ARTICLE

DISTRICT JUDGES AS INVESTMENTS

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Although the authors prepared this Article while serving as Supreme Court Fellows in 2013–14, the views expressed are in their personal capacities alone. For comments on earlier drafts, the authors thank William H. Beach, Brian Benczkowski, Andrew Bradt, Lincoln Caplan, Elisebeth Collins, Susan Davies, Chief Judge Morrison C. England, Bert Huang, Richard Jaffe, Judge D.P. Marshall Jr., Gillian Metzger, Henry P. Monaghan, Judge Kimberly J. Mueller, Elena Simms, Marissa Skopp, Sheldon Snook, Kathryn Spier, Chief Judge Leonard P. Stark, Dawinder Sidhu, and Russell Wheeler. The authors also thank Marissa Benavides, Alex Bernstein, Justin Brooke, Kellen Wittkop, and the editors of the *Harvard Journal on Legislation*.

When considering legislation to create judgeships for the ninety-four U.S. District Courts, Congress ought to evaluate each judgeship as a potential investment in judicial infrastructure, and examine both its costs and benefits. Instead, the dominant political framing has been to look at judgeships as cost drivers—an error compounded by a mistake in the cost-estimate methodology leading to consistent overstatement of the associated costs.

Expenses are not the only reason for caution in creating new district judgeships, however, and policymakers have struggled to address critical needs in certain districts without substantially changing the size and shape of the federal trial bench. This Article offers a resolution of this tension through a proposal to create a small number of judgeships that, rather than being assigned to a particular district by statute, would be temporarily assigned to districts by the Judicial Conference based on where they would best contribute to the efficiency of the courts. This approach maximizes political plausibility by giving the Judiciary control over allocation of marginal resources. And it does so without modifying the nomination and confirmation ecosystem by which individuals are selected and appointed to office as judges for particular districts by the President in close consultation with home-state Senators.

I. Introduction

The Judicial Conference of the United States, the federal courts' managerial and policy making body over which the Chief Justice presides, has recommended to Congress that it create sixty-eight new district judgeships nationally.[1] Since 1990, district courts have experienced thirty-eight percent growth in caseload while Congress has expanded the number of district judgeships by only four percent.[2] The Congressional Budget Office ("CBO"), a nonpartisan, legislative branch agency charged by law with esti-

[1] *See* Admin. Off. of the U.S. Courts, Judicial Conference Judgeship Recommendations (Mar. 2015), www.uscourts.gov/file/361/download [http://perma.cc/24DJ-ZYLF]. The full recommendation is for sixty-eight new permanent district judgeships and eight conversions of existing temporary district judgeships to permanent judgeships; thus, if enacted as legislation, sixty-eight new seats with vacancies would be created.

[2] Letter from Judge Thomas F. Hogan to Sen. Patrick J. Leahy, Chairman, Sen. Judiciary Comm. (Apr. 5, 2013), http://theusconstitution.org/sites/default/files/briefs/4-5-13-Hogan-to-PJL-re-Federal-Judges.pdf [http://perma.cc/L9LQ-EEQ3]. This is not to say that cases and judgeships ought to rise in parallel; only that caseloads have increased substantially while judgeships remained flat. *See As Workloads Rise in Federal Courts*, *Judge Counts Remain*

mating the fiscal impact of new legislation, produced a report in 2011 suggesting that each new judgeship would cost approximately $1 million in startup costs and $770,000 annually in support expenses—above and beyond the salary and benefits of the judge. Members of Congress have cited these cost estimates as a key reason for withholding approval of new judgeships, even for those districts designated by the Judicial Conference as having the greatest need.[3]

This paper argues that the CBO cost estimates are flawed.[4] The figures, based on "Unit Cost Estimates" supplied by the Administrative Office of the U.S. Courts ("AO"), reflect analysis prepared for the Judicial Conference's work at the aggregate national level. Part II explains how CBO estimates mistakenly draw on these national averages, which do not give policymakers a reasonable estimate of net new expenses to the Judiciary for particular additional judgeships in high-need districts. We note expressly our respect for the professionalism and capabilities of the staffs of CBO and the AO. We argue the error has been in miscommunication between the two agencies, the budgetary equivalent of a Metric measurement that is not converted into the Imperial system.

Part III provides a theoretical framework for contemplating spending on district courts. Litigants, not judges, drive the district courts' workload and the need for salaries and expenses incurred by the Judicial Branch. Congress sets the subject matter and geographical jurisdiction of the district courts, and the people who live and have business within the geographical bounds of each district generate and file the cases that judges must decide or otherwise manage to resolution. Instead of cost drivers, Article III judges are best viewed as capital investments required to get maximum productivity from other salaries and expenses of a court. Microeconomic models demonstrate that ensuring adequate Article III personnel in busy districts is essential to efficient and cost-effective use of taxpayer dollars. Beyond offering a new way of looking at expenses connected with—but not caused by—individual

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Flat, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (Oct. 14, 2014), http://trac.syr.edu/tracreports/judge/364/ [http://perma.cc/4X34-8DKZ].

[3] For example, Senator Chuck Grassley, now Chair of the Senate Judiciary Committee, explained his opposition to a 2011 proposal to add a handful of judgeships to high need districts as grounded in concern about whether adding judgeships to the districts would be an "efficient and cost effective way to allocate taxpayer resources." 157 CONG. REC. S7061-02 (daily ed. Nov. 2, 2011) (statement of Sen. Chuck Grassley); *see also* S. Rep. No. 110-427, at 17 (2008) (articulating supplemental and minority views on 2008 judgeships bill). In a hearing on a judgeships bill in 2013, Senator Jeff Sessions observed that "[c]ertainly there appears to be a need for new judgeships in certain areas of our country, but we have to recognize we are in a tight financial situation." *The Federal Judgeship Act of 2013: Hearing Before the Subcomm. on Bankr. & the Courts of the Sen. Comm. on the Judiciary*, 113th Cong. 3 (2013) (statement of Sen. Jeff Sessions).

[4] This paper addresses district judgeships only and we disclaim any notion that the same considerations apply equally to circuit judgeships. Among other factors, the different nature of appellate judging and the availability and equities of using other judges sitting by designation to fill gaps mean that the analysis of how many judgeships are required at the federal appellate level is beyond the scope of the analysis we undertake here.

new judgeships, this approach also provides a framework for thinking about the overall expense of the federal judiciary.[5]

Part IV proposes a new mechanism by which CBO can generate more accurate cost estimates for legislation proposing new judgeships. Instead of looking to national averages, CBO should work with the AO and the particular district courts to generate a shared understanding of how a new judgeship would affect that individual district. For example, whether the courthouse in a given district has an available courtroom already outfitted for use by a district judge will materially affect the startup numbers; similarly, whether or not existing slots for employees can be reallocated to a new judge's chambers staff will materially affect the annual expense. This paper examines the budgets of two district courts, in the Eastern District of California and in the District of Delaware, to model this mechanism.

Part V proposes that Congress create a handful of floating "efficiency judgeships," which would empower the Judiciary itself to direct a small number of judgeships to the district courts with greatest need. Historically, almost all judgeships created by Congress have been assigned by statute to a particular district. In contrast, an efficiency judgeship would be assigned to a particular district by the Judicial Conference each time that judgeship became vacant, with a statutory mandate directing the assignment based on maximum increase in court efficiency. This would give the Judicial Conference a dynamic tool to provide emergency relief to the district courts with greatest mismatch between district judges and workload. But it would also help the courts control costs and deliver service efficiently while addressing responsible concerns about the size of the Article III judiciary and the long-term financial commitments that accompany it.

Part VI is a conclusion.

Workload is not evenly distributed among the ninety-four district courts and a handful of districts urgently need help.[6] Improving the accuracy of the

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[5] That national expense is approximately $5 billion per year, just two-tenths of one percent of the federal budget. *See generally* CHIEF JUSTICE JOHN G. ROBERTS, JR., 2013 YEAR-END REPORT ON THE FEDERAL JUDICIARY 7–8 (2013). The Judiciary's total annual budget, including for defender services, is approximately $7 billion; the annual appropriation for the salary and expense account that funds court operations nationwide is approximately $5 billion. *Id.*

[6] *See* Daniel Wilson, *Border States Need More Judges Due to Immigration Docket*, LAW360 (Mar. 10, 2015), http://www.law360.com/articles/629440/border-states-need-more-judges-due-to-immigration-docket [http://perma.cc/HU2A-3PE5] (quoting Judge William Traxler, Chair of the Executive Committee of the Judicial Conference, stating that "there continues to be a great need in our border courts for help . . . . The judges there have caseloads that are just staggering"); S. Comm. on Bankr. & the Courts, 113th Cong. (Sept. 10, 2013) (statement of Hon. Timothy M. Tymkovich) ("The lack of additional judgeships combined with the growth in caseload has created enormous difficulties for many courts across the nation, but it has reached urgent levels in five district courts that are struggling with extraordinarily high workloads, with 700 or more weighted filings per authorized judgeship, averaged over a three-year period. The severity of conditions in the Eastern District of California, the Eastern District of Texas, the Western District of Texas, the District of Arizona, and the District of Delaware requires immediate action. The Conference urges Congress to establish new judgeships in those districts as soon as possible."); *see also Responding to the Growing Need for Federal*

CBO cost estimate and exploring the contextual financial ramifications of judgeship deficiencies is essential to removing an obstacle that has prevented policymakers from delivering needed reinforcement to the Judiciary.

II. CBO Cost Estimates For New Judgeships Have Been Based on the Wrong Data Set

A structural flaw in generating cost estimates for district judgeships has led to an overstatement of costs. It also has led to a masking of productivity gains that, in combination with accurate cost estimates, might justify new judgeships.

When confronted with new legislative proposals, members of Congress weigh many competing factors in determining whether to support or oppose the proposed changes to federal law. One particularly important factor, especially in recent years, is draft legislation's fiscal impact.[7] To measure fiscal impact and inform the debate over bill passage, Congress depends on the Congressional Budget Office, a nonpartisan agency in the Legislative Branch charged with estimating the fiscal impact of new legislation.

The statute establishing CBO requires the agency to estimate the costs of each bill reported from a House or Senate committee against a baseline established by existing law over a five-year period.[8] The chairs of the House and Senate budget committees use these estimates to decide whether the legislation violates that chamber's budget rules. Many members use the estimates to weigh the financial costs of the legislation against its expected benefits.

CBO's findings pursuant to its statutory instructions may therefore yield valuable information that can be used to guide the deliberative process. On the other hand, imprecise estimates can overstate the true cost of legislation and confuse congressional debate. The debate over the Emergency Judicial Relief Act of 2011 illustrates how the wrong basis for a CBO cost estimate has steered legislators away from the most efficient policy in judgeship authorizations.

Judgeships: The Federal Judgeship Act of 2009, 111th Cong. 167 (Sept. 28, 2009) (statement of Judges of the Eastern District of California) (expressing support for five additional judgeships).

[7] New statutory limits on discretionary appropriations are the most prominent manifestation of Congress's increased scrutiny of budgetary effects. In response to trillion-dollar deficits during the recent recession, Congress enacted the Budget Control Act of 2011 to limit annual appropriations in each of the next ten years. *See generally* Pub. L. No. 112-25, 125 Stat. 240 (2011). The caps have not been breached in any fiscal year since, saving billions of dollars under CBO's baseline projections. Further, when the caps for fiscal years 2014 through 2017 were increased, Congress enacted corresponding adjustments to spending and fees to offset the higher discretionary spending limits.

[8] Congressional Budget and Impoundment Control Act of 1974 § 308(1), 2 U.S.C. § 639 (2012). The statute requires cost estimates to be measured against existing law over a five-year period; however, CBO cost estimates usually project direct costs ten years into the future so that the budget committees can enforce the limits in Congress's budget resolution.

A. The Emergency Judicial Relief Act of 2011 is Proposed

The country is divided by statute into ninety-four judicial districts, each of which has an authorized number of judgeships.[9] The total national number of authorized Article III district judgeships is 673,[10] and heavily populated districts tend to have more judgeships, while less populated areas tend to have fewer.[11] But changes in a district over time—due to shifts in population, case complexity, and continuing service of senior judges—can result in severe mismatches between workload and availability of judicial resources in individual districts.[12]

In 2011, Senators Dianne Feinstein (D-CA) and Jon Kyl (R-AZ) introduced S. 1014, the Emergency Judicial Relief Act. The bill would have created twelve permanent district judgeships in courts that have been hardest hit by population and demographic changes that have caused dramatic caseload increases.[13]

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[9] *See* U.S. CONST. art. III, § 1 (authorizing "such inferior courts as the Congress may from time to time ordain and establish"); 28 U.S.C. § 133(a) (2012) (providing for appointment and number of district judges); *see also* ADMIN. OFF. OF THE U.S. COURTS, CHRONOLOGICAL HISTORY OF AUTHORIZED JUDGESHIPS IN U.S. DISTRICT COURTS (2014), http://www.uscourts.gov/file/402/download?token=-A4EXvQD [http://perma.cc/4SU9-TRUX].

[10] 28 U.S.C. § 133(a) (2012). Four additional judgeships are authorized in territorial courts created by Congress under its Article IV power. *See, e.g.*, 48 U.S.C. § 1821(b)(1) (2012) (providing for a judge of the District Court for the Northern Mariana Islands); *see generally* Nguyen v. United States, 540 U.S. 935 (2003) (discussing history, authority, and limitations of such judgeships).

[11] *See generally* CHRONOLOGICAL HISTORY OF AUTHORIZED JUDGESHIPS IN U.S. DISTRICT COURTS, *supra* note 9. For example, the Southern District of New York, which includes Manhattan, has twenty-eight authorized judgeships, *id.* at 46, while the Western District of Wisconsin has just two, *id.* at 69.

[12] For a list of authorized judgeships, see ADMIN. OFF. OF THE U.S. COURTS, AUTHORIZED JUDGESHIPS, 1789–2014 (2014), www.uscourts.gov/file/1918/download [http://perma.cc/R3D2-SSLF]. For one indication of severe mismatches between workload and availability of judicial resources, see *Judicial Emergencies*, ADMIN. OFF. OF THE U.S. COURTS, http://www.uscourts.gov/judges-judgeships/judicial-vacancies/judicial-emergencies [http://perma.cc/3ZKD-ACXJ] (last updated Nov. 9, 2015). The Judicial Conference has defined a "judicial emergency" as attaching to any district court vacancy where weighted filings are in excess of 600 per judgeship, although alternate measures factor in length of time the vacancy has been pending. *Id.* Many district courts have weighted caseloads per judgeship at that level, even where a full complement of judges is in office; therefore they are not technically "judicial emergencies," a term defined to attach to a vacancy in an existing judgeship. *See Federal Court Management Statistics: United States District Courts—National Judicial Caseload Profile*, ADMIN. OFF. OF THE U.S. COURTS (Dec. 31, 2013), http://www.uscourts.gov/statistics-reports/federal-court-management-statistics-december-2013 [http://perma.cc/W4YB-U6JC].

[13] Of these twelve, ten new judgeships would have been created in the District of Arizona (2); the Eastern District of California (4); the District of Minnesota (1); the Southern District of Texas (1); and the Western District of Texas (2). In addition, two temporary judgeships would have been converted to permanent judgeships in the District of Arizona (1); and the Central District of California (1). In May 2013, Senator Feinstein sponsored an amendment to immigration legislation, adopted by voice vote in the Senate Committee on the Judiciary that would have added a subset of these same new judgeships if enacted into law. In July 2014, the Senate Committee on Appropriations Subcommittee on Financial Services and General Government reported a marked-up bill for FY2015 that would have added a similar set of new judgeships. *See* S. 1371, 113th Cong. § 308(a) (2014).

Senators Feinstein and Kyl called their bill a narrow solution targeted at problems faced by six district courts that have been deeply overburdened by caseloads.[14] Their introductory statement highlighted the Eastern District of California, which has six authorized district judgeships serving a population of more than 7.6 million people, by far the highest ratio of judges to population in the country.[15] In 2012, the district had weighted filings of 1,132 per judgeship, the second most among the ninety-four district courts, and more than twice the national average.[16]

B. The Congressional Budget Office Prepares a Cost Estimate

When the Senate Judiciary Committee reported the Feinstein-Kyl bill in October 2011, CBO prepared and issued a cost estimate.[17] As the estimate explains, a judgeships bill entails two types of new costs under federal budget rules: direct spending and discretionary spending.[18]

1. Direct Spending—Judges' Salaries and Benefits

First is direct spending—that is, spending not subject to annual appropriations. Once judges have been confirmed by the Senate and appointed by the President, their salaries—$201,100 per year as of 2015—and benefits are paid annually without the need for further legislative action.[19] CBO esti-

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[14] 157 CONG. REC. S3058-05 (daily ed. May 17, 2011).

[15] By comparison, the Northern and Southern Districts of Iowa together have five judgeships serving a population of less than 3.1 million.

[16] ADMIN. OFF. OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2012 ANNUAL REPORT OF THE DIRECTOR, Table X-1A (2012) [hereinafter 2012 JUDICIAL BUSINESS REPORT] http://www.uscourts.gov/statistics/table/x-1a/judicial-business/2012/09/30 [http://perma.cc/7HM6-NLC8]. Weighted caseloads are a measure created by the AO to account for variations in average time taken to resolve different types of criminal and civil cases. References to annual court statistics are to the federal Fiscal Year.

[17] CONG. BUDGET OFFICE, S. 1014, CONGRESSIONAL BUDGET OFFICE COST ESTIMATE: EMERGENCY JUDICIAL RELIEF ACT OF 2011 (Dec. 1, 2011) [hereinafter COST ESTIMATE FOR S. 1014], http://www.cbo.gov/sites/default/files/cbofiles/attachments/s1014.pdf [http://perma.cc/2KUU-T5DF].

[18] "Direct spending" and "mandatory spending" are interchangeable terms in the budgetary process—both refer to spending from the federal treasury not subject to appropriations. D. ANDREW AUSTIN & MINDY R. LEVIT, CONG. RESEARCH SERV., RL33074, MANDATORY SPENDING SINCE 1962, at 1 n.1 (Mar. 23, 2012). CBO ordinarily uses the term "direct spending" while the AO ordinarily uses the term "mandatory spending." Given that this paper addresses how Congress creates cost estimates for legislation affecting the federal judiciary, the CBO-preferred terminology is used throughout.

[19] *See Judicial Salaries*, FEDERAL JUDICIAL CENTER, http://www.fjc.gov/history/home.nsf/page/js_3.html [http://perma.cc/AN98-5Y99]; *see also* U.S. CONST. art. III, § 1 ("The judges . . . shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office."). Historically, Congress has expressly included funds for direct spending in its annual appropriations. *See, e.g.*, Pub. L. No. 112-74, 125 Stat. 786 (2011). Beginning with the omnibus appropriations bill for Fiscal Year 2014, Congress has moved to new language in appropriations legislation that excludes salaries for Article III judges from the quantified funds and simply states: "In addition, there are appropriated such sums as may be necessary under current law for the salaries of circuit and district

mated that the mandatory pay and benefits of twelve district judgeships would cost a total of $2 million per year.[20]

Congressional budget rules require an offset of any increase in direct spending.[21] To meet this requirement, the 2011 Feinstein-Kyl bill provided for a $10 increase in district court filing fees nationwide, from $350 to $360 per case. CBO estimated in 2011 that the fee increase would raise $2 million per year, fully offsetting the direct costs of new judgeships—that is, the salaries and benefits for judges filling the twelve new judgeships the bill would have authorized.

2. Discretionary Spending

The second category of spending projected in the CBO report provides for administrative staff support and office space for the new judges.[22] These support costs throughout the Judiciary are funded by the annual appropriations process, which provides for the portion of federal government spending that is not automatically paid for through permanent law.[23] Before any money may be drawn from the Treasury, a provision for such "discretionary spending" must first be enacted into law in an appropriations bill, which governs the power to obligate federal funds over a limited period of time.[24] All annual appropriations for judicial administration, including any expenses connected to new judgeships, will be subject to budget rules governing the appropriations bill in which the new money is included. Thus, they do not "score" and need not be offset in the authorizing legislation.[25] Instead, CBO

judges . . . ."). *See, e.g.*, Pub. L. No. 113-76, 128 Stat. 5 (2014). The Congressional Research Service has observed that even during a lapse in appropriations, Article III judges would continue to be paid. CLINTON T. BRASS, CONG. RESEARCH SERV., RL34680, SHUTDOWN OF THE FEDERAL GOVERNMENT: CAUSES, PROCESSES, AND EFFECTS 12 (Sept. 25, 2013); *see also* Letter from Congressional Budget Office to Chairman Patrick J. Leahy (Sept. 24, 2014), https://www.cbo.gov/sites/default/files/113th-congress-2013-2014/reports/BudgetImpactofCourtDecisionsLeahyLtr.pdf [https://perma.cc/PJA2-4NED]. Admittedly, no less a distinguished figure than Judge Richard S. Arnold, who had served as chair of the budget committee of the Judicial Conference, took the contrary view. Richard S. Arnold, *Money, or the Relations of the Judicial Branch with the other Two Branches, Legislative and Executive*, 19 ST. LOUIS U. L.J. 19, 20 (1996).

[20] In October 2011, at the time of the CBO cost estimate, annual pay for a district judge was $174,000.

[21] PAYGO enforcement applies only to changes in deficits; thus it is avoided when spending is offset. *See* Statutory Pay-As-You-Go Act of 2010, 2 U.S.C. § 923(4)(a) (2012). CBO projected that the increase in court filing fees would fully offset the salaries and benefits of new judges, and so it scored the aggregate change to direct spending as either zero or modestly negative in each year on the scorecard. *See* COST ESTIMATE FOR S. 1014, *supra* note 17.

[22] *See, e.g.*, COST ESTIMATE FOR S. 1014, *supra* note 17.

[23] *See, e.g.*, Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130 (2014).

[24] Under the Antideficiency Act, federal employees are prohibited from creating or authorizing an expenditure in excess of the amount made available by appropriation. 31 U.S.C. § 1341 (2012).

[25] The key enforcement mechanism is section 302(f) of the Budget Act. *See* Budget Act § 302(f), 2 U.S.C. § 633(f) (2012).

provides estimates of discretionary spending associated with legislation like the Feinstein-Kyl bill for informational purposes rather than budget rule-enforcement purposes.[26]

Here, CBO estimated $10 million in startup costs, "including office construction, furniture, and law books," for the new judgeships based on estimates provided by the AO.[27] In addition, it asked the AO for an estimate of per judge annual expenditures, "such as support staff and court operations," and received a figure of $770,000.[28] On the basis of that number, CBO estimated $18 million in additional costs over a five-year period.[29]

C. The Proposal Meets Congressional Resistance

In total, CBO estimated that Congress would need to provide $28 million of discretionary appropriations in S. 1014 to support the twelve additional judgeships over the first five years after the bill's enactment—no small change, even if not much in the context of the federal budget.

Senator Chuck Grassley, then ranking minority member of the Senate Judiciary Committee who became the Committee's chair in 2015, opposed the Feinstein-Kyl bill because of concern about whether adding judgeships to the districts would be an "efficient and cost effective way to allocate taxpayer resources."[30] But CBO's cost estimate may have been misleading in this instance because it did not predict the cost of adding *specific* judgeships to the most overburdened districts. And, more broadly, the cost estimate framed the issue of new judgeships in a counterproductive way. The productivity of judgeships—the return on investment on them—should drive congressional decision-making on federal judgeships, not a per-judge cost viewed in isolation from the environment in which the judges will be working. When a microeconomic approach is applied to specific districts, it becomes apparent that adding judgeships to overburdened districts may meet Senator Grassley's demand for an "efficient and cost effective way" to complete the business of the courts.

D. One-Size-Fits-All Estimate Ignores District-Specific Factors

In generating its 2011 score, CBO used an AO estimate of $770,000 in annual support costs per district judgeship.[31] This figure was provided by the

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[26] *See, e.g.*, COST ESTIMATE FOR S. 1014, *supra* note 17.

[27] *Id.*

[28] *Id.* This figure is up from support costs of $560,000 per judge, as estimated by CBO in 2006. CONG. BUDGET OFFICE, H.R. 4093, FEDERAL JUDGESHIP AND ADMINISTRATIVE EFFICIENCY ACT OF 2005 (Nov. 21, 2005).

[29] COST ESTIMATE FOR S. 1014, *supra* note 17.

[30] 157 CONG. REC. S7061-02 (daily ed. Nov. 2, 2011) (statement of Sen. Chuck Grassley); *see also* S. Rep. No. 110-427, at 17 (2008) (supplemental and minority views on 2008 judgeships bill).

[31] *See* COST ESTIMATE FOR S. 1014, *supra* note 17.

AO from its "Unit Cost Table," which estimates: (i) that the chambers staff for each judge costs approximately $250,000 per year in salaries and benefits; (ii) that the Clerk's Office staff and court reporter services allocable to each judge cost approximately $200,000 per year in salaries and benefits; and (iii) that the rent and security costs for a judge's courtroom and chambers will be between $285,000 and $360,000 per year.[32] The Budget Division of the AO multiplies the total cost from the Unit Cost Table by the number of proposed new judgeships to help determine the estimated costs of these new judgeships.[33] This process likely yielded reasonable estimates for bills to add many judgeships spread throughout the Judiciary, such as those enacted by Congress in 1978, 1984, and 1990—adding 113, 53, and 61 new district judgeships respectively.[34]

But the bottom line of the AO's Unit Cost Table—the worst-case cost approximation for a new judgeship that might be created in any of the ninety-four U.S. District Courts—does not reflect what a new judgeship in a particular district may cost. The budget formulation process precedes the implementation phase by years. It is difficult to project court statistics by district (e.g., caseloads by case type) that far into the future, so the formulation process operates at a less detailed level than the budget execution process. By contrast, when the Judicial Conference allocates money to the individual districts from the Judiciary's annual appropriation—budget execution rather than formulation—it uses granular statistics in each district to guide its decisions.[35]

CBO estimates are meant to provide a realistic estimate of pending legislation's budgetary impact, as compared to a statutorily mandated baseline, so that lawmakers understand the fiscal consequences of their vote.[36] But there may be no instance in which the Unit Cost Table is a reasonable proxy for what actual expenditures would be: incremental personnel expenses will depend on whether existing employee slots are being reassigned to a new chambers, and real estate costs will vary based on whether the courtroom and chambers already exist.[37]

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[32] Interview with Elena Simms, AO Supervisory Budget Analyst, and Marissa Skopp, AO Budget Analyst, in Washington, D.C. (May 22, 2014) [hereinafter Interview with AO Budget Staff]. The balance of the projected annual expense, about $60,000, is attributable to technology costs, travel for training, and other similar expenses.

[33] *Id.*

[34] *See* ADMIN. OFF. OF THE U.S. COURTS, ADDITIONAL AUTHORIZED DISTRICT JUDGESHIPS SINCE 1960, http://www.uscourts.gov/file/365/download [http://perma.cc/2S3M-NA7D].

[35] Interview with AO Budget Staff, *supra* note 32. For example, district courts with higher pro se and patent filings receive additional resources to reflect the additional person hours needed to process these cases. The weight assigned to patent cases in particular is twice the value assigned to other generic civil case filings.

[36] CONG. BUDGET OFF., AN INTRODUCTION TO THE CONGRESSIONAL BUDGET OFFICE (2015), https://www.cbo.gov/sites/default/files/cbofiles/attachments/2015-IntroToCBO-v2.pdf [https://perma.cc/BCL7-HGPU] (describing baseline projections as "a neutral benchmark against which members of Congress can measure the effects of proposed legislation").

[37] One might reason that the law of averages will make estimates a wash, and this is precisely what makes the Unit Cost Table work for purposes of budget formulation for the

Put differently, the Unit Cost table fails to consider all of the work that is already being done or will no longer need to be done by a court staff if adequate Article III judicial resources have been supplied by Congress. It also fails to consider rent already being paid on empty courtroom space. For reasons that follow, adding judges to an overburdened district may in certain circumstances actually reduce current expenses stemming from high caseloads and save modest amounts of taxpayer money.

1. Support Personnel

Judicial Conference policy authorizes district judges to hire three chambers employees—either three law clerks or, alternatively, two law clerks and one secretary.[38] The Unit Cost Table assumes three new hires for these positions, as well as new allocations from the Court clerk's office for a Courtroom Deputy Clerk, docketing support, and court reporter services.[39] For a high-need district, these employees or employee slots may already be in place and simply be subject to reassignment.[40]

First, the employees of the clerk's office who would be assigned to the Judge—that is, the courtroom deputy and the assistant clerks handling docket support—may already be on the payroll. Clerk's offices are, by necessity, staffed based on caseload as well as judgeship allocation—cases must be docketed and pro se litigants must receive assistance as they come

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aggregate of all ninety-four district courts. But high-need districts are an unrepresentative sample of the national average—for example, because they are more likely to have emergency allocations in place to handle heavy caseloads—so using the Unit Cost Table double counts expenses.

[38] *See Chambers Staff: Qs & As*, FED. JUD. CTR., http://www.fjc.gov/federal/courts.nsf/autoframe!openform&nav=menu1&page=/federal/courts.nsf/page/352 [http://perma.cc/UP7V-EB5L] (noting that district judges are authorized to hire three employees). Historically, most district judges have chosen an arrangement of two law clerks and a non-attorney Judicial Assistant or secretary, but changes in technology and law practice make the use of three law clerks increasingly common among new appointees. Still, this is a matter confined to the judge's discretion, and one district judge who chooses to have a judicial assistant pointed out to us that the position may be akin to a paralegal, leaving attorneys in a chambers free for legal work. Indeed, the Judicial Conference recently approved formal hiring authority for judges to hire a paralegal in lieu of a judicial assistant. JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 20 (Mar. 10, 2015) [hereinafter 2015 REPORT OF THE PROCEEDINGS], http://www.uscourts.gov/file/18176/download [http://perma.cc/F7JT-AC8S]. The individual judge's discretion to structure his or her staff extends further. For example, since 1799, district judges have had authority to hire a Court Crier. *See Court Officers and Staff: Court Criers*, FED. JUD. CTR., http://www.fjc.gov/history/home.nsf/page/admin_03_13.html [http://perma.cc/A24E-EFTB].

[39] Interview with AO Budget Staff, *supra* note 32. Many district courts do not dedicate individual court reporters to district judges, leaving the judges to draw instead on a pool managed by the district Clerk's Office, using an electronic court recorder operator ("ECRO") as a backup when needed.

[40] District courts operate under a decentralized budget plan wherein Authorized Work Units ("AWUs"), the annualized aggregate staff hours needed to run the courts in a district based on projected workload, are one basis of distributing funding from the Judiciary's national salaries and expenses account. Interview with AO Budget Staff, *supra* note 32.

through the courthouse doors.[41] In other words, cases are going to be filed regardless of whether additional judges are in place, and a responsible court will have a staff adequate in size to handle administration of those cases even without enough dedicated judges to move the cases at maximum efficiency.[42] Staff members screen pleadings, process submitted court documents, and manage juror identification and summonsing. Staff members also provide human resources, financial management, and information technology services to the court regardless of how many judges are assigned to the district.[43] Similarly, interpreters are furnished from central courts' funds based on case needs and not judgeship allocations.[44] So the addition of a judge does not automatically require additional personnel in these areas. Although a new district judge has authority to select his or her own chambers staff (the three positions in chambers),[45] the employee slots considered in a cost estimate will not necessarily be net new additions for the court unit. Some high-caseload courts already have extra law clerks and other staff members allocated to them,[46] and these personnel slots would presumably transfer to new judges as additional appointments reduce per-judge caseload. In other words, a law clerk hire in the chambers of the new judge under the ordinary hiring authority delegated to each judge would be offset by obviated need for and concomitant expiration of emergency supplemental hiring

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[41] *See* JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 25–26 (Sept. 17, 2013) [hereinafter 2013 REPORT OF THE PROCEEDINGS], http://www.uscourts.gov/file/2155/download [http://perma.cc/J6HB-4YEH] (discussing updates to clerks' office staffing formulas); *Budget Hearing–The Judiciary: Hearing Before the H. Subcomm. on Financial Services & General Government of the H. Comm. on Appropriations*, 113th Cong. 3–4 (2012) (statement of Hon. Julia S. Gibbons, Budget Committee Chair, Judicial Conference of the United States).

[42] This principle has its limits. At some point, a court may have such a substantial deficiency of judicial resources that the courthouse doors are partially closed and potential litigants begin to treat the courts as unavailable to resolve their disputes. A counter-force of induced demand—that is, an increase in consumption following from an increase in supply, often introduced as an argument against widening roads—could conceivably attach to particular courts when new judgeships are added, but given that contemporary new judgeship legislation consists only of targeted efforts to supplement districts empirically short-handed relative to sister courts on a proportional basis, this phenomenon is unlikely to invite a flood of new business relative to other districts. *See generally* Gilles Duranton & Matthew A. Turner, *The Fundamental Law of Road Congestion: Evidence from US Cities*, 101 AM. ECON. REV. 2616 (2011) (analyzing evidence of "fundamental law of highway congestion" to demonstrate that increased provision of roads does not relieve congestion). Legislative response giving new judicial resources to the highest-need districts will normalize, though not equalize, induced demand among the district courts nationally.

[43] Interview with AO Budget Staff, *supra* note 32.

[44] *See* ADMIN. OFF. OF THE U.S. COURTS, 5 GUIDE TO JUDICIARY POLICY (COURT INTERPRETING) § 210.30.

[45] *See generally* Christopher Avery et al., *The New Market for Federal Judicial Law Clerks*, 74 U. CHI. L. REV. 447 (2007) (discussing the market dynamics this distributed hiring authority creates).

[46] *See* 2015 REPORT OF THE PROCEEDINGS, *supra* note 38, at 20 (describing status of additive law clerks program). The Judicial Conference allocates money from the Temporary Emergency Fund to provide judges with additional chambers staff to assist with unanticipated vacancies or increased caseloads.

authority of extra law clerks for an overburdened court. Other savings may be found through work that is no longer required: for example, clerk's offices will not need to allocate work-time necessary to host visiting judicial personnel who are assigned to assist the court pursuant to statutory authorization. Instead, an optimal level of judicial resources will obviate the need for clerk's office work-time in arranging chambers, providing remote docket support, and familiarizing a visiting judge with local practices—everything above what is needed to support ordinary case management.[47] Magistrate judges can be used more efficiently by assignment of fewer dispositive motions for report and recommendations where *de novo* appeal of right by the losing party is likely.[48]

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[47] The Chief Justice of the United States and the Chief Judges of the Courts of Appeals have statutory power to "designate and assign temporarily" the judges of one Article III Court to another. 28 U.S.C. §§ 291–297 (2012). The process of such assignments creates additional administrative work. *See* Jennifer Evans Marsh, THE USE OF VISITING JUDGES IN THE FEDERAL DISTRICT COURTS: A GUIDE FOR JUDGES & COURT PERSONNEL appx. F (rev. 2003), https://bulk.resource.org/courts.gov/fjc/visijud3.pdf [https://perma.cc/TE8S-8HLF] (providing checklist for courts hosting a visiting judge). The Judicial Conference has noted that absent special circumstances, long-term assignments "tend to be costly." *Id.* at 29 n.29. In 2009 and 2010, "nearly 90 judges from other federal [district] courts" and courts of appeals assisted the Eastern District of California and the population it serves by resolving hundreds of cases. *See Justice Kennedy Joins Call for New Judgeships for Eastern California Court*, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT (Aug. 30, 2010) [hereinafter *Justice Kennedy Joins Call*], http://cdn.ca9.uscourts.gov/datastore/general/2010/08/30/Justice_Kennedy_CAE_Remarks.pdf [http://perma.cc/6P3G-85N3]; *see also Call for Help Answered by Visiting Judges*, THIRD BRANCH, Oct. 2008, at 2, 2–3 (discussing assistance by visiting judges nationwide). For judges assigned to overloaded courts, visiting colleagues are an essential relief valve. But visiting judges are an imperfect substitute for dedicated members of a court. *See Committee Answers Courts' Calls for Help*, THIRD BRANCH, Dec. 2010, at 11, 12 (quoting then-chair of the Judicial Conference Committee on intercircuit assignments saying that "visiting judge assistance . . . is only a short-term solution to workload problems and does not replace the need for additional judgeships"). For one, there are travel expenses and staff costs incurred by both the visiting judges program (centrally paid) and the hosting court. For another, intercircuit visiting judges may not be as familiar with the law and practice in the host circuit. *Id.* at 10. Resident judges may acquire a kind of "muscle memory" with respect to case profiles in particular districts (such as a high immigration-related caseload) that allows for more efficient dispatch of cases. *See* Lindsey Anderson, *Federal judges in West Texas want Pecos vacancy to be filled quickly*, EL PASO TIMES (Mar. 29, 2015, 11:37 PM), http://archive.elpasotimes.com/news/ci_27810773/federal-judges-want-pecos-vacancy-be-filled-quickly/ [http://perma.cc/L3XK-C6T8] (quoting U.S. District Judge Philip Martinez, based in El Paso, Texas, as saying, "I think we want Texas judges hearing Texas cases, ideally . . . . Visiting judges can handle cases, but they're not familiar with the pace of cases.").

[48] Consider two different allocations for ten dispositive motions cases. A district judge might personally decide all ten (ten motions handled by district judge, none by magistrate judge). Or, the district judge might refer all ten to a magistrate judge for report and recommendations. *See* 28 U.S.C. § 636(b)(1) (2012). The powers given to magistrate judges make their determinations appealable, and subject to *de novo* review. *See* FED. R. CIV. P. 72(b)(3). However, if no objections are raised, the report can be adopted so long as the district court finds "no clear error on the face of the record." FED. R. CIV. P. 72, Advisory Committee's Note; *see also* Diamond v. Colonial Life & Acc. Ins. Co., 416 F.3d 310, 315 (4th Cir. 2005). Assuming objections are made to half of the reports, the total court workload will have increased by fifty percent (five motions handled by district judge, ten by magistrate judge). Notwithstanding the fact that the second scenario increases the total court workload, it is an allocation necessitated by the short-run limits of Article III judicial resources. But relying on it in the long run is an

2. Courtroom Costs

Previously constructed courthouses and courtrooms are classic examples of sunk costs—prior expenditures that cannot be recovered—that microeconomics teaches should not change a rational decision-maker's choices.[49]

The Unit Cost Table assumes that new courtrooms and chambers space will need to be acquired and built-out, or alternatively that existing space will need to be renovated (which would also entail relocation expenses for the current occupants).[50] In either case, the Unit Cost Tables assume that new rent expenses would be incurred for space allocated to a new judge.[51]

In some districts, all existing space may be filled and the new construction "worst case" scenario in the Unit Cost Tables could be a reasonable estimate for new real estate expenses associated with a new judgeship in one district. But in September 2013, the Judicial Conference approved a "No Net New" space and facilities policy under which any increase in courthouse square footage within a circuit must be offset by an equivalent reduction in square footage within the same fiscal year.[52] So while a specific district's ongoing rent costs may rise, there should be a corresponding drop in rent costs elsewhere.[53]

In many districts, open courtroom space may exist because of prior construction in anticipation of then-future (now-current) needs, changes in the number or activity of judges in senior status, and changes in the needs of other types of judges who may also be located in the same courthouse as the

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expensive way to handle cases—not just from the perspective of the court budget, but also for litigants who may have to repeat briefing and argument of motions. Another viewpoint on magistrate judges suggests that, to the extent district courts do not have an adequate number of Article III judges, parties may feel undue pressure to consent to proceed before a magistrate judge for final disposition in civil cases under 28 U.S.C. § 636(c). *See* Joe Palazzolo, *Magistrate Judges Play a Larger Role: Court Backlogs prompt parties to lawsuits to choose junior judges*, WALL ST. J. (Apr. 6, 2015, 5:20 PM), http://www.wsj.com/articles/magistrate-judges-play-a-larger-role-1428355226 [http://perma.cc/5Z3E-SFFW]. Even recognizing the high quality of the magistrate bench, the result is that congressional failure to provide an adequate number of Article III judges pushes litigants to proceed before judges holding offices appointed without Senate advice and consent.

[49] For a historical account of debates in late twentieth-century federal courthouse design and construction, see JUDITH RESNIK & DENNIS CURTIS, REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS 169–82 (2011).

[50] Interview with AO Budget Staff, *supra* note 32.

[51] *Id*.

[52] *See* 2013 REPORT OF THE PROCEEDINGS, *supra* note 41, at 32 (excepting new courthouse construction, renovations, or alterations specifically approved by Congress). This policy is on top of the Judicial Branch's current three-year commitment to reduce building space by three percent. *See* David Sellers, *Successes Reported in Aggressive Space and Rent Reduction Initiative*, JUDICIARY NEWS (Mar. 10, 2015), http://www.uscourts.gov/news/2015/03/10/successes-reported-aggressive-space-and-rent-reduction-initiative [http://perma.cc/B67X-LXA2].

[53] The fiscal impact of a space tradeoff may not be zero because of differing real estate costs between court sites within a circuit. For example, a square foot added to court space in Wilmington, Delaware, may be less expensive than an offset square foot returned to the General Services Administration in Philadelphia, Pennsylvania.

district court (for example, circuit judges, magistrate judges, and bankruptcy judges).[54]

So for a given high-need district, the net new facilities cost may be near zero. Indeed, the new judgeships may reduce government waste in these instances by leveraging money already being spent on courthouse space.

3. Cost Savings

Some current expenses will actually shrink with the provision of additional judgeships. The need for visiting judges from other courts will disappear or diminish—as will travel costs for those judges and their staffs when they do hold hearings or conduct trials on site.[55] Courts with the greatest deficiencies in judicial resources may use dozens of "visiting" judges who sit by designation.[56] Designations keep courts afloat in the short-term, but they are an expensive and inefficient substitute for dedicated district judges as a long-term mechanism for courts to conduct their business.

III. An Efficiency-Driven Approach Would Produce Better Policy and Save Taxpayer Money

District courts have one measurable, final product: case closures.[57] The work of the judiciary is "to secure the just, speedy, and inexpensive determination of every action and proceeding."[58] But district courts have no control over their target output level—that is, the number of cases that they must

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[54] Thirty-three federal courthouses were completed between 2000 and 2010. U.S. Gov't Accountability Off., GAO-10-417, Federal Courthouse Construction: Better Planning, Oversight, and Courtroom Sharing Needed to Address Future Costs 2 (2010) [hereinafter GAO-10-417]. The Government Accountability Office has concluded that many of these courthouses were overbuilt, and criticized both the Judiciary and the General Services Administration (the federal government "landlord" agency) for the resulting construction and operating expense. *See id.* at 42. For better or worse, the courthouses and courtrooms exist. Construction costs for new courthouses are already sunk and the rent on them is being paid annually from the Judiciary budget to the General Services Administration, whether they are being used or not. *See* Judith Resnik, *Building the Federal Judiciary (Literally and Legally): The Monuments of Chief Justices Taft, Warren, and Rehnquist*, 87 Ind. L.J. 823, 884–87 (2012) (discussing rent paid by the Judiciary).

[55] Nearly four decades ago, a House Judiciary Committee report accompanying a judgeships bill noted that some courts—especially those in "districts with attractive climates"—have been "blessed with large amounts of time donated by 'visiting judges' from other district courts." H. R. Rep. No. 95-858, at 4 (1978). But it suggested that the Committee sought to "strongly discourag[e] the future practice of large amounts of visiting judge time." *Id.*

[56] *See, e.g.*, *Justice Kennedy Joins Call*, *supra* note 47 (referring to ninety visiting judges over two-year period).

[57] During Fiscal Year 2013, 255,260 civil cases and 91,266 criminal defendants were filed in the U.S. District Courts (including four territorial courts). *See* Admin. Off. of the U.S. Courts, U.S. District Courts—Judicial Business 2013 (2013), http://www.uscourts.gov/Statistics/JudicialBusiness/2013/us-district-courts.aspx [http://perma.cc/UJF2-FRDV]. Because new filings exceeded case closings ("terminations"), the total number of pending civil cases and criminal defendants grew eight percent during the fiscal year.

[58] Fed. R. Civ. P. 1.

resolve—which is determined by external factors. Congress enacts laws that set the jurisdiction of the courts and provide litigants with causes of action, while parties decide if and when to bring suit under those laws.[59] Once an action is filed, a district court must expend resources to move the case to disposition.

At the same time, Congress is responsible for allocating resources to the courts so that they may dispose of their pending caseloads and fulfill their mission. CBO's cost estimates are required by statute to frame this question in terms of the additional cost of the proposed inputs: new judges, staff, space, and equipment.[60] They do not take into account the effect on output—that is, case closures. Nor do they take into account the consequences of poor resource allocation when the required level of output is already predetermined—that is, a Band-Aid approach of emergency resources and creative use of a less efficient visiting judges program.[61] A conceptual framework for maximizing efficient use of judicial resources is important to informed congressional decision-making.[62]

A critical caveat: case closings are not widgets. Timely resolutions are better for litigants in the aggregate than long-delayed finality. The quality and volume of written opinions may receive more or less attention depending on a judge's caseload.[63] Maintaining a manageable workload for district judges may affect their willingness to continue to serve in senior status upon eligibility for retirement, when they choose whether to continue assisting the

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[59] In any given year, economic trends and other changes in circumstances may impact the caseload. For example, in 2010, the district courts saw increases in cases related to consumer credit, civil rights, labor laws, Social Security, and foreclosures, partly attributable to the economic downturn. CHIEF JUSTICE JOHN G. ROBERTS, JR., 2010 YEAR-END REPORT ON THE FEDERAL JUDICIARY 10 (2010). In 2008, immigration criminal case filings jumped twenty-seven percent, mostly due to filings in five southwestern border districts. CHIEF JUSTICE JOHN G. ROBERTS, JR., 2008 YEAR-END REPORT ON THE FEDERAL JUDICIARY 13 (2008). Caseloads remain attributable to congressional choices regarding federal court jurisdiction because Congress always retains power to alter the lower courts' jurisdiction. For a discussion of the dynamic by which Congress may increase courts' jurisdiction without supplying new resources, see ROBERT A. KATZMANN, COURTS AND CONGRESS 107 (1997) (noting that "vesting the judiciary with added responsibilities, without a concomitant increase in resources, could hinder the administration of justice.").

[60] *See* 2 U.S.C. § 653 (requiring CBO to estimate "the costs which would be incurred" in carrying out a reported bill).

[61] Conceivably, CBO could factor behavioral changes into its cost estimates for judgeship bills. *Cf.* CONG. BUDGET OFF., PROCESSES: WHAT BEHAVIORAL RESPONSES ARE INCLUDED IN CBO'S ESTIMATES, https://www.cbo.gov/about/processes#behavior [https://perma.cc/S5S6-P4VL]. But the highly-localized changes in behavior and the relatively small amount of expenditures at stake in context of the overall federal budget limit the feasibility and possible precision of the modeling that would be needed to accomplish this.

[62] This article also contends in Parts III and IV that a district-specific analysis is required to support the granular decisions of whether productivity yield justifies the investment of additional judgeships in particular districts.

[63] *Cf.* William W. Schwarzer, *Foreword to the First Edition*, *in* JUDICIAL WRITING MANUAL: A POCKET GUIDE FOR JUDGES, at vii (2d ed. 2013), http://www2.fjc.gov/sites/default/files/2014/Judicial-Writing-Manual-2D-FJC-2013.pdf [http://perma.cc/FX4X-GXW6] ("It is . . . not enough that a decision be correct—it must also be fair and reasonable and readily understood . . . . What the court says, and how it says it, is as important as what the court decides.").

courts on what is, effectively, a voluntary basis.[64] But for purposes of this analysis, it is not necessary to identify or even model the optimal judicial workload. Instead, we may simply assume that the median national judicial workload, an accretive consequence of congressional decisions expressed in legislation, represents rough congressional judgment about what is appropriate. Equivalent justice ought to be available from courthouse to courthouse across the country.

The bottom-line question for policymakers, then, should be how changes in the allocation of limited resources affect the productivity of individual courts and the Judiciary as a whole. Congress should strive to use those resources most efficiently; judicial policy should produce the preferred level of output using the smallest amount of resources possible. In this context, as explained above, the relevant output is the number of cases disposed of by the courts. The resources used to process those cases can be simplified into two inputs—judges and all other resources—both controlled by Congress to varying degrees.

A. District Court Costs Are Best Understood Via a Two-Input Model

The first input is the number of Article III judges available to hear and dispose of cases. Current law provides for 673 district judgeships nationally and specifies how many judgeships are allocated to each district.[65]

Although Congress directs how many judgeships are authorized for each district and strongly influences whether and when those judgeships are filled, the actual judicial resources available for a particular district at a given time may vary substantially based on service provided by judges in senior status, which is a consequence of the personal choices of individual judges who have served long enough to be eligible for retirement. Once Article III judges reach a minimum combination of age and years of service, they may retire with full pay and benefits, but also may elect to continue to carry a full or partial caseload.[66] Between 1996 and 2014, the portion of all civil and criminal matters terminated by senior judges grew from fourteen to twenty-four percent, but the number of senior judges—and the work they are

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[64] *See* Joe Palazzolo, *In Federal Courts, the Civil Cases Pile Up*, WALL ST. J. (Apr. 6, 2015), http://www.wsj.com/articles/in-federal-courts-civil-cases-pile-up-1428343746 [http://perma.cc/7GW6-QCUE] (quoting one district judge as saying, "[h]ow long people are willing to work under these circumstances is a real question mark").

[65] *See* 28 U.S.C. § 133(a) (2012).

[66] For a discussion of a district judge's incentives to take senior status on immediate eligibility, see Michael L. Shenkman, *Decoupling District from Circuit Judge Nominations: A Proposal to Put Trial Bench Confirmations on Track*, 65 ARK. L. REV. 217, 237–38 (2012). *See generally* Stephen B. Burbank et al., *Leaving the Bench, 1970-2009: The Choices Federal Judges Make, What Influences their Choices, and their Consequences*, 161 U. PA. L. REV. 1 (2012).

available to perform—varies widely by individual court.[67] This can make availability of judicial resources lumpy.[68]

The Judicial Conference of the United States, the judicial branch's policy-making body, may request that Congress add or move judgeships, but the overall number and allocation of judgeships has been designed so that it may be changed only through enactment of new law.[69] Only Congress, not the Courts, has institutional control over this input.[70]

The second input is salaries and expenses associated with supporting the Article III judges, such as for law clerks, administrative staff, courtroom and office space, office equipment, and research subscriptions. Congress also indirectly controls this input by enacting annual "discretionary" appropriations that pay for judicial support costs. In a typical appropriations cycle, the Financial Services and General Government Appropriations Bill provides an appropriation for the Salaries and Expenses account for the Judiciary. This account includes funds for most appellate, district, and bankruptcy courts, as well as pretrial services and probation offices, totaling $4.85 billion in Fiscal Year 2015.[71] The Executive Committee of the Judicial Conference then allocates funds from this lump sum to the various circuit and district courts.[72] So while Congress is responsible for providing the top-line appropriation for the courts, the Judicial Branch has considerable leeway in moving that money around among districts and circuits.[73]

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[67] *See Federal Senior Judges Carry a Growing Workload*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, http://trac.syr.edu/tracreports/judge/395/ [http://perma.cc/N7ZS-VECC] (last updated July 9, 2015).

[68] For example, in 2014, senior judges in the District of Kansas closed 48.5% of the district's civil and criminal cases. *See id.* Two senior judges fully retired in August and September 2015, leaving only five active district judges and three remaining senior judges. *See* Roxana Hegemen, *2 Senior Federal Judges in Kansas Leaving U.S. District Court*, KAKE (July 18, 2015), http://www.kake.com/home/headlines/2-senior-federal-judges-in-Kansas-leaving-US-District-Court—316882001.html [http://perma.cc/3Y5J-A8R5]. Because those two judges took senior status in 1989 and 2008, respectively, no new resources will replace them on retirement.

[69] For an example of such a request, see 161 CONG. REC. S6072 (daily ed. July 28, 2015) (communication from the Secretary, Judicial Conference of the United States, transmitting a report of proposed legislation entitled "Federal District Judgeship Act of 2015" to the Committee on the Judiciary).

[70] In very rare cases, such as when a senior judge takes up residency in another district with a full caseload for a period of years, the effect can be akin to a congressional change in judicial resources. *See, e.g.*, Guillermo Contreras, *Hawaiian Judge Coming to Alamo City*, SAN ANTONIO EXPRESS-NEWS (Dec. 26, 2012), http://www.mysanantonio.com/news/local_news/article/Hawaiian-judge-coming-to-Alamo-City-4145437.php [http://perma.cc/4XMB-YVDS] (describing designation of Senior U.S. District Judge David Alan Ezra of the District of Hawaii to the Western District of Texas).

[71] *See* Pub. L. No. 113-235, 128 Stat. 2348 (2015).

[72] While the Judiciary has operated in a generally decentralized budget environment since 1987 (formally "local court budget management"), some Judiciary funds are centrally paid by the Administrative Office of U.S. Courts on behalf of court units.

[73] In deference to the Judiciary's status as a co-ordinate branch, Congress traditionally empowers the Judicial Conference of the United States to "equitably distribute resources based on the workload of each district." H.R. REP. NO. 112-136, at 32 (2012).

The Judicial Conference has used this flexibility to provide additional staff and resources to overburdened courts to help maintain an acceptable level of output despite a shortage of Article III judges in those districts.[74] But Article III judges, on the one hand, and support staff and services, on the other, are imperfect substitutes, so there are additional costs—and a corresponding drop in efficiency—whenever a court has too much or too little of either input. The challenge for a cost-conscious Congress, short of making changes to the jurisdiction of federal district courts, should be to find the mix of judgeships and fungible appropriations for other salaries and expenses that maximizes a district's efficiency.[75]

B. How to Model the Short-run Production Function

To determine this optimal combination of inputs, we can model the resource allocation decisions for a two-input production function generating a single product, case closings.[76] The first input is Article III judges and the second input consists of all other salaries and expenses.

Each court must dispose of all federal cases that are filed within that district.[77] But that output can be achieved with many different combinations of Article III judges and support costs, some less efficient than others.

When these different combinations are graphed, they create what economists call an "isoquant," a curve showing the input combinations that will produce the same level of output. The isoquant reflects tradeoffs in productivity between the two types of inputs, and the decreasing marginal return of each input when the other is held constant. The shape of the curve is a reflection of imperfect substitutes.

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[74] A leading example is the additive law clerks program. *See* 2015 REPORT OF THE PROCEEDINGS, *supra* note 38, at 20.

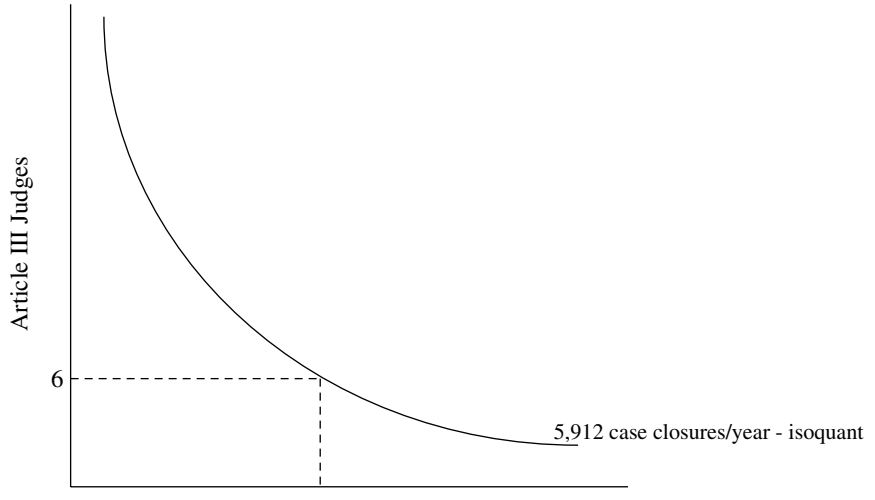
[75] *See generally* Robert W. Kastenmeier & Michael J. Remington, *Court Reform and Access to Justice: A Legislative Perspective*, 16 HARV. J. ON LEGIS. 301, 305–06 (1979) (providing a broader theoretical perspective on federal courts as a finite resource subject to allocation decisions). A major change to federal jurisdiction, such as eliminating diversity jurisdiction, could obviate the need for new judgeships anywhere in the country. *See id.* at 312–13 (cataloging early 20th century legal leaders advocating for elimination of diversity jurisdiction and positing that it continues to exist because "the bar likes forum shopping"). This Article seeks to address judgeship needs where jurisdiction is held constant, without addressing the normative question of whether federal jurisdiction ought to be held constant.

[76] *Cf.* LEE EPSTEIN ET AL., THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL & EMPIRICAL STUDY OF RATIONAL CHOICE 4 (2013) (suggesting that labor economics concepts such as the "production function" can further the understanding of the work of judges).

[77] A court also must dispose of cases remanded to it or transferred in from another district and it need not dispose of cases transferred out to other districts. *See* 28 U.S.C. § 1412 (2012) (providing for change of venue).

Consider, for example, the production function model for the Eastern District of California, which has six authorized Article III judgeships and received 5,912 case filings in the year that ended September 30, 2014.[78]

SHORT-RUN VARIABLE COST FOR 5,912 CASE CLOSURES/YEAR



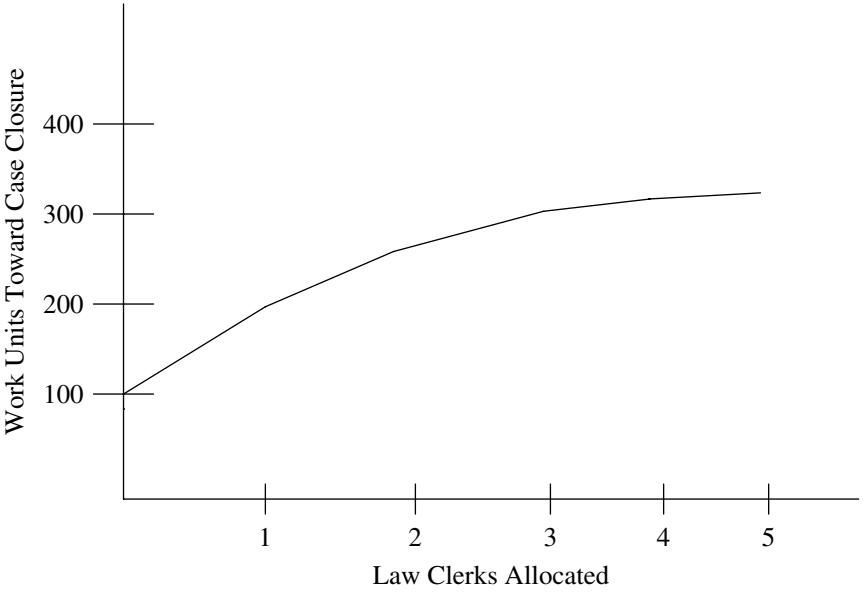
In the short run, existing Article III judgeships are fixed, and a particular production level is required. So, the Judicial Conference resource allocation decision—and the consequent determination of how much to spend on salaries and expenses for the given court—can be modeled through elementary microeconomics. The point on the isoquant corresponding to the number of existing judgeships (6) identifies the other salaries and expenses required (OSE_0) to reach the necessary production level of 5,912 case closures per year.[79] To be clear, the Eastern District of California has 6 authorized judgeships and its actual level of case closings was 5,912 in 2014; as a theoretical matter, the other salaries and expenses required to reach this out-

[78] *See* ADMIN. OFF. OF THE U.S. COURTS, U.S. DISTRICT COURTS—COMBINED CIVIL AND CRIMINAL FEDERAL COURT MANAGEMENT STATISTICS (Sept. 30, 2014), http://www.uscourts.gov/file/14089/download [http://perma.cc/YR5W-83G3].

[79] Given that the total amount available to the Judicial Conference for allocation is limited, the Judicial Conference may be unable to provide the full amount of other salaries and expenses required to meet the target level of case closings with available Judicial Resources. The consequence in a given year would be an increase in the number of pending cases. In fact, in 2014, the Eastern District of California closed slightly more cases than it opened (6,168 compared with 5,912). But that made for small headway against a total pending caseload—effectively, a backlog—of 7,835 cases. *See id.*

put can be solved formulaically.[80] Another way of stating the same principle is that the Judicial Conference must determine the amount of court staff salaries and expenses—effectively, the short-run variable cost—that will enable six district judges to close 5,912 cases.

SINGLE DISTRICT JUDGE PRODUCTION MODEL



For a simplified example of the Judicial Conference's exercise of resource allocation responsibility, imagine first solving for the most efficient size of the chambers staff allocated to a single district judge. A district judge sitting alone for a day without any law clerks will be able to make progress toward closing some number of cases, which we will model as 100 work units.[81] A single law clerk might double the judge's production to 200 work units by performing legal research and drafting opinions and orders at the judge's direction. A second law clerk might supplement another sixty percent of the judge's original production, yielding 260 total work units. A third member of the chambers staff might supplement another forty percent of the judge's original production, yielding 300 work units. Additional staff would

[80] Although the illustrated production function employs actual numbers for judicial resources and caseload to model the analysis of solving for the OSE variable, the particular shape of the isoquant curve shown is merely illustrative of a reflection of imperfect substitutes. These models treat judges and other court resources as homogenous for simplification.

[81] The work units concept and values are introduced only for purposes of illustrating application of the production model. As a historical matter, district judges did without law clerks entirely until 1936. *See* Paul R. Baier, *The Law Clerks: Profile of an Institution*, 26 VAND. L. REV. 1125, 1131 n.24 (1973).

further supplement the single district judge's production, but with diminishing marginal returns.

The judicial world is more complicated than this simplified model, and other allocations of resources internal to the judiciary may add productivity at lower expense than additional in-chambers law clerks. For example, while the first law clerk may be the least expensive way to double the productivity of a single Article III judge, appointing a Magistrate Judge—creating a subordinate judicial officer with the power to decide non-dispositive motions independently and handle cases on consent—will probably add more productivity on a per-dollar basis than a fourth law clerk.[82]

This, in essence, is the work of the Judicial Conference in making policy decisions about how many law clerks district judges may be authorized to employ and how many magistrate judges a given district court is authorized to appoint.[83] But, even where it would be the most cost-efficient way to increase total case closures to the level required by the jurisdiction Congress has created, the Judicial Conference cannot adjust the number of district judgeships. For the Judicial Conference, the teaching of the basic microeconomics model is to treat district judgeships as capital investments that are fixed for the horizon of other resource allocation decisions.

C. How the Two-Input Model Should Affect Congress's Perspective on District Court Costs

In the long run, however, Article III judgeships can be adjusted by congressional action. So, the search for the most "efficient and cost-effective" use of taxpayer resources should be a search for the least-cost combination of inputs necessary to produce the required number of case closings. Congress is not merely solving for the amount of a single input required to reach an output; it should be determining the input mix that will generate the required output at the least expense.

Again, in theoretical terms, it is possible to model a function demonstrating different combinations of Article III judgeships and other salaries and expenses that will produce the same output. Simplifying all salaries and

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[82] *See* 28 U.S.C. §§ 631–639 (providing for creation of magistrate judgeships and setting maximum powers of the office). *But see Magistrate Judges, 'Indispensable Resource' for Federal Courts*, THIRD BRANCH, June 2011, at 4, 4 (quoting observation by chair of Judicial Conference Committee on the Administration of the Magistrate Judges System that although "Magistrate Judges are an indispensable resource" they "cannot fully compensate for an insufficient number of district judges"). *See generally* Tim A. Baker, *The Expanding Role of Magistrate Judges in the Federal Courts*, 39 VAL. U. L. REV. 661 (2005) (providing a discussion of the history of the office).

[83] *See, e.g.*, JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 32–33 (Sept. 13, 2011) (adopting certain changes in magistrate judge authorizations); JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 28 (Mar. 15, 2011) (discussing use of the Temporary Emergency Fund to provide funding for judges to hire additional chambers staff to assist with temporary work emergencies).

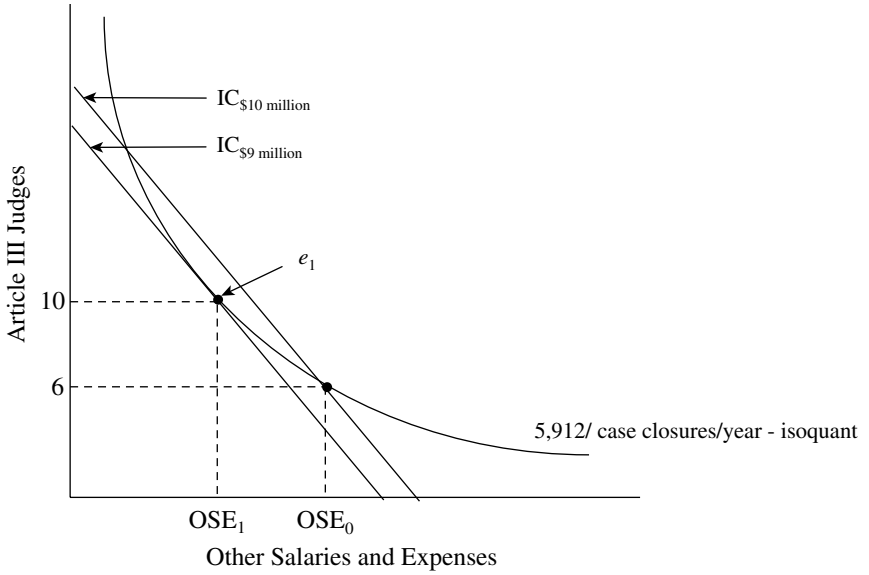
expenses to the single category of law clerks, one can imagine that the same output may be produced by: (a) one judge and ten law clerks; (b) two judges and four law clerks; or (c) five judges working without law clerks. The graphic representation of these tradeoffs is another isoquant curve.

While the production level from all three combinations described in the prior paragraph will be the same, the expenses will be different because a judge and a law clerk have different salaries. An isocost line, with a slope that represents the cost ratio of the two inputs, indicates different combinations of production inputs (here, judges and law clerks) that can be paid for at the same expense.

Together, the isocost and isoquant provide a mathematical solution to the question of how to most efficiently combine two inputs to reach a required output: To get the least expensive way of producing the required number of case closings, we solve for the isocost line (with a slope that represents the cost ratio of the two inputs) that is tangent to the isoquant curve (input combinations with the same output) reflecting the required output in order to find the least-cost combination of production inputs. By definition, this is the most efficient and cost-effective way to allocate taxpayer resources.

Setting aside the simplification by which the only expenses are judges and law clerks, we return to the model for allocating resources to produce the target number of case closures in the Eastern District of California. The intersection of six judges and OSE_0 of other salaries and expenses is the same as it appeared in the short-run variable cost calculation, above. But if we now assume that the number of judges is not, we can find a lower-cost resource allocation to produce the same output. The chart below, which uses dummy budget numbers for illustrative purposes in this model, shows that while our initial resource combination of 6 judges and OSE_0 would cost $10 million, the alternative combination of 10 judges and OSE_1 would cost only $9 million to generate the same output.

OPTIMAL INPUT MIX FOR 5,912 CASE CLOSURES/YEAR



As the model reflects, additional judgeships may reduce the need for emergency law clerks and traveling judges, which in turn reduces the amount of other salaries and expenses that must be devoted to the district. In sum, spending money on new judgeships can, in some cases, enable a court to *reduce* its total expenses. Withholding a judgeship can cost the taxpayers money through wasted resources—that is, deployment of resources with lower marginal productivity per dollar of expense relative to new judicial appointments.

D. Courthouse Rent Expenses are Fixed

Given that they are fixed for the foreseeable future,[84] courthouses and courtrooms are best represented as a second capital input with a different time horizon than Article III resources. Formally, the AO pays annual rent centrally from the appropriated "discretionary" funds to the General Services Administration.[85] Treating rent expense as a third input to the model (effectively, a second type of capital fixed over an even longer time horizon

[84] Beyond construction time, significant new court space is unlikely to be constructed any time soon given the current budget environment. *See* U.S. GEN. SERV. ADMIN., Five-Year Courthouse Project Plan for FY 2016-2020 (2014), http://www.gsa.gov/portal/mediaId/189063/fileName/Courthouse_Project_Plan_FYs16_20_09-16-2014.action [http://perma.cc/8Q2F-3TXK].

[85] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-263, FEDERAL COURTHOUSES: RECOMMENDED CONSTRUCTION PROJECTS SHOULD BE EVALUATED UNDER NEW CAPITAL-PLANNING PROCESS 7 (2013) (noting that GSA charges the Judiciary rent, and that in 2012, "the

than Article III judges), the best medium-term policy-making approach will be to hold the real estate expense constant and solve for the most efficient production mix on a two-input model between Article III judges and all other salaries and expenses excluding rent.[86] This adjusts for the reality that court real estate is more or less fixed for the immediate future.[87]

IV. Accurately Understanding the Costs of Proposed Judgeships Requires District-Specific Inquiries

We propose a simplified district-specific inquiry to be undertaken by the CBO with assistance from the AO in generating cost estimates for particular judgeship bills. For purposes of illustration, we apply the model to two Courts with urgent needs: the Eastern District of California and the District of Delaware.

A. Three Key Questions CBO Should Ask When Evaluating a New Judgeship

In place of using data from the AO's Unit Cost Tables—which may not represent the actual new expenses of any district—CBO should work with the AO and the particular district courts for which new judgeships are being considered, to develop a better approximation of how authorization of a new judgeship would alter the financial picture for the Judiciary.

First, CBO should ask whether a suitable courtroom and chambers exist for the potential new judge. If so, there may be no new real estate expense attributable to the judgeship. If not, renovation may be required, creating a startup cost; however, under the federal courts "No Net New" policy, the change in annual rent expense should always be close to zero.[88]

Second, CBO should ask whether additional clerk's office staff will be required. Many clerks' offices have a sufficient number of on-board employees to supply a dedicated deputy clerk and the required docketing support to an additional judge without resorting to new hiring.

Third, CBO should ask whether employee slots exist now that might be replaced by the chambers staff allocation for a new judge, netting zero additional expense for chambers staff (an offset of full time employee slots). For

judiciary's rent payments to GSA totaled over $1 billion for approximately 42.4 million square feet of space in 779 buildings that include 446 federal courthouses").

[86] Over a longer time horizon where courthouse construction and decommissioning may be possible, the policy paradigm for Congress will be to create a three-dimensional model with inputs of (1) Article III judges, (2) rent, and (3) all other salaries and expenditures, to create the most efficient long-run production mix for a given district court.

[87] The courts have engaged in a project to release some space back to the General Services Administration. *See Right Fit for Courts Means Reduced Footprint and Rent Costs*, Admin. Off. of the U.S. Courts (May 17, 2013), http://news.uscourts.gov/right-fit-courts-means-reduced-footprint-and-rent-costs [http://perma.cc/NSV5-DY37].

[88] *But see* GAO-10-417, *supra* note 54 (discussing reasons why space offset may not have precisely zero cost).

example, the Judicial Conference may have made special allocations of staff attorneys or additional in-chambers law clerks for which the emergency need would be obviated by additional Article III resources.

B. The Eastern District of California as a Case Study

The Eastern District of California has vacant courtrooms and judicial chambers in both its Sacramento and Fresno courthouses: at least two courtroom and chambers sets are available in each courthouse.[89] Accordingly, for the first several additional judges in the district, there would be no new expense for acquisition, build-out, or annual rent of courtroom and chambers space.

The Court has sufficient resources in its clerk's office to provide a dedicated deputy clerk and all needed court reporter and interpreter resources.[90] Indeed, due to recent retirements, experienced personnel have been reabsorbed into the clerk's office and are available to support the new judicial officers.[91] At the same time, the need to support visiting judges and handle a larger-than-average carrying caseload will decrease, reducing some work needs in the clerk's office.[92]

At least as an initial matter, the first appointee to the new judgeship would need to hire a new chambers staff at an estimated cost of $261,000 per year.[93] But the additional judicial resource and accompanying chambers staff would likely reduce the need to renew (or at least to renew fully) the additive in-chambers law clerks that the Judicial Conference has approved on a three-year basis. Accordingly, a fair estimate of additional expenses over current law for the new judgeship's support personnel would be $261,000 for the first new judge, and potentially less than that for additional law clerks once new judicial resources begin to obviate the need for renewal of the current additive law clerk program.[94]

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[89] Telephone interviews with Hon. Morrison C. England, Chief Judge, U.S. Dist. Court for the E. Dist. of Cal. (July 2014) [hereinafter Interview with Chief Judge England]; Email from Hon. Morrison C. England, Chief Judge, U.S. Dist. Court for the E. Dist. of Cal., to Michael L. Shenkman (Oct. 6, 2015) [hereinafter Email from Chief Judge England] (on file with authors).

[90] *See* Interview with Chief Judge England, *supra* note 89; Email from Chief Judge England, *supra* note 89.

[91] *See* Interview with Chief Judge England, *supra* note 89; Email from Chief Judge England, *supra* note 89.

[92] *See* Interview with Chief Judge England, *supra* note 89; Email from Chief Judge England, *supra* note 89.

[93] Although judicial salaries are not adjusted by locality payments, staff salaries are so adjusted. Thus, a chambers staff with duty station in Fresno will cost eighteen percent less than the same chambers staff in Sacramento. Thus, for an additional judgeship assigned to Fresno instead of Sacramento, the cost may be lower. *See generally* OFF. OF PERSONNEL MGMT., 2015 LOCALITY PAY AREA DEFINITIONS, https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2015/locality-pay-area-definitions/#s [https://perma.cc/V6N5-GCYT].

[94] Law clerks are typically hired for one- or two-year term appointments—only a minority are career hires—and so these changes do not entail layoffs or personnel realignments, only realignments of slots as term appointments expire and positions become vacant.

Many other reductions in expenses are real but sufficiently difficult to quantify that they could not reasonably be included in the cost estimate. The District has grappled with a sustained period during which it had only one active judge in its Fresno Division, and it operated during 2014 and 2015 under an emergency order that saw cases from the Fresno Division wheeled out to judges in Sacramento, 180 miles away.[95] That had obvious costs to litigants,[96] but also case management costs to the Court (including travel and lodging costs when judges with a Sacramento duty station must travel to Fresno to cover criminal calendars, conduct trials, etc.).

ANNUAL DISCRETIONARY COST OF NEW JUDGESHIP IN THE E.D. CAL.

($ thousands)	CBO Est.	Dist. Specific
Courthouse expenses	361	0
Clerk's office staff	206	0
Chambers staff	261	261
Operations and maintenance	58	58
Total annual cost	**886**	**319**

C. The District of Delaware as a Case Study

The District of Delaware does not have a vacant courtroom.[97] If an additional district judge is added, it will need to relocate a magistrate judge from a current district judge courtroom and renovate other space for use by a magistrate judge. The AO estimates the one-time build-out and relocation costs in that circumstance to be $200,000.[98] Although the additional chambers and courtroom would entail an annual rent to be paid to GSA, the Judiciary's "No Net New" space policy would require other real estate used elsewhere in the courts of the Third Circuit to be released, meaning the best

[95] *See* John Balazs, *Sacramento Judges to be Assigned Fresno Civil Actions*, E. DISTRICT OF CAL. BLOG (Apr. 1, 2014), http://edca.typepad.com/eastern_district_of_calif/2014/04/sacramento-district-judges-to-be-assigned-fresno-civil-cases.html [http://perma.cc/5AFF-7BB9].

[96] *See* Palazzolo, *supra* note 64 (quoting U.S. District Judge Larry O'Neill, the only active judge sitting in Fresno, as stating that he receives letters "indicating, 'Even if I win this case now, my business has failed because of the delay. How is this Justice?' " and his comment that "the simple answer, which I cannot give them, is this: It is not justice. We know it."). *See also* Sudhin Thanawala, *Wheels of Justice Slow at Overloaded Federal Courts*, ASSOCIATED PRESS (Sept. 27, 2015), http://bigstory.ap.org/article/54175de3d735409ab99a2f10e872d58e/wheels-justice-slow-overloaded-federal-courts [http://perma.cc/Q5QR-7ARU] ("The result, the judges and attorneys say, is longer wait times in prison for defendants awaiting trial, higher costs for civil lawsuits and delays that can render those suits moot.").

[97] Telephone interviews with Hon. Leonard P. Stark, Chief Judge, United States District Court for the District of Delaware (July 2014) [hereinafter Interviews with Chief Judge Stark]; Email from Hon. Leonard P. Stark, Chief Judge, United States District Court for the District of Delaware to Michael L. Shenkman (Oct. 1, 2015) (on file with authors) [hereinafter Email from Chief Judge Stark].

[98] Interview with AO Budget Staff, *supra* note 32.

annual cost estimate for the space required for the additional judgeship remains zero.

The District of Delaware's practice is for the clerk's office to dedicate two staff members to each district judge's chambers: a courtroom deputy and a case manager. Of the two positions, one would likely come out of the existing clerk's office staff but the other would need to be a new hire.[99] So, the annual net new cost for clerk's office support staff would be approximately $70,000, representing this new hire's salary and benefits.[100]

Despite 1,175 weighted filings per judge in the twelve months ended March 31, 2015—the third-greatest number in the country[101]—the District of Delaware did not as of mid-2015 have any special resource FTE allocations from the Judicial Conference that could be redeployed to a new judge's chambers. Accordingly, a fair estimate of the new total salary expenses would be the $261,000 representing a full complement of new chambers staff.

ANNUAL DISCRETIONARY COST OF NEW JUDGESHIP IN THE D. DEL.

($ thousands)	CBO Est.	Dist. Specific
Courthouse space[102]	361	0
Clerk's office staff	206	70
Chambers staff	261	261
Operations and maintenance	58	58
Total annual cost	**886**	**389**

D. The District-Specific Approach

The above examples demonstrate that instead of thinking about $1 million per judgeship per year, Congress should be equipped to take a district-specific approach with more targeted cost estimates. In the Eastern District of California, net new startup expenses would be near zero and in the District of Delaware, they would be closer to $200,000. In the Eastern District of California, net new annual discretionary expenses would be about $319,000 and in the District of Delaware, they would be closer to $389,000. In addition to equipping Congress with more information to support its policymaking, the conversation between CBO, the AO, and the particular court

[99] Interviews with Chief Judge Stark, *supra* note 97.

[100] Interview with AO Budget Staff, *supra* note 32.

[101] *Federal Court Management Statistics: United States District Courts—National Judicial Caseload Profile*, ADMIN. OFF. OF THE U.S. COURTS (Mar. 31, 2015), http://www.uscourts.gov/file/18187/download [http://perma.cc/G67Y-VCBV].

[102] This number assumes no net new annual rent, although it does not factor-in the one-time renovation expenses described above.

would improve financial, facilities, and human resources planning in the potentially affected court units.

The examples of particular circumstances in the Eastern District of California and the District of Delaware demonstrate the problems with basing CBO cost estimates, and therefore resource allocation decisions, on national averages and simplified assumptions used in budget formulation. Existing staff and space vary markedly from district to district.[103] This is especially true of over-burdened districts that already receive additional resources, such as more clerk's office staff, visiting judges, or emergency law clerks, to compensate for their higher workload and emergency designation.[104] As a result, CBO's cost estimates have tended to overestimate the additional expenditures necessary to support a new judgeship—likely making Congress less willing to provide critical judicial resources.

These new costs are a drop in the bucket of the Judiciary's annual spending. Careful attention to out-of-pocket expenditures is warranted, but it creates the risk of action that is penny-wise and pound-foolish. The cost estimate methodology above improves on current practice by avoiding double-counting of expenses already being incurred; it does not go so far as to reflect that additional judgeships in high-need districts create much more productive courts that better serve their litigants and will reduce expenses to the litigants—including the Executive Branch of the United States Government—by sums many times greater than the cost of the additional judgeship.[105] Still, CBO cost estimates can be improved through district-specific inquiry, giving better information to members of Congress. The theoretical model described in Part III provides the essence of an argument that Congress should consider maximizing efficiency in the courts, rather than concentrating solely on the incidental costs of adding a new federal judgeship.

V. Proposed Floating Efficiency Judgeships

The argument in this paper is not necessarily for more judges. It is for a clearer way of looking at the financial consequences of them. An Article III

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[103] Interview with AO Budget Staff, *supra* note 32.

[104] *Id.*

[105] *See, e.g.*, Letter on Behalf of Federal Bar Association from Daniel J. Croxall & Matthew G. Jacobs to Sen. Dianne Feinstein (June 24, 2014) (on file with authors) (describing E.D. Cal. vacancy crisis as "bad for business, bad for the legal profession, and bad for all the residents of the Eastern District, who lack the sort of access to a federal judicial forum enjoyed elsewhere in the country"). In keeping with CBO practices that disfavor dynamic scoring, it may be appropriate for future cost estimates of new judgeships to recognize potential cost effects on other parts of the federal government without quantifying them in the estimates themselves. For example, delayed case processing may increase detention and other Marshals Service expenses; civil litigation delays may impose costs on U.S. Attorney offices. It would also be appropriate to at least acknowledge that many other costs are externalized to private litigants. *See generally* Jonah B. Gelbach & Bruce H. Kobayashi, *The Law and Economics of Proportionality in Discovery*, 50 Ga. L. Rev. (forthcoming fall 2015) (discussing externalization of costs in litigation).

judiciary that becomes too large may have systemic costs that cannot be reflected in dollars.[106] So instead of increasing the number of Article III judges as soon as a district's workload rises, the optimal response in marginal cases is to create more flexible judicial resources that can be reallocated to accommodate the current needs of the judiciary.[107] This could be most easily achieved by creating floating judgeships that the Judicial Conference would be able to allocate on the basis of efficiency concerns each time a vacancy arises in them.

Here is the essence of the proposal: Congress would enact legislation creating perhaps a dozen floating efficiency judgeships that are not allocated to a particular district. Rather, for each "efficiency judgeship" created by Congress, the Judicial Conference would be directed to determine the district in which an appointment would make the greatest contribution to judicial efficiency. In reaching the determination, the Conference would be required to invite proposals for reducing or avoiding expenditures by a district court, and it would be authorized to determine the district to which the floating efficiency judgeship would be assigned based only on such cost-reduction proposals and on weighted caseloads of the various districts. The Secretary of the Judicial Conference would transmit the determination to the Congress and to the President, who would then be empowered to submit a nomination for that vacancy. The Senate would render advice and consent on the nomination under its ordinary procedure, including the Judiciary Committee's blue slip requirements by which home state senators must consent to a nominee advancing before a hearing will take place.

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[106] *See Considering the Role of Judges Under the Constitution of the United States: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 24–25 (Oct. 5, 2011) (statements of Justices Breyer and Scalia), http://www.gpo.gov/fdsys/pkg/CHRG-112shrg70991/pdf/CHRG-112shrg70991.pdf [http://perma.cc/T279-MF64]; *see also* Lumbermen's Mut. Cas. Co. v. Elbert, 348 U.S. 48, 59 (1954) (Frankfurter, J., concurring) (positing that "inflation of the number of the district judges . . . will result, by its own Gresham's law, in a depreciation of the judicial currency and the consequent impairment of the prestige and of the efficacy of the federal courts"); Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 515 (1928) ("A powerful judiciary implies a relatively small number of judges."). For a synopsis of arguments for and against a cap on the size of the federal judiciary, see GORDON BERMANT ET AL., IMPOSING A MORATORIUM ON THE NUMBER OF FEDERAL JUDGES: ANALYSIS OF ARGUMENTS AND IMPLICATIONS 23–36 (1993).

[107] Using the Judicial Conference for strategic deployment of limited judicial resources to maximize their benefits leverages the vision of Chief Justice Taft, who persuaded Congress to create the predecessor organ of the Conference with the comment that it no longer made sense for each district judge "to paddle his own canoe." *See* William Howard Taft, *The Possible and Needed Reforms in the Administration of Justice in Federal Courts*, 8 A.B.A. J. 601, 602 (1922). He envisioned the Judicial Conference as allowing "team work" by "throw[ing] upon the council of judges the responsibility of making the judicial force do a work which is distributed unevenly throughout the entire country." *Id.* at 601. Courts scholar Russell Wheeler has noted that the Judiciary's predominant docket management tools in the first half of the last century were "cooperation" and "teamwork," but case management activism gradually replaced it. *See* Russell Wheeler, *Judicial Cooperation Among State Courts in Europe and the United States: A Comparative Approach*, BROOKINGS (Dec. 13, 2010), http://www.brookings.edu/research/papers/2010/12/13-judicial-cooperation-wheeler [http://perma.cc/H6AA-JG6J].

The key difference from a traditional authorized judgeship is that when the *next* vacancy occurs in the district court that benefited from the efficiency judgeship, whether the vacancy was in that judgeship or a traditional one, the President would not have authority to fill it.[108] Instead, the Judicial Conference would make a new determination about where the additional seat would most contribute to the efficiency of a court and the President would fill the judgeship for that court.[109] Thus, even though judges appointed through this authorization would hold office for life (subject to good behavior) in a single district, each efficiency judgeship would be reallocated every few years based on where it would make the greatest contribution to the efficiency of the Judiciary.

As an example, imagine that District A, with three authorized judgeships—filled by Judges 1, 2, and 3—is assigned an efficiency judgeship by the judicial conference. The President would then have the power to appoint, by and with consent of the Senate, an additional Judge, Judge 4. For a period of time, District A would operate with four authorized judgeships. But when Judge 1 takes senior status, no additional vacancy in the district would be created automatically, and instead the efficiency judgeship would return to the central pool for assignment by the Judicial Conference. District A could compete with other districts for the next appointment under the efficiency judgeship.

Essential to this proposal is that it would upset neither the nomination and confirmation process, nor the strong link between a judge and the district that he or she is appointed to serve.[110] Chief Justice Taft once proposed a "flying squadron" of judges with no home district who could be dispatched for temporary assignment wherever they were needed.[111] Dean Theodore Ruger has observed that although a 1922 bill was introduced in the Senate along the lines of Taft's proposal—which Taft aggressively lobbied for—the "new conception of judicial branch 'elasticity' [was] too extreme for the Congress of the time (and probably for today's Congress as well)."[112] Unlike Taft's proposal, which represented a "sharp break from the traditional con-

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[108] Of course, the Judicial Conference could designate the same district as most needing that new vacancy, creating a new vacancy to fill in that same district.

[109] A 1981 study paper sponsored by the Federal Judicial Center proposed that federal judgeship creation could be delegated to the Judicial Branch. See CARL BARR, JUDGESHIP CREATION IN THE FEDERAL COURTS: OPTIONS FOR REFORM 16 (1981). Even as this paper also suggested constraints and checks on the expansionary power, Congress could reasonably be skeptical about the incentives inherent in any such delegation. By contrast, the efficiency-judgeship proposal in this paper delegates only resource allocation authority to the Judicial Conference—which has full interest in efficient allocation—but retains expansionary authority in the Congress.

[110] For analysis of the political economy of the district judge selection process, *see* Shenkman, *supra* note 66. For discussion of the historical decentralization of lower courts in the federal system, see Theodore W. Ruger, *The Judicial Appointments Power of the Chief Justice*, 7 U. PA. J. CONST. L. 341, 353–54 (2004).

[111] *See* PETER GRAHAM FISH, THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION 26–29 (1973).

[112] Ruger, *supra* note 110, at 355–56.

ception of geographic fixity,"[113] the idea developed here modifies only the traditional concept of judgeships, rather than of the judge. A judicial officer appointed pursuant to a floating efficiency judgeship would have submitted to the same nomination and selection process, and hold an identical office, to another judge appointed pursuant to a judgeship permanently dedicated to a particular district. Indeed, this proposal is crafted to minimize its novel attributes.[114] Even the provision for an action of judicial administration to make a new seat temporarily available in a district is not new, as the operation would parallel the current 28 U.S.C. § 133(b), which creates appointment authority to backfill courts where an active service judge has been appointed to an office of national judicial administration. The appointment authority is created by statute, but the attachment to a particular district is created anew for each forthcoming appointment by a decision internal to the Judiciary—in the case of § 133(b), the decision by the Chief Justice to appoint a judge to one of the covered offices.[115]

A. An Example of Efficiency Judgeship Allocation

By way of illustration, suppose that an efficiency judgeship along the lines of this proposal is authorized and becomes available for assignment by the Judicial Conference in 2017. The Conference would invite submissions from district courts with likely need for an additional Article III judge. The first part of a submission would be the statement of need, including both a quantitative analysis of new filings and weighted caseload, and also a qualitative explanation of any special circumstances. The second part of a submission would be a statement of anticipated savings, explaining how a new judge would allow more efficient use of resources, obviate certain otherwise-expected expenditures, or both.

District A might show both a heavy caseload and an available chambers and courtroom sitting empty and ready for occupancy. It might also have a very small number of senior judges and might have been incurring substantial expenses supporting visiting judges. District B might show the same caseload per judgeship on paper, but might have been receiving the assis-

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[113] *Id.* at 356.

[114] One way of thinking about statutory multidistrict litigation ("MDL") procedure is as a kind of shadow "efficiency" process by which the national judiciary, in the form of the Judicial Panel on Multidistrict Litigation, is able to deploy spare resources in comparatively lighter-workload courts to relieve some national burdens. For an account of the history behind MDL proceedings, see generally Andrew Bradt, *The Multidistrict Litigation Act of 1968* (forthcoming 2016) (manuscript on file with authors). The share of federal civil litigation handled in MDL proceedings is substantial. In the year that ended March 31, 2014, more than 25,000 MDL cases were filed in the Southern District of West Virginia alone, representing more than eight percent of all civil cases filed nationally. *Federal Judicial Caseload Statistics 2014*, ADMIN. OFF. OF THE U.S. COURTS, http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2014 [http://perma.cc/GR3K-CLH2].

[115] *See* 28 U.S.C. § 601 (vesting power to appoint the Director of the Administrative Office of U.S. Courts in the Chief Justice of the United States).

tance of several senior judges and have no room available in the current facility. The Judicial Conference would sensibly assign the efficiency judgeship to District A.

But the notion that additional help is available based on an efficiency showing would also have an important dynamic effect. Specifically, the competition for additional resources creates a marketplace among chief judges and their colleagues in high-need districts to identify and deliver on how work can be done more efficiently.[116]

Suppose, for example, that District B has a high ratio of magistrate judges to district judges. It might propose to give back a magistrate judgeship allocation, promising not to fill the next vacant magistrate judge seat—freeing courtroom and chambers space, as well as personnel expenses—in the event it receives an efficiency judge slot assignment. By including in its bid to the Judicial Conference a compelling analysis of why the swap would be both appropriate and efficient, District B might win the efficiency judge assignment. Indeed, cost-savers in Congress could thus encourage judges to find cost savings in districts throughout the country that, as a practical matter, it would be impossible to direct through responsible legislation.

The best practice in drafting legislation is to leave the exact formula by which decisions are made to the discretion of the Judicial Conference, allowing refinement with the benefit of experience. For example, there is probably a threshold number of judgeships per district, perhaps around fifteen, above which it does not make sense to assign an efficiency judge because statistically another vacancy will arise—requiring reassignment of the efficiency judgeship—too soon to make a meaningful difference. That would exclude a handful of the largest districts in the country from taking advantage of this program to address structural changes in workload. But it is possible to imagine circumstances in which large courts with urgent and pressing needs—for example, the Texas district courts that have been confronted with skyrocketing caseloads in recent years—would work out with the Judicial Conference how efficiency judgeships might assist them on a truly short-term basis.

Even with some details to be worked out with the benefit of experience, the Judiciary Committees of the House and Senate might reasonably engage in pre-enactment discussions with the Administrative Office of the U.S. Courts to create a shared understanding of how the Judicial Conference would likely proceed. Notwithstanding the limited allocation authority that would be delegated to the Judicial Conference, Congress has full prerogative to write the rules at the outset and to change them if need arises based on experience. In view of the blue slip process, individual senators would be

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[116] *Cf.* JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 32 (Sept. 11, 2012) (discussing Business Rule No. 1, which returns a portion of savings from real estate relinquishment to the relevant circuit judicial council "to encourage court units to relinquish space").

essential to the filling of each efficiency judgeship assignment. The program would be effective only if the three branches of government engaged in continued cooperation in its implementation. From the congressional perspective, this proposal incorporates structural protections giving senators ongoing veto-gates in filling efficiency judgeships, which should address any concerns about Judicial Conference derogation from congressional design.

B. The Policy and Political Advantages of Efficiency Judgeships

The arguments for why the floating judgeships proposed here would improve efficiency and reduce costs are recited above. Critically, this model would create incentives for districts with needs for extra help to "bid" on additional judicial resources by economizing elsewhere, especially in use of built-out courtroom and chambers space.

In 2011, Senator Grassley proposed to move existing judgeships from the lowest-workload districts to the highest-workload districts, which makes sense if efficiency is the only criterion.[117] He has recently reiterated his view that "adding judgeships in busier courts without simultaneously reducing the number in courts where they aren't needed is irresponsible."[118]

But as a practical matter, it is a rare circumstance, indeed, in which a senator would be willing to give up a judgeship in his or her home state—and the opportunity to influence a lifetime appointment it entails—even when doing so is best for the system as a whole.[119] So the likelihood of enacting legislation to repeatedly rebalance judicial resources on the basis of shifting caseloads is low (a theoretical conclusion borne out by recent practice).[120] By contrast, the efficiency-judgeship option removes much of the politically thorny micro-resource allocation decision from Congress and delegates it to the Judicial Conference. This small fraction of overall judicial resources is then nimbly allocated and reallocated based on transparent caseload metrics and cost-reduction proposals, without local political interests intervening.

Alternatively, efficiency judgeships might be thought of as a replacement for temporary judgeships, which have become disfavored in recent years. A temporary judgeship provides for the appointment of a constitutionally tenured Article III judge but requires that the first vacancy in the district

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[117] *See* Amendment HEN11760 to S. 1014, (proposed by Senator Grassley at Senate Judiciary Committee Executive Business Meeting, Oct. 6, 2011) [hereinafter Amendment HEN11760].

[118] Palazzolo, *supra* note 64.

[119] Senator Feinstein noted that Senator Grassley's amendment would make the legislation impossible to pass. *See* Sen. Feinstein, Remarks at Executive Business Meeting of the Senate Judiciary Committee (Oct. 13, 2011). *But see* 2015 REPORT OF THE PROCEEDINGS, *supra* note 38, at 20 (agreeing "to recommend to the President and the Senate not filling the next judgeship vacancy in the District of Wyoming, based on low-weighted caseload in that district").

[120] *See* ADDITIONAL AUTHORIZED DISTRICT JUDGESHIPS SINCE 1960, *supra* note 34.

after the temporary judgeship's expiration will go unfilled.[121] Historically, temporary judgeships have provided needed judicial resources to a district without making the commitment of a permanent judgeship.[122] Given the relative infrequency of comprehensive congressional action on judgeship bills, arrangements to extend or let lapse each temporary judgeship have become perennial challenges for the Judicial Conference and for conscientious legislators.[123] Efficiency judgeships improve on the concept of temporary judgeships by allowing the Judicial Conference to reassign marginal judicial resources after the initial modest augmentation.

In this manner, Congress sets the collective priorities and the proverbial rules of the road, but individual members are insulated from decisions in which one state gains at the expense of another.[124] Fortunately, in the efficiency-judgeship context, the allocation would involve decisions about where to *add* new judicial resources rather than where to remove them, though there is no escaping from some residual possibility of politically perceived winners and losers. And in this context, no new decision-making agency is needed, because the Judicial Conference—an apolitical authority over which the Chief Justice presides by law, 28 U.S.C. § 331—is well-positioned to be the decision-making body. This approach would be consistent with the finest traditions of cooperation between Congress and the Judiciary.[125]

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[121] For a history of authorization and lapse of temporary district judgeships, see ADMIN. OFF. OF THE U.S. COURTS, AUTHORIZED TEMPORARY JUDGESHIPS, http://www.uscourts.gov/file/17841/download [http://perma.cc/NR2G-Q99N].

[122] As of the date of publication of this paper, Congress has authorized ten temporary district judgeships over and above the 667 permanently authorized judgeships. For a full history of temporary district judgeships, see *id.*

[123] As an authorizing committee, the Judiciary Committee will surely agree that enacting temporary judgeships through omnibus appropriations legislation reflects a breakdown in the deliberative process. For example, extensions of three temporary judgeships were enacted in omnibus appropriations legislation signed in December 2009. Consolidated Appropriations Act, Pub. L. No. 111-117, 123 Stat 3034 (2009). In fall 2010, all three crossed their lapse date, and a judgeship was lost when a vacancy occurred in one district (the other two being subsequently extended in other legislation).

[124] Although many models reflect the efficacy of delegating this type of allocation decision, perhaps the best known is the Defense Base Closure and Realignment Commission, by which Congress outsourced resource allocation decisions according to cost-based and operational concerns it developed. *See* Pub L. No. 101-510, §§ 2902–2903, 104 Stat. 1485, 1808–12 (codified at 10 U.S.C. § 2687 (2012)); *see also* Dalton v. Specter, 511 U.S. 462, 464–65 (1994) (describing mechanics of base closure and realignment process); Jon D. Michaels, *The (Willingly) Fettered Executive: Presidential Spinoffs in National Security Domains and Beyond*, 97 VA. L. REV. 801, 893–94 (2011) (describing political economy of base closure and realignment process).

[125] *Cf.* Judge Anthony Scirica, *2014 James Madison Lecture*, YOUTUBE (Oct. 22, 2014), https://www.youtube.com/watch?v=Zp63rxGqiA0 [https://perma.cc/DG2E-37CY]. In his lecture, Judge Scirica reflected that Congress has granted many self-regulatory powers to the Judiciary while retaining an oversight role. He describes this as an "accommodation [that] has preserved accountability in a way that insulates the judges from political pressures, but which also depends on a partnership between the two branches in cultivating judicial self-governance." *Id.*; *see also* Russell R. Wheeler & Robert A. Katzmann, *A Primer on Interbranch*

To respond to Senator Grassley's concerns, a key result of creating efficiency judgeships is that Congress would not need to revisit where and when to add permanent judgeships continually. The model accounts for the service of senior judges actually being rendered at any given time in a more flexible manner than the traditional judgeship authorizations ever could. And, in 2016, this legislation could be enacted at a time when the identity (and therefore party affiliation) of the next president is not yet known, maximizing the sense of non-partisan fair play and the likelihood that members of both parties could pursue this policy in service of good judicial administration.[126]

A final note about efficiency judgeships, however, is to observe their limits. A handful of districts are so structurally short of judicial resources—the Eastern District of California and the District of Delaware among them—that a permanent supplement to the number of dedicated authorized judgeships is essential. That would enhance the effectiveness of those courts and avoid the same highest-need districts perennially absorbing all efficiency judgeships that might be created. But, efficiency judgeships could be an important part of a package of judgeship authorizations that addresses needs for the foreseeable future, without undertaking a massive expansion of the Article III judiciary.

VI. Conclusion

Article III courts and the services they provide cost money. The Constitution gives Congress the power to create and set the jurisdiction of lower federal courts, and attentiveness to costs is a sensible part of Congress's role in the judicial system.

Yet what the microeconomic approach applied to specific districts shows is that withholding Article III judgeships can be penny-wise and pound-foolish, impeding the efficiency and cost-effectiveness of the Judiciary.[127] In districts with extremely high caseloads, Congress must be prepared to spend money on judgeships to create a more efficient Judiciary.

In its role generating cost estimates to support congressional decision-making, CBO best serves the Congress by treating judgeships as capital investments rather than cost drivers. Instead of using national averages and treating the judges as the causal factor in expenses, CBO should engage in a district-specific inquiry with the courts, asking three questions for each new proposed judgeship: What will it cost? What will it save? And what it will produce?

Relations, 95 Geo. L.J. 1155, 1160–61 (2007) (describing how legislators and judges have consulted, within limits, on the administration of justice).

[126] Chairman Grassley has noted that this practice reflects the best traditions of all judgeship bills. *See, e.g.*, Amendment HEN11760, *supra* note 117 (proposing to make changes in judgeships effective on the first full day of the next presidential term of office).

[127] This same logic applies to filling vacant district judgeships as well as creating new ones. Vacancies in very high-caseload districts only exacerbate the efficiency calculations suggested here for evaluating the fiscal consequences of new judgeships.

Congress, too, can innovate by pursuing the goal of judicial efficiency. The efficiency judgeships this paper proposes would improve the operation of trial courts throughout the country, while reflecting the conservative approach to budgets that the Senate Judiciary Committee Chairman has long-championed.

At the outset of the Magna Carta's ninth century, Congress must continue its efforts to ensure that our federal judiciary vindicates the Great Charter's promise that "[t]o no one will we . . . delay right or justice." In a government of limited resources, an efficiency analysis of judgeships can help ensure legislative success in pursuit of that worthy goal.

Appendix: Draft Legislative Language

Title: To provide for the appointment of additional Federal district judges for the judicial districts for which the appointment would make the greatest contribution to judicial efficiency.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Judicial Usage Demands Greater Efficiency Act of 2015".

SEC. 2. ADDITIONAL FEDERAL DISTRICT JUDGES.

Section 133 of title 28, United States Code, is amended by adding at the end the following:

"(c) Additional Federal District Judges.—

"(1) Definition.—In this subsection, the term 'corresponding vacancy' means a vacancy arising on the district court for a judicial district for which an appointment is made under paragraph (3), by and with the advice and consent of the Senate, after the date on which the appointment is made.

"(2) Identification of Districts by Judicial Conference.—

"(A) In General.—Not later than 6 months after the date of enactment of this subsection, the Judicial Conference of the United States shall submit to the President and Congress a ranked list of 12 additional district judge appointments that would make the greatest contribution to judicial efficiency, which may include more than 1 district judge appointment for a single judicial district.

"(B) Updates.—For each corresponding vacancy that is not filled under paragraph (4), the Judicial Conference of the United States shall submit to the President and Congress 1 additional district judge appointment that would make the greatest contribution to judicial efficiency.

"(C) Process.—In identifying district judge appointments under subparagraphs (A) and (B), the Judicial Conference of the United States—

"(i) shall invite proposals for reducing or avoiding expenditures by a district court; and

"(ii) may identify additional district judge appointments only on the basis of cost-management proposals described in clause (i) and the weighted caseloads of the judicial districts.

"(3) APPOINTMENT OF EFFICIENCY JUDGES.—The President shall appoint, by and with the advice and consent of the Senate, 1 additional district judge for each district judge appointment identified by the Judicial Conference of the United States under paragraph (2), which shall be for a judicial district identified by the Judicial Conference of the United States.

"(4) FIRST VACANCIES NOT FILLED.—For each appointment made under paragraph (3) for a judicial district, an equal number of corresponding vacancies for the judicial district next occurring shall not be filled."