What can be done about backlogs?

With no new judgeships in sight, federal courts are getting creative to manage caseloads

BY MERRITT MCALISTER, ADALBERTO JORDÁN & KIMBERLY J. MUELLER

No new judgeships have been authorized for the federal courts of appeals in more than 40 years, resulting in a system that is burdened by large caseloads: By 2021, filings per judge had increased nearly 22 percent.[1] The situation is more dire in district courts, where no new judgeships have been added since 2003, and case filings have since increased by 17 percent in only 20 years.[2] Some districts have not seen any new judges since 1978.[3] Observers have criticized this state of affairs as implicating a host of rule of law concerns, including increased court delays, decreased access to justice, and a judiciary unrepresentative of the diverse country it serves.[4] Scholars have debated the steps judges have taken to triage oppressive dockets, including reducing oral argument, issuing unpublished decisions, and relying more on judicial staff attorneys to handle cases.[5] Though Congress held formal hearings on the need for new judgeships as recently as 2021,[6] and the Judicial Conference of the United States has consistently recommended adding new positions,[7] no action has yet been taken.

We asked a federal appellate court judge — **ADALBERTO JORDÁN**, of the U.S. Court of Appeals for the Eleventh Circuit — and a federal district court judge — **KIMBERLY J. MUELLER**, chief judge of the U.S. District Court for the Eastern District of California — to weigh in on the reality of caseloads, their pressures, and potential solutions. Moderating the conversation was **MERRITT MCALISTER**, interim dean and Levin, Mabie & Levin Professor of Law at the University of Florida Levin College of Law, whose recent article, *Rebuilding the Federal Circuit Courts*, examines the tradeoffs judges have undertaken to keep up with increased demand. Their lightly edited conversation follows. [*Editor's note: This discussion was held in February 2023 and references data that may have changed since that time.*]

MCALISTER: Federal appeals have been on a steady decline since their apex in 2005, when 70,000 cases were appealed, to their nadir in 2022, which saw only 40,000 such cases. Even so, the U.S. Courts of Appeals have not seen any increase in authorized judgeships since 1990, so appellate judges are still overwhelmed relatively speaking. Judge Jordán, first, what do you make of the decline in federal appeals? And do you think we still need more judges on the U.S. Court of Appeals?

JORDÁN: The decline is perplexing, and I've talked to colleagues around the country who are trying to figure out the reasons. We seem to generally think that it is a combination of factors. There's still the lag from the pandemic, and structural changes to the economy that may be long-term or permanent; companies moving in and out of relevant sectors, or deciding not to spend money on litigation, and using their capital or resources for other things; the cost of litigating in federal court continuing to rise; and the fact that district court filings, both on the criminal side and the civil side, went down during COVID. We haven't seen the ▸

cases come back to where they previously were.

Part of it may also be a structural change in the way we're doing things as lawyers. Law firms all over the country are having trouble figuring out the right work-home balance for people who want to work remotely. For a profession that has never really worked that way before, I think that probably has some effect on productivity in terms of the cases that get litigated. Of course, the cases that get appealed are a smaller percentage of the cases that get filed in district court, so it's a pyramid effect. If the base of the pyramid is smaller in terms of caseload, we're going to see an effect in the courts of appeals. But as you said, cases have been going down all over the country.

To go back to your question about whether we need more appellate judges — for years I and one other judge on the Eleventh Circuit were the only ones who consistently voted for more judges in the biennial survey. I thought we needed them, and I believed we were doing too much work in a hurried fashion. But during the last survey I voted no for the first time. That's because I want to see if this slowdown is going to be permanent or whether it's just a blip and cases are going to go back up.

MCALISTER: If the appellate caseload stays where it is right now, are there adequate resources to handle that level of demand?

JORDÁN: I can only speak for our circuit, and I think the answer is yes — but it would require a lot of hard work. We rely on our staff attorneys to prepare memos on nonmerit dispositions, motions, jurisdictional issues, and the like. I think it's impossible for us, even with the current lower caseload, to read every piece of paper that gets filed in nonmerit scenarios. We rely on the staff attorney memos to at least tell us what's at issue so we can decide what we need to read from the parties' filings. When I clerked on the Eleventh Circuit back in 1987, total filings were a little bit over 3,800, and now we're somewhere in the mid-4,000s. So, even with today's lower filings, overall caseload numbers have increased for our circuit relative to where they were in the mid-1980s. How you deal with that docket depends on how you process cases, how many of those cases get sent to argument, how many get resolved on the briefs. There's also the added caveat that some matters are counted as merits dispositions now, and they are not cases that you could ever send to oral argument — for example, an application by someone who is in custody to file a second or successive habeas corpus petition under 28 U.S.C. § 2254 or a motion to vacate under 28 U.S.C. § 2255. If such an application is denied, that counts as a merits termination, but that's not something you would send to oral argument because it's one-sided; the government never responds. You've got 30 days by statute to decide the application, and that adds to the number of cases that you're taking in and disposing of and decreases the percentage of cases you're sending to argument.

> Practically speaking, for more than 20 years we have been in emergency status and are at all times, and will be unless or until Congress authorizes additional judgeships for our district. That is because we have the same number of judgeships as we did 40 years ago — six — and our population has gone from 2.5 million to 8.5 million, with correspondingly higher and higher caseloads per judgeship.
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MCALISTER: Judge Mueller, what are your observations about caseloads at the appellate and district court levels?

MUELLER: I was going to facetiously suggest that the reason there are fewer appeals is because district courts are doing their job well.

But seriously, going back about five years or so, from the time a district

court resolves a case, only about 12 percent of cases get appealed. That's a pretty low number.

In terms of case filings, the big story for us has been COVID, where we saw what we think was a slight temporary drop in new filings. I think that's true nationwide. We are already starting to see case filings come back, and I think those numbers will stabilize. (Bankruptcy is a whole different story, and I think the numbers are starting to creep up, but bankruptcy just bottomed out. The question there was whether or not to maintain the number of judges — and for now we have kept those judgeships in place.)

But for us, particularly in districts like the Eastern District of California — 34 counties in the Central Valley of California — we see our caseloads just continuing to rise going forward. That is in large part because, within California, we are one area where the population is increasing rapidly as people move inland, away from the more expensive coastal areas. We are home to California's capital city, the state Water Project, huge swaths of federal land and agricultural operations, Lake Tahoe and Yosemite National Park. We are one of several districts our Administrative Office of the Courts (AO) in Washington, D.C., has recognized as carrying "extraordinarily high and sustained caseloads," many years running.[8] And we regularly revert to official "judicial emergency" status as defined by the AO, whenever we have a single vacancy on our court of any duration.[9] Practically speaking, for more than 20 years we have been in emergency status and are at all times, and will be unless or until Congress authorizes additional judgeships for our district. That is because we have the same number of judgeships as we did 40 years ago — six — and our population has gone from 2.5 million to 8.5 million, with correspondingly higher and higher caseloads per judgeship. To properly serve our population, and to achieve reasonable caseloads per judgeship, we need 5 new judgeship positions to fix our judicial infrastructure for the foreseeable future.

I have a fear that if we don't get the additional resources where they are needed, we become less available, and therefore litigants opt out of our forum when they have disputes we are meant to resolve. While we resist assembly-line procedures, we implement our own forms of triage — less oral argument, less civil hearing time on motion calendars — which is a huge loss, although some of us still value oral argument greatly. Most Rule 16 conferences — the important initial scheduling conferences, where judges have a chance to get a case launched in a way that will achieve efficiencies and move toward a fair disposition — are not done live but submitted on the papers. So there's that kind of loss, too. But ultimately, we need to take time to decide the cases correctly, and in many, many cases time-to-disposition stretches well past three years, which the AO considers a presumptively reasonable period of time to resolve a case. Many motions languish more than six months, the maximum time by which we ideally will resolve them.

I don't have any way to document my concern about attrition in federal court filings, even as our actual numbers are rising, but at occasional bar events, attorneys will say something like, "We are doing our best to help you out — we just go to state court." But that is not the way things are supposed to work. Through this kind of atrophy, one way or the other, are we unable to serve the essential function that we're supposed to serve? That's my big worry.

MCALISTER: Do you have any thoughts about ways to assess the impact of delay, or the impact of more streamlined procedures, on litigants themselves?

MUELLER: Justice delayed is justice denied, of course. When a case takes more than three years to go to trial or otherwise resolve, witnesses' memories fade and evidence otherwise becomes stale. One particularly stark example, though, is that we have declined multidistrict litigations [MDLs] because we have felt we just don't have the bandwidth to add them to any judge's caseload. But when you tell the attorneys who work in that space that that's been our position, they're aghast. They know that deprives people who live in the Central Valley of ready access to full participation in those cases if they're arising here. In other words, we're an MDL "sender" district, though I do have one senior judge colleague who now says he's willing to take an MDL if one is the right fit. I am now of the mind that we should definitely seek to host MDLs, particularly for the kinds of cases we so regularly see transferred out now. Medical device cases are a prime example, reflective of Sacramento's status as a medicine and health care hub.

Another example is likely patent cases. If someone can find a way to get a patent case to the Northern District of California, or to Texas, they're going to go file there. The Northern District has about the same population as our district but more than twice the number of judges — and correspondingly, much more reasonable caseloads.

MCALISTER: Judge Jordán, I want to think a little more about how courts respond to caseload pressures. Do you have any concern ▸

about reduced oral argument, lack of publication, or the risk of over-reliance on staff attorneys?

JORDÁN: I'm a big believer in oral argument. I came from an appellate practice background, and I think if you're requiring three judges and their clerks to home in on cases and really concentrate on them for argument, the chances of getting things right increase quite a bit.

We are expected to provide a reasoned decision explaining, to the degree necessary, our rationale for deciding a case in a certain way. I think, like any bureaucracy, once you put in structures, it's hard to move away from them once you've set them up and they've been in place for a long time. I don't have any problem with the triage structures that we have in place, as long as the judge is not completely relying on them to do his or her work. It's okay to get a staff attorney memo in a criminal sentencing case or a *pro se* case, but that's only the beginning. You owe it to the public at large, to the bar and the bench, and to yourself, to make sure that you and your clerks go beyond the staff attorney memo, make sure the memo is right, or hasn't missed anything.

As for oral argument, we as judges control the rate and the pace of oral argument. We're not delegating that task to the clerk's office or the staff attorney's office or to anyone else. We're the ones who are deciding what cases go to oral argument and how much time to give the attorneys during oral argument. If the oral-argument numbers are down, it's because the judges are sending less cases to oral argument. Whether that's good or bad, correct or incorrect, we're the ones who control the oral-argument end of the spectrum.

MCALISTER: The data tells us that not all circuits have the same practices,[10] and that creates some risk of disparities and differences in terms of how they handle cases that don't go to oral argument.

JORDÁN: The other thing with regard to oral arguments is that our court, for one, saw incredible uniformity and lack of change for a very long period of time, but since 2016 more than half of our active judges have changed. With the recent confirmation of Nancy Abudu, we've now added seven new judges in the last seven years. That's a huge change for a court with 12 active judges. It takes a while for a new judge on a court that is relatively small to get his or her bearings and figure out how many cases he or she should be sending to oral argument. What matters enough to send to oral argument? When am I confident that I can handle a case on the briefs and the record? What's the culture inside the circuit about oral arguments, published versus nonpublished opinions, et cetera? That's going to take a little for new judges to sort out.

MCALISTER: Absolutely. The Eleventh Circuit isn't alone. The Second Circuit has also had significant changeover, and some of these practices and customs and circuit habits are likely shifting or will take time to sort out. Judge Mueller, how do some of these caseload pressures affect your court? Do you feel that the emergency situation forces you not to write decisions sometimes — or not to do what you might otherwise do if you had more time?

MUELLER: There's definitely a push and pull, and a fair amount of pressure. I've been a district judge now for a little more than 10 years and was a magistrate judge for almost eight before that. When I first became a district judge, I was determined to hear all the motions on my civil law and motion calendar, because I remembered as an attorney what it felt like to get a notice from the judge that the matter was submitted. I just thought as a judge, without a hearing, I was missing a chance to clarify a key point, to make certain the record was clear. But I have found it impossible to meet that aspirational goal.

The question is, have I been able to save time by not writing as much? I have found it very difficult to let go of that. My understanding of what federal courts do is that we strive to fully explain ourselves. I look for the cases where I might be able to issue a bench order, but I find them to be few and far between — particularly because, if you take seriously what you hear while you're on the bench, you might need to refine an articulation of the way in which a case is decided. Bench orders can save time. You can direct an attorney to get the transcript and create a fully written order. I have found that unsatisfactory, as much as I try to issue bench orders when I can.

The other frustration is when I decide what to submit on the papers as opposed to what to hear on my law and motion calendar, with oral argument in the courtroom, I'm necessarily making that decision several weeks in advance of a hearing date, often without having delved into the case fully. So I'm making only an initial determination. It may be that, once I have a draft order in a case that I decided to submit, I realize there's something more there. So there are inefficiencies introduced. Do I put the matter back on calendar? Do I ask for supplemental briefing? It is

a very stressful position to be in if one is committed to full access to justice.

Because of the caseload, I often think I'm not able to provide the full quality of justice that would be ideal, fully explaining ourselves for the litigants in the first instance, or for the public and an appellate court. It's often the case that the better I explain myself, the less likely a case is going to come back to me after an appeal, so saving time initially can mean having to spend more time later on.

JORDÁN: My experience on the district court in Miami for 12-plus years was very much the same as that of Chief Judge Mueller. You're on the bench all the time. You have a heavy criminal docket with a lot of trials, and you struggle to get out reasoned orders in your civil docket. The civil docket tends to languish at times because of the speedy trial concerns on the criminal side.

We had a chart that went out every month that showed every judge's pending cases. I was never at the far end of the chart as the slowest judge, but I was always two or three from the end. I was just not one of those judges who could do everything very quickly. I wanted to provide a reasoned explanation of what I was doing and why I was doing it, and that takes time.

MUELLER: As chief judge of our district now, I can lag a bit. As of the date of this conversation, I have a total of 814 cases pending, actual cases, a bit more than my other Sacramento colleagues, all of whom are above the national weighted average caseload per judgeship. We have two district judges in our Fresno courthouse, each with over 1,000 actual cases pending.

In many courts, there's been a strong push to maximize the use of magistrate judges. Our court has long respected magistrate judges as their own judges. I benefited from that management approach, and I had my own caseload to manage. We now have two magistrate judges for every district judge, in recognition of our limited district judge resources. Given this ratio, we encourage the parties to make full use of our magistrate judges, by considering consenting- to full-magistrate judge jurisdiction in civil cases, for instance. Does that mean there's less need for more Article IIIs? Having done both jobs and really valuing the magistrate judge job, I don't think so. There is something meaningfully different in the definition and the role that an Article III judge plays in terms of full independence and life tenure subject to good behavior, being accountable only to the Constitution and the laws. While felony criminal trials and sentencing are at the heart of Article III, complex civil cases also often benefit from the full attention of an Article III judge. I think you see parties signaling that when they don't consent to magistrate judge jurisdiction in quite a few cases.

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MCALISTER: Do you know what percentage of cases have consented to magistrate judges in your district?

MUELLER: It varies district to district. We have been trying to encourage more consents by adding more cases to the magistrate judge wheel in the first instance, so that means a case is assigned only to a magistrate judge

without the parties knowing who the district judge will be. We tried that approach initially with the prisoner and pro se cases. Those can be very difficult, getting consents from both sides. More recently, we've begun assigning a percentage of nonprisoner civil cases to magistrate judges only. Our current rate of consents districtwide is 9.5 percent, as of May 2023. That number is actually up from 2.2 percent as of May 2022. It's too early to know if that's a trend. The Northern District of California has adopted an approach to maximizing magistrate judge utilization, and it is being held up as the model because it has a pretty high rate of magistrate judge consents. Culturally that district is very different, given the number of judges and the caseload. I don't know that we can be expected to follow in their shoes entirely, but we are taking some steps in that direction, on a pilot basis.

MCALISTER: One concern that has been raised about judicial expansion is the potential for jumbo courts, which might lead to less stability in the law, less collegiality, and perhaps less prestige in the position. What are the risks to your courts in terms of adding more judges?

JORDÁN: I think there is a risk at some point. I can imagine how difficult it must have been for the old Fifth Circuit to have had an en banc argument with 26 judges[11] going around the table each speaking for 10 or 15 minutes if they wanted to. You can see how sometimes it would take more than one day to conference a case heard by the full court. And if you had two or three en banc cases in the same week, the process probably seemed interminable. But there are tradeoffs when caseloads increase and there are no new judges. I've always been a big believer — at least when the cases were higher, before the recent trend downward — that, in a circuit like ours, 15 is not the same as 26. In other words, when cases were higher, we would have been well served by having 15 judges, as opposed to 12. I don't believe an Eleventh Circuit with 15 active judges would create the same problems as the 26-judge old Fifth Circuit.

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To get to 15 judges, Congress could have taken care of part of the political problem by adding one new judgeship to each state in the Eleventh Circuit. But that does not solve the problem of figuring out when it is politically feasible to create new judgeships. Who, for example, gets to appoint the judges? If a Democrat is in the White House and Congress has a Republican majority, the Republicans probably would not support a bill to create new judgeships. And the same is true of the Democrats if the tables were reversed. I know there have been some proposals about how to try to equalize that process so that everyone's invested and doesn't feel left out if they vote for new judges.

At some point, there is a risk that a court can get too big and that you can lose touch with your colleagues and with the development of the law in ways that are not beneficial, especially in a court like ours. We're spread out over three states, and our oral arguments move from state to state. We hear cases in Atlanta, Georgia, in Montgomery, Alabama, in Jacksonville, Florida, and in Miami, Florida.

MUELLER: On the addition of judges, in my mind, the north star has to be, what is needed to serve the litigants and to convince the public that the courts are here to take the disputes that belong in federal court, and resolve them fairly and as efficiently as possible while giving them their due? Maybe it is true that more districts need to be created — even district courts. California became four districts in the '60s because of population growth. Maybe it needs more today.

Collegiality can be addressed through things like forming executive committees, as well as concerted efforts to gather for regular bench-wide meetings and informal gatherings. Strong clerks of court can definitely help and in fact are essential.

Our bench right now — six active district judges when we're full up — that's the committee of the whole, but if we doubled, we'd be 12 — hardly a jumbo court. That number would not be a burden, and we'd be in much better position to handle the cases that are coming our way.

The Ninth Circuit is a special challenge because of California. I have signed letters opposing splitting the Ninth Circuit, because none of the proposals involved anything other than splitting California. I have heard some thoughtful suggestions on ways to avoid that problem, but I do think California benefits from having a single federal appellate court overseeing it, as sprawling as the Ninth Circuit is. Modified en banc procedures have addressed some concerns about the size of the circuit. And despite its size, circuit judges are very productive and resolve matters relatively efficiently, all things considered.

MCALISTER: From the perspective of a district court within the Ninth Circuit, do you see instability in the law or conflicting decisions that suggest that the right hand does not necessarily know what the left hand is doing?

MUELLER: We see some of that, yes. When we read a decision, we might take a peek at who's on the panel and pay close attention to en banc activity. There's a lot of en banc activity in certain areas of the law, and a fair number of cases going up to the Supreme Court. We try to keep our finger on the pulse. We pay attention to the unpublished decisions, given that they are citable now. We take into account how explanatory a decision is. Sometimes we try to read the tea leaves, sometimes we're bound by a decision and we note that, even if it might change, we're bound by it. Sometimes we'll ask the parties if we should hold off if it seems clear a case is going to the Supreme Court. We manage in all of these ways, doing our best to get it right under the law.

MCALISTER: Marin Levy [faculty director of Duke's Bolch Judicial Institute] has argued that one way to respond to some of the political difficulties of adding judges is to encourage senior status.[12] I'm curious about your thoughts on, as Professor Levy says, the promise of senior judges, whether you perceive barriers to going senior in some ways, and whether you think that senior judges are a mechanism for helping relieve some of these caseload pressures.

MUELLER: We have historically balanced our caseload challenges on the backs of senior judges, assuming that they would stick around. And senior judges — those judges who have reached senior status by satisfying the "rule of 80"[13] — have been invaluable in continuing to take significant caseloads. The strong tradition in our district — again, a reflection of our practical emergency status — is that judges have been expected to immediately take senior status once they're eligible, because that's the only way we've gotten new judgeships.

MCALISTER: How many senior judges do you have right now?

MUELLER: Right now we have three. As I said, we've balanced our caseloads on their backs, because they help take some of the pressure off active judges. But if you draw a bell curve of the number of senior judges that we've had over time, it reached a height about 20 years ago, and it's been steadily dropping. For example, my predecessor as chief judge assumed senior status and then immediately retired. For some, family members insist on retirement. For some, there's a level of burnout that makes staying on unappealing. Some folks go into JAMS [Judicial Arbitration and Mediation Services] or another mediation/arbitration practice. Some want to go teach and have a much more relaxed workload. Every one of our former senior judges no longer with us is a public servant at heart, but the steady drumbeat of heavy caseloads and their demands can be very difficult to maintain.

Another consideration for senior judges is that, in tight budget times, the resources allocated to them can come under the microscope. There's been some suggestion that senior judges won't have full access to a courtroom or maintain their own chambers. We're currently adjusting staffing formulas, tying staff to the caseload a senior judge carries. The combined effect of cost-cutting measures might be seen as too much of an affront by a judge after many years of service. I do think, at the district court level, maintaining chambers, maintaining appropriate staffing, maintaining courtrooms for senior judges — all of these are important considerations if we are to have a certain number of judges decide to continue serving once they reach senior status.

JORDÁN: The flipside is that some judges do not go senior, but their pace ▸

slows. It's only natural that you're not going to do as much work in your mid-80s as you were doing in your early 60s. The senior judges do substantial work, and we couldn't do our jobs without them, but the total work done by senior judges at any point in time is too unpredictable. If most judges go senior when they are eligible, and stayed on the bench and didn't just retire, we would have a pretty steady stream of work that they could do. But because senior status and retirement are such individual decisions, you never really know from year to year what you're going to have.

MCALISTER: Let's talk about the Judicial Conference of the United States — the policymaking arm of the federal courts — which plays a substantial role in terms of making recommendations to Congress for new authorized judgeships. The Judicial Conference has established benchmarks for workload and, once a court hits that benchmark, it is eligible to request more judges. Are there reforms that you might like to see in that process?

JORDÁN: I'll touch on an area that we haven't discussed at all yet today, and that is the budget. We're at the mercy of Congress and the money it allocates to us. I don't know the exact numbers, but I'm pretty sure that our allotment for either last year or this year is very, very close to the allotment we had in 2013.

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If you think about inflation and the cost of living, and you're telling a court that its dollars today are the same as they were 10 years ago, then that court needs to figure out a way to make ends meet. We ultimately do what we need to do, but the system needs improvement, and if we get by in a lean year, we wonder whether Congress is going to think we can do the same amount of work with less and less and less. We need some predictability, and knowing what you are getting in the next two to three years would certainly help courts plan long term. It almost seems like we're always playing catch-up with the money we are allocated. We finally found out we're getting this allotment, but how do we use it? How do we plug gaps? What do we do this year with this money that we haven't had for two or three years? I think that's part of the problem, although it may not be one that the Judicial Conference can solve.

MUELLER: I would echo that. Again, the Ninth Circuit chief judges, including the Judicial Conference representatives, are having deep discussions about the budget. In a nut-

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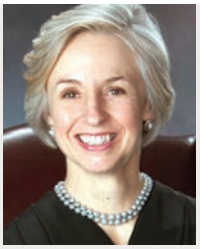

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shell, our fundamental plea is that the Judicial Conference go to Congress with an ask that reflects what we really need. I think the judiciary as a whole has tried over many years to be reasonable, and sometimes we have sold ourselves short. The thought now is that we ought to make certain Congress knows what we need, even assuming our full request may not be fully funded in a final appropriations bill for any given year.

And then there is the perennial, pressing need for more judgeships, especially in districts like the Eastern District of California. The fact that several district courts in different parts of the country — California, Texas, Indiana, Delaware — have significant, longstanding needs warrants special Congressional attention. If new judgeships are finally to be created, hopefully these neediest districts will be given top priority.

I like the idea you describe in your article, Merritt, that Congress should undertake a mandatory review of a federal appellate circuit every five years to determine whether to authorize a new judgeship. At the same time, if to solve the political problem the creation of judgeships is spread out over too much time, it's not acknowledging the pretty deep hole some of us are in. I think it's hard to disagree that special attention should be given to districts like ours.

MCALISTER: Congress might prioritize those handful of districts that are in dire straits, and then implement a longer-term solution for everyone. That seems like a solution that maybe everyone can live with. One can hope, right? Fingers crossed.

MUELLER: One can hope. Fingers crossed, indeed!

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1 Merritt E. McAlister, *Rebuilding the Federal Circuit Courts*, 116 Nw. U. L. Rev. 1137, 1206 (2022). More recent statistics suggest a possible downturn.

2 Kristina Davis, *Overwhelmed federal courts ask Congress for more judges*, The San Diego Union-Trib. (Feb. 25, 2021), https://www.sandiegouniontribune.com/news/courts/story/2021-02-25/federal-courts-congress-relief.

3 *Chronological History of Authorized Judgeships - District Courts*, U.S. Courts, https://www.uscourts.gov/judges-judgeships/authorized-judgeships/chronological-history-authorized-judgeships-district-courts (last visited July 13, 2023).

4 *See* Maggie Jo Buchanan & Stephanie Wylie, *It Is Past Time for Congress to Expand the Lower Courts*, Ctr. for Am. Progress (July 27, 2021), https://www.americanprogress.org/article/past-time-congress-expand-lower-courts/.

5 *See, e.g.*, McAlister, *supra* note 1, at 1138; Marin K. Levy, *Judicial Attention as a Scarce Resource: A Preliminary Defense of How Judges Allocate Time Across Cases in the Federal Courts of Appeals*, 81 Geo. Wash. L. Rev. 401, 414–416 (2013).

6 *"The Need for New Lower Court Judgeships, 30 Years in the Making": Hearing Before the Subcomm. on Cts., Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 117th Cong. 9 (2021) (testimony of Marin K. Levy, Professor of Law, Duke University School of Law), https://www.congress.gov/117/meeting/house/111237/witnesses/HHRG-117-JU03-Wstate-LevyM-20210224-U1.pdf.

7 *Federal Judiciary Seeks New Judgeship Positions*, U.S. Courts (Mar. 14, 2023), https://www.uscourts.gov/news/2023/03/14/federal-judiciary-seeks-new-judgeship-positions; *Judiciary Seeks New Judgeships, Reaffirms Need for Enhanced Security*, U.S. Courts (Mar. 16, 2021), https://www.uscourts.gov/news/2021/03/16/judiciary-seeks-new-judgeships-reaffirms-need-enhanced-security; *Recent Recommendations by the Judicial Conference for New U.S. Circuit and District Court Judgeships: Overview and Analysis*, EveryCRSReport.com (SEPT. 3, 2019), https://www.everycrsreport.com/reports/R45899.html.

8 Letter from Hon. Roslynn R. Mauskopff, Jud. Conf. of the U.S., to Vice President Kamala Harris, U.S. S. (Apr. 25, 2023); Letter from Hon. Roslynn R. Mauskopff, Jud. Conf. of the United States, to Speaker Kevin McCarthy, U.S. H.R. (Apr. 25, 2023).

9 The "judicial emergency" definition for district courts is: "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 and 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." *Judicial Emergency Definition*, U.S. Courts, https://www.uscourts.gov/judges-judgeships/judicial-vacancies/judicial-emergencies/judicial-emergency-definition (last visited June 13, 2023). The districts currently listed as judicial emergencies are: the Eastern and Western Districts of Louisiana, the Southern and Western Districts of Texas, the Central, Northern, and Southern Districts of California, and the Middle and Southern Districts of Florida. *Judicial Emergencies*, U.S. Courts, https://www.uscourts.gov/judges-judgeships/judicial-vacancies/judicial-emergencies (last visited Aug. 16, 2023).

10 To explore these data, *see generally* McAlister, *supra* note 1.

11 At its high-water mark in 1978 — before some judges were transferred to the Eleventh Circuit — the Fifth Circuit had 26 authorized judgeships. *U.S. Court of Appeals for the Fifth Circuit - Legislative History*, U.S. Ct. App. 5th Cir., https://www.ca5.uscourts.gov/about-the-court/circuit-history/circuit-history (last visited July 13, 2023).

12 *See generally* Marin K. Levy, *The Promise of Senior Judges*, 115 Nw. U. L. Rev. 1227 (2021).

13 Senior judges can reach senior status when their years of service added to their age equals 80.