16, 2009).

¹² See S. 678: Federal Judgeship Act of 1997, Related Legislation, <http://www.govtrack.us/congress/bill.xpd?bill=s105-678&tab=related> (last visited Sept. 17, 2009); The Third Branch, End of the 105th Congress Resolves Legislative Action, <http://www.uscourts.gov/ttb/nov98ttb/105congres.html> (last visited Sept. 17, 2009).

¹³ See Federal Judgeship Act of 1997, S. 678, 105th Cong. (1997).

¹⁴ *Id.* §§ 2-3, 5.

¹⁵ The Third Branch, End of the 105th Congress Resolves Legislative Action, <http://www.uscourts.gov/ttb/nov98ttb/105congres.html> (last visited Sept. 17, 2009).

¹⁶ *Id.*

¹⁷ S. REP. NO. 110-427, at 2 (2008) (quoting 154 CONG. REC. S2138-01, S2153 (daily ed. Mar. 13, 2008) (statement of Chairman Leahy)).

The bill was scheduled to receive a hearing in June 2008; however, the hearing was suspended after Republicans invoked a Senate procedural rule to protest the slow pace of confirmations for federal appeals court judges.¹⁸ The bill, which would have gone into effect on January 21, 2009 and had bipartisan support,¹⁹ passed out of the Judiciary Committee in July 2008, but the full Senate never acted on it.

In the Senate Report submitted with the bill, four Republican Senators challenged the Judicial Conference's recommendations on the number of needed judgeships. The Senators stated,

We are of the position that if there is a clear, demonstrated need for new judgeships, the Congress should act to create those positions. There may well be a need for some of the judgeships contained in S. 2774. However, the GAO continues to find that the Judicial Conference's methodology is flawed and unreliable. . . . [T]he federal judiciary has not proven that it has taken every step it can to improve efficiencies, be it through use of technology, case management techniques, or senior/magistrate/visiting judges. Further, there are significant costs that come with creating new permanent and temporary judgeships. For these reasons, we believe that the Judiciary Committee should not be quick to rubber-stamp the AO's request in S. 2774. Moreover, because of the continued findings by the GAO that the methodologies utilized by the Judicial Conference are not accurate and could be improved, we believe that the AO should implement the GAO's recommendations before it submits—and Congress approves—any further judgeship requests.²⁰

Upon reintroducing the Federal Judgeships Act in the 111th Congress, Senator Leahy stated that case filings in federal appellate and district courts have risen since 1990. Thus, Senator Leahy asserted, Congress should pass a comprehensive judgeships bill to “ease the strain of heavy caseloads that has burdened the courts and thwarted the administration of justice.”²¹ It is likely, however, that Republicans, who have yet to sign on to the bill, will have concerns about the legislation.

III. Concerns About the Act

We agree with Senators Grassley, Sessions, Brownback, and Coburn that if there is a clear need for new judgeships, those judgeships should be created. However, the creation of new judgeships by Congress should not be used as a political tool to reshape the federal judiciary. For that reason, we recommend that any judgeships bill contain safeguards to ensure that the independent judiciary remains just that—independent.

A. Possible Inaccuracy of the Judicial Conference's Recommendations

¹⁸ The Third Branch, Judicial Confirmations at Center of Cancelled Hearing, July 2008, <http://www.uscourts.gov/ttb/2008-07/article07.cfm> (last visited Sept. 17, 2009).

¹⁹ See Federal Judgeship Act of 2008, S. 2774, 110th Cong. § 5 (2008).

²⁰ S. REP. NO. 110-427, at 19 (2008) (statement of Sens. Grassley, Sessions, Brownback, and Coburn).

²¹ Leahy Introduces Bill to Authorize Federal Judgeships, *supra* note 1.

The newly created judgeships are based on recommendations by the Judicial Conference of the United States,²² which was created by Congress to offer policy recommendations on the structure and operation of the federal judiciary.²³ Yet, unlike Congress, the Judicial Conference is not directly accountable to the people.

Assessments of the need for more judgeships demand more scrutiny before casting this cost onto the taxpayer. It costs approximately \$1,062,000 to create a circuit court judgeship the first year, and approximately \$931,000 each subsequent year to maintain it.²⁴ A district court judgeship costs slightly more—approximately \$1,169,000 the first year, and \$960,000 each subsequent year.²⁵ In recent prepared testimony for a Senate Judiciary Committee hearing, William O. Jenkins, Jr., director of Homeland Security and Justice at the Government Accountability Office (“GAO”), stated that “neither [the GAO] nor the Judicial Conference can assess the accuracy of adjusted case filings as a measure of the case-related workload of courts of appeals judges.”²⁶ In 2003, the GAO had produced a report on the accuracy of the weighted and adjusted case filings systems for calculated judicial workload.²⁷ “The GAO concluded that there were problems with the reliability of both district and appellate court methodologies.”²⁸ In 2008,

Mr. Jenkins reiterated his concerns with the reliability of the AO’s methodology, and specifically questioned the accuracy of the case weights used by the AO to assess judgeship needs. Mr. Jenkins noted that notwithstanding the findings of the 2003 GAO report, the AO had not implemented their recommendations to improve the accuracy of their methodology.²⁹

Given the uncertainty surrounding the need for new judgeships, and the fact “that it is easier to create judgeship positions than to eliminate them,” “Congress must be reasonably confident that, before it creates new federal court judgeships and expands the federal judiciary on a permanent basis, it does so based upon accurate and complete information.”³⁰ One way to do this, as Senators Grassley, Sessions, Brownback, and Coburn suggested, is for Congress, before it creates new judgeships based on possibly inaccurate information, to fill the current judicial vacancies.³¹ According to the Administrative Office of the U.S. Court’s website, as of September 25, 2009, there are twenty current vacancies to the U.S. Courts of Appeals, and seven nominees

²² See Leahy Introduces Bill to Authorize Federal Judgeships, *supra* note 1. For the actual judgeship recommendations, see Press Release, The Third Branch, Judicial Conference Judgeship Recommendations (Mar. 2009), available at http://www.uscourts.gov/Press_Releases/2009/recommendations.pdf.

²³ See 28 U.S.C.S. § 331.

²⁴ S. REP. NO. 110-427, at 17 (2008) (statement of Sens. Grassley, Sessions, Brownback, and Coburn).

²⁵ *Id.*

²⁶ *Responding to the Growing Need for Federal Judgeships: The Federal Judgeship Act of 2008: Hearing Before the S. Judiciary Comm.*, 110th Cong. 95 (2008) (statement of William O. Jenkins, Jr., Director, Homeland Security and Justice, Government Accountability Office).

²⁷ S. REP. NO. 110-427, at 18-19 (2008) (statement of Sens. Grassley, Sessions, Brownback, and Coburn).

²⁸ *Id.* at 18.

²⁹ *Id.* at 19.

³⁰ *Id.* at 17.

³¹ *Id.*

to fill those vacancies.³² There are seventy-four current vacancies to federal district court benches, with nine nominees awaiting confirmation.³³ The site also lists twenty-six future vacancies.³⁴ During the previous administration, the Senate failed to confirm numerous well-qualified judicial nominees, such as Judge Robert Conrad, Rod Rosenstein, Steve Matthews, and Peter Keisler. If there is such a great need for judges, then these well-qualified individuals should have been confirmed. Before Congress creates additional judgeships, the existing vacancies should be filled with similarly well-qualified individuals. If the courts still find themselves in need of additional judges after the existing vacancies are filled, then Congress should consider judgeships legislation.

B. Date of Effectiveness

The date of effectiveness in a judgeship bill can serve as a political tool to reshape the judiciary. The judgeships bill introduced in the 110th Congress, while the Democrats controlled Congress and the Republicans controlled the White House, would have come into effect on January 21, 2009,³⁵ after the new president assumed office, thus eliminating concerns about partisan court-packing. As Senator Hatch, a co-sponsor of the 2008 Act, noted at its introduction,

Americans are blessed to have the best and most independent judicial system in the world. In our constitutional framework, Congress has responsibility to both make the laws and ensure that the judiciary tasked with interpreting and applying those laws has the appropriate resources. This includes addressing the staffing and compensation needs of the judicial branch, and we should strive to do so without political gambles or speculation about the outcome of a Presidential election.³⁶

The current bill, however, provides that it “shall take effect on the date of enactment of this Act.”³⁷ If the bill passes this Congress, President Obama would be tasked with immediately filling all of the new permanent and temporary judgeships with nominees whom he has selected and who represent his judicial philosophy. While every president leaves his mark on the judiciary, this would certainly increase the extent of President Obama’s mark.

To further the goal of an independent judiciary and to avoid any attempts by Congress to use the judgeships bill to attempt to reshape the federal judiciary, the bill should be amended to come into effect on January 21, 2013. While this change would delay filling these new judgeships, such a delay is a small price to pay for Congress to avoid partisan interference with the federal judiciary.

Furthermore, the Act will likely garner more bipartisan support with an amendment of this type. For example, a Republican aide noted that Senator Hatch “would consider cosponsoring the

³² Summary of Judicial Vacancies, U.S. Courts, Administrative Office of the U.S. Courts, <http://www.uscourts.gov/judicialvac.cfm> (last visited Sept. 25, 2009).

³³ *Id.*

³⁴ *Id.*

³⁵ See Federal Judgeship Act of 2008, S. 2774, 110th Cong. § 5 (2008).

³⁶ S. REP. NO. 110-427, at 3 (2008) (quoting 154 CONG. REC. S2138-01, S2154 (Mar. 13, 2008) (statement of Sen. Hatch)).

³⁷ Federal Judgeship Act of 2009, *supra* note 2, § 5.

[Act] again if the effective date were changed to Jan[uary] 21, 2013.”³⁸ In response, “Democrats contend that a postponed effective date has been the exception, not the rule, for proposals of this kind,” citing for support “the last comprehensive [judgeship] bill [passed] in 1990, when a Democratic Congress and a Republican president agreed on an immediate increase” of judgeships.³⁹

Another suggestion to ameliorate partisan interference in the molding of the judiciary is to stagger the creation of the new judgeships to include some judgeships created before the next presidential election, and some after the election. This solution should alleviate concerns about partisan court-packing.

C. The Act Allows Even More Partisan Interference over the Courts than it First Appears

The Act allows even more partisan interference over the courts than it first appears, as the temporary judgeships are lifetime appointees, and thus are effectively permanent positions. As Ed Whelan, president of the Ethics and Public Policy Center, pointed out, the distinction between the temporary and permanent judgeships created is,

irrelevant from the perspective of President Obama’s appointment power, since Obama would fill the new “temporary” judgeships with lifetime (not temporary) appointments The distinction matters only 10 years or more down the road when the first vacancy occurs on the court with a temporary judgeship: whoever is president at that time would not be able to fill the vacancy (which means that the number of actual judgeships on that court would then equal the permanent authorized number).⁴⁰

Therefore, if the legislation passed, President Obama would be able to immediately fill all of the judgeships created by the bill with lifetime appointees. Furthermore, future presidents would be prevented from filling vacancies on the courts with temporary judgeships when a vacancy occurs. In order to avoid encroaching on a future president’s ability to fill judicial vacancies, these temporary judgeships should be removed from the bill.

IV. Conclusion

This bill, if enacted, will have a profound effect on the federal judiciary. We urge Congress to modify the legislation in several ways to (1) avoid partisan interference with the judiciary’s operation, and (2) ensure taxpayer money is spent wisely and efficiently. While it is recognized that federal judgeship nominees will likely possess similar views to those of the president, the judiciary has always been viewed as set apart from partisan politics to some degree. Legislation passed to alter the judiciary by enabling the appointment of judges holding a certain political viewpoint is to be discouraged. While it is recognized that a certain amount of partisan

³⁸ David Ingram, *Without GOP Support, Leahy Pushes for More Judges*, Blog of LegalTimes, Sept. 9, 2009, <http://legaltimes.typepad.com/blt/2009/09/without-gop-support-leahy-pushes-for-more-judges.html>.

³⁹ *Id.*

⁴⁰ Ed Whelan, *Re: Senator Leahy Wants Judges*, National Review: Bench Memos, Sept. 10, 2009, <http://bench.nationalreview.com/post/?q=ODg2OWQ1ZmJkMWExNGFjNjU3YjA5MjkwYWU1Mjg5ZjE=>.

entanglement is unavoidable by the fact that the judiciary will need to be modified and expanded at certain points during our nation's growth, and this expansion will be conducted by politicians, the judiciary's independence must be cultivated, and with that aim in mind, we urge that several of the solutions and proposals contained within this document be incorporated into the Act.