



General Government Division

B-281256

November 30, 1998

The Honorable Charles E. Grassley
Chairman, Subcommittee on Administrative
Oversight and the Courts
Committee on the Judiciary
United States Senate

Subject: Federal Judiciary: Information on Cases Assigned to Senior
Judges in Fiscal Year 1997 in Four Circuit Courts of Appeals

Dear Mr. Chairman:

As you requested, this letter discusses the extent to which the case assignments of senior judges may have reduced the caseload of nonsenior judges in the four circuit courts of appeals (the first, second, sixth, and ninth) that have judgeship requests pending before Congress.¹ Senior judges are those who have retired from regular, full-time, active service but remain on the bench. To meet this objective, we obtained data on (1) each circuit's case filings as of September 30, 1997; (2) the number of senior judges in each circuit as of September 30, 1997; (3) the number of active judges in each circuit as of September 30, 1997; and (4) the number of times senior judges were assigned to cases filed in each circuit in fiscal year 1997.² Because the age of senior judges may affect the number of case assignments they are willing and able to undertake, we also obtained the birth dates of the senior judges in each circuit.

In our analysis, we used three different measures of the number of judges available to a circuit court of appeals to address its caseload—authorized judgeships, active judges, and senior judges. The Judicial Conference of the United States³ used authorized judgeships to assess judgeship needs for its 1997 judgeship request. Authorized judgeships are the number of judgeships authorized by statute in each circuit. Active judges represent the number of authorized judgeships filled at a specific time. Thus, the difference between authorized judgeships and active judges is the number of authorized judgeships vacant at any specific

¹ The 12 regional federal circuit courts of appeals are organized into geographic circuits, whose boundaries are defined by statute. There is also a court of appeals for the federal circuit with national jurisdiction over specific types of appeals.

² Case assignments represent the number of times senior judges were assigned to cases filed in the circuit. Because it is possible for more than one senior judge to be assigned to an individual case, the number of case assignments is not necessarily the same as the number of cases to which senior judges were assigned.

³ The Judicial Conference is the federal judiciary's principal policymaking body. It consists of 26 judges plus the Chief Justice of the United States, who presides over the conference.

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time. In this letter, we refer to authorized judgeships and active judges, collectively, as nonsenior judges. Senior judges are judges who have retired from regular, full-time, active service but remain on the federal bench and continue to perform such judicial duties as they are willing and able to undertake. The total number of active and senior judges represents the maximum number of judges actually available to address a circuit court of appeals' caseload at any specific time.

Federal circuit courts of appeals generally decide cases using panels of three judges each. The Judicial Conference's policy is to base its assessment of the need for additional judges in each circuit court of appeals on the adjusted case filings⁴ per three-judge panel of authorized judgeships. Thus, if a court had 12 authorized judgeships, it would have 4 panels of 3 judgeships each. The Judicial Conference's policy is that courts of appeals with adjusted case filings of 500 or more per three-judge panel may be considered for 1 or more additional judgeships. However, in considering a circuit court of appeals request for additional judgeships, the Judicial Conference may consider factors other than adjusted case filings, such as the geography of the circuit or the median time from case filings to disposition.

Results in Brief

Our analysis of the data on senior judges' case assignments indicated that senior judges handled the equivalent of from about 9 percent to about 16 percent of the total adjusted case filings in the four circuits in fiscal year 1997. Consequently, the case filings assigned to nonsenior judges—whether measured as authorized judgeships or active judges—were reduced by the same percent. The reductions for nonsenior judges were about 9 percent in the first circuit, about 13 percent in the second circuit, about 15 percent in the sixth circuit, and about 16 percent in the ninth circuit.

If all authorized judgeships in each circuit had been filled, the adjusted case filings per three-judge panel of authorized judgeships in each circuit would have ranged from about 592 in the first circuit to about 750 in the second circuit. Deducting case assignments for senior judges reduced the range to between about 515 (sixth circuit) and about 655 (second circuit) adjusted case filings per panel.

Authorized judgeship vacancies increase the caseload that must be borne by the active judges in the circuit. If senior judges had not taken any case assignments in fiscal year 1997, the adjusted case filings per three-judge panel of active judges would have ranged from about 696 in the sixth circuit to about 1,083 in the second circuit. After deducting case assignments for senior judges, the range of adjusted case filings per panel of active judges was between about 589 (sixth circuit) and about 947 (second circuit).

The effect of senior judges' case assignments on the caseload of the active judges in the circuit depends upon the number of senior judges in the circuit and the caseload that they, collectively, are willing and able to undertake. Age is one factor that may affect the case

⁴ Case filings are adjusted as described on page 3 of this letter.

assignments that senior judges are willing and able to accept. As of September 30, 1997, the number of senior judges who were age 76 or older in each circuit ranged from two in the second circuit to seven in the ninth circuit. Senior judges who were age 76 or older represented from 25 percent (second circuit) to 60 percent (first circuit) of the senior judges in each circuit. The number of senior judges in a circuit may also change at any time. For example, between September 30, 1997, and March 31, 1998, the second circuit gained a senior judge, the ninth circuit lost the services of two senior judges—one retired from the bench and one died—and three senior judges in the sixth circuit retired from the bench.

Background

In March 1997, the Judicial Conference of the United States sent a request to Congress for 17 additional judgeships (12 permanent and 5 temporary)⁵ in 5 circuit courts of appeals—the first, second, fifth, sixth, and ninth. In October 1997, the fifth circuit court of appeals withdrew its request for one permanent judgeship. Thus, the Judicial Conference currently has pending before Congress a request for 11 permanent and 5 temporary judgeships in 4 circuit courts of appeals.

For the purpose of assessing the need for additional judgeships in the circuit courts of appeals, the Judicial Conference counts all case filings equally, with two exceptions. First, cases refiled and approved for reinstatement⁶ are excluded from total case filings. Second, pro se cases—defined by the Administrative Office of the U.S. Courts (AOUSC) as cases in which one or both of the parties are not represented by legal counsel—are deducted from total case filings and weighted at 0.33 each. For example, a court with total pro se case filings in fiscal year 1997 of 1,500 would be credited with 495 adjusted pro se case filings ($1,500 \times 0.33$). The remaining non pro se cases would be weighted at 1.0 each. Thus, a court of appeals with 4,500 case filings (excluding reinstatements)—1,500 pro se cases and 3,000 non pro se cases—would be credited with 3,495 “adjusted” case filings.

Scope and Methodology

We contacted the chief judge of the first, second, sixth, and ninth circuit courts of appeals to request data on (1) the number of active and senior judges in each of the circuits as of September 30, 1997, and March 31, 1998; (2) the birth date of each senior judge; and (3) the number of pro se and non pro se case assignments (excluding reinstatements) of the senior judges in each circuit in fiscal year 1997.

⁵ A temporary judgeship is a position that is statutorily created for a specific number of years, usually 5 or 10. It is important to note that it is the position, not the judge appointed to the position, that is temporary. Judges appointed to temporary circuit courts of appeals judgeships hold lifetime tenure. When a temporary judgeship’s statutory term expires, the next vacancy to occur in the circuit cannot be filled. However, between the time that a temporary judgeship position expires and a vacancy occurs within the circuit, it is possible that the circuit could have more judges than authorized judgeship positions.

⁶ Such cases were dismissed for procedural defaults when originally filed but “reinstated” to the court’s calendar when the case was later refiled. The number of such cases, as a proportion of total cases, is generally small (see encl. I).

Using the case filings data for each circuit from AOUSC's publication, Judicial Business of the United States Courts, 1997, we calculated the total adjusted case filings for each circuit. We followed the Judicial Conference's method of determining adjusted case filings. We excluded reinstatements, weighted pro se cases at 0.33, and weighted non pro se cases at 1.0. On the basis of the total adjusted case filings data for each circuit, we calculated the adjusted case filings per three-judge panel of authorized judgeships and per three-judge panel of active judges. On the basis of the senior judge case assignment data provided by each circuit, we deducted the pro se and non pro se case assignments for senior judges in each circuit from the total number of possible pro se and non pro se case assignments in each circuit in fiscal year 1997. The total number of possible pro se or non pro se case assignments is the number of adjusted pro se or non pro se case filings times three (the number of judges per panel). We then recalculated the adjusted case filings per three-judge panel of authorized judgeships and per three-judge panel of active judges. The data that the ninth circuit provided were not fully comparable to the data provided by the other three circuits. The clerk of court of the ninth circuit court of appeals provided an estimate of senior judge assignments based on senior judge "case participations" in fiscal year 1997. This is the number of cases in which the senior judge participated in the case decision, whether or not the case was filed in fiscal year 1997. We used the birth date of the senior judges to calculate their ages as of September 30, 1997.

Judgeships and Judges for Each Circuit as of September 30, 1997

Table 1 shows the number of authorized judgeships, active judges, senior judges, and new judgeships requested in the first, second, sixth, and ninth circuit courts of appeals as of September 30, 1997. None of the four circuits had all of their authorized judgeships filled as of September 30, 1997. The number of vacant authorized judgeships ranged from 1 to 10. The number of senior judges in each circuit ranged from 5 in the first circuit to 19 in the ninth circuit. The number of active judges and senior judges was equal or almost equal in three of the four circuits. The Judicial Conference has a request pending for a total of 16 additional judgeships for these 4 circuits, including 5 temporary judgeships (see table 1).

Table 1: The Number of Authorized Judgeships, Active Judges, Senior Judges, and Requested Additional Judgeships in Four Circuit Courts of Appeals as of September 30, 1997

Circuit	Number of			New judgeships requested ^p
	Authorized judgeships	Active judges ^a	Senior judges	
First	6	5	5	1
Second	13	9	8	2
Sixth	16	14	9	4
Ninth	28	18	19	9

^aThe number of active judges at any time is the number of authorized judgeships minus the number of authorized judgeship vacancies.

^pThe requested judgeships included two temporary judgeships for the sixth circuit and three temporary judgeships for the ninth circuit.

Source: GAO analysis of data from AOUSC and the first, second, sixth, and ninth circuit courts of appeals.

Impact of Senior Judges on Caseload of Authorized Judgeship and Active Judge Panels

As table 2 shows, the adjusted case filings per panel of three authorized judgeships ranged from about 592 in the first circuit to about 750 in the second circuit. Deducting the case assignments of senior judges reduced the adjusted case filings per panel of authorized judgeships in all four circuits. The per panel reduction ranged from about 54 adjusted case filings in the first circuit to about 105 adjusted case filings in the ninth circuit.

Table 2: Adjusted Case Filings per Three-judge Panel of Authorized Judgeships, Including and Excluding the Total Adjusted Case Filings Assigned to Senior Judges in Fiscal Year 1997

Circuit	Number of three-judge panels	Adjusted case filings per three-judge panel ^a		Difference ^b	
		Including case filings assigned to senior judges	Excluding case filings assigned to senior judges	Number	Percent
		First	2.00	592	538
Second	4.33	750	655	95	13
Sixth	5.33	609	515	94	15
Ninth	9.33	678	572	105	16

^aAssumes all authorized judgeships are filled. Results shown were rounded to nearest whole number.

^bResults shown were rounded to nearest whole number.

Source: GAO analysis of data from AOUSC and the first, second, sixth, and ninth circuit courts of appeals.

Because none of the circuits had all of their authorized judgeships filled as of September 30, 1997, none were operating with a full complement of authorized judgeships. To determine the impact of these vacancies on the case filings of three-judge panels of active judges, we determined the number of three-judge panels that could be formed using the number of active judges on each circuit as of September 30, 1997. The results are shown in table 3. The adjusted case filings per panel of active judges ranged from about 696 in the sixth circuit to about 1,083 in the second circuit—noticeably higher than the adjusted case filings per panel of authorized judgeships shown in table 2. Excluding case assignments for senior judges reduced the adjusted case filings per panel of active judges from about 65 in the first circuit to about 164 in the ninth circuit.

Table 3: Adjusted Case Filings per Three-judge Panel of Active Judges, Including and Excluding the Total Adjusted Case Filings Assigned to Senior Judges in Fiscal Year 1997

Circuit	Number of three-judge panels	Adjusted case filings per three-judge panel ^a		Difference ^a	
		Including case filings assigned to senior judges	Excluding case filings assigned to senior judges	Number	Percent
		First	1.67	710	646
Second	3.00	1,083	947	137	13
Sixth	4.67	696	589	107	15
Ninth	6.00	1,054	891	164	16

^aResults shown were rounded to nearest whole number.

Source: GAO analysis of data from AOUSC and the first, second, sixth, and ninth circuit courts of appeals.

Senior judges helped to reduce the caseload of nonsenior judges—whether measured as authorized judgeships or active judges—in each of the four circuits in fiscal year 1997. However, the assistance that senior judges provide at any specific time is a function of both the number of senior judges in the circuit and the case assignments that they are willing and able to accept. The number of senior judges in a circuit and the case assignments that they are collectively willing and able to accept can vary from year to year or within a fiscal year for several reasons. Active judges may decide to take senior status, adding to the number of senior judges in the circuit. Senior judges may, at their discretion, reduce their workload at any time or retire from the federal bench entirely. Courts of appeals judges who retire from the federal bench entirely are not eligible to perform federal judicial duties. For example, between September 30, 1997, and March 31, 1998, the second circuit gained one senior judge; in the sixth circuit, three senior judges retired from the bench; and, in the ninth circuit, one senior judge retired from the bench and one died.

Age is one factor that may either affect the number of case assignments a senior judge is willing and able to accept or that may affect a senior judge’s decision to retire from the bench entirely.⁷ Generally, judges must be at least 65 years of age to take senior status. As of September 30, 1997, senior judges in the four circuits ranged in age from 63⁸ to 90. The average age was 73. The range of ages of senior judges in each circuit as of September 30, 1997, is shown in table 4. At least 25 percent of the senior judges in each circuit were age 76 years or older. The actual workload that any individual senior judge accepts would depend upon factors other than age, such as the judge’s overall health.

Table 4: Ages of Senior Judges in Four Circuit Courts of Appeals, September 30, 1997

Circuit	65-70 years	71-75 years	76-80 years	81 or more years ^a	Total number of judges	Percent 76 years or older
First	2	0	2	1	5	60
Second	4	2	1	1	8	25
Sixth	1	4	4	0	9	44
Ninth	10	2	4	3	19	37

^aThe oldest judge was 90 years of age.

Source: GAO analysis of data from the first, second, sixth, and ninth circuit courts of appeals.

Agency Comments

On November 6, 1998, we provided a draft of this letter to AOUSC for comment. On November 12, 1998, officials of AOUSC’s Office of Program Assessment provided oral comments on the draft. They generally agreed with the draft and provided several technical corrections, which we incorporated into this letter as appropriate.

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⁷ A 1994 AOUSC study, for example, showed that the median workload of senior district court judges generally declined as the judges’ years of senior status increased. Actual workload would vary among the individual judges, of course.

^a One judge in the second circuit court of appeals, who was on disability and subsequently returned to duty on senior status, was age 63.

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We are sending copies of this letter to the Ranking Minority Member of your subcommittee; the Chairmen and Ranking Minority Members of the House and Senate Judiciary Committees; the Chairman and Ranking Minority Member of the Subcommittee on Courts and Intellectual Property, House Committee on the Judiciary; the Director of the Administrative Office of the U.S. Courts; the Chair of the Judicial Conference Committee on Judicial Resources; and the Chief Judge of each of the four circuit courts of appeals that provided data. We will make copies of this letter available to others upon request.

Major contributors to this letter include William Jenkins and Katrina Moss, General Government Division; Jeanne Barger, Dallas Field Office; and Geoffrey Hamilton, Office of the General Counsel. If you have any questions about this letter, please contact me on 512-8777.

Sincerely yours,

A handwritten signature in black ink that reads "Richard M. Stana". The signature is written in a cursive style with a long horizontal line extending from the end of the name.

Richard M. Stana
Associate Director
Administration of Justice Issues

Enclosure

Unadjusted and Adjusted Case Filings in the First, Second, Sixth, and Ninth Circuit Courts of Appeals, FY97

Fiscal year 1997 case filings varied widely among the four circuit courts of appeals for which judgeship requests were pending before Congress as of October 1, 1998. The following table shows both the unadjusted and adjusted case filings for each circuit in fiscal year 1997. The Judicial Conference uses adjusted case filings to assess judgeship needs in each circuit.

Table I.1: Unadjusted Case Filings and Adjusted Case Filings for the First, Second, Sixth, and Ninth Circuit Courts of Appeals, Fiscal Year 1997

Case filings	First circuit	Second circuit	Sixth circuit	Ninth circuit
Unadjusted case filings				
Pro se case filings				
Total pro se case filings	382	1,693	2,000	3,424
Less reinstated pro se case filings	-4	-206	-47	-80
Net unadjusted pro se case filings	378	1,487	1,953	3,344
Non pro se case filings				
Total non pro se case filings	1,067	3,123	2,622	5,268
Less reinstated non pro se case filings	-8	-364	-20	-46
Net unadjusted non pro se case filings	1,059	2,759	2,602	5,222
Adjusted case filings				
Adjusted pro se filings ^a	125	491	644	1,104
Adjusted non pro se filings ^b	1,059	2,759	2,602	5,222
Total adjusted case filings	1,184	3,250	3,246	6,326

^aAdjusted pro se filings equal net unadjusted pro se filings multiplied by 0.33 (rounded to nearest whole number).

^bAdjusted non pro se filings are weighted at 1.0 each.

Source: GAO analysis of AOUSC data.

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