



June 27, 2013

Honorable Patrick J. Leahy
Chairman
Senate Judiciary Committee
224 Dirksen Senate Office Bldg.
Washington, DC 20510

Honorable Chuck Grassley
Ranking Member
Senate Judiciary Committee
152 Dirksen Senate Office Bldg.
Washington, DC 20510

Re: Oppose S. 699, the Court Efficiency Act of 2013

Dear Chairman Leahy and Ranking Member Grassley:

We write in opposition to S. 699, the “Court Efficiency Act of 2013,” which would eliminate three seats on the Court of Appeals for the District of Columbia Circuit (the “D.C. Circuit”), reducing the number of permanent judges on the court from 11 to eight.

To be clear, we support Congress’s authority to promote the efficiency of the federal court system, as well as members’ prerogatives to oppose judicial nominees under the advice and consent clause.¹ We are concerned, however, that S. 699 will deprive the D.C. Circuit of sorely needed staffing—at the expense of Americans’ access to justice.

Crucially, these are not partisan concerns. The ACLU, which jealously guards its independence from any political party, would object as strongly to attempts by a Democratic administration to add seats to the Supreme Court to defend a core policy initiative like the Affordable Care Act. We would likewise object to efforts—as we have in the past—to split the Ninth Circuit to counter its perceived liberal bias.²

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¹ U.S. Const. art II, § 2, ¶ 2.

² In the 109th Congress, the ACLU opposed several ideologically motivated proposals to split the Ninth Circuit. We did not take a formal position on the Roosevelt administration’s 1937 proposal to add a possible six seats to the Supreme Court to protect key components of the New Deal from opposition by economically conservative justices. This was not for lack of debate, however, and the board decided not to take a position largely because the Supreme Court had not, by 1937, become a significant force in the advancement of civil liberties. Samuel Walker, *In Defense of American Liberties* 106-07 (2d ed., S. Ill. Univ. Press 1999) (1990). Given the intervening seven-and-a-half decades, and as with the plan to split the Ninth Circuit, the ACLU would almost certainly come out in active opposition to such a proposal today.

We would have a different position were there compelling evidence that the D.C. Circuit is overstaffed or underworked, but there is little such evidence. In recent comments in favor of the Court Efficiency Act, Ranking Member Grassley noted that the D.C. Circuit “ranks last or almost last in nearly every category that measures workload.”³ He goes on to cite three metrics, based on statistics from the Administrative Office of the U.S. Courts: (1) appeals filed per authorized judgeship; (2) appeals terminated by authorized judgeship; and (3) appeals pending per authorized judgeship.⁴

Each of these metrics, however, is a measure of the number of cases before a given judge, not a true indication of workload.⁵ Not every federal appeal is born equal. Some are more complex than others, which take more time to judge than others, and the D.C. Circuit—responsible as it is for reviewing challenges to federal administrative decisions and rules—handles more complex matters, on average, than any other circuit.

As now-Chief Justice of the United States and former D.C. Circuit Judge John Roberts pointed out in 2006, a full one-third of D.C. Circuit appeals are from federal agency decisions, versus less than 20 percent nationwide. About one-quarter of D.C. Circuit cases feature the government as a civil litigant, versus less than five percent nationwide. In total, two-thirds of all cases at the D.C. Circuit are civil government cases; that number is about a quarter of all cases in all circuit courts nationwide.⁶ Additionally, as the Washington Post pointed out using 2012 data, when one removes immigration cases from the administrative appeals terminated on the merits before the other circuits, the D.C. Circuit disposed of more than three times as many complex administrative appeals as its closest competitors. Both the Courts of Appeals for the Second and Ninth Circuit, with 13 and 27 judges sitting, respectively, had 33 non-immigration administrative appeals terminated to the then-seven judge D.C. Circuit’s 108.⁷

This skew in favor of cases involving the government is because of the court’s exclusive or concurrent jurisdiction over the complex regulatory disputes originating in the alphabet soup of

³ *Hearing on the Nomination of Sri Srinivasan to be a United States Circuit Judge for the D.C. Circuit Before the S. Comm. on the Judiciary*, 113th Cong. (2013) (prepared statement of Ranking Member Chuck Grassley).

⁴ *Id.*

⁵ The Washington Post recently examined other metrics and concluded that “[y]ou can’t just assert that one appeals filing is equal to another – or one set of statistics is better than another. Depending on the metrics, the D.C. Circuit could very well be in first place.” Glenn Kessler, *The Fact Checker: Is the D.C. Circuit ‘Last in Almost Every Category’?*, Wash. Post, June 6, 2013.

⁶ John G. Roberts, Jr., *What Makes the D.C. Circuit Different? A Historical View*, 92 Va. L. Rev. 375, 376-77 (2006).

⁷ *The Fact Checker*, *supra* note 5. Senator Grassley’s staff cited the appeals terminated statistic as evidence of the D.C. Circuit’s underwork, but it appears to support the converse. Indeed, it may actually underrepresent the court’s workload because the D.C. Circuit tends to consolidate related administrative appeals more than other courts. *Id.*

the federal administrative agencies. As noted, these matters are inherently more labor intensive than other federal appellate cases. They result in thousands of labor hours for judges and other court staff, including days of oral arguments; voluminous briefing by parties, intervenors and amici curiae; and the drafting of long and detailed opinions.

For instance, pending or recently decided matters include cases that could potentially influence internet regulation, competition and innovation for a generation;⁸ severely limit the president's recess appointment power;⁹ and free or continue to indefinitely detain the prisoners in the military's facility at Guantanamo Bay, Cuba.¹⁰

Along with this continued tight focus on complex administrative and constitutional cases,¹¹ the court's per judge workload has increased significantly. As of March 2012, there were seven judges sitting on the D.C. Circuit with 1,369 cases pending (196 cases per judge, including 115 administrative appeals and 26 U.S. civil matters).¹² By contrast, in March 2007, with 10 judges sitting, the average was 144 cases per judge, including 61 administrative appeals and 22 U.S. civil matters.¹³ Even with an eighth judge on the court, the caseload remains significantly higher than it was in 2007. For instance, assuming the numbers have remained relatively stable from September 2012 to the present, there are about 90 administrative appeals per judge pending today, versus 61 in March 2007.¹⁴

⁸ *Verizon Commc'ns Inc. v. Fed. Commc'ns Comm'n*, No. 11-1355 (D.C. Cir. Sept. 30, 2011).

⁹ *Noel Canning v. Nat'l Labor Relations Bd.*, No. 12-1115, slip op. (D.C. Cir. Jan. 25, 2013), *cert. granted*, (U.S. June 24, 2013) (No. 12-1281).

¹⁰ See Lawfare, <http://www.lawfareblog.com/category/guantanamo/litigation/dccircuit/> (last visited June 5, 2013) (collecting cases).

¹¹ Admin. Office of the U.S. Courts, Federal Judicial Caseload Statistics: March 31, 2012 app. tbl. B-1 (2012). The D.C. Circuit had 1,369 appeals pending on March 31, 2012. Of these, 154 were criminal (11% of total versus 26% nationwide); 72 were prisoner petitions (about the same proportion as nationwide); 182 were U.S. civil cases (13% of total versus 5% nationwide); 3 were private prison petitions (less than a percent of total versus 15% nationwide); 115 were private civil matters (8% of total versus a full 23% nationwide); 7 were bankruptcy cases (about the same proportion as nationwide); 807 were administrative appeals (59% of total versus 23% nationwide); and 29 were original proceedings (about the same proportion as nationwide). Accordingly, in 2012, the D.C. Circuit's docket was skewed dramatically toward U.S. civil matters and administrative appeals (at the expense of criminal matters and private civil matters).

¹² *Id.*

¹³ Admin. Office of the U.S. Courts, Federal Judicial Caseload Statistics: March 31, 2007 app. tbl. B-1 (2007). The vacancy on the court in 2007 was the seat held by Chief Justice Roberts, which has been open since his elevation in September 2005.

¹⁴ *Id.*; Admin. Office of the U.S. Courts, Federal Judicial Caseload Statistics: Sept. 30, 2012, app. tbl. B-1 (2012).

Notably, the Judicial Conference of the United States, the apolitical judicial administrative agency overseen by Chief Justice Roberts and tasked with surveying and submitting recommendations concerning the workload and business of the federal courts, has not recommended any reduction in the number of sitting judges on the D.C. Circuit.¹⁵ Right now, it continues to recommend 11 seats for the court.

Additionally, numerous court experts, including former Chief Judge Patricia Wald, have urged Congress to ensure the court is staffed appropriately. Chief Judge Wald wrote in February 2013, “[t]here is cause for extreme concern that Congress is systematically denying the court the human resources it needs to carry out its weighty mandates.”¹⁶ The bill would further deny the Obama administration the ability to name any judges, other than Judge Srinivasan, to the court, which is often cited as a feeder for and second only in importance to the Supreme Court. This raises important separation of powers issues, which are perhaps not obvious at first blush. As Chief Judge Wald writes:

There is, moreover, a subtle constitutional dynamic at work here: The president nominates and the Senate confirms federal judges for life. While some presidents may not encounter any vacancies during their administration, over time the constitutional schemata ensures that the makeup of courts reflects the choices of changing presidents and the “advice and consent” of changing Senates.¹⁷

To be sure, senators are under no obligation to confirm nominees who they feel compelled to oppose.¹⁸ And, again, our concerns are not driven by any partisan loyalty or hostility. Rather, as with the plan to split the Court of Appeals for the Ninth Circuit out of concern for a liberal bias or the Roosevelt court-packing plan, we would object to any attempt by the legislative or executive branch to interfere with the ideological or partisan profile of the judicial branch outside of the constitutionally mandated advice and consent procedure.

The federal judiciary is about justice. It cannot dispense justice without both independence and the resources it needs to conduct its business. Both independence and ability are threatened by the Court Efficiency Act, without any compelling showing of resulting efficiencies.

* * *

¹⁵ See Letter from Thomas F. Hogan, Sec’y, Judicial Conference of the U.S., to Senator Patrick J. Leahy (Apr. 5, 2013) (recommending just four additional judges for the Ninth Circuit Court of Appeals and one for the Sixth in biennial review of judicial staffing).

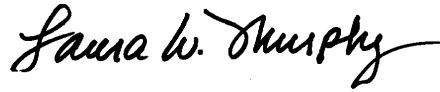
¹⁶ Patricia M. Wald, *Senate Must Act on Appeals Court Vacancies*, Wash. Post, Feb. 28, 2013.

¹⁷ *Senate Must Act*, *supra* note 13. Three of the current eight circuit judges are President George W. Bush appointees: Judges Brown, Griffith and Kavanaugh.

¹⁸ Importantly, these comments are unrelated to the three D.C. Circuit nominations put forward by the Obama administration. To the extent new judges are needed to handle the court’s workload, the Senate should expedite the nominations process. We take no position on any of the specific nominees.

Please do not hesitate to contact Legislative Counsel/Policy Advisor Gabe Rottman at 202-675-2325 or grottman@dcaclu.org if you have any questions or comments.

Sincerely,

A handwritten signature in black ink that reads "Laura W. Murphy". The signature is written in a cursive style with a long, sweeping underline.

Laura W. Murphy
Director, Washington Legislative Office

A handwritten signature in black ink that reads "Gabriel Rottman". The signature is written in a cursive style with a long, sweeping underline.

Gabriel Rottman
Legislative Counsel/Policy Advisor

cc: Members of the Committee