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Statement for the Record

United States Senate
Committee on the Judiciary

“The Judicial Conference’s Recommendation for More Judgeships”

June 30, 2020

Chairman Graham, Ranking Member Feinstein, and Members of the Committee:

Thank you for holding this important hearing on the Judicial Conference’s recommendation for more judgeships.

My name is Anthony Marcum, and I am a fellow with the Governance Project at the R Street Institute. The R Street Institute is a nonprofit, nonpartisan public policy research organization whose mission is to engage in substantive policy research and legislative outreach. Much of my current work focuses on our separation-of-powers system, including policy matters that affect the federal judiciary. My background includes time as both an attorney and federal law clerk, which has shaped my research and interest in this important topic.

To begin, it is undeniable that more federal judgeships are needed. For years—and across presidential administrations—the nonpartisan Judicial Conference of the United States, the national policymaking body for the federal courts, has pressed Congress to authorize additional judgeships.¹ And throughout the years, members on both sides of this Committee have introduced or supported legislation that would create additional judgeships.²

¹ See e.g., Admin. Office of the U.S. Courts, Judicial Conference Seeks New Judgeships To Handle Growing Workloads At All Levels, <https://www.uscourts.gov/news/1997/03/11/judicial-conference-seeks-new-judgeships-handle-growing-workloads-all-levels>; Admin Office of the U.S. Court, Caseload Increases Stress Need for New Federal Judgeships, <https://www.uscourts.gov/news/2013/09/10/caseload-increases-stress-need-new-federal-judgeships>; Admin Office of the U.S. Court, Courts Need New Judgeships, Judicial Conference tells Congress, <https://www.uscourts.gov/news/2018/06/21/courts-need-new-judgeships-judicial-conference-tells-congress>.

² See, e.g., To create additional Federal court judgeships, S. 878, 108th Cong. § 1 (2003); Federal Judgeship Act of 2008, S. 2774, 110th Cong. §3(a) (2008); Federal Judgeship Act of 2009, S. 1653, 111th Cong. § 3(a) (2009); Federal Judgeship Act of 2013, S. 1385, 113th, Cong. § 3(a) (2013); Judicial Efficiency Improvement Act, S. 3259, 115th Cong. § 14(a) (2018).

The facts support these continued calls. According to the Congressional Research Service, “Since 1977 Congress has enacted three omnibus judgeship bills, with the most recent omnibus bill enacted in 1990.”³ In the subsequent thirty years, the U.S. population and civil filings in federal courts have soared, and case delays have worsened. Yet, for three decades, the number of federal judgeships has stayed nearly the same.

This creates real-world harm. As I have argued before, “Mounting caseloads create significant case delays and unneeded legal uncertainties, which fuel greater litigation costs and impose significant hardship on individuals and businesses across the country.”⁴

This problem is not solved simply by filling every available judicial vacancy. District courts in Delaware, Florida, Indiana, Louisiana, and Texas, for example, have no vacancies, but nevertheless have weighted filings well over the recommended limit for each district judge.⁵ Similarly, of the twenty-seven district courts and one circuit court for which the Judicial Conference has requested additional judgeships, a significant number similarly have no vacancies.⁶

Fortunately, Congress can resolve this judicial capacity crisis. And judging by its past actions, a majority of lawmakers agree that something must be done. Therefore, the only questions that remain are *when* and *how* Congress will intervene. Regrettably, the political reality is that bipartisan legislation is difficult to pass. And effective legislation is all the more difficult when it comes to judgeships, as one political party has little incentive to award a president of another party the chance to nominate additional federal judges.

There are a number of proposals to untie this political knot. Most, however, require overlong timelines. The reasoning goes that since no one can expect who the next president will be, it is only fair to stagger judgeships for a number of years over the next one or two administrations. Although well-intentioned, the capacity crisis is happening now, and thirty years for sufficient judgeships is long enough.

A faster and more effective solution would be to temporarily expand the federal magistrate judge system until Congress can deliver long-term judgeship reform. This proposal is explained in

³ Barry J. McMillion, Cong. Research Serv., Recent Recommendations by the Judicial Conference for New U.S. Circuit and District Court Judgeships: Overview and Analysis 7 (2019), <https://fas.org/sgp/crs/misc/R45899.pdf>.

⁴ Anthony Marcum, The federal courts need more judges – magistrates [sic] can help, Washington Examiner, <https://www.washingtonexaminer.com/opinion/the-federal-courts-need-more-judges-magistrates-can-help>.

⁵ See Admin. Office of U.S. Courts, Comparison of Districts — 12-Month Period Ending December 31, 2019, U.S. Cts. (2019),

https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distcomparison1231.2019.pdf; Examining the Need for New Federal Judges: Hearing Before the H. Comm. on the Judiciary, 115th Cong. 5 (2018) (written testimony of Hon. Roslynn Mauskopf et al.) <https://docs.house.gov/meetings/JU/JU03/20180621/108453/HHRG-115-JU03-Wstate-MausopkR-20180621.pdf>.

⁶ Admin. Office of the U.S. Courts, Additional Judgeships or Conversion of Existing Judgeships Recommended by the Judicial Conference,

https://www.uscourts.gov/sites/default/files/2019_judicial_conference_judgeship_recommendations_0.pdf.

detail in an article I recently wrote for the *Cincinnati Law Review*.⁷ That piece is attached to this letter.⁸

In short, the federal magistrate judge program was created by Congress over fifty years ago, and employs Article I judicial officers to work in tandem with Article III judges to manage cases and improve the workflow of federal district courts. It is a wide-ranging and invaluable system for federal district courts, and Supreme Court justices, fellow judges, and many court scholars have all recognized its contribution.

The advantages of growing the magistrate judge system are numerous. Most relevant to lawmakers, because the magistrate judge system is an Article I creation, it sidesteps the oft-contentious Article III nomination and confirmation process. In lieu of Senate confirmation, these judges are vetted by a local merit selection panel and finally chosen by the district judges they will serve with. And unlike Article III judges who serve “during good Behaviour,” magistrate judges serve renewable eight-year terms.

Since their creation, federal magistrate judges have shown their worth. Information provided by the U.S. Courts during the 2019 fiscal year details the hundreds of thousands of civil and criminal matters magistrate judges resolve annually.⁹ Magistrate judges assist district courts in numerous ways—by alleviating caseloads, fast-tracking civil trials, and decreasing the cost and stress of perpetually delayed litigation, to name a but a few. In consent cases, magistrate judges can handle entire civil cases. In criminal cases, magistrate judges often handle most pre-trial matters and entire misdemeanor cases. In other instances, magistrate judges can shorten litigation times by being active in case management, resolving non-dispositive motions, and even helping parties settle their disputes before trial.

But adding more magistrate judges is not simply a numbers game. Due to geography, population, economy, resources, and many other factors, every district court is unique in its challenges and emphases. The distinct statutory role of magistrate judges allows district courts the needed flexibility to task magistrate judges with broad, narrow, or evolving responsibilities.

Most critiques of expanding the federal magistrate judge system would probably focus on magistrate judges’ powers and qualifications. The Judicial Conference itself has raised one likely argument. In June 2018, three district court judges and members of the Judicial Conference’s Judicial Resources Committee testified before a House Judiciary Subcommittee on the need for new federal judgeships. Their testimony provided reasons why additional judgeships are necessary but argued that “[t]he problem cannot be addressed just by adding magistrate judges, or hoping senior and visiting judges will lessen the workload and reduce the need for more

⁷ Anthony Marcum, Why Federal Magistrate Judges Can Improve Judicial Capacity, 88 U. Cin. L. Rev. 1009 (2019), <https://scholarship.law.uc.edu/uclr/vol88/iss4/2>.

⁸ Much of my subsequent testimony borrows language from this article.

⁹ See Admin Office of the U.S. Courts, Matters Disposed of by U.S. Magistrate Judges For the 10-Year Period Ended September 30, 2019, https://www.uscourts.gov/sites/default/files/data_tables/jb_s17_0930.2019.pdf.

judgeships.”¹⁰ Magistrate judges are insufficient, they reasoned, because their “jurisdiction is limited.”¹¹

Yet the advantage of the magistrate judge system is not its jurisdiction, but its flexibility. Although magistrate judges cannot oversee criminal felony trials by consent or referral, they may be involved in nearly every other aspect of district court litigation. And criminal trials in federal court are rare. In fact, “Nearly 80,000 people were defendants in federal criminal cases in fiscal 2018, but just 2% of them went to trial.”¹² And in the case of civil trials, when faced with the option of months—if not years—of delay, there is little doubt that litigants would consent and have their case heard much earlier before a well-qualified magistrate judge. As such, a magistrate judge’s jurisdictional limitations are not as stark—or as problematic—as the Judicial Conference may suggest.

Lastly, there is no serious debate on the high qualifications of magistrate judges. The selection process ensures that nominees are selected based on merit, and district judges have an overwhelming incentive to pick candidates who can do the job quickly and competently. It’s notable that a number of magistrate judges ultimately become district judges. According to a 2017 Congressional Research Service report, the third most common professional experience immediately prior to becoming a district judge was serving as a magistrate judge.¹³ President Donald Trump’s judicial nominees have followed this trend, as over twenty of them served first as federal magistrate judges.¹⁴

The current dearth of district judgeships has placed real-world burdens on the courts and those seeking justice through them. An expansion of the magistrate judge system would serve as an apolitical and effective short-term solution to this very real problem.

I thank the committee for its focus on this important issue. If I can be of any assistance to members of the subcommittee, please feel free to contact me or my colleagues at the R Street Institute.

Respectfully submitted,

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¹⁰ Examining the Need for New Federal Judges: Hearing Before the H. Comm. on the Judiciary, 115th Cong. 8 (2018), https://www.uscourts.gov/sites/default/files/testimony_for_congressional_hearing_-_examining_the_need_for_new_federal_judges_0.pdf.

¹¹ Id.

¹² John Gramlich, Only 2% of federal criminal defendants go to trial, and most who do are found guilty, Pew Res. Ctr. (June 11, 2019), <https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/>.

¹³ Barry J. McMillion, Cong. Research Serv., U.S. Circuit and District Court Judges; Profiles of Select Characteristics 25–27 (2017), <https://fas.org/sgp/crs/misc/R43426.pdf>.

¹⁴ Jimmy Hoover & Andrew Kragie, Law360’s Guide To Trump’s Judicial Picks, Law360, <https://www.law360.com/articles/963060/law360-s-guide-to-trump-s-judicial-picks>.

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WHY FEDERAL MAGISTRATE JUDGES CAN IMPROVE JUDICIAL CAPACITY

*Anthony Marcum**

ABSTRACT

Judicial confirmations are often the subject of political debate. Recently, much of the discussion has focused on the Trump administration's and Republican senators' success in nominating and confirming federal judges. Irrespective of this success, consistently growing caseloads continue to overburden many federal district courts, leading to unnecessary cost and delay. This essay surveys the current judicial capacity crisis in many district courts and Congress' struggles to resolve it. It then turns to short-term solutions that courts have used to alleviate their expanding burdens and highlights the federal courts' most successful short-term solution: the federal magistrate judge system. This essay then introduces the origins and modern structure of the federal magistrate judge system and argues that, until Congress is able to pass substantive judgeship legislation, an ambitious expansion of this program would best serve struggling district courts.

I. INTRODUCTION

Most commentary about the federal court system focuses on the Supreme Court. This is for good reason. The Supreme Court is the highest court in the nation, and its decisions have the potential to affect nearly every corner of society. But for the vast majority of Americans, their legal disputes will never pass through the large bronze doors on 1 First Street NE. For them, their federal cases will begin—and end—in one of the 94 U.S. district courts around the country.

Many of these district courts are suffering from a capacity crisis. Due to a combination of growing caseloads and insufficient judgeships, case delays are on the rise and civil litigants are losing their day in court. This is not an unfamiliar problem for lawmakers. Thirty years ago, Congress, deploring case delays and overburdened courts, increased the number of available district court judgeships. In the following years, as the national

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population and case filings have increased, case delays have also soared, frustrating both litigants and judges. Much of the blame can be attributed to Congress. After all, legislation is difficult to pass on a bipartisan basis, and the problem becomes even more complex when one political party has little incentive to award a president of another party the chance to nominate additional federal judges.

In the meantime, district courts lacking sufficient judgeships have employed a variety of creative methods to manage the hundreds of thousands of cases filed each year. The most effective of these has been the expansion of the federal magistrate judge system. This system, created by Congress over fifty years ago, employs Article I judicial officers to work in tandem with Article III judges to manage cases and improve the workflow in the federal district courts.

As both judges and scholars recognize, this little-discussed system has become “nothing less than indispensable” to the federal judiciary.¹ Given this success, until federal lawmakers are able to produce significant judgeship legislation, Congress and the judiciary should work together to expand the magistrate judge system in order to temporarily alleviate the current judicial capacity crisis.

Part I of this essay highlights the ongoing judicial capacity crisis in U.S. district courts. It begins with an overview of the Judicial Improvement Act of 1990, a substantive congressional reform that still resonates today for both its institutional changes and its addition of Article III judgeships. Fast-forwarding to present day, Part I proceeds to explain that the number of district court judgeships has not kept pace with growing populations and civil case loads. And although Congress has recognized the strain this puts on the capacity of district courts, it has failed to reach the political consensus necessary to pass substantive judgeship legislation.

Part II discusses the federal magistrate judge system. It highlights its “commissioner” origins and its evolution, culminating with the 1968 Federal Magistrate’s Act. This Act established the modern magistrate judge system, an Article I judicial system working alongside Article III judges in district courts. As case burdens have grown, magistrate judgeships have increased by the hundreds, and their responsibilities have evolved to handle nearly every aspect of district court litigation.

Part III argues that while Congress fiddles with judgeship legislation, it also has the opportunity to substantially increase the magistrate judge system, allowing magistrate judges to take on much of the burden in district court civil litigation until Congress is able to pass substantive

1. *Peretz v. United States*, 501 U.S. 923, 928 (1991) (quoting *Gov’t of Virgin Islands v. Williams*, 892 F.2d 305, 308 (3d Cir. 1989)).

judgeship legislation. Part III concludes by introducing and responding to potential critiques against such an expansion.

II. THE JUDICIAL CAPACITY CRISIS

A. More District Court Judgeships Are Needed

The Judicial Improvements Act of 1990 set the groundwork for how the federal courts would operate for the next thirty years.² Title I—called the Civil Justice Reform Act of 1990 (CJRA)—focused on ways to lessen costs and delays in civil litigation.³ The CJRA required federal district courts to create “reduction plans” that would identify ways to resolve civil cases more quickly. For added accountability, the CJRA also required the Administrative Office of the United States Courts (AO) to prepare a semiannual report that identified any motions pending for more than six months and cases pending for more than three years.⁴ To this day, the AO continues to publish this semiannual report, which is now available online.⁵

Titles III and IV of the Judicial Improvements Act offered other changes, including adjusting the retirement system for certain judges and modifying the rules surrounding the discipline and possible removal of judges.⁶

Title II was the Act’s most influential reform. Called the Federal Judgeship Act of 1990, this title created sixty-one new judgeships in district courts across the country.⁷ Although additional judgeships were set in every corner of the nation, particular emphasis was placed on “district courts in border and coastal States.”⁸ The reasoning was twofold: (1) case increases were most prevalent in these districts due to growing federal drug prosecutions, and (2) mandates such as the Speedy Trial Act, which set time limits to complete federal prosecutions, limited time for

2. See Pub. L. No. 101-650, 104 Stat. 5089.

3. 104 Stat. at 5090; 28 U.S.C. § 471.

4. 104 Stat. at 5093–94; 28 U.S.C. § 476.

5. See *Civil Justice Reform Act Report*, U.S. COURTS, <https://www.uscourts.gov/statistics-reports/analysis-reports/civil-justice-reform-act-report> (last visited May 12, 2020).

6. 104 Stat. at 5104–27.

7. 104 Stat. at 5098–5104. Specifically, the Act created sixty-one permanent and eight temporary-to-permanent judgeships (totaling sixty-nine), thirteen temporary judgeships, and four roving-to-permanent judgeships. See also ADMIN. OFFICE OF THE U.S. COURTS, ADDITIONAL AUTHORIZED JUDGESHIPS, <https://www.uscourts.gov/sites/default/files/districtauth.pdf> (last visited May 12, 2019).

8. *Federal Judgeship Act of 1990: Hearing on H.R. 5316 Before the Subcomm. on Econ. and Commercial Law of H. Comm. on the Judiciary*, 101st Cong. 4 (1990) (statement of Rep. Jack Brooks, Chairman, H. Comm. on the Judiciary).

judges to consider concurrent civil cases.⁹

These reforms were much needed. As summarized by one district judge, “[T]he burdens associated with the criminal caseload in some courts [were] rapidly reaching the point where judges [could] no longer devote any of their time to the civil docket.”¹⁰ In turn, these ongoing delays increased the costs of civil litigation. When introducing the CJRA, then-Senator Joe Biden observed that “when cases cost so much and take so long that some people can’t use the courts at all and those who can use them find their pocketbooks depleted at record pace, we have a crisis of major dimensions.”¹¹

Three decades later, the federal courts again face a crisis of major dimensions. Since 1990, the United States population has soared. The number of civil filings has also exploded. Case delays have again worsened, especially in many of the most populated states and districts. Yet the number of district court judgeships has remained largely stagnant for thirty years.

The numbers are revealing. In 1990, the United States population was just shy of 249 million.¹² The population in 2020 is estimated to be just over 329 million, representing an increase of over 30%.¹³ Civil case filings have followed a similar trajectory. In 1990, nearly 218,000 civil cases were filed in federal court.¹⁴ Last year, almost 298,000 civil cases were filed—an increase of approximately 36%.¹⁵

As more cases are filed, more cases remain pending. In 1990, over 244,000 cases were pending in district court.¹⁶ By 2019, the number had risen to over 357,000—over a 46% increase.¹⁷ These escalating numbers of unresolved cases have led to growing case delays. Of the approximately 357,000 cases pending through 2019, over 56,000—or 15%—have been pending for three years or more.¹⁸ In 1990, only 10%

9. *Id.* at 4-5.

10. *Id.* at 18 (statement of Hon. Walter T. McGovern, Judge, U.S. Dist. Court, W. Dist. Wash.).

11. *The Civil Justice Reform Act of 1990 and The Judicial Improvements Act of 1990: Hearing on S. 2027 and S. 2648 Before the S. Comm. on the Judiciary*, 101st Cong. 6-7 (1990) (statement of Sen. Joseph R. Biden, Jr., Chairman, S. Comm. on the Judiciary).

12. *1990 Census*, U.S. CENSUS BUREAU, <https://www.census.gov/main/www/cen1990.html> (last visited May 12, 2020).

13. *U.S. and World Population Clock*, U.S. CENSUS BUREAU, <https://www.census.gov/popclock/> (last visited May 12, 2020).

14. ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS, TABLE 4.1 (2019), https://www.uscourts.gov/sites/default/files/data_tables/jff_4.1_0930.2019.pdf.

15. *Id.*

16. *Id.*

17. *Id.*

18. ADMIN. OFFICE OF THE U.S. COURTS., ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS, TABLE 4.11 (2019),

of cases had been pending that long.¹⁹

Yet in this nearly thirty-year period, the number of new district court judgeships has only marginally risen, especially relative to actual need and historical practice. Since the 1990 Judicial Improvements Act, Congress has created only thirty-one district court judgeships.²⁰ To compare, in the thirty years before to the 1990 legislation, Congress created over 270 judgeships.²¹ In the ten years before that, Congress had created another fifty-two judgeships.²²

Certain district courts have been disproportionately harmed by Congress' failure to add new judgeships. The district courts within the Ninth Circuit Court of Appeals are a notable example. The Ninth Circuit covers the western portion of the United States, encompassing nine states, two territories and fifteen federal district courts.²³ It features some of the most sparsely populated states in the nation (e.g., Alaska and Montana) as well as the most populated state in the nation (California). Since 1990, the population in California has grown by roughly 10 million.²⁴ During the same time, the population of Alaska has grown by just over 187,000, and that of Montana has grown by just over 263,000.²⁵ Alaska and Montana each have one district court, which covers each state, respectfully.²⁶ California has four district courts covering different regions of the state.²⁷

https://www.uscourts.gov/sites/default/files/data_tables/jff_4.11_0930.2019.pdf (last visited May 12, 2019).

19. *Id.*

20. ADMIN. OFFICE OF THE U.S. COURTS, AUTHORIZED JUDGESHIPS (2019), <https://www.uscourts.gov/sites/default/files/allauth.pdf>.

21. ADMIN. OFFICE OF THE U.S. COURTS, ADDITIONAL AUTHORIZED JUDGESHIPS (2019), <https://www.uscourts.gov/sites/default/files/districtauth.pdf>.

22. CARL BAAR, FED. JUDICIAL CTR., JUDGESHIP CREATION IN THE FEDERAL COURTS: OPTIONS FOR REFORM 29 (1981).

23. *What is the Ninth Circuit?*, U.S. CTS. FOR THE NINTH CIR., https://www.ca9.uscourts.gov/judicial_council/what_is_the_ninth_circuit.php (last visited May 12, 20).

24. *Compare Intercensal Estimates of the Total Resident Population of States: 1980 to 1990*, U.S. CENSUS BUREAU (Sept. 9, 2016), <https://www2.census.gov/programs-surveys/popest/tables/1980-1990/state/asrh/st8090ts.txt> (a 1990 population estimate of about 30 million), with *Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2018*, U.S. CENSUS BUREAU 4 (Mar. 2, 2020), <https://www2.census.gov/programs-surveys/popest/tables/2010-2018/state/totals/PEPANNRES.pdf> (a 2018 population estimate of about 40 million).

25. *Compare* U.S. CENSUS BUREAU, 1990 CENSUS OF POPULATION GENERAL POPULATION CHARACTERISTICS, ALASKA 1 (1990) (1990 state population of 550,043), and U.S. CENSUS BUREAU, 1990 CENSUS OF POPULATION GENERAL POPULATION CHARACTERISTICS, MONTANA 1 (1990 state population of 799,065), with *Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2018*, U.S. CENSUS BUREAU 4 (Mar. 2, 2020), <https://www2.census.gov/programs-surveys/popest/tables/2010-2018/state/totals/PEPANNRES.pdf> (a 2018 population estimate of 737,438 for Alaska and 1,062,305 for Montana) (last visited May 12, 2020).

26. U.S. CTS. FOR THE NINTH CIR., *supra* note 23.

27. *Id.*

Given their marginal population increases, it is unsurprising to see that neither Alaska nor Montana have added a district judgeship since 1984.²⁸ The opposite, however, would be expected of California. Since 1990, Congress has only added permanent judgeships in one of the four California district courts. In 2002, Congress added five judgeships in the Southern District of California, which covers only San Diego and Imperial counties.²⁹ And despite California's statewide population boom, neither the Northern District of California (based in San Francisco) nor the Central District of California (based in Los Angeles) have seen new permanent judgeships since 1990.³⁰ The Eastern District of California (covering Sacramento, thirty-four counties and eight million residents) has had no new judgeships since 1978.³¹

In reviewing caseload burdens on district courts, the Judicial Conference of the United States—the national policymaking body for the federal courts—applies a benchmark of 430 weighted filings per district judge.³² Today, many courts exceed this number, but the Eastern District of California is especially aberrant. By the end of 2019, the Eastern District of California faced 745 weighted filings *per judgeship*, 73% more than the recommended amount.³³ Because judges are simply not able to keep up with their caseloads, 13% of civil cases in the district are over three years old, and the median time from filing a civil case to trial is nearly two and a half years.³⁴

But the Eastern District of California is not alone. Other district courts face similar, or even more burdensome, caseloads. District courts in

28. Admin. Office of the U.S. Courts, *Chronological History of Authorized Judgeships - District Courts*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/authorized-judgeships/chronological-history-authorized-judgeships-district-courts> (last visited May 12, 2020).

29. *Id.*

30. *Id.*

31. *Id.*; Hon. Lawrence J. O'Neill et al., *An Important Letter to Congress from the Judges of the Eastern District of California Regarding Our Caseload Crisis*, 1 (June 19, 2018), <http://www.caed.uscourts.gov/caednew/assets/File/Judgeship%20Letter%20June%202018.pdf>.

32. *Examining the Need for New Federal Judges: Hearing Before the H. Comm. on the Judiciary*, 115th Cong. 5 (2018) (written testimony of Hon. Roslynn Mauskopf et al.) [hereinafter Mauskopf et al.]. To note, weighted filings do not equate to the number of actual cases pending per district judge. Instead, "Weighted filings statistics account for the different amounts of time district judges require to resolve various types of civil and criminal actions." For instance, "Average civil cases or criminal defendants each receive a weight of approximately 1.0; for more time-consuming cases, higher weights are assessed (e.g., a death-penalty habeas corpus case is assigned a weight of 12.89); and cases demanding relatively little time from judges receive lower weights (e.g., an overpayment and recovery cost case involving a defaulted student loan is assigned a weight of 0.10)." *Explanation of Selected Terms*, ADMIN. OFF. OF THE U.S. CTS., https://www.uscourts.gov/sites/default/files/explanation_of_selected_terms_december_2019_0.pdf (last visited May 12, 2020).

33. Admin. Office of U.S. Courts, *Comparison of Districts Within the Ninth Circuit — 12-Month Period Ending December 31, 2019*, U.S. CTS. 9 (2019), https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distcomparison1231.2019.pdf

34. *Id.*

Delaware, Indiana, Florida, and New Jersey see over one thousand weighted filings per judgeship.³⁵ And district courts in Arizona, Louisiana, and Ohio see over seven hundred weighted filings per judgeship.³⁶

Even more troubling is that these numbers assume that these districts have no judicial vacancies.³⁷ With districts that do, the case burdens are potentially even higher. The number of vacancies has sharply increased in recent years. In 2014, there were 50 district court vacancies.³⁸ By 2017, that number had risen to 120.³⁹ Today, there still remain over seventy district court vacancies.⁴⁰ Of these vacancies, there are only roughly forty nominees currently pending to fill these positions.⁴¹ What is more, several district judges are scheduled to take senior status this year or next, creating additional vacancies in the near future.⁴² Because of these growing caseloads and longstanding vacancies, the Judicial Conference has identified forty-six “judicial emergencies” across the country.⁴³ These determinations identify the most crushing vacancy numbers.⁴⁴

The old saying that “justice delayed is justice denied” has never been more relevant. Indeed, longstanding vacancies and the sluggish growth in new judgeships creates real-world harm. In civil litigation, each party typically pays its own litigation costs. Case delays add to these costs, disproportionately hurting litigants with fewer resources. Parties with more resources may even use this disadvantage as a litigation strategy.⁴⁵

35. *Id.* at 3, 7, 11.

36. *Id.* at 6, 9, 11.

37. Mauskopf et al., *supra* note 32, at 4 (“The caseload standards used by the Judicial Conference are expressed as filings per authorized Article III judgeship, which assumes that all vacancies are filled.”).

38. Admin. Office of the U.S. Courts, *Status of Article III Judgeships - Judicial Business 2018*, U.S. CTS. <https://www.uscourts.gov/statistics-reports/status-article-iii-judgeships-judicial-business-2018> (last visited May 12, 2020).

39. *Id.*

40. Admin. Office of the U.S. Courts, *Judicial Vacancies*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies> (last visited May 12, 2020).

41. *Id.*

42. Admin. Office of the U.S. Courts, *Future Judicial Vacancies*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/future-judicial-vacancies> (last visited May 12, 2020).

43. Admin. Office of the U.S. Courts, *Judicial Emergencies*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/judicial-emergencies> (last visited May 12, 2020).

44. . Specifically, a “judicial emergency” is defined as “any vacancy where weighted filings are in excess of 600 per judgeship; OR any vacancy in existence more than 18 months where weighted filings are between 430 to 600 per judgeship; OR any vacancy where weighted filings exceed 800 per active judge; OR any court with more than one authorized judgeship and only one active judge.” Admin. Office of the U.S. Courts, *Judicial Emergency Definition*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/judicial-emergencies/judicial-emergency-definition> (last visited May 12, 2020).

45. *See, e.g.*, EVAN A. BLOCH & JEREMY A. MERCER, *SETTLEMENT TACTICS IN US LITIGATION* 1

A 2014 report by the Brennan Center identified other concerns. For starters, judicial vacancies mean more than just absent judges—they also mean less administrative support in the courthouse.⁴⁶ Less administrative support and growing caseloads add even more pressure on sitting judges to resolve cases even faster, which “raise[s] troubling concerns about the quality of justice dispensed.”⁴⁷ Furthermore, there are growing worries of “judicial burn-out,” pushing judges inclined to stay on the bench to retire instead.⁴⁸

B. Congressional Reluctance

Judges have not been silent about their concern and have called for congressional action. For instance, in 2018, nine district judges from the Eastern District of California wrote an open letter to Congress “to provide notice of a current crisis” that will lead to “inaccessibility to the Federal Courts by the more than [eight] million people who reside within the Eastern District.”⁴⁹ Prior to his retirement, one of the signers, District Judge Lawrence J. O’Neill, often included a “preliminary statement” in his written opinions:

Judges in the Eastern District of California carry the heaviest caseloads in the nation, and this Court is unable to devote inordinate time and resources to individual cases and matters. Given the shortage of district judges and staff, this Court addresses only the arguments, evidence, and matters necessary to reach the decision in this order. The parties and counsel are encouraged to contact the offices of United States Senators [Dianne] Feinstein and [Kamala] Harris to address this Court’s inability to accommodate the parties and this action.⁵⁰

Of course, one immediate fix would be for the president to nominate more judges for current judicial vacancies and for the Senate to quickly confirm them. But there are myriad political and pragmatic issues to consider. For one, compared to circuit court or Supreme Court nominees, senators have significant influence on district court nominees in their

(2010), http://www.klgates.com/files/tempFiles/c81c9da3-1d96-411e-86db-ccaa3dadaaf9/Bloch_Mercer_SettlementTactics.pdf (Suggesting that “[i]f . . . you represent a defendant with substantial resources and the plaintiff has limited resources, you may want to litigate and not settle.”).

46. ALICIA BANNON, BRENNAN CTR. FOR JUSTICE, *THE IMPACT OF JUDICIAL VACANCIES ON FEDERAL TRIAL COURTS* 8–9 (2014), <https://www.brennancenter.org/sites/default/files/publications/Impact%20of%20Judicial%20Vacancies%20072114.pdf>.

47. *Id.* at 1.

48. *Id.*

49. O’Neill et al., *supra* note 31, at 1.

50. *See, e.g.*, *Thomas v. Select Portfolio Servicing, Inc.*, 1:18-cv-00211-LJO-BAM, 2018 WL 2356758, at *1 (E.D. Cal. May 24, 2018).

state.⁵¹ Therefore, the selection process often includes negotiations between Senate offices and the White House, which takes additional time. If this process breaks down, a home state senator can block a nomination in the Senate by withholding a blue slip.⁵² As a result, a home state senator enjoys numerous opportunities to recommend, stall, or even block a district court nomination.

Nevertheless, even if all seats were expeditiously filled, it would not be enough to cure the current capacity crisis in many district courts. The overwhelming caseload statistics highlighted previously assume that all vacancies are filled.

The solution—advanced by judges, the Judicial Conference, and many members of Congress—is for Congress to add more district court judgeships via legislation. Before his retirement, Judge O’Neill, for instance, publically pleaded for more judges for his California district court.⁵³ In 2018 testimony before the House Judiciary Committee, members of the Judicial Conference recommended that Congress create dozens of new judgeships across the country.⁵⁴ The Judicial Conference has since revised its request, asking for sixty-five new permanent judgeships in the most precarious districts.⁵⁵

For years, though, judgeship legislation has faltered in Congress. Several bills that would have created dozens of new judgeships have failed to pass both chambers. For instance, a 1999 bill introduced by Senator Pat Leahy would have added forty-three judges.⁵⁶ A 2000 bill introduced by former Senator Orrin Hatch would have added thirty-seven judgeships.⁵⁷ Bills introduced in 2003, 2005, 2007, 2008, 2009, 2011, and 2013 that would have added dozens of new judgeships also failed.⁵⁸

51. DENIS STEVEN RUTKUS, CONG. RESEARCH SERV., RL34405, ROLE OF HOME STATE SENATORS IN THE SELECTION OF LOWER FEDERAL COURT JUDGES 2 (2013), <https://fas.org/sgp/crs/misc/RL34405.pdf>.

52. Under the current policy of the chairman of the Senate Judiciary Committee, although the blue slip does not apply to circuit judge nominees, it still applies to district court nominees. Anthony Marcum, *Understanding the Blue Slip Debate*, R ST. POLICY SHORT NO. 68 (Mar. 2019), <https://www.rstreet.org/wp-content/uploads/2019/03/Final-Short-No.-68.pdf>.

53. McClatchy California Opinion Editors, Opinion, *Memo to President Trump and Capitol Hill Leaders: The Central Valley Needs New Judges*, FRESNO BEE (Mar. 1, 2019, 12:04 PM), <https://www.fresnobee.com/opinion/editorials/article226944179.html>.

54. Mauskopf et al., *supra* note 32, at 2.

55. Admin. Office of the U.S. Courts, *Additional Judgeships or Conversion of Existing Judgeships Recommended by the Judicial Conference, 2019*, U.S. CTS., https://www.uscourts.gov/sites/default/files/2019_judicial_conference_judgeship_recommendations_0.pdf (last visited May 12, 2020).

56. Federal Judgeship Act of 1999, S. 1145, 106th Cong. § 3 (2000).

57. Federal Judgeship Act of 2000, S. 3071, 106th Cong. § 3 (2000).

58. *See, e.g.*, To create additional Federal court judgeships, S. 878, 108th Cong. § 1 (2003); Deficit Reduction Act of 2005, H.R. 4241, 109th Cong. § 5203(a) (2005); Federal Judgeship and Administrative Efficiency Act of 2005, H.R. 4093, 109th Cong. § 103(a) (2005); Immigration Enforcement and Border

In 2018, two bills were introduced, each proposing sixty new district court judgeships.⁵⁹ Both bills, however, failed to advance past their respective committees.

Many of these pitfalls can be attributed to party politics. One of the two bills from the last Congress, for instance, would have divided the Ninth Circuit into two circuits, a move long supported by Republicans and opposed by Democrats.⁶⁰ Such “poison pills” often stall otherwise bipartisan judgeship legislation. There are also other realities to consider. New judgeships give a president the chance to nominate more judges. Naturally, politicians from one party are reluctant to give a president from the opposing party the opportunity to name more federal judges. This amounts to a major obstacle to passing judgeship legislation.

In the meantime, federal courts have employed creative stopgaps. Some have increased their focus on mediations and informal settlement conferences to resolve more cases before trial or lengthy motion practice.⁶¹ Many have relied on senior judges and visiting judges. In 2019, senior judges—federal judges that are eligible to retire but continue working, typically but not always at a reduced level—adjudicated 22% of all district court cases and 28% of all trials.⁶² Further, in 2019, visiting judges—federal judges from other courts authorized to take cases in other jurisdictions—were used to participate in thousands of appeals and criminal matters.⁶³ But these stopgaps only go so far. Indeed, the Judicial Conference considers all of these factors before requesting additional judgeships, and even with these considerations, it still advocates adding dozens of district court judgeships.

This essay highlights the most effective stopgap so far: the federal magistrate judge system. An expansion of this system in district courts would be an effective way to temporarily solve the judiciary’s capacity crises until longer-term judgeship legislation is in place.

Security Act of 2007, S. 2294, 110th Cong. § 201(d)(1) (2007); Federal Judgeship and Administrative Efficiency Act of 2007, H.R. 3520, 110th Cong. § 103(a) (2007); Federal Judgeship Act of 2008, S. 2774, 110th Cong. § 3(a) (2008); Federal Judgeship Act of 2009, H.R. 3662, 111th Cong. § 3(a) (2009); Federal Judgeship Act of 2009, S. 1653, 111th Cong. § 3(a) (2009); Southwest Border Judgeship Expansion Act of 2011, H.R. 2365, 112th Cong. § 2(a) (2011); A bill to provide for additional Federal district judgeships, S. 1032, 112th Cong. § 1(a) (2011); Federal Judgeship Act of 2013, S. 1385, 113th, Cong. § 3(a) (2013).

59. Judicial Efficiency Improvement Act, S. 3259, 115th Cong. § 14(a) (2018); Judiciary ROOM Act of 2018, H.R. 6755, 115th Cong. § 101(a).

60. Judicial Efficiency Improvement Act, S. 3259, 115th Cong. § 2 (2018).

61. See, e.g., Admin. Office of the U.S. Courts, *Court Declares a Settlement Week to Clear Old Caseload*, U.S. CTS., <https://www.uscourts.gov/news/2018/01/12/court-declares-settlement-week-clear-old-caseload> (last visited May 12, 2020).

62. Admin. Office of U.S. Courts, *The Federal Bench – Annual Report 2018*, U.S. CTS., <https://www.uscourts.gov/statistics-reports/federal-bench-annual-report-2018> (last visited May 12, 2020).

63. *Id.*

III. THE FEDERAL MAGISTRATE JUDGE SYSTEM

A. *Origins of the Federal Magistrate Judge System*

Ever since Congress has created judgeships, it has also empowered judicial officers to support them. Soon after the first Judiciary Act of 1789—which established a six-member Supreme Court as well as lower circuit and district courts—“Congress gave circuit courts authority to appoint ‘discreet persons learned in the law’ to accept bail.”⁶⁴ Over the next few decades, “Congress repeatedly expanded the power of these appointees . . . granting them powers including the ability to take affidavits and bail in civil cases, to take depositions in civil cases, to issue arrest warrants, and to hold persons for trial.”⁶⁵ In 1896, Congress shifted these now-titled “United States commissioners” to the district courts and set four-year term limits, subject to earlier removal by the district court.⁶⁶

In 1968, Congress passed the Federal Magistrates Act (FMA), disposing of the commissioner role and laying the groundwork for the modern magistrate judge system.⁶⁷ The FMA had dual purposes: “(1) to replace the outdated commissioner system with a cadre of new, upgraded federal judicial officers; and (2) to provide judicial relief to district judges in handling their caseloads.”⁶⁸ The FMA set eight-year term limits for full-time magistrates and broadly expanded their authority to try “minor offenses” and any “additional duties . . . not inconsistent with the Constitution and laws of the United States.”⁶⁹ In short, the FMA, which listed a non-exhaustive “number of tasks that magistrates could perform,” was largely a “grant[] of authority to serve as a guide and for district judges to experiment freely in delegating tasks to magistrates.”⁷⁰

The FMA gave magistrates, as Article I judicial officers, broad powers and allowed district courts substantial discretion in tasking them with a variety of judicial responsibilities. But this system soon raised both legal and policy questions. In 1974, the Supreme Court heard *Wingo v. Wedding* where the Court considered whether the FMA conflicted with a

64. Kelly Holt, *Congressional Guidance on the Scope of Magistrate Judges' Duties*, 84 U. CHI. L. REV. 909, 913 (2017).

65. *Id.*

66. Act of May 28, 1896, ch. 252, §§ 19–21, 29 Stat. 140, 184–85.

67. Pub. L. No. 90-578, 82 Stat. 1107 (1968).

68. PETER G. MCCABE, FED. BAR ASS'N, A GUIDE TO THE FEDERAL MAGISTRATE JUDGES SYSTEM 5 (2016),

<https://www.fedbar.org/wp-content/uploads/2019/10/FBA-White-Paper-2016-pdf-2.pdf> [hereinafter MCCABE, MAGISTRATE JUDGE GUIDE].

69. Pub. L. No. 90-578, §§ 636, 3401, 82 Stat. 1107, 1113, 1115–16.

70. Brendan Linehan Shannon, *The Federal Magistrates Act: A New Article III Analysis for A New Breed of Judicial Officer*, 33 WM. & MARY L. REV. 253, 257 (1991).

separate habeas corpus statute that required a hearing before a federal judge.⁷¹ To resolve this and other legislative ambiguities, Congress amended the FMA two years later to “clarify the powers of magistrates to hear habeas corpus” actions and other matters.⁷² Soon after, Congress passed the Federal Magistrate Act of 1979 to further expand and clarify magistrates’ duties in district court.⁷³

Recent legislation has recognized magistrates’ true judicial role in the federal courts. In addition to creating dozens of new judgeships, the Judicial Improvements Act of 1990 formally changed the title of “United States Magistrate” to “United States Magistrate Judge.”⁷⁴ In 1996, appeals of magistrates’ final adjudications in civil consent cases were rerouted to go directly to circuit court. And in 2000, magistrate judges gained contempt authority.⁷⁵

B. The Modern Magistrate Judge System

While Congress determines the number of district court judgeships, the Judicial Conference determines the number of magistrate judgeships around the country.⁷⁶ When making this determination, the Judicial Conference considers the “advice of district judges, the circuit councils, and the Administrative Office of the U.S. Courts.”⁷⁷ Nevertheless, the Judicial Conference’s determinations are ultimately “subject to congressional funding of the requested positions.”⁷⁸ The AO’s 2021 discretionary budget requested that Congress fund “two additional full-time magistrate judges” and additional support staff, among other “critical new investments.”⁷⁹ If approved, these additional judgeships will be placed in district courts selected by the Judicial Conference.

Once Congress has provided funds for an additional magistrate judgeship and the Judicial Conference has selected where the judgeship should go, a regulated process begins to fill the new vacancy. Through the FMA and subsequent revisions, Congress has set a baseline for who

71. *Wingo v. Wedding*, 418 U.S. 461, 462-65 (1974).

72. Tim A. Baker, *The Expanding Role of Magistrate Judges in the Federal Courts*, 39 VAL. U. L. REV. 661, 665 (2005).

73. MCCABE, MAGISTRATE JUDGE GUIDE, *supra* note 68, at 11-13.

74. Civil Justice Reform Act of 1990, Pub. L. No. 101-650, § 321, 104 Stat. 5089, 5117.

75. See MCCABE, MAGISTRATE JUDGE GUIDE, *supra* note 68, at 13 (summarizing more recent legislation).

76. *Magistrate Judgeships*, FED. JUD. CTR., <https://www.fjc.gov/node/7501> (last visited May 12, 2020).

77. *Id.*

78. *Id.*

79. ADMIN. OFFICE OF THE U.S. CTS., THE JUDICIARY FISCAL YEAR 2020 CONGRESSIONAL BUDGET SUMMARY 4 (2020), https://www.uscourts.gov/sites/default/files/fy_2021_congressional_budget_summary_0.pdf.

may be a magistrate judge, established guidelines on how magistrate judges are chosen, and specified their broad role in district courts.

Unlike lay magistrates who serve in many state courts around the country, or even Article III judges nominated by the president, federal magistrate judges must be lawyers and members of a bar for a least five years.⁸⁰ Of course, nearly all magistrate judges far exceed this minimum standard. Indeed, last year, new magistrate judges “had been members of the bar for an average of 22 years at the time of their appointments” and had held an array of legal experiences.⁸¹

The high quality of magistrate judges is ensured largely due to how they are selected. Compared to the nomination and confirmation of Article III judges, the selection of magistrate judges is both a regulated and apolitical process. Regulations require that magistrate judge vacancies be publicly posted “as widely as practicable so that all qualified members of the bar are aware of the opportunity to apply for the position.”⁸²

From there, the district judges of the relevant court establish a merit selection panel that considers magistrate judge applications.⁸³ Each member of the panel “must either be a resident of the district, or, if a nonresident, have significant ties to the community.”⁸⁴ To avoid conflicts of interest, the panel cannot include federal judges or court employees.⁸⁵ Each panel member is also obligated to disclose “any personal or professional relationship” she may have with an applicant.⁸⁶ To emphasize the community’s interest in the selection, it is further required that at least two non-lawyers sit on the panel.⁸⁷

The panel enjoys some discretion in reviewing applicants. It may conduct personal interviews and consider a range of characteristics, including an applicant’s legal scholarship, length and type of practice,

80. Compare Lars Trautman & SteVon Felton, *The Use of Lay Magistrates in the United States*, R ST. POLICY STUDY NO. 173 (May 2019), <https://www.rstreet.org/wp-content/uploads/2019/05/Final-No.-173.pdf> (surveying states’ use of lay magistrates in local courts), and *About the Court, Frequently Asked Questions*, SUPREME CT. OF THE U.S., https://www.supremecourt.gov/about/faq_general.aspx (“The Constitution does not specify qualifications for Justices such as age, education, profession, or native-born citizenship.”), with 28 U.S.C. § 631(b) (1948) (requiring full-time magistrate judges to have “been for at least five years a member in good standing of” a bar).

81. Admin. Office of the U.S. Courts, *Status of Magistrate Judge Positions and Appointments – Judicial Business 2019*, U.S. CTS., <https://www.uscourts.gov/status-magistrate-judge-positions-and-appointments-judicial-business-2019> (last visited May 12, 2020).

82. MAGISTRATE JUDGES DIV., ADMIN OFFICE OF THE U.S. COURTS, *THE SELECTION, APPOINTMENT, AND REAPPOINTMENT OF UNITED STATES MAGISTRATE JUDGES 14* (2010), <http://www.nced.uscourts.gov/pdfs/Selection-Appointment-Reappointment-of-Magistrate-Judges.pdf>.

83. *Id.* at 17.

84. *Id.*

85. *Id.*

86. *Id.* at 21.

87. *Id.* at 17.

knowledge of the court system, and personal character.⁸⁸ Diversity is also considered, as the panel is encouraged to “give due consideration to all qualified applicants . . . particularly those from underrepresented groups.”⁸⁹ Above all, the panel is expected to “recommend individuals who possess the same types of personal and professional qualities expected of district judges.”⁹⁰

Within ninety days, the panel submits a report to the district court identifying the five most qualified applicants.⁹¹ From those five names, the district judges of the court may conduct their own interviews and will ultimately select a new magistrate judge by majority vote.⁹² The selected applicant then undergoes a full Federal Bureau of Investigation and Internal Revenue Service investigation⁹³ After completing these investigations and taking both judicial and constitutional oaths, a magistrate judge begins their service.⁹⁴

Once on the bench, the tenure and benefits of magistrate judges differs from those of Article III judges in several important respects. First, while Article III judges serve “for good behavior,” full-time magistrate judges serve for eight-year terms. During this time, magistrate judges earn 92% of the salary of district judges.⁹⁵ And while Article III judges may only be removed through impeachment by Congress, magistrate judges may be removed during their term by a majority of judges in the relevant district for “incompetency, misconduct, neglect of duty, or physical or mental disability.”⁹⁶ Alternatively, a magistrate judge’s position may “terminated if the [Judicial Conference] determines that the services performed by [the magistrate judge] are no longer needed.”⁹⁷

There are, however, some notable similarities. Like the salaries of Article III judges, magistrate judges’ salaries may not be reduced during their term.⁹⁸ Also, like Article III judges, magistrate judges may attend training programs and seminars, and they receive funding for law clerks, office and courtroom space, and administrative staff.⁹⁹ And although

88. *Id.* at 25–28.

89. *Id.* at 28.

90. *Id.* at 26.

91. *Id.* at 29–30.

92. *Id.* at 31–33.

93. *Id.* at 32.

94. *Id.* at 39–40.

95. 28 U.S.C. § 634(a) (1948).

96. 28 U.S.C. § 631(i) (1948).

97. *Id.*

98. 28 U.S.C. § 634(b) (1948). Of course, while magistrate judges’ salaries are protected by statute, Article III, Section 1 of the U.S. Constitution protects Article III judges’ salaries.

99. 28 U.S.C. § 635(a) (1948). Often within the first year of service, magistrate judges attend “baby judges school,” which provides instruction on many of the issues and responsibilities magistrate judges encounter in their work. See 28 U.S.C. § 637 (1946); Spike Gillespie, *A Dream Made Real*, U.

magistrate judges do not enjoy life tenure, they may be reappointed to multiple eight-year terms, potentially serving for decades.¹⁰⁰ Finally, magistrate judges who complete at least one term are eligible to receive retirement benefits.¹⁰¹

The modern magistrate judge system, as succinctly summarized by one Midwestern magistrate judge, is to be “deliberately flexible so that each district could structure the Magistrate’s role to best suit its needs.”¹⁰² This flexibility allows magistrate judges to be “the utility ball player of the court system.”¹⁰³

This flexibility is most evident in the district court’s civil docket.¹⁰⁴ Most, if not all, magistrate judges are heavily involved in the early pretrial stages of a civil case. As a result, many magistrate judges “have become experts in civil case management, discovery and settlement.”¹⁰⁵ These skills have become increasingly useful for district courts.

For instance, it has been shown that earlier “planning and management of litigation” by judges helps to “accelerate[] the processing and termination of cases.”¹⁰⁶ As a result, magistrate judges are often tasked with setting early litigation benchmarks, including discovery and motion deadlines and trial dates.¹⁰⁷

If a discovery dispute arises, some magistrate judges will meet with parties to determine if the issue can be resolved informally.¹⁰⁸ If motions to compel are filed, district judges will often have a magistrate judge

TEX. AT AUSTIN SCH. OF LAW (Feb. 16, 2010), <https://law.utexas.edu/news/2010/02/16/a-dream-made-real/>.

100. This is common practice. Indeed, as observed by the AO, “[A]n incumbent magistrate judge who has performed well in the position should be reappointed to another term of office.” MAGISTRATE JUDGES DIV., ADMIN OFFICE OF U.S. COURTS, *supra* note 82, at 37. During their terms, magistrate judges undergo performance reviews, and the district court is not obligated to reappoint them. And even if the court decides to consider another eight-year term for an incumbent magistrate judge, it must nevertheless provide public notice in order to receive comments from the public and the bar. *Id.* at 37–40.

101. 28 U.S.C. § 377(a)-(b) (1988).

102. Hon. Aaron E. Goodstein, *The Expanding Role of Magistrate Judges: One District’s Experience*, THE FED. LAWYER 69 (2014), http://www.fedbar.org/Resources_1/Federal-Lawyer-Magazine/2014/MayJune/Features/The-Expanding-Role-of-Magistrate-Judges-One-Districts-Experience.aspx?FT=.pdf.

103. *Id.*

104. To note, magistrate judges are substantially involved with criminal cases as well. For example, they often authorize arrest warrants and search warrants; hold initial appearances, detention hearings, and arraignments; and try all misdemeanor cases. MCCABE, MAGISTRATE JUDGE GUIDE, *supra* note 68, at 22–39. This essay, though, focuses how magistrate judges may primarily alleviate district courts’ civil caseloads.

105. *Id.* at 41.

106. FED. R. CIV. P. 16 advisory committee’s notes to 1983 amendment.

107. MCCABE, MAGISTRATE JUDGE GUIDE, *supra* note 68, at 42.

108. See e.g., Hon. Gordon P. Gallagher, *Discovery Dispute Procedures*, U.S. DIST. COURT, DIST. OF COLO. (Mar. 1, 2017), http://www.cod.uscourts.gov/Portals/0/Documents/Judges/MAG/Discovery_Dispute_Procedures.pdf (detailing one magistrate judge’s discovery dispute policy).

rule.¹⁰⁹ As a result, because “a party’s success in today’s federal court litigation arena often rises or falls at the discovery stage . . . magistrate judges traditionally enjoy substantial control and influence” over civil cases.¹¹⁰

After the discovery period, few civil cases—around 1%—go to trial in district court.¹¹¹ This is often the result of out-of-court settlement where, again, magistrate judges play an important role. In many districts, magistrate judges oversee settlement conferences, conduct mediations, or even manage courts’ alternative dispute resolution programs.¹¹²

Magistrate judges also frequently handle the entirety of Social Security appeals¹¹³ and prisoner cases.¹¹⁴ They do so for three simple reasons: “because of the large number of them filed in many courts, the time that referral saves for district judges, and the expertise that magistrate judges have developed in the[se] specialized areas of the law.”¹¹⁵ Both types of cases constitute a significant portion of district courts’ civil docket. Last year, for example, over 55,000 prisoner petitions and 17,000 Social Security appeals were filed in district court.¹¹⁶

In these types of cases and others, motions are often filed, and district judges may task magistrate judges to resolve them. Motions in these instances fall under two categories: dispositive and non-dispositive motions. Dispositive motions are typically motions that could end a case or claim. Such motions include motions for summary judgement and

109. Goodstein, *supra* note 102, at 69 (“In some districts where the criminal load was substantial, Magistrates had very limited civil duties; but, in others, they were assigned all of the civil discovery disputes, together with additional pretrial case management.”).

110. Baker, *supra* note 72, at 676. Moreover, objections to magistrate judges’ discovery orders are often futile. In interviews, some “districts [have] expressed the view that they considered it important to ‘back up’ the magistrate judge when objections were taken to a magistrate judge’s discovery rulings.” Hon. Philip M. Pro, *United States Magistrate Judges: Present but Unaccounted For*, 16 NEV. L.J. 783, 802 (2016).

111. Jeffrey Q. Smith & Grant R. MacQueen, *Going, Going, But Not Quite Gone: Trials Continue to Decline in Federal and State Courts*, 101 *Judicature* 26, 28 (2017).

112. Pro, *supra* note 110, at 790; MCCABE, *MAGISTRATE JUDGE GUIDE*, *supra* note 68, at 44–45.

113. “Unlike the vast majority of federal district court cases, [Social Security Administration Disability] cases are appeals. The claimant seeking disability benefits under federal law has sought relief in a multi-tiered adjudication process within the Social Security Administration. After being denied benefits by an agency administrative law judge and the Appeals Council (the SSA’s appellate body), a claimant may appeal that denial to their local federal district court.” Tracey E. George et al., *From Wall Street to Main Street: A Multidimensional Map of the Impact of Magistrate Judges on Federal Courts* 24 (Vand. Law Res., Working Paper No. 18-57, 2018), <https://ssrn.com/abstract=3262302>.

114. “There are three principal categories of prisoner cases: (1) state habeas corpus proceedings; (2) federal habeas corpus proceedings; and (3) petitions challenging conditions of confinement.” MCCABE, *MAGISTRATE JUDGE GUIDE*, *supra* note 68, at 51.

115. *Id.* at 49–50.

116. Admin. Office of the U.S. Courts, *Table 4.4: U.S. District courts—Civil Cases Filed, by Nature of Suit*, U.S. CTS., https://www.uscourts.gov/sites/default/files/data_tables/jff_4.4_0930.2019.pdf [<https://perma.cc/NLX9-FNS5>].

motions to dismiss a claim or class action.¹¹⁷ When reviewing dispositive motions, magistrate judges may conduct hearings, hear testimony, and submit a report and recommendation (R&R) to the court that contains proposed findings of fact and a recommended disposition.¹¹⁸ Parties may object to any aspect of the R&R.¹¹⁹ A district judge will review any objection to the R&R *de novo* and “may accept, reject, or modify, in whole or in part” the R&R or “recommit the matter to the magistrate judge with instructions.”¹²⁰

When non-dispositive motions are referred to a magistrate judge, the magistrate judge conducts “required proceedings” but will afterward submit an order instead of an R&R.¹²¹ Parties may also appeal orders to a district judge, but the standard of review is much higher than the standard used for objections to R&Rs for dispositive motions. Instead of reviewing the objections *de novo*, the district judge may only modify the magistrate judge’s order if it “is clearly erroneous or is contrary to law.”¹²²

In addition to resolving piecemeal matters in civil cases, magistrate judges may assume the identical duties of a district judge. Indeed, “if all parties consent,” magistrate judges in civil cases may rule on dispositive motions and oversee jury and bench trials.¹²³ In these cases, appeals do not go to the district judges but instead proceed directly to the above circuit court.¹²⁴

C. Magistrate Judges’ Wide-Ranging Impact

The federal magistrate judge system is a wide-ranging and invaluable system for federal district courts. Supreme Court justices, fellow judges, and many court scholars have all recognized its contribution.

One year after the Judicial Improvements Act passed, Justice John Paul Stevens noted that, “Given the bloated dockets that district courts have now come to expect as ordinary, the role of the magistrate in today’s federal judicial system is nothing less than indispensable.”¹²⁵ Years later, Justice Sonia Sotomayor similarly remarked that it was “no exaggeration to say that without the distinguished service of these judicial colleagues,

117. 28 U.S.C. § 636(b)(1)(A) (1948).

118. § 636(b)(1)(C). *See also* FED. R. CIV. P. 72(b).

119. § 636(b)(1)(C).

120. *Id.*

121. FED. R. CIV. P. 72(a).

122. § 636(b)(1)(A).

123. § 636(c). *See also* FED. R. CIV. P. 73(a).

124. § 636(c)(3). *See also* FED. R. CIV. P. 73(c).

125. *Peretz v. United States*, 501 U.S. 923, 928 (1991) (emphasis added) (quoting *Virgin Islands v. Williams*, 892 F.2d 305, 308 (3d Cir. 1989)).

the work of the federal court system would grind nearly to a halt.”¹²⁶ Retired federal district judge (and former magistrate judge) Philip Pro also observed “that the interrelationship between United States district and magistrate judges is inescapable, and profoundly important to the resolution of most cases litigated in United States district court.”¹²⁷ A recent research paper also concluded “that all districts courts rely upon magistrate judges and grant them real power.”¹²⁸

The facts support these observations. As summarized previously, there are currently 667 authorized district judgeships, not much more than the 632 judgeships authorized after the 1990 Judicial Improvements Act passed. While the push for additional district judgeships has stagnated in recent years, the number of full-time magistrate judges has soared. In 1971, there were only sixty-one full-time magistrate judges serving in district courts nationwide. By 1990, there were 300 full-time magistrate judges and only 162 part-time magistrate judges. Ten years later, 500 full-time magistrate judges were in service.¹²⁹ Today, there are 549 authorized magistrate judges and only twenty-nine part-time magistrate judges.¹³⁰

As caseloads continue to increase, magistrate judges have picked up much of the slack. Information provided by the U.S. Courts during the 2019 fiscal year details the thousands of civil matters magistrate judges resolve annually.¹³¹ In 2019 alone, magistrate judges disposed of 226,808 non-dispositive motions; issued R&Rs in 4,410 Social Security appeals, 25,414 in prisoner litigation, and 16,200 on other dispositive motions; held 19,290 settlement conferences and 54,192 pretrial conferences; oversaw 1,065 evidentiary hearings and 9,864 motions hearings; and fully presided over 17,817 civil cases, including 186 jury trials and 98 nonjury trials.¹³²

Of these tens of thousands of matters, two categories stand out most for their vast increases in numbers over the last ten years: civil dispositive motions (a 40% increase) and full civil consent cases (a 42% increase).

126. *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1938–39 (2015).

127. Pro, *supra* note 110, at 821.

128. George et al., *supra* note 113, at 6.

129. Admin. Office of the U.S. Courts, *Just the Facts: Magistrate Judges Reach the Half Century Mark*, U.S. CTS. (Feb. 20, 2019), <https://www.uscourts.gov/news/2019/02/20/just-facts-magistrate-judges-reach-half-century-mark>.

130. Admin. Office of the U.S. Courts, *Status of Magistrate Judge Positions and Appointments – Judicial Business 2019*, <https://www.uscourts.gov/status-magistrate-judge-positions-and-appointments-judicial-business-2019> (last visited May 12, 2020).

131. Admin Office of the U.S. Courts, *Matters Disposed of by U.S. Magistrate Judges For the 10-Year Period Ended September 30, 2019*, U.S. CTS., https://www.uscourts.gov/sites/default/files/data_tables/jb_s17_0930.2019.pdf (last visited May 12, 2020).

132. *Id.*

A recent paper written by two authors who have worked at the AO offers potential reasons for the increase of R&Rs for dispositive motions:

Some courts view [R&Rs] as a “necessary evil” for practical and equitable division of the court’s judicial workload among the court’s judges, often in the context of a heavy overall caseload. Many district judges find referrals of certain case-dispositive motions, especially if they are to require evidentiary hearings (e.g., motions to suppress evidence in felony cases), as extremely valuable time-savers Finally, courts report that, typically, objections are not filed to reports and recommendations issued in particular types of cases, such as social security appeals, in which case the delay in adjudication of the motion is shortened to some degree.¹³³

Other reasons support the expansion of civil consent cases. To alleviate case burdens, some district courts place magistrate judges on the case “wheel,” meaning magistrate judges are assigned full civil cases with the same regularity as district judges.¹³⁴ Of course, litigants may refuse to consent to these random assignments, but most consent.

The reasons for consent are plenty. Magistrate judges are highly qualified, familiar with the federal court system, and typically have more trial availability than district judges. Magistrate judges are also likely to have more trial dates available due to having no felony criminal trial docket.¹³⁵ Moreover, consenting to a magistrate judge taking over an entire civil case avoids other delays. For example, it avoids the duplicity of a district judge referring a motion to a magistrate judge for an R&R and then the delay of potential objections to that R&R being sent back to the district judge. Full consent would save any dispositive appeals for the circuit court. Lastly, a magistrate judge is already likely to be familiar with a case’s facts if that magistrate judge was previously tasked with conducting case management conferences and resolving discovery disputes, meaning less time is needed for the them to become familiar with the nuanced facts of the case.¹³⁶

In short, Magistrate judges allow for fewer case delays for civil litigants. It is no wonder that Department of Justice regulations

133. Douglas A. Lee & Thomas E. Davis, “Nothing less than Indispensable”: *The Expansion of Federal Magistrate Judge Authority and Utilization in the Past Quarter Century*, 16 *NEV. L.J.* 845, 945 (2016).

134. Hon. Morton Denlow, *Should You Consent to the Magistrate Judge? Absolutely, and Here’s Why*, 37 *LITIG.* 3 (2011).

135. *See, e.g.,* Thomas v. Select Portfolio Servicing, Inc., 1:18-cv-00211-LJO-BAM, 2018 U.S. Dist. LEXIS 88072, at *1 (E.D. Cal. May. 24, 2018) (ordering litigants to “reconsider consent to conduct all further proceedings before a Magistrate Judge, whose schedules are far more realistic and accommodating to parties than that of [the district judge] who must prioritize criminal and older civil cases.”).

136. Denlow, *supra* note 134, at 66.

“encourage the use of magistrate judges” in district court litigation.¹³⁷

IV. HOW AN INCREASE IN MAGISTRATE JUDGES HELPS

The political process has failed the federal courts. As caseloads and delays have risen, Congress has failed to enact long-term legislation to add new judgeships and help alleviate the burden on federal courts. Yet while Congress has remained static, the federal courts have been active in finding creative ways to manage the judicial capacity crisis. The most effective avenue has been the growth of the magistrate judge system. An even greater expansion of this program would serve as an effective short-term solution for federal district courts—at least until Congress is able to deliver long-term reform.

A. The Advantages of Magistrate Judges

The advantages of growing the magistrate judge system are numerous. The most obvious is that additional magistrate judges in the most overburdened district courts would help alleviate caseloads, fast-track civil trials, and decrease the cost and stress of perpetually delayed litigation. In consent cases, magistrate judges can handle entire civil cases. In other situations, magistrate judges can shorten litigation times by being active in case management, resolving non-dispositive motions, and even helping parties settle their disputes before trial.

But adding more magistrate judges is not simply a numbers game. Due to geography, population, economy, resources, and many other factors, every district court is unique in its challenges and emphases. The distinct statutory role of magistrate judges allows district courts the needed flexibility to task magistrate judges with broad, narrow, or even evolving responsibilities.

While district judges are generalists encountering a “remarkable diversity of cases,”¹³⁸ magistrate judges have the opportunity to specialize and assist courts on specific or especially complex topics. Magistrate judges already versed in the growing and complex world of “eDiscovery,” for instance, may be instrumental in resolving discovery disputes before a litany of motions and drawn-out evidentiary hearings. In one example, before joining Facebook, Paul Grewal was a magistrate judge in the Northern District of California.¹³⁹ Prior to joining the bench, Grewal was

137. 28 C.F.R. § 52.01(b) (1980).

138. Hon. Diane P. Wood, *Generalist Judges in a Specialized World*, 50 SMU L. Rev. 1755 (1997).

139. Ina Fried, *U.S. Magistrate Judge Paul Grewal is leaving the bench for Facebook*, VOX (May 12, 2016, 8:43 PM), <https://www.vox.com/2016/5/12/11668896/federal-magistrate-paul-grewal-joining-facebook>.

an intellectual property litigator, representing inventors and technology firms. In the district home to Silicon Valley, the expertise Grewal gained from private practice certainly helped him resolve complex district court cases centered on these topics.¹⁴⁰

Many district courts have enacted policies promoting specialization, especially for prisoner cases and Social Security appeals.¹⁴¹ In 2001, the Eastern District of New York “appointed a new, additional magistrate judge with a specific mandate: to oversee the court’s pro se docket.”¹⁴² The court reasoned that this program “could direct greater attention to those pro se cases involving potentially meritorious claims.”¹⁴³ A 2014 “standing order” from the Eastern District of Virginia states that “if all parties in a Social Security Appeal consent,” the case will be assigned to a magistrate judge “for all purposes.”¹⁴⁴ Many other districts follow similar practices.¹⁴⁵

Yet despite magistrate judges’ large influence, their congressional-based authorities do not trample on the judiciary’s toes. As discussed above, the district court enjoys a variety of tools to use as checks ensuring that magistrate judges’ powers do not exceed the authority of judges who were confirmed by the Senate. The first of these checks is how magistrate judges are selected. Although recommended by a merit selection panel, a magistrate judge is ultimately chosen by the Article III judges for whom they will work. The second is the process of referring matters in federal court. Unless all parties consent to proceed before a magistrate judge, a district judge will have the opportunity to accept or reject R&Rs and can exercise discretion over whether to delegate matters to a magistrate judge. The third is district judges’ power to remove a magistrate judge for cause as well as the choice not to reappoint a magistrate judge once their eight-year term is complete. The final check is proximity. Indeed, “District judges interact with magistrate judges in the courthouse and thus can rely on the many informal tactics used in every workplace by supervisors over

140. *Id.*

141. Pure specialization, though, is somewhat controversial. Both the Judicial Conference and the Magistrate Judges Committee have disfavored pure specialization. Some districts have “reconciled” this issue “by using magistrate judges in both roles, that is, as specialists for certain narrow types of cases (e.g., state habeas corpus cases) but also as generalists in a range of other types of cases.” Lee & Davis, *supra* note 133, at 947.

142. Lois Bloom, *Federal Courts, Magistrate Judges, and the Pro Se Plaintiff*, 16 NOTRE DAME J.L. ETHICS & PUB. POL’Y 475, 495 (2002).

143. *Id.* at 495–96.

144. Hon. James R. Spencer, *Standing Order*, U.S. DIST. CT., E. DIST. VA. (June 21, 2014), <http://www.vaed.uscourts.gov/localrules/StandingOrderConsentmagistrate.pdf>. The magistrate judge identified to receive these cases, Judge David J. Novak, was confirmed to be a district judge in the same district in October 2019.

145. See George et al., *supra* note 113, at 26–32 (detailing “common patterns in how [magistrate judges] are used by district courts to process [Social Security Administration] cases.”).

their direct reports.”¹⁴⁶

Perhaps most importantly, the growth of the magistrate judge system sidesteps the largest barrier to long-term judicial reform: the politics of judicial confirmations. The constitutional origins of both district judges (Article III) and magistrate judges (Article I) lay the groundwork for this advantage. District judges are nominated by the president and confirmed by the Senate. As a result, presidents and senators have an interest in selecting judges “who satisfy their supporters, their political party, and the attentive public.”¹⁴⁷ This process, as summarized by one district judge who experienced it firsthand, can become “highly partisan.”¹⁴⁸

The calculus changes when choosing a magistrate judge. After careful vetting by a merit selection panel, district judges—not politicians—choose who will be their colleague. This alone incentivizes Article III judges “to pick stellar candidates.”¹⁴⁹ Indeed, although “[d]istrict judges undoubtedly care to some extent about the magistrate judges’ ideological position on those topics most relevant to district court work . . . the most pressing consideration for district judges is their personal concerns about getting their work done.”¹⁵⁰ These considerations allow district judges to select a magistrate judge “more truly based on merit.”¹⁵¹

Expansion of the magistrate judge system should gain bipartisan support. Year after year, members of Congress, citing growing caseloads, have publicly supported increasing judgeships. However, their enthusiasm often wanes when the president is a member of the opposite party. The reason is simple: “New judgeships create new vacancies, and neither party wants to give the other the opportunity to fill them.”¹⁵² Expanding the magistrate judge system alleviates this problem. Neither the President nor the Senate will have to consider additional nominations. Magistrate judges are term-limited and have no authorities to defy the Article III judges that the Senate did confirm. Most importantly, the expansion of the system provides some relief to overburdened district courts while they wait on Congress to pass substantive judgeship legislation.

As mentioned before, it is not enough simply to fill all current vacancies. Some of the most desperate district courts have few, or none at all. Furthermore, the political scramble to fill vacant seats may

146. *Id.* at 9.

147. *Id.*

148. Pro, *supra* note 111, at 817.

149. Judith Resnik, “*Uncle Sam Modernizes His Justice*”: *Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation*, 90 GEO L. J. 607, 671 (2002).

150. George et al., *supra* note 113, at 9.

151. Pro, *supra* note 110, at 817.

152. Cara Bayles, “*In a Timely Manner*”: *Three Decades of Judgeship Bills*, LAW360 (Mar. 19, 2019, 9:17 PM), <https://www.law360.com/articles/1140612>.

generate unintentional political aftershocks, which may further delay successful judgeship legislation. Undoubtedly, President Trump and the Senate have been wildly successful in nominating and confirming many judicial nominees in recent years.¹⁵³ But this success is largely premised on one party controlling both the presidency and the Senate. History tells us that this advantage cannot last. And when the inevitable occurs—in which one party occupies the White House and the other controls the Senate—the growing partisan ill-will surrounding confirmations could hurt the prospect of passing good judgeship legislation or even postpone the filling of future vacancies. The more prudent approach, therefore, is to use magistrate judges as a Band-Aid while the politically fraught judicial confirmation process has time to heal.

B. Possible Implementation

Any expansion of the magistrate judge system is reliant on Congress for appropriation of funds. Although the federal budget process is often victim to political impasse, the judiciary is rarely a source of dispute. Indeed, as the federal judiciary accounts for only 0.2% of the entire federal budget, there is not much to scrutinize. Moreover, compared to the arguably bloated budgets of other agencies and initiatives, the judiciary has made great efforts in recent years to reduce spending—including, for example, saving approximately \$36 million a year by reducing rent space.¹⁵⁴

Congressional appropriators have noticed. In a recent House Appropriations Committee report, Congress praised “the Judiciary’s cost containment efforts over the past 12 years.”¹⁵⁵ Appropriators have also recognized the most pressing problem facing the federal courts, stating their concern “that, absent executive and congressional action to fill existing judicial vacancies and the passage of comprehensive bipartisan legislation to create new judgeships, the ability of the federal courts to administer justice in a swift, fair, and effective manner could be

153. See *Judicial Appointment Tracker*, HERITAGE FOUND., <https://www.heritage.org/judicialtracker> (last visited May 12, 2020) (providing “current data on six components of the process: judicial vacancies, nominations, hearings, confirmations, votes to end debate, and roll call votes.”).

154. ADMIN. OFFICE OF THE U.S. CTS., *THE JUDICIARY FISCAL YEAR 2021 CONGRESSIONAL BUDGET SUMMARY* iii (2020), https://www.uscourts.gov/sites/default/files/fy_2021_congressional_budget_summary_0.pdf.

155. STAFF OF H. COMM. ON APPROP., 116TH CONG., *REP. ON FINANCIAL SERVICES AND GENERAL GOVERNMENT APPROPRIATIONS BILL, 2020*, at 37 (Comm. Print 2019), <https://appropriations.house.gov/sites/democrats.appropriations.house.gov/files/FY2020%20FSGG%20Draft%20Report.pdf>.

compromised.”¹⁵⁶

The federal courts should use Congressional appropriators’ fears to their advantage. If appropriators are worried about the need for new judgeships (and are willing to fund them), it follows that they may be willing to fund an increase of the magistrate judge system. This measure would temporarily help the federal courts “administer justice in a swift, fair, and effective manner.”

Appropriators should not be concerned about funding duplicative judicial capacity efforts. If Congress were later to pass legislation adding district judgeships, the Judicial Conference has statutory discretion to terminate a magistrate judgeship “if the conference determines that the services performed . . . are no longer needed.”¹⁵⁷ Therefore, the number of magistrate judgeships can be reduced as more district judges begin service.

The Judicial Conference has requested funds for additional magistrate judgeships before. Its past requests have been comparatively modest. For fiscal years 2020 and 2021, for instance, the Judicial Conference requested \$7.3 million for eight new magistrate judgeships and associated support staff and operating costs.¹⁵⁸ Of course, a significant expansion of the program would be more expensive. Using the simple (and generously approximate) million-dollars-per-judgeship formula, if the Judicial Conference were to request the same number of new magistrate judges as it has new district judgeships,¹⁵⁹ the initial request would just exceed \$70 million, a minimal increase of the judiciary’s current \$7.5 billion annual appropriation.¹⁶⁰

Nevertheless, any increase in federal spending merits close review, and Congress would likely look to ways to offset the cost of expanding the magistrate judge system. A modest increase in civil filing fees could provide a significant offset as well as a reroute of some of the federal courts’ discretionary funding. As one example, the fees the judiciary collects from access to its electronic records system totals approximately \$145 million annually, even though its actual operating costs are much less.¹⁶¹ But even if no creative offset were available, an increase of the

156. *Id.* at 40.

157. 28 U.S.C. § 631(i) (1948).

158. ADMIN. OFFICE OF THE U.S. CTS., *supra* note 154, at 8. ADMIN. OFFICE OF THE U.S. CTS., THE JUDICIARY FISCAL YEAR 2020 CONGRESSIONAL BUDGET SUMMARY 16 (2019), https://www.uscourts.gov/sites/default/files/fy_2020_congressional_budget_summary_0.pdf

159. As noted *supra*, the Judiciary Conference recently recommended sixty-five permanent and eight temporary district court judgeships. Admin Office of the U.S. Courts, *supra* note 55.

160. ADMIN. OFFICE OF THE U.S. CTS., *supra* note 154, at i.

161. See Adam Liptak, *Attacking a Pay Wall That Hides Public Court Filings*, N.Y. TIMES (Feb. 4, 2019), <https://www.nytimes.com/2019/02/04/us/politics/pacer-fees-lawsuit.html> (“By one estimate, the actual cost of retrieving court documents, including secure storage, is about one half of one ten-thousandth

magistrate judge system remains a worthy investment.

C. Potential Critiques

A significant expansion of the magistrate judge system would likely generate some objection. Most of the critiques would probably focus on magistrate judges' powers and qualifications.

The Judicial Conference itself has raised one likely argument. In June 2018, three district court judges and members of the Judicial Conference's Judicial Resources Committee testified before a House Judiciary Subcommittee on the need for new federal judgeships. Their testimony provided reasons why additional judgeships are necessary but argued that "[t]he problem cannot be addressed just by adding magistrate judges, or hoping senior and visiting judges will lessen the workload and reduce the need for more judgeships.¹⁶² Magistrate judges are insufficient, they reasoned, because their "jurisdiction is limited."¹⁶³

Yet the advantage of the magistrate judge system is not its jurisdiction, but its flexibility. Although magistrate judges cannot oversee criminal felony trials, by consent or referral, they may be involved in nearly every other aspect of district court litigation. And criminal trials in federal court are rare. In fact, "Nearly 80,000 people were defendants in federal criminal cases in fiscal 2018, but just 2% of them went to trial."¹⁶⁴ As such, a magistrate judge's jurisdictional limitations are not as stark—or as problematic—as the Judicial Conference may suggest.

Furthermore, the flexibility of the magistrate judge system gives district courts the discretion to use magistrate judges in any way they see fit. This makes magistrate judges more beneficial than either senior judges or visiting judges. A senior judge is an Article III judge who has taken senior status.¹⁶⁵ Yet unlike a regular district judge, senior judges are not obligated to take a full caseload or work throughout the entire year.¹⁶⁶ The district court has little control over senior judges' workload, making magistrate judges—over which the court has more control—a more reliable judicial partner in many district courts. A separate dilemma arises for visiting judges. A visiting judge's service is more temporary

of a penny per page. But the federal judiciary charges a dime a page to use its service, called Pacer (for Public Access to Court Electronic Records).")

162. Mauskopf et al., *supra* note 32 at 10.

163. *Id.*

164. John Gramlich, *Only 2% of federal criminal defendants go to trial, and most who do are found guilty*, PEW RES. CTR. (June 11, 2019), <https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/>.

165. See generally Frederic Block, *Senior Status: An Active Senior Judge Corrects Some Common Misunderstandings*, 92 CORNELL L. REV. 533 (2007).

166. *Id.* at 536.

than a magistrate judge's eight-year term, and anytime a visiting judge adjudicates cases in a neighboring court, it abandons cases in its own court—a problem that the magistrate judge system does not encounter.

There are additional arguments stating that some of a magistrate judge's authority violates the limits of the Federal Magistrate Act or unconstitutionally infringes on Article III courts. Most of these concerns, though, focus on magistrate judges' involvement in pretrial criminal matters.¹⁶⁷ In civil cases, the Supreme Court has viewed magistrate judges as a proper (and welcome) member of the district courts.¹⁶⁸

In *Wellness International Network, Ltd. v. Sharif*, for example, the Court considered “whether Article III allows bankruptcy judges to adjudicate . . . claims with the parties' consent.”¹⁶⁹ Although the case concerned bankruptcy judges, the result also implicated the magistrate judge system since, as the Court noted, Congress authorized both bankruptcy and magistrate judges “to assist Article III courts in their work.”¹⁷⁰ The Court ultimately concluded that it was proper for both bankruptcy and magistrate judges to hear full consent cases, finding:

Bankruptcy judges, like magistrate judges, “are appointed and subject to removal by Article III judges.” They “serve as judicial officers of the United States district court” and collectively “constitute a unit of the district court” for that district. Just as “[t]he ultimate decision whether to invoke [a] magistrate [judge]'s assistance is made by the district court,” bankruptcy courts hear matters solely on a district court's reference, which the district court may withdraw sua sponte or at the request of a party. “[S]eparation of powers concerns are diminished” when . . . “the decision to invoke [a non-Article III] forum is left entirely to the parties and the power of the federal judiciary to take jurisdiction remains” in place.¹⁷¹

The Court concluded that “Congress could choose to rest the full share of the Judiciary's labor on the shoulders of Article III judges. But doing so would require a substantial increase in the number of district judgeships.”¹⁷² According to the Court, as long as Article I judges “are subject to control by the Article III courts, their work poses no threat to

167. See, e.g., Holt, *supra* note 64, at 911 (arguing “that the [Federal Magistrate Act] does not empower magistrate judges to accept guilty pleas in felony cases”); Tomi Mendel, Note, *Efficiency Run Amok: Challenging the Authority of Magistrate Judges to Hear and Accept Felony Guilty Pleas*, 68 VAND. L. REV. 1795, 1796 (2015) (arguing “that the delegation to magistrate judges of felony-guilty-plea proceedings, though beneficial to district judges, raises concerns of fairness and constitutionality for criminal defendants.”).

168. MCCABE, MAGISTRATE JUDGE GUIDE, *supra* note 68, at 60–66 (reviewing legal challenges to bankruptcy and magistrate judges' authority).

169. *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1939 (2015).

170. *Id.* at 1938.

171. *Id.* at 1945 (citation omitted).

172. *Id.* at 1946.

the separation of powers.”¹⁷³

Another (and weaker) criticism could be that magistrate judges are not qualified to take on such an important judicial role. Yet, as discussed earlier, judges and scholars have dismissed this notion outright. So have attorneys who litigate in federal court. In one survey, lawyers who regularly practiced in federal courts within the Ninth Circuit were polled on their preference of having magistrate judges preside over their civil trials.¹⁷⁴ In the poll, 85% of respondents “disagreed or strongly disagreed with the statement that magistrate judges are less likely than district judges to rule correctly,” and only 7% of respondents “never consent to have a magistrate judge conduct their civil trials.”¹⁷⁵ On this issue, one corporate attorney wrote that many “clients complain that civil litigation takes too long” and noted that “[c]onsenting to civil trial by a Magistrate Judge best serves the goals of a corporate client.”¹⁷⁶

Furthermore, recall that merit selection panels are encouraged to recommend magistrate judge nominees “who possess the same types of personal and professional qualities expected of district judges.”¹⁷⁷ This recommendation exists for an important reason: A number of magistrate judges ultimately become district judges. According to a 2017 Congressional Research Service report, the third most common professional experience immediately prior to becoming a district judge was serving as a magistrate judge.¹⁷⁸ President Donald Trump’s judicial nominees have followed this trend, as over twenty of them have served as federal magistrate judges.¹⁷⁹ For example, one nominee, Bridget Shelton Bade, served as a magistrate judge in the District of Arizona before her recent elevation to the Ninth Circuit.¹⁸⁰ These nominees have the unique experience of having their record and experience scrutinized by a merit selection panel, district judges, and now the U.S. Senate, which

173. *Id.*

174. John F. Murtha, *Why do Lawyers Elect, or Not Elect, to have Magistrate Judges Conduct their Civil Trials?*, 11:11 Fed. Bar Ass’n, Idaho Ch. 8 (2007), <https://www.fedbar.org/idaho-chapter/wp-content/uploads/sites/37/2019/10/July-2007-pdf.pdf>.

175. *Id.* at 11.

176. Michael J. Bolton, *Choosing to Consent to a Magistrate Judge: A Client’s View*, THE FED. LAWYER, May/June 2014, at 91, <https://www.fedbar.org/wp-content/uploads/2014/05/PBMJ-feature3-mayjun14-pdf-1.pdf>.

177. MAGISTRATE JUDGES DIV., ADMIN OFFICE OF THE U.S. COURTS, *supra* note 82, at 26.

178. BARRY J. McMILLION, CONG. RESEARCH SERV., U.S. CIRCUIT AND DISTRICT COURT JUDGES: PROFILE OF SELECT CHARACTERISTICS 25–26 (2017), <https://fas.org/sgp/crs/misc/R43426.pdf>.

179. Jimmy Hoover & Andrew Kragie, *Law360’s Guide To Trump’s Judicial Picks*, LAW360, <https://www.law360.com/articles/963060/law360-s-guide-to-trump-s-judicial-picks> (last updated Feb. 25, 2020).

180. Press Release, U.S. Courts for the Ninth Circuit, Senate Confirms US Magistrate Judge Bridget Bade to Seat on Ninth Circuit Court of Appeals (Mar. 26, 2019), http://cdn.ca9.uscourts.gov/datastore/ce9/2019/03/26/Bade_Confirmed.pdf.

exemplifies their professional competence, ability as jurists, and respect among their legal peers.

V. CONCLUSION

The current dearth of district judgeships has placed real-world burdens on the courts and those seeking justice through them. An expansion of the magistrate judge system would serve as a short-term solution to this very real crisis.

Most importantly, the ingrained flexibility of the magistrate judge system provides district courts the discretion to use magistrate judges as they see fit. Different district courts have different needs, and magistrate judges can help fulfill them. Depending on the district, magistrate judges can be used to resolve specific case types, be tasked with pretrial matters and mediation, or (with consent) be given a docket nearly identical to that of a district judge.

Most relevant to lawmakers, an expansion of the system should encounter little political opposition. Because the magistrate judge system is an Article I creation, it sidesteps the oft-partisan Article III nomination and confirmation process. Furthermore, although the growth of the magistrate judge system would require additional appropriation, given the marginal cost, it would be possible for Congress to identify a reasonable offset.

Even without Senate scrutiny, there should be little concern about magistrate judges' qualifications or their ability to do their job. The selection process ensures that nominees are selected based on merit, and district judges have an overwhelming incentive to pick candidates who can do the job quickly and competently. There is also no reason to worry that magistrate judges would bypass district judges' authority. Without full consent by civil parties, district judges have the final say over a magistrate judge's rulings.

To improve the judiciary's capacity, Congress has the chance to crawl before it walks. For a small slice of its annual appropriation to the federal courts, Congress can greatly expand the magistrate judge system and thereby offer temporary relief to an overburdened district court system. In the meantime, Congress can focus on building the political consensus to pass a significant judgeships bill, just as it did thirty years ago.