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FEDERAL JUDGESHIP ACT OF 2008

JULY 21 (Legislative day JULY 17), 2008.—Ordered to be printed

Mr. LEAHY, from the Committee on Judiciary, submitted the following

R E P O R T

together with

SUPPLEMENTAL AND MINORITY VIEWS

[To accompany S. 2774]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to which was referred the bill (S. 2774), to provide for the appointment of additional Federal circuit and district judges, and for other purposes, having considered the same, reports favorably thereon, without amendment, and recommends that the bill do pass.

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I. BACKGROUND AND PURPOSE OF THE FEDERAL JUDGESHIP ACT OF 2008

Chief Justice Rehnquist referred to our independent judiciary as the crown jewel of our government. Our Federal courts must have

an adequate number of judges in order to safeguard our most cherished liberties and rights. Yet, rising caseloads threaten to diminish the quality of the justice system. The Federal Judgeship Act of 2008 responds to the resource needs of the Federal judiciary by authorizing certain additional U.S. courts of appeals and district court judgeships.

Article III of the United States Constitution provides, in part, that Congress oversee the administration of the judicial branch and create such inferior courts "as the Congress from time to time may ordain or establish." Additional judgeships in the courts of appeals and district courts are created through legislation by Congress, the only constitutionally authorized body to address the resource needs of the Third Branch.

It has been 18 years since Congress enacted a comprehensive judgeship bill to add new Federal judgeships. In 1990, legislation established 11 additional circuit court judgeships and 61 permanent and 13 temporary district court judgeships.[1] In recent years Congress has periodically responded to the continuing rise in workloads by creating 27 additional permanent district court judgeships,[2] but no additional circuit court judgeships have been created.

Upon introducing the Federal Judgeship Act of 2008 on March 13, 2008, Senator Leahy observed:

> Without a comprehensive bill, Congress has proceeded to authorize only a few additional district court judgeships and extend temporary judgeships when it could. For instance, in 2002 we were able to provide for 15 new judgeships in the Department of Justice authorization bill. However no additional circuit court judgeships have been created since 1990 despite their increased workload. . . . Our Federal judges are working harder than ever, but in order to maintain the integrity of the Federal courts and the promptness that justice demands, judges must have a manageable workload.[3]

Despite the piecemeal authorization of additional judgeships in recent years, growing caseloads continue to outpace the resources of the Federal courts. In 2006, the national weighted caseload per authorized district court judgeship was an average of 464, eight percent above the standard set for creating additional judgeships by the Judicial Conference of the United States ("Judicial Conference").[4] Furthermore, the weighted caseload per three-judge panel at the circuit court level in 2006 was 1,197, only 2.7 percent lower than the record high in 2005.[5] The situation is even more dramatic in most courts where this bill authorizes additional judgeships.

Historically, when vacancies on the Federal bench are low, Congress has authorized additional judgeships.[6] On May 15, 2008, the

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[1] Judicial Improvement Act of 1990, Pub. L. 101–650, §§ 202–203, 104 Stat. 5089, 5098–5104 (1990). This was during the presidency of President George H.W. Bush. The previous comprehensive judgeship act was enacted in 1984 during the presidency of Ronald Reagan.

[2] *Table H U.S. District Courts Additional Authorized Judgeships* (visited Jul. 9, 2008) <http://www.uscourts.gov/history/tableh.pdf>.

[3] 154 Cong. Rec. S2138–01, S2153 (daily ed. Mar. 13, 2008) (statement of Chairman Leahy).

[4] "Judgeship Recommendations of the Judicial Conference of the United States 2007," p. 3.

[5] *See id.*

[6] *See* A & B apps.

day the Committee considered S. 2774, Federal district court vacancies stood at 35, and circuit court vacancies were at 12.[7] In 1990, when the district courts had 28 vacancies and the circuit courts had 7 vacancies,[8] Congress saw fit to authorize 72 new permanent judgeships.[9]

The Federal Judgeship Act of 2008 authorizes 12 new permanent court of appeals judgeships, two temporary judgeships for the Ninth Circuit Court of Appeals, 38 permanent district court judgeships, and 14 temporary district court judgeships. It converts five temporary district court judgeships into permanent judgeships in Hawaii, Kansas, Arizona, New Mexico, and the eastern district of Missouri, and extends one existing temporary district court judgeship in the northern district of Ohio.

The bill also attempts to insulate the creation of new judgeships from partisan politics by providing that the judgeships do not become effective until the day after the inauguration of the next President. Upon introduction of the bill, Senator Hatch, a lead sponsor, stated:

> Americans are blessed to have the best and most independent judicial system in the world. In our constitutional framework, Congress has responsibility to both make the laws and ensure that the judiciary tasked with interpreting and applying those laws has the appropriate resources. This includes addressing the staffing and compensation needs of the judicial branch, and we should strive to do so without political gambles or speculation about the outcome of a Presidential election.[10]

Judicial Conference process

The bill is based on the 2007 recommendations of the Judicial Conference and its analysis of caseloads and needs for new judgeships. The Judicial Conference, the official policymaking arm of the judicial branch, meets biennially to review and make recommendations to Congress regarding the need for additional judgeships in the Federal court system.

When evaluating judgeship needs in both the district and circuit courts, caseloads provide the starting point, but data are further evaluated in the context of many other variables. Recommendations for circuit court judgeships are based on a standard of 500 filings per panel, with *pro se* appeals weighted as one-third of a case. The Judicial Conference also takes into account the effect of local circumstances on circuit court judgeship needs.

Recommendations for district courts begin with, but are not limited to, the number of weighted filings per authorized judgeship. Weighted filings are defined as "a mathematical adjustment of filings, based on the nature of cases and the expected amount of

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[7] *Federal Judicial Vacancies Vacancy Summary—110th Congress* (visited Jun. 17, 2008) <http://www.uscourts.gov/cfapps/webnovada/CF__FB__301/archived/summary05__01__08.html>. On July 15, 2008, there were only nine circuit court vacancies.

[8] *Vacancies in the Federal Judiciary (Article III Judges Only) December 1, 1990* (visited Jul. 9, 2008) <http://www.uscourts.gov/vacancies/archives/1981__1985/Dec 1__90.pdf)

[9] Judicial Improvement Act of 1990, Pub. L. 101–650, §§ 202–203, 104 Stat. 5089, 5098–5104 (1990).

[10] 154 Cong. Rec. S2138–01, S2154 (March 13, 2008) (statement of Sen. Hatch).

judge time required for disposition."[11] For example, under the Judicial Conference's case weighting system, a civil antitrust case is counted as 3.45 cases, and a homicide case is counted as 1.99 weighted cases.[12] The Judicial Conference's Subcommittee on Judicial Statistics uses a caseload level of 430 weighted filings per authorized judgeship, after adding an additional judgeship, as the starting point for considering requests for additional judicial resources.[13]

Case weights are not the sole factor used to determine judgeship recommendations; they simply indicate which districts merit further examination in the recommendation process. Judge George Z. Singal, Chairman of the Judicial Resources Committee of the Judicial Conference, testified before the Committee that "caseload statistics furnish the threshold for consideration, but the process entails a critical scrutiny of the caseloads in light of many other considerations and variables, all of which are considered together."[14]

The Judicial Conference takes into account several factors in addition to weighted caseloads when measuring each court's judgeship needs. The conference considers:

> [T]he number of senior judges, their ages, and levels of activity; magistrate judge assistance; geographical factors, such as the number of places of holding court; unusual complexity; temporary or prolonged caseload increases or decreases; the use of visiting judges; and any other factors noted by individual courts (or identified by the [Judicial Conference's] Statistics Subcommittee) as having an impact on resource needs.[15]

Before the Judicial Conference makes a final judgeship recommendation to Congress in its biennial report, the recommendation is subject to a formal six-step process:

> First, the courts submit a detailed justification to the Subcommittee on Judicial Statistics. The Subcommittee reviews and evaluates the request and prepares a preliminary recommendation which is given to the courts and the appropriate circuit judicial councils for their recommendation. More recent caseload data are used to evaluate responses from the judicial council and the court, if a response is submitted, as well as to prepare recommendations for approval by the Committee on Judicial Resources. The Committee's recommendations are then provided to the Judicial Conference for final approval.[16]

The Judicial Conference's detailed statistical analysis, formal six-step process of review, and evaluation of additional workload factors are all tools used to formulate a recommendation that is both conservative and adequate. Several steps are in place to ensure

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[11] "Judgeship Recommendations of the Judicial Conference of the United States 2007," 1 app. at 3 n.1.

[12] *See id.*

[13] *Id.* at 1 app. at 3.

[14] *Responding to the Growing Need for Federal Judgeships: The Federal Judgeship Act of 2008: Hearing on S. 2774 Before the Senate Comm. on the Judiciary*, 110th Cong. 4 (2008) (statement of Judge George Z. Singal, Chair of the Judicial Conference Committee on Judicial Resources).

[15] *Id.* at 3.

[16] "Judgeship Recommendations of the Judicial Conference of the United States 2007," 1 app. at 1.

that the judiciary uses resources as efficiently as possible. These steps include recommending temporary rather than permanent judgeships; recommending not filling vacancies; using senior judges; sharing judges within and between circuits; increasing the use of magistrate judges; using alternative dispute resolution; and taking advantage of new technology.[17]

Judge Singal testified that the Judicial Conference:

> [R]ecognizes that growth in the judiciary must be carefully limited to the number of new judgeships that are necessary to exercise federal court jurisdiction. The [Judicial] Conference attempts to balance the need to control growth and the need to seek resources that are appropriate to the judiciary's caseload. In an effort to implement that policy, we have requested far fewer judgeships than the caseload increases combined with other factors would suggest are now required.[18]

The Judicial Conference's 2007 recommendations include establishing 67 new circuit court and district court judgeships, converting five district court judgeships from temporary to permanent, and extending one temporary district court judgeship for an additional five years. Excluding one judgeship that was enacted into law between the time the recommendation was made and when the legislation was drafted, the Judicial Conference's recommendations are duplicated in S. 2774.

Despite the increased workload of the Federal judiciary, it has been 18 years since Congress enacted a comprehensive Article III judgeships bill to address the longstanding and continuous need for additional resources in our Federal judiciary. This bipartisan bill, based on recommendations from the Judicial Conference, helps alleviate the workload of judges in our Nation's Federal courts to ensure the quality of justice.

District Court case weights

The Judicial Conference uses case weight measures to evaluate the relative caseloads of the district courts. The case weight formula currently used by the Judicial Conference is an "event-based" method developed in 2003–2004 by the Federal Judicial Center (FJC), the education and research agency of the Federal courts. The "event-based" method of case weighting analyzes information about the type and frequency of events that occur in a case in order to determine the judicial resources expended on each case. The new system was approved by the Judicial Conference's Subcommittee on Judicial Statistics in 2003, and was adopted by the Judicial Conference in 2004. The 2003–2004 method replaced a time study method last updated in 1993 that required judges and staff to keep detailed records of the amount of time spent on each case. The new method produces case weights in a shorter period of time while imposing less of a record keeping burden. In addition, because the "event-based" method that was used incorporates empirical electronic data from case management databases and statistical re-

[17] *Id.* at 1 app. at 4–5.

[18] *Responding to the Growing Need for Federal Judgeships: The Federal Judgeship Act of 2008: Hearing on S. 2774 Before the Senate Comm. on the Judiciary*, 110th Cong. 4 (2008) (statement of Judge George Z. Singal, Chair of the Judicial Conference Committee on Judicial Resources).

ports, the case weights can be easily updated based on electronic data input.

In 2003, the Government Accountability Office (GAO) examined the research design of the Federal Judicial Center's 2003–2004 case weighting method. In a hearing before the Judiciary Committee, William O. Jenkins, Jr., Director of Homeland Security and Justice at the GAO and contributor to the 2003 report, testified that the GAO found two problems with the 2003–2004 case weight method:

> First was the challenge of collecting reliable, comparable data for the analysis on in-court events from two different automated data systems, one of which had not been implemented in all district courts. The FJC established a technical advisory group to work through this issue. Second, unlike the methodology used to develop the 1993 case weights, the design for updating these case weights included limited data on the time judges actually spent on specific types of cases. Specifically, the proposed design included data from judicial databases on the in-court time judges spent on different types of cases, but did not include collecting actual data on the noncourtroom time that judges spend on different types of cases. Instead, estimates of noncourtroom time would be based on estimates derived from the structured, guided discussions of about 100 experienced judges meeting in 12 separate groups (one for each geographic circuit). Noncourtroom time was likely to represent the majority of judge time used to develop the revised case weights. The accuracy of case weights developed on such consensus data cannot be assessed using standard statistical methods, such as the calculation of standard errors. As the Federal Judicial Center acknowledged in commenting on our 2003 report, it is not possible to objectively, statistically assess how accurate the new case weights are.[19]

Despite the GAO's conclusion regarding the 2003–2004 case weighting method adopted by the Judicial Conference, Mr. Jenkins testified that the GAO "has no views on the Judicial Conference's pending request for additional judgeships."[20] Additionally, Mr. Jenkins agreed that the method used by the FJC offered the benefits of reduced judicial burden, cost savings and faster development of the case weights.[21]

In a letter to Senators Schumer and Sessions, Chairman and Ranking Member of the Subcommittee on Administrative Oversight and the Courts, John S. Cooke, Deputy Director of the Federal Judicial Center, addressed both of the GAO's concerns. With regard to data collection using two automated systems, Mr. Cooke wrote:

> At the time the study was conducted—2003 to mid-2004—the district courts were in the process of converting from the case-management systems that they had been

[19] *Responding to the Growing Need for Federal Judgeships: The Federal Judgeship Act of 2008: Hearing on S. 2774 Before the Senate Comm. on the Judiciary*, 110th Cong. 3–4 (2008) (statement of William O. Jenkins, Jr., GAO).

[20] *Id.* at 1.

[21] *Id.* at 6.

> using for several years, ICMS, to a new system, CM/ECF, but relatively few courts had changed over completely. In order to use national docketed event information in our calculations, we had to extract the information from both types of systems. To do this, after convening a technical advisory group of experienced technicians and data managers from the Administrative Office of the U.S. Courts (AO) and the district courts, we built separate but equivalent data extraction programs for each system. We then converted all court-specific codes into a standard set of codes, and used those standard codes in the analyses. This successful approach to dealing with the dual database issue allowed us to construct event frequency counts that were solidly based on a large cohort of cases that represented national case-processing practice in the district courts.[22]

Regarding time estimates derived from consensus data, Mr. Cooke wrote:

> As mentioned above, we used routinely collected empirical data wherever possible in developing the case weights, but consensus-based estimates of judge processing time were required for some of the event-weight calculations. We decided to take advantage of the knowledge of experienced district judges about how they process cases, and ask them to estimate the amount of time required to conduct specific case activities in various types of cases. The challenge was to obtain these expert estimates in a structured manner.
>
> To do this we used a variation of the Delphi Method, a technique originally developed by the Rand Corporation in 1964 and used since then in many research situations—including the development of case weights in some state courts—to obtain a consensus estimate from subject-matter experts. The method uses an iterative approach of individual estimates, statistical feedback, and re-estimates to arrive at a consensus.[23]

Mr. Cooke added that:

> The estimation process was structured, rigorous, and based on an accepted method for obtaining expert estimates that has been used for years in various settings. The meeting materials and process were designed to focus the task with empirically-derived default values, and to address some of the common difficulties with estimating. The time values produced by this process can be relied on as good estimates of the national average time required to complete the defined case events.[24]

In response to the GAO's assertion that the accuracy of case weights cannot be assessed because statistical measures such as

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[22] Letter from John S. Cooke, Deputy Director, the Federal Judicial Center, to Senator Charles Schumer and Senator Jeff Sessions, Chair and Ranking Member, Subcomm. on Admin. Oversight and the Courts of the Senate Comm. on the Judiciary (Feb. 19, 2008).

[23] *See id.*

[24] *Id.* (citation omitted).

standard error cannot be calculated from consensus data, Judge Singal stated that standard errors "provide information about the data collected, but cannot by themselves indicate how accurate those data are."[25]

Circuit Court adjusted filings

The Judicial Conference uses adjusted case filings to assess the need for additional circuit court judgeships. The adjusted filings measure is relatively simple compared to the district court case weight formula, with filings weighted as one case, with the exception of *pro se* appeals, which are weighted as one-third of a case. The Judicial Conference uses adjusted filings rather than weighted cases when comparing caseloads in the circuit courts. Varying practices, precedents and degrees of case complexity among circuits have thus far impeded the creation of a set of nationally applicable case weights for the circuit courts. The Judicial Conference threshold standard for considering additional circuit court judgeship requests is 500 adjusted filings per panel.

The GAO's 2003 report concluded that the Judicial Conference's method for calculating adjusted circuit court filings was flawed. Mr. Jenkins testified before the Committee that "[t]he adjusted filings workload measure is not based on any empirical data regarding the time that different types of cases required of appellate judges,"[26] and that the standard of 500 filings per panel "principally reflects a policy decision using historical data on filings and terminations."[27]

Authorities both within and outside the Federal judiciary have addressed the GAO's concerns. In response to written questions from members of the Committee, Judge Singal wrote:

> Data from the FJC support the [adjusted filings] figure. Professor Arthur Hellman of the University of Pittsburgh School of Law, a noted expert on federal court issues, testified before a House Judiciary Subcommittee in 2003 that because only a very small percentage of pro se cases receive oral argument or a published opinion, it is reasonable to conclude that pro se cases contribute significantly less to the judicial workload. Professor Hellman further explained that in a world of limited resources, it is not necessary to carry out direct empirical research to support this reasonable figure, especially with the FJC's data. Professor Hellman calls the one-third adjustment of pro se cases "justified."
>
> The standard of 500 adjusted filings per panel as the threshold for considering recommendations for additional appellate judgeships, is a useful and appropriate standard that is based on the experience of appellate judges. It is recognized as appropriate outside the Judiciary as well. Professor Hellman testified that the 500 adjusted filings

[25] *Responding to the Growing Need for Federal Judgeships: The Federal Judgeship Act of 2008: Hearing on S. 2774 Before the Senate Comm. on the Judiciary,* 110th Cong. (2008) (answers to written questions submitted by Senators to Judge George Z. Singal, Chair of the Judicial Conference Committee on Judicial Resources).

[26] *Responding to the Growing Need for Federal Judgeships: The Federal Judgeship Act of 2008: Hearing on S. 2774 Before the Senate Comm. on the Judiciary,* 110th Cong. 7 (2008) (statement of William O. Jenkins, Jr., GAO).

[27] *Id.* at 8.

standard, based on historical data on filings and terminations, is "quite defensible," and that the "Judicial Conference has indeed taken a conservative approach in assessing courts of appeals requests for new judgeships." In addition to the historical basis, Professor Hellman's examination of typical workloads led him to "conclude" that the Judicial Conference baseline of 500 adjusted filings per panel is "reasonable."[28]

II. History of the Bill and Committee Consideration

A. INTRODUCTION OF THE BILL

Senator Patrick Leahy introduced S. 2774, the Federal Judgeship Act of 2008, joined by Senators Hatch, Feinstein, and Schumer on March 13, 2008. Since the bill's introduction, Senators Bingaman, Harkin, Inouye, Brown, Murray, Nelson of Nebraska, Kennedy, Hagel, Salazar, Menendez, Akaka, Martinez, Graham, Coleman, Lugar, Bayh, and Klobuchar have joined as cosponsors. The bill was referred to the Committee on the Judiciary.

B. COMMITTEE CONSIDERATION

At the request of Senator Coburn during the May 15, 2008 markup of the bill, Chairman Leahy agreed to hold a Committee hearing on S. 2774. The Committee scheduled a hearing, to be chaired by Senator Feinstein, entitled "Responding to the Growing Need for Federal Judgeships: The Federal Judgeship Act of 2008."[29] On June 17, 2008, the day the hearing was scheduled to occur, Minority Leader McConnell objected to a unanimous consent request to authorize the hearing to take place during that day's session of the Senate. The hearing the Republican Senators requested could not proceed to be held in person because Republican Senators objected. The hearing was accordingly suspended but written testimony was circulated.

Written testimony was received from the Honorable George Z. Singal, Chief Judge of the District of Maine and Chair of the Judicial Conference's Judicial Resources Committee; and William O. Jenkins, Jr., Director of Homeland Security and Justice at the U.S. Government Accountability Office (GAO).

Mr. Jenkins's written testimony described a 2003 GAO report examining the research design of the case weighting method adopted by the Judicial Conference in 2004. Mr. Jenkins stated that the GAO does not have a view on the judgeship request contained in S. 2774.

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[28] *Responding to the Growing Need for Federal Judgeships: The Federal Judgeship Act of 2008: Hearing on S. 2774 Before the Senate Comm. on the Judiciary,* 110th Cong. (2008) (answers to written questions submitted by Senators to Judge George Z. Singal, Chair of the Judicial Conference Committee on Judicial Resources).

[29] The Senate Judiciary Committee's Subcommittee on Administrative Oversight and the Courts previously held a hearing on November 16, 2005, entitled "Creating New Federal Judgeships: The Systematic or Piecemeal Approach." Testimony was received from Honorable W. Royal Furgeson, Jr., U.S. District Judge for the Western District of Texas, and Chairman of the Judicial Conference Committee on Judicial Resources; Honorable William H. Steele, U.S. District Judge for the Southern District of Alabama and a former magistrate judge in Mobile; Robyn J. Spalter, Esq., President of the Federal Bar Association, and an attorney with the firm of Kluger, Peretz, Kaplan and Berlin, in Miami, Florida; and Marc Galanter, Professor of Law and South Asian Studies at the University of Wisconsin at Madison and LSC Centennial Professor at the London School of Economics and Political Science.

Judge Singal's written testimony stated that since the last comprehensive judgeship bill was enacted in 1990, case filings have continued to grow, outpacing the resources of the Federal judiciary. He described the situation in courts where judgeships were recommended as "dramatic."[30] He wrote that in the district courts, where the Judicial Conference's standard is a workload of 430 weighted filings per judgeship, "the workload exceeds 430 per judgeship in all but one district court in which the Conference is recommending an additional judgeship. Weighted filings were 500 per judgeship or higher in 18 of those district courts, and five courts exceeded 600 weighted filings per judgeship."[31] He added that in the circuit courts, where the Judicial Conference's standard for examining judgeship needs is at 500, "four circuits exceeded 900 adjusted filings per panel" and "[i]n each circuit court in which the Conference is recommending additional judgeships, the caseload levels substantially exceed the standard."[32]

The Committee received a letter from the president of the Federal Bar Association stating that "passage of comprehensive judgeship legislation is critical and long overdue" to ensure that our judicial system is "properly equipped to meet its mission."[33]

The Federal Judgeship Act of 2008 was first placed on the Committee's markup schedule for May 8, 2008. The Committee considered S. 2774 a week later on May 15, 2008. Senator Cornyn circulated for consideration an amendment that would have added four district judges to the western district of Texas. Senator Cornyn did not offer the amendment during the markup.

The Committee voted to report the Federal Judgeship Act of 2008, without amendment, favorably to the Senate. The Committee proceeded by rollcall vote as follows:

Tally: 15 Yeas, 4 Nays.

Yeas (15): Leahy (D–VT), Kennedy (D–MA), Kohl (D–WI), Feinstein (D–CA), Schumer (D–NY), Whitehouse (D–RI), Durbin (D–IL), Feingold (D–WI), Biden (D–DE), Specter (R–PA), Hatch (R–UT), Graham (R–SC), Brownback (R–KS), Grassley (R–IA), Kyl (R–AZ).

Nays (4): Cardin (D–MD), Sessions (R–AL), Cornyn (R–TX), Coburn (R–OK).

III. Section-by-Section Summary of the Bill

Section 1. Short title

This section provides that the legislation may be cited as the "Federal Judgeship Act of 2008."

Section 2. Circuit Judges for the Circuit Courts of Appeals

Section 2(a) provides for the creation of 10 new circuit court of appeal judgeships and is allocated as follows: one additional circuit court judge for the first circuit; one additional circuit court judge for the sixth circuit; two additional circuit court judges for the sec-

[30] *Responding to the Growing Need for Federal Judgeships: The Federal Judgeship Act of 2008: Hearing on S. 2774 Before the Senate Comm. on the Judiciary,* 110th Cong. 5 (2008) (statement of Judge George Z. Singal, Chair of the Judicial Conference Committee on Judicial Resources).

[31] *Id* at 4.

[32] *See Id.*

[33] Letter from James S. Richardson Sr., Federal Bar Association, to Senator Patrick Leahy and Senator Arlen Specter, Chair and Ranking Member, Senate Comm. on the Judiciary (June 16, 2008).

ond circuit; two additional circuit court judges for the eight circuit; and four additional circuit court judges for the ninth circuit.

Section 2(b) provides for the creation of 2 temporary circuit judges for the ninth circuit court of appeals. These judgeships are temporary in that the first two vacancies in the ninth circuit court, occurring 10 years or more after the confirmation of both of these temporary circuit judges, will not be filled.

Section 2(c) amends the table in section 44 of title 28, United States Code. This section provides a table that reflects the total number of permanent circuit judgeships authorized with respect to each of the thirteen circuit courts of appeals.

Section 3. District Judges for the District Courts

Section 3(a) provides for the creation of an additional 38 district court judges in 21 district courts and is allocated as follows:

Section 3(b) provides for the creation of 14 new temporary district judges in 12 different States. Additionally this section provides that the first vacancy in each of the 14 district courts occurring after 10 or more years from the date the temporary judge in that particular district court is confirmed, shall not be filled.

Section 3(c)(1) provides for the conversion, upon the effective date of this Act, of five temporary district court judgeships into permanent judgeships. The converted judgeships are the existing judgeships for the districts of Hawaii, Kansas, Arizona, New Mexico, and the eastern district of Missouri. The incumbents in these offices will hold the converted judgeships.

Section 3(c)(2) provides that the existing temporary judgeship for the northern district of Ohio is extended on the date this Act is effective. This judgeship is temporary in that the first vacancy in the office of district judge in the northern district of Ohio, occurring 20 years or more after the confirmation date of this temporary judge, will not be filled.

Section 3(d) amends section 133 of title 28, United States Code. This section provides a table that reflects the total number of permanent district judgeships authorized with respect to each of the district courts.

Section 4. Authorization of appropriations

This section authorizes that the necessary funds be appropriated to carry out this Act, including sums necessary to provide appropriate space and facilities.

Section 5. Effective date

Section 5(a) provides that in general this Act and its amendments take effect on January 21, 2009.

Section 5(b) provides that the amendments made by this Act take effect after the amendment made by section 509(a)(2) of the Court Security Improvement Act of 2007.

IV. Congressional Budget Office Cost Estimate

The Committee sets forth, with respect to the bill, S. 2774, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

JUNE 18, 2008.

Hon. PATRICK J. LEAHY,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 2774, the Federal Judgeship Act of 2008.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Leigh Angres.

Sincerely,

PETER R. ORSZAG.

Enclosure.

S. 2774—Federal Judgeship Act of 2008

Summary: S. 2774 would increase the number of federal circuit court judges by 14 and the number of federal district court judges by 52. Based on information from the Administrative Office of the United States Courts (AOUSC), CBO estimates that enacting S. 2774 would increase direct spending by $107 million over the 2009–2018 period for the salaries and benefits of additional federal circuit and district court judges.

CBO estimates that discretionary expenditures for support staff and office space associated with each judgeship would cost $188 million over the 2009–2013 period, subject to appropriation of the necessary funds.

S. 2774 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would not affect the budgets of state, local, or tribal governments.

Estimated cost to the Federal Government: The estimated budgetary impact of S. 2774 is shown in the following table. The costs of this legislation fall within budget function 750 (administration of justice).

	By fiscal year, in millions of dollars—											
	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2009–2013	2009–2018
CHANGES IN DIRECT SPENDING												
Circuit Courts of Appeals Judgeships:												
Estimated Budget Authority	0	1	3	3	3	3	3	3	3	3	10	25
Estimated Outlays	0	1	3	3	3	3	3	3	3	3	10	25
District Court Judgeships:												
Estimated Budget Authority	0	2	10	10	10	10	10	10	10	10	32	82
Estimated Outlays	0	2	10	10	10	10	10	10	10	10	32	82
Total Changes:												
Estimated Budget Authority	0	3	13	13	13	13	13	13	13	13	42	107
Estimated Outlays	0	3	13	13	13	13	13	13	13	13	42	107
CHANGES IN SPENDING SUBJECT TO APPROPRIATION												
Estimated Authorization Level	11	36	52	44	45	46	48	49	50	52	190	436
Estimated Outlays	10	32	51	44	45	46	48	49	50	52	188	433

Basis of estimate: CBO estimates that enacting S. 2774 would increase direct spending and spending subject to appropriation as

discussed in the following sections. For this estimate, CBO assumes that provisions of S. 2774 will take effect on January 21, 2009, as specified in the bill, and that additional judges authorized by the bill will be confirmed during 2010.

Direct spending

CBO estimates that enacting S. 2774 would increase direct spending by $107 million over the 2009–2018 period for additional circuit and district court judges appointed under Article III of the Constitution. Salaries and benefits of Article III judges are provided annually without the need for discretionary appropriations. Thus, increases in such compensation would increase direct spending.

Circuit Courts of Appeals Judgeships. S. 2774 would authorize 12 additional federal circuit court judgeships in several circuit courts of appeals. The bill also would authorize two temporary circuit court judges in the ninth circuit court of appeals. Under the bill, the first two vacancies that occur in that circuit more than 10 years after the initial confirmation 3 of those positions would not be filled. Based on the current-law salaries of circuit court judges (about $180,000) and information from the AOUSC on the benefits of federal judges, CBO estimates that the mandatory pay and benefits for 14 additional circuit court judges would total about $3 million a year once all judges have been confirmed. As a result, those circuit court provisions would increase direct spending by $25 million over the 2009–2018 period.

District Court Judgeships. S. 2774 would authorize an additional 38 permanent and 14 temporary district court judgeships in several judicial districts. For the temporary judgeships authorized under the bill, the first vacancy that occurs more than 10 years after the initial confirmation of those positions would not be filled. Based on the current-law salaries of district court judges (about $169,000), as well as information from the AOUSC on the benefits of federal judges, CBO estimates that the mandatory pay and benefits for 52 additional district court judges would total about $10 million a year once all judges have been confirmed. As such, those district court provisions would increase direct spending by $82 million over the 2009–2018 period.

S. 2774 also would make permanent temporary judgeships in Hawaii, Kansas, Arizona, New Mexico, and the eastern district of Missouri. In addition, under the bill, any vacancy that occurs for an existing federal judgeship in the northern district of Ohio would continue to be filled for an additional 10 years. CBO cannot predict whether a judicial vacancy would occur in those districts under current law during the 2009–2018 period. Therefore, this estimate does not include any possible increases in direct spending resulting from those provisions. Those judges are each currently paid about $169,000 a year.

Spending subject to appropriation

Based on information from AOUSC, CBO estimates that implementing S. 2774 would cost $188 million over the 2009–2013 period for administrative support and office space for new judges. Of that amount, about $50 million would be incurred in the first few years for startup costs, including office construction, furniture, and law

books. The remaining amount—$138 million—would be for annual expenditures (about $600,000 per judge) for administrative needs, such as support staff and court operations.

Intergovernmental and private-sector impact: S. 2774 contains no intergovernmental or private-sector mandates as defined in UMRA and would not affect the budgets of state, local, or tribal governments.

Estimate prepared by: Federal costs: Leigh Angres; Impact on state, local, and tribal governments: Melissa Merrell; Impact on the Private Sector: Paige Piper/Bach.

Estimate approved by: Peter H. Fontaine, Assistant Director for Budget Analysis.

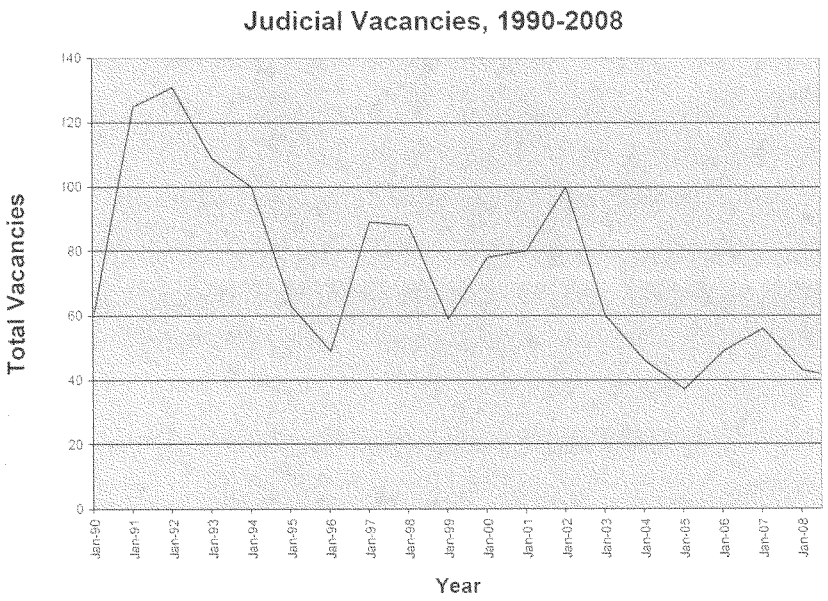
V. Regulatory Impact Evaluation

In compliance with rule XXVI of the Standing Rules of the Senate, the Committee finds that no significant regulatory impact will result from the enactment of S. 2774.

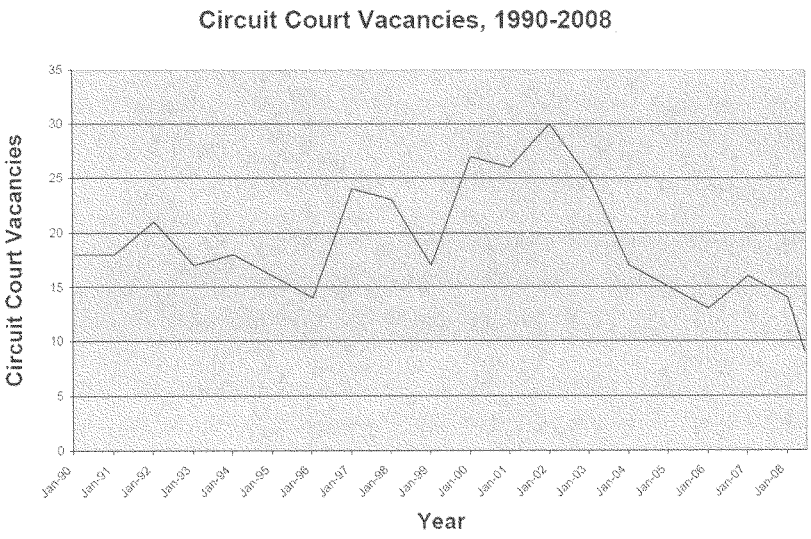
VI. Conclusion

The Federal Judgeship Act of 2008, S. 2774, is the first comprehensive bill in 18 years to address the judgeship needs in our Federal court system. The relentless growth in the workload of judges in our Federal court system is demonstrated by a 58–percent increase in circuit court filings and a 40–percent increase in district court filings since 1990. This bipartisan bill, designed to alleviate the caseload for Federal judges, is based upon the biennial recommendations of the Judicial Conference, which were derived from an analysis of weighted case filings and workload factors. The bill adds 55 permanent and 17 temporary Federal judgeships in support of an efficient and prompt system of justice in our Federal courts.

VII. Appendix A – Judicial Vacancies, 1990-2008



VIII. Appendix B – Circuit Court Vacancies 1990-2008



IX. SUPPLEMENTAL AND MINORITY VIEWS

SUPPLEMENTAL VIEWS OF SENATORS CHUCK GRASSLEY AND SAM BROWNBACK, AND MINORITY VIEWS OF SENATORS JEFF SESSIONS AND TOM COBURN ON S. 2774, "THE FEDERAL JUDGESHIP ACT OF 2008"

S. 2774, "The Federal Judgeship Act of 2008," creates a total of 66 new federal judgeships at both the district and appellate court level. This number is based on a request submitted by the Administrative Office of the U.S. Courts (AO) to the Congress in March 2007. Congress has a constitutional responsibility to oversee the administration of the federal judiciary and to determine the proper size of the federal courts. Congress must be reasonably confident that, before it creates new federal court judgeships and expands the federal judiciary on a permanent basis, it does so based upon accurate and complete information. Congress should carefully analyze the statistics and methodology employed by the AO to determine whether there is a sound basis for this request. S. 2774 creates new permanent and temporary judge positions—14 new circuit court judgeships and 52 new district court judgeships. That is why it is important to determine whether the numbers utilized to calculate these new judgeships justify the increases.

The reality is that it is easier to create judgeship positions than to eliminate them. Instead of rushing to create a large number of new judgeships, it would be more prudent to fill the current federal court vacancies. Certainly confirming these judicial nominees is the quickest way to help ease the burdens on certain courts.

In addition, S. 2774 will result in significant federal spending to create and sustain the new judgeships. According to the AO, the cost for creating each circuit court judgeship is approximately $1,062,000 for the first year, with recurring annual costs averaging a little more than $931,000. A district court judgeship costs roughly $1,169,000 for the first year, with recurring costs of approximately $960,000. These recurring figures do not even take into account the annual cost of living adjustments federal judges receive almost every year. These adjustments generally amount to a pay increase of 3% per year. Further, these numbers may go higher as this estimate does not take into consideration the possibility of legislation that would increase federal judge salaries. The cost associated with the creation of 66 new federal judgeships is staggering. Using the AO's numbers, the one year cost to maintain 66 new judgeships is more than $62 million. The ten-year cost is more than $620 million. This is a substantial cost to the American taxpayer at a time when everyone is seeking ways to cut costs and become more efficient.

We believe that the Committee has not done all it can to ensure that the request for new federal judgeships is necessary. The Judi-

ciary Committee has traditionally undertaken an in-depth review on the need to create new temporary and permanent federal judgeships. For example, in 1996, Senator Grassley, then-Chairman of the Subcommittee on Administrative Oversight and the Courts, sent out a questionnaire asking all federal appellate and district court judges about their views on a number of issues dealing with the administration of justice in the federal courts. In addition, the Subcommittee held a series of oversight hearings to evaluate the appropriate allocation of judgeships for each circuit, and to find ways to improve overall productivity of the federal judiciary. As a result of the hearings and analysis of the questionnaire responses, the Subcommittee produced a report based on the hearing testimony, court statistics and questionnaire data.

The Subcommittee Report concluded that unjustifiable, open-ended growth of the federal judiciary is not desirable. For example, the Report found that many judges were of the opinion that smaller courts foster collegiality, coherence in case law and better administration of justice, particularly at the appellate court level. The Report found that Congress should consider the significant costs of creating new permanent judgeships—over a million dollars for each judge—as well as the moneys that have to go into new judge chambers, courthouses and court staff to support those new judgeships. The Report also found that the federal courts were not employing many technologies or administrative practices that could help reduce the judges' workload, and recommended that before creating new judgeships, Congress consider whether a court has implemented as many efficiencies as possible—such as better case management techniques and technology, better use of senior, visiting and magistrate judges, and a reduction of non-case-related judicial activities and travel by the judges.

Perhaps most importantly, the Report concluded that there was no consensus on the proper measure of need for judges, nor was there a consensus on whether the statistical formulae utilized by the Judicial Conference are an effective and reliable means for calculating the appropriate number of judges. In fact, the Report found that a number of judges themselves believed that there were significant problems with the methods of calculation utilized by the AO. The Report concluded that Congress should carefully examine whether a court's caseload truly justifies a new judgeship position—in particular that the increase in caseload is a permanent one and not just a temporary spike in case filings. In this regard, Congress should scrutinize the methodology utilized by the Judicial Conference when calculating judgeship needs.

These concerns with the Judicial Conference's methodology were confirmed by the U.S. Government Accountability Office (GAO). In early 2000, the GAO was asked to determine whether the weighted and adjusted case filing systems used by the AO accurately calculated the workload of judges. At a House Judiciary Committee hearing in June 2003, William Jenkins, the top expert on these issues at the GAO, produced a report and testified about a number of flaws with the case-related workload measures that the Judicial Conference uses when it assesses judgeship needs. The GAO concluded that there were problems with the reliability of both district and appellate court methodologies.

In June 2008, Mr. Jenkins was asked to testify before the Senate Judiciary Committee on the Judicial Conference's methodology, whether the methodology had been improved since his 2005 testimony, and whether there were any ongoing concerns with the reliability of the present methodology. Mr. Jenkins reiterated his concerns with the reliability of the AO's methodology, and specifically questioned the accuracy of the case weights used by the AO to assess judgeship needs. Mr. Jenkins noted that notwithstanding the findings of the 2003 GAO report, the AO had not implemented their recommendations to improve the accuracy of their methodology.[34]

We are of the position that if there is a clear, demonstrated need for new judgeships, the Congress should act to create those positions. There may well be a need for some of the judgeships contained in S. 2774.[35] However, the GAO continues to find that the Judicial Conference's methodology is flawed and unreliable. As examined in a 2005 Subcommittee on Administrative Oversight and the Courts hearing chaired by Senator Sessions, the federal judiciary has not proven that it has taken every step it can to improve efficiencies, be it through use of technology, case management techniques, or senior/magistrate/visiting judges. Further, there are significant costs that come with creating new permanent and temporary judgeships. For these reasons, we believe that the Judiciary Committee should not be quick to rubber-stamp the AO's request in S. 2774. Moreover, because of the continued findings by the GAO that the methodologies utilized by the Judicial Conference are not accurate and could be improved, we believe that the AO should implement the GAO's recommendations before it submits—and Congress approves—any further judgeship requests.

CHUCK GRASSLEY.
JEFF SESSIONS.
SAM BROWNBACK.
TOM COBURN.

[34] The Minority Leader objected to the Committee's hearing because the Senate had failed to confirm an adequate number of President George W. Bush's circuit and district court nominees at that point in the 110th Congress. When the Minority Leader objected to the Committee meeting, he noted the irony of enacting legislation that would increase the number of federal judgeships while simultaneously failing to hold hearings and confirmation votes for qualified judicial nominees who had been languishing in Committee for months and even years. Further, some of the blocked nominees were nominated to districts to which the bill would add judgeships based on those districts' apparent need.

[35] For example, in the opinions of Senators Brownback and Grassley, the heavy caseload statistics, steady trend in increased caseload, and testimonials from judges and practitioners, demonstrate a justifiable need to shift the District of Kansas's temporary judgeship to a permanent judgeship and to create a new temporary judgeship for the Northern District of Iowa (both included in S. 2774).

MINORITY VIEWS OF SENATOR JOHN CORNYN ON S. 2774, "THE FEDERAL JUDGESHIP ACT OF 2008"

I concur with the Committee Report that rising caseloads threaten to diminish the quality of the justice system, and that S. 2774, "The Federal Judgeship Act of 2008," is an important step to respond to the resource needs of the Federal judiciary. I submit these minority views to express my belief that further Congressional scrutiny and analysis is needed regarding the allocation and number of new judgeships before S. 2774 becomes law.

Article I of the U.S. Constitution gives Congress the power to constitute the lower federal courts. This responsibility cannot be delegated, and should be undertaken by Congress through deliberation and debate based on the most current data available.

The version of S. 2774 that was passed by the Judiciary Committee on May 15, 2008, adopts the Judicial Conference's 2007 recommendations without revision. Since those recommendations were released, additional data has become available, and additional needs have been expressed by Judges on the ground regarding the urgent needs of the federal courts.

Specifically, the judges of the Western District of Texas have persuaded me that their district urgently needs four new district judgeships, which is three more than are provided by S. 2774. Data published since the Judicial Conference released its 2007 recommendations supports this claim.

On July 7, 2008, the Subcommittee on Judicial Statistics of the Committee on Judicial Resources of the Judicial Conference issued a preliminary recommendation that the 2009 Biennial Judgeship Survey should call for four additional judgeships in the Western District of Texas.

According to the latest numbers available, the Western District of Texas has the largest number of criminal cases per judge in the nation. At 393 criminal cases per judgeship, the Western District has more than four times the national average. As a border district, a large percentage of the caseload in the Western District of Texas involves narcotics trafficking, human trafficking, and other crimes that require vigorous enforcement. Successful enforcement requires additional judgeships.

The Administrative Office's 2007 judicial survey, on which S. 2774 is based, establishes a minimum standard of 430 weighted case filings per district judge. Four of the Western District's seven divisions currently have weighted case filings per judge over 700. Applying the 430 weighted cases per judge standard and the latest data available, the Western District could receive up to six new judges.

The Western District's request for four new judges is a current needs request, not an anticipatory needs request. My conversations with the judges of the Western District of Texas indicate that the

need for new judgeships is urgent, and that the current case overload faced by the judges of the Western District of Texas is not sustainable. Precisely because the last comprehensive judgeship bill was passed 18 years ago, Congress must address the escalating caseload crisis in the Western District now.

I am of the opinion that S. 2774 should be amended to add three additional new judgeships for the Western District of Texas, for a total of four new judgeships in that district. Before the May 15, 2008 markup of S. 2774, I circulated an amendment to add the needed three additional judges. I did not offer the amendment during the markup because Chairman Leahy promised to work with me to address the needs of the Western District of Texas. I look forward to working with Chairman Leahy and my other Senate colleagues to ensure that the Western District of Texas, and other districts that are underserved by the current version of S. 2774, receive the additional judgeships that they need.

JOHN CORNYN.

X. CHANGES TO EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 2774, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

TITLE 28 UNITED STATES CODE

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CHAPTER 3—COURTS OF APPEALS

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§ 44. Appointment, tenure, residence and salary of circuit judges.

(a) The President shall appoint, by and with the advice and consent of the Senate, circuit judges for the several circuits as follows:

Circuit	Number of Judges
District of Columbia	11
First	*7*
Second	*15*
Third	*16*
Fourth	15
Fifth	17
Sixth	*17*
Seventh	11
Eighth	*13*
Ninth	*33*
Tenth	12
Eleventh	12
Federal	12

TITLE 28 UNITED STATES CODE

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CHAPTER 5—DISTRICT COURTS

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§ 133. Appointment and Number of District Judges

(a) The President shall appoint, by and with the advice and consent of the Senate, district judges for the several judicial districts, as follows:

Districts	Judges
Alabama:	
Northern	7
Middle	3
Southern	3
Alaska	3
Arizona	*17*
Arkansas:	
Eastern	5
Western	3
California:	
Northern	*16*
Eastern	*10*
Central	*31*
Southern	13
Colorado	*8*
Connecticut	8
Delaware	4
District of Columbia	15
Florida:	
Northern	4
Middle	*19*
Southern	19
Georgia:	
Northern	11
Middle	4
Southern	3
Hawaii	*4*
Idaho	2
Illinois:	
Northern	22
Central	4
Southern	4
Indiana:	
Northern	5
Southern	*6*
Iowa:	
Northern	2
Southern	3
Kansas	*6*
Kentucky:	
Eastern	5
Western	4
Eastern and Western	1
Louisiana:	
Eastern	12
Middle	3
Western	7
Maine	3
Maryland	10
Massachusetts	13
Michigan:	
Eastern	15
Western	4
Minnesota	*8*
Mississippi:	
Northern	3
Southern	6

Districts	Judges
Missouri:	
Eastern	*7*
Western	*6*
Eastern and Western	2
Montana	3
Nebraska	*4*
Nevada	7
New Hampshire	3
New Jersey	17
New Mexico	*8*
New York:	
Northern	5
Southern	28
Eastern	*18*
Western	*5*
North Carolina:	
Eastern	4
Middle	4
Western	4
North Dakota	2
Ohio:	
Northern	11
Southern	8
Oklahoma:	
Northern	3
Eastern	1
Western	6
Northern, Eastern, and Western	1
Oregon	*7*
Pennsylvania:	
Eastern	22
Middle	6
Western	10
Puerto Rico	7
Rhode Island	3
South Carolina	*11*
South Dakota	3
Tennessee:	
Eastern	5
Middle	4
Western	5
Texas:	
Northern	12
Southern	*21*
Eastern	*8*
Western	*14*
Utah:	5
Vermont	2
Virginia:	
Eastern	*12*
Western	4
Washington	
Eastern	4
Western	*8*
West Virginia	
Northern	3
Southern	5
Wisconsin:	
Eastern	5
Western	2
Wyoming	3

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