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October 28, 2013

Hon. Bob Goodlatte
Chairman, House Judiciary Committee
Hon. John Conyers, Jr.
Ranking Member, House Judiciary Committee
2138 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Goodlatte and Ranking Member Conyers:

To assist the Committee in its consideration of the issues to be presented at its October 29, 2013, hearing entitled "Are More Judges Always the Answer?", we are writing on behalf of Constitutional Accountability Center mainly to address proposed legislation that seeks to reduce the number of judgeships on the U.S. Court of Appeals for the D.C. Circuit from 11 to eight.

On June 4, 2013, Representative Tom Cotton proposed the "Stop Court-Packing Act," H.R. 2239, which would, if enacted, eliminate three of the 11 authorized judgeships from the D.C. Circuit. Representative Cotton justified H.R. 2239 by citing the caseload of the court, the fact that its active judges are "evenly split between judges appointed by Republican and Democratic presidents," and the Congressman's desire to support the court's ability to "frustrate[] [President Obama's] liberal, big-government ambitions."[1] This bill is similar to Senator Charles Grassley's proposed "Court Efficiency Act," S. 699, which would eliminate three of the 11 authorized judgeships from the D.C. Circuit, and add one judgeship each to the Second Circuit and the 11th Circuit.[2]

While it is perfectly legitimate for members of Congress to question whether a specific federal court has too many judges, or too few, based on workload, H.R. 2239 and S. 699 go far beyond asking

[1] http://cotton.house.gov/media-center/press-releases/cotton-introduces-the-stop-court-packing-act
[2] *See* Senator Charles Grassley News Release, "Nomination of Sri Srinivasan and Court Efficiency Act" (April 10, 2013), available at <http://www.grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=45436>.

such questions—they answer them. And they do so without the benefit of any of the indicia of neutrality and objectivity that should accompany a proposal to dramatically reduce the size of a federal court.

In fact, these proposals ignore recent recommendations of the Judicial Conference. By letter of April 5, 2013 to Senate Judiciary Chairman Patrick Leahy, a copy of which was also sent to Senator Grassley, the Judicial Conference transmitted to the 113th Congress "the Conference's Article III and bankruptcy judgeship recommendations and corresponding draft legislation for the 113th Congress" (the basis of the proposed Federal Judgeship Act of 2013). With respect to the Circuit Courts, these recommendations included the addition of four judges to the Ninth Circuit and one to the Sixth Circuit; there was no recommendation to add any judges to the Second or 11th Circuits, or to eliminate any seats on the D.C Circuit or not fill any existing vacancies on that court.

Proposals to eliminate the three seats on the D.C. Circuit purport to be based on the court's "light" caseload, which is in turn based on a comparison of the numbers of cases in the D.C. Circuit with the numbers of cases in other Circuits, equating one D.C. Circuit case with one case in the other courts in terms of workload burden. This is not an appropriate mode of comparison for the D.C. Circuit, which, according to the Federal Judicial Center, has a unique caseload heavily weighted with administrative agency appeals "that occur almost exclusively in the D.C. Circuit and [are] more burdensome than other cases in several aspects,"[3] including having "more independently represented participants per case" and "more briefs filed per case," as well as the fact that they are "more likely to have participants with multiple objectives, involve complex or statutory law, and require the mastery of technical or scientific information."[4]

The unique nature of the D.C. Circuit's workload has been noted repeatedly by those who have served as judges on that court, including no less an authority than the Chief Justice of the United States, John Roberts, who has said:

> It is when you look at the docket that you really see the differences between the D.C. Circuit and the other courts. One-third of the D.C. Circuit appeals are from agency decisions. That figure is less than twenty percent nationwide. About one-quarter of the D.C. Circuit's cases are other civil cases involving the federal government; nationwide that figure is only five percent. All told, about two-thirds of the cases before the D.C. Circuit involve the federal government in some civil capacity, while that figure is less than twenty-five percent nationwide.[5]

As former D.C. Circuit Chief Judge Pat Wald -- who served on that court for more than twenty years -- has explained:

> The D.C. Circuit hears the most complex, time-consuming, labyrinthine disputes over regulations with the greatest impact on ordinary Americans' lives: clean air and water regulations, nuclear plant safety, health-care reform issues, insider trading and more. These cases can require thousands of hours of preparation by the judges, often consuming days of argument, involving hundreds of parties and interveners, and necessitating dozens of briefs and thousands of pages of record – all of

[3] U.S. General Accounting Office, *Federal Judgeships: The General Accuracy of the Case-Related Workload Measures Used to Assess the Need for Additional District Court and Courts of Appeals Judgeships,* GAO-03-788R, at 10 (May 30, 2003) (quoting Federal Judicial Center, *Assessment of Caseload Burden in the U.S. Court of Appeals for the D.C. Circuit*, Report to the Subcommittee on Judicial Statistics of the Committee on Judicial Resources of the Judicial Conference of the United States (Washington, D.C. 1999)).

[4] *Id.*

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

which culminates in lengthy, technically intricate legal opinions.[6]

Judge Wald further noted that "My colleagues and I worked as steadily and intensively as judges on other circuits even if they may have heard more cases. The nature of the D.C. Circuit's caseload is what sets it apart from other courts."[7]

Indeed, precisely because of the unique and complex nature of the D.C. Circuit's caseload, the Judicial Conference does not apply to the D.C. Circuit the caseload formula that it uses to evaluate how many judges are appropriate for the other Circuit Courts.[8] In this respect, the Conference recognizes what the proposals by Senator Grassley and Representative Cotton do not -- that the D.C. Circuit's cases cannot be equated numerically, one for one, with the cases of the other federal appellate courts. Such flawed comparisons are of apples and oranges.

In addition, the assertion that the current caseload of the D.C. Circuit requires the elimination of nearly 30% of its authorized judgeships is contradicted by the fact that other recent nominees were confirmed to this same court when the caseload numbers were less. For example, President George W. Bush's nominees Janice Rogers Brown and Thomas Griffith were confirmed to the 10th and 11th seats on the D.C. Circuit in June 2005, even though the caseload per authorized judge (109) was smaller than it is now (132).[9] That number was also smaller when John Roberts was confirmed to the D.C. Circuit in May 2003 -- 83 cases pending per authorized judge – as well as when Brett Kavanaugh was confirmed in May 2006 -- 125 cases pending per authorized judge.[10]

And in February 2003, when there were eight active judges on the D.C. Circuit (the same number as now), Senator Orrin Hatch stated the following in urging the confirmation of Bush nominee Miguel Estrada to the court's ninth seat:

> It is a very important court. In fact, next to the Supreme Court, it is the next most important court in the country – no question about it – because the decisions they make affect almost every

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[6] Patricia M. Wald, "Senate must act on appeals court vacancies," *Washington Post* (Feb. 28, 2013), available at: < http://articles.washingtonpost.com/2013-02-28/opinions/37350554_1_senior-judges-chief-judge- appeals-court-vacancies>.

[7] *Id.* For more information, *see also* Judge Wald's remarks about the D.C. Circuit at the March 25, 2013 discussion of "Why Courts Matter: The D.C. Circuit," here: http://www.americanprogress.org/events/2013/03/14/56746/why-courts-matter-the-d-c-circuit/.

[8] *See* U.S. General Accounting Office, *Federal Judgeships: The General Accuracy of the Case-Related Workload Measures Used to Assess the Need for Additional District Court and Courts of Appeals Judgeships,* GAO-03-788R, at 8, 11 (May 30, 2003).

[9] On March 31, 2005 -- the date closest to the confirmations of Brown and Griffith for which these figures have been published by the U.S. Courts -- there were 1,313 cases pending in the D.C. Circuit, which at the time had 12 authorized judgeships, or 109 cases per authorized judge. The most current published U.S. Courts statistics are as of March 31, 2013, when there were 1,456 pending cases in the D.C. Circuit, or 132 cases per authorized judge. Another way to look at the data is by cases per active judge, measuring the workload of the judges actually on the court. In March 2005, there were nine active judges on the D.C. Circuit, and thus 146 cases per active judge. After Brown's confirmation to the 10th seat, there were 131 cases per active judge, a number that dropped to 119 when Griffith was confirmed. Currently, with only eight active judges on the D. C. Circuit, the caseload is 182 appeals per active judge, 53% higher than it was when Griffith was confirmed. (With all three current vacancies filled, the caseload per active judge would be 132.)

[10] These figures are calculated using the number of cases pending on March 31, 2003 and March 31, 2006, respectively, the closest dates to the confirmations of Roberts and Cavanaugh for which these statistics are published.

> American in many instances. . . *I might also add that the D.C. Circuit is in the midst of a vacancy crisis unseen in recent memory. Only eight of the court's 12 authorized judgeships currently are filled. . . The D.C. Circuit has not been down to eight active judges since 1980. It is a crisis situation because it is extremely important. The vacancy crisis is substantially interfering with the D.C. Circuit's ability to decide cases in a timely fashion*. As a result, litigants find themselves waiting longer and longer for the court to resolve their disputes. Because so many D.C. Circuit cases involve constitutional and administrative law, this means that the validity of challenged government policies is likely to remain in legal limbo.[11]

As of March 31, 2003, the nearest date to Senator Hatch's speech for which there are published data from the U.S. Courts regarding the D.C. Circuit's workload, the court had 1,001 cases pending, or a workload of only 83 cases per authorized judge. Now, as noted above, that workload is 132 cases per authorized judge. Moreover, what Senator Hatch said about the D.C. Circuit in 2003 remains true today: the court is of vital importance to America and it is currently understaffed, not overstaffed.

Some conservatives who support Senator Grassley's proposal or who have advocated that the Senate not permit the vacancies on the D.C. Circuit to be filled have claimed that President Obama, by complying with his constitutional mandate to nominate people to fill authorized seats on the federal bench, is engaging in "court packing."[12] This of course is an utter misuse of the term, which has its origins in the proposal by President Franklin Delano Roosevelt to add *new* judicial seats to the Supreme Court in an effort to shift the Court's balance – not to a President's simply doing his constitutionally specified job, that is, nominating people to fill existing, authorized judicial *vacancies*.

It should come as no surprise, then, that even some conservatives have had a hard time understanding the "court packing" charge. As Byron York, a Fox News contributor and author of *The Vast Left Wing Conspiracy*, noted, "it doesn't strike me as 'packing' to nominate candidates for available seats."[13] American Enterprise Institute scholar Norm Ornstein said that the claim made him "laugh out loud."[14] Ornstein continued by asking, "How could a move by a president simply to fill long-standing existing vacancies on federal courts be termed court packing?"[15] That's a good question. If anything, it appears that Representative Cotton and Senator Grassley and supporters of their bills are attempting to maintain the D.C. Circuit's marked ideological imbalance: while Representative Cotton asserts that the court is currently "evenly divided," in reality the six senior judges who continue to hear cases alongside the eight active judges render the court starkly divided (or packed, one might say), 9-5, in favor of judges appointed by Republican Presidents.

The D.C. Circuit is rightly considered to be the Nation's second most important court, after the Supreme Court. This is because the D.C. Circuit has exclusive or favored jurisdiction over disputes involving numerous federal laws and regulations, and is responsible for resolving critically important cases

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[11] 149 Cong. Rec. No. 21, S1953 (daily ed. Feb. 5, 2003) (statement of Senator Hatch, emphasis added), available at: <http://www.gpo.gov/fdsys/pkg/CREC-2003-02-05/pdf/CREC-2003-02-05-pt1-PgS1928-3.pdf#page=25>.

[12] *See*, *e.g.*, Jennifer Bendery, "Republicans Charge Obama With Court-Packing for Trying to Fill Empty Seats," *Huffington Post* (May 28, 2013), available at: < http://www.huffingtonpost.com/2013/05/28/obama-court-packing_n_3347961.html>.

[13] Byron York, Twitter (May 28, 2013), available at: <https://twitter.com/ByronYork/statuses/339389884672389121>.

[14] Norm Ornstein, "It Might Finally Be Time for the 'Nuclear Option' in the Senate," *The Atlantic* (May 30, 2013), available at: < http://www.theatlantic.com/politics/archive/2013/05/it-might-finally-be-time-for-the-nuclear-option-in-the-senate/276377/>

[15] *Id*.

involving national security, environmental protection, employment discrimination, food and drug safety, separation of powers, and the decisions of a wide array of administrative agencies. The full staffing of this court is of nationwide importance. Certainly no decision to effectuate a nearly 30% reduction in the number of judges on this critical court, or to decline to fill authorized vacancies, should be made in a partisan, political manner and without careful study.

Sincerely,

Doug Kendall
President
Constitutional Accountability Center