Imposing a Moratorium on the Number of Federal Judges

Federal Judicial Center

Imposing a Moratorium on the Number of Federal Judges: Analysis of Arguments and Implications

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Federal Judicial Center
1993

Contents

Authorship and Acknowledgments

The authors of this report are listed in alphabetical order. Russell Wheeler took the lead role in organizing, drafting, and revising various versions. Judge Schwarzer and Gordon Bermant also contributed substantially to the conceptualization and revisions of the text. Edward Sussman contributed early draft materials, which included much of the graphic and tabular data in the final text, and is the author of the appendix on the House of Representatives.

We sent this paper in draft form to several persons for comment and are pleased to acknowledge here the suggestions we received from the following even while recognizing that our revisions will not please all those who commented.

Thanks to

Judges Lucius Bunton, Ruth Bader Ginsburg, Ralph Guy, Diana Murphy, Jon Newman, Stephen Reinhardt, Deanell Tacha, Michael Telesca, and J. Harvie Wilkinson III

Professors Robert Katzmann, Daniel Meador, and Thomas Rowe

Circuit Executive Steven Flanders

David Cook, James Macklin, and Elizabeth McGrath of the Administrative Office of the U.S. Courts

William Eldridge, Fletcher Mangum, and Judith McKenna of the Federal Judicial Center.

James Apple, Norman Baker, Melissa Pecherski, and John Shapard of the Center provided assistance with particular data elements.

Some federal judges favor capping the number of federal district and circuit judgeships, in the sense of not having that number grow larger than the current or a slightly higher level. Other judges favor a policy of slow growth, requesting additional judgeships to deal with additional work but only when procedural, jurisdictional, and structural adjustments clearly prove ineffective. Still others favor a policy of steep and immediate growth, asking Congress to at least double the number of judgeships. This paper analyzes the arguments for and against imposing a cap on the number of judgeships but in so doing references also the two other approaches to the size of the judiciary.

We have focused our analysis on the capping proposal because it has been advanced from several quarters and is the subject of immediate debate within the judiciary: one committee of the Judicial Conference of the United States has endorsed a cap and three others are considering it. Several prominent commentators have advocated limiting growth to a maximum quite close to the current number of authorized judgeships. In using the capping proposal as the vehicle for analysis, however, we do not mean to suggest that it is the approach favored by most judges. It is not, according to a recent Center survey, and the Judicial Conference explicitly rejected it in 1990.

This paper does not present a Federal Judicial Center position on whether the judiciary should endorse a cap or any other approach. It attempts to summarize fairly and analyze the competing arguments.[1] It thus responds to the Center's mandate to "conduct research and study of the operation of the courts of the United States, and to stimulate and coordinate such research and study on the part of other[s]."[2]

The paper is organized in three parts:

- Part I describes the current processes for creating life-tenured judgeships and summarizes the evolution of the idea of a moratorium on their increase.

1. It is not our intent, however, to present fully the case of the proponents or the opponents of particular approaches, and it is not necessary to do so to accomplish the paper's purpose.

2. 28 U.S.C. § 620(b)(1).

- Part II provides background on moratoria already imposed on the House of Representatives and the Supreme Court.
- Part III, the heart of the paper, presents the various arguments for imposing a moratorium on new judgeships, responses to those arguments, and commentary.

The terms "cap," "ceiling," and "moratorium" (in the dictionary sense of "a suspension of activity") are used interchangeably in the paper to denote a recognized limit on the number of judgeships, intended to persist for several decades at a minimum.

Part I: Introduction

This part describes how the number of judgeships has grown and is now determined and summarizes the emergence of the moratorium concept.

The growth of the judiciary and current arrangements for regulating its size

Congress controls the number of circuit and district judgeships by amending the numbers in 28 U.S.C. §§ 44(a) and 133(a). The last amendments were in 1990, when Congress increased circuit judgeships to 179 and district judgeships to 649.[3] Thus, there is now and always has been a cap on the number of circuit and district judgeships, and Congress has routinely raised that cap. A moratorium as the term is used here would change the historic assumption that the number of judgeships should be periodically increased.

Figures 1 through 4 lay out the growth in the number of life-tenured judgeships, general and lawyer population, and district and appellate filings. These numbers and trends are subject to various interpretations. We leave it to the readers to draw their own conclusions about the data's significance for the debate about the appropriate size of the federal judiciary.

Growth of the number of circuit and district judgeships

The 1789 Judiciary Act provided for six Supreme Court justices and created thirteen district courts and thirteen district judgeships. The district courts were limited jurisdiction trial courts. Supreme Court justices served with the district judges on the system's principal trial court, the circuit court; there were no separate intermediate appel-

3. This figure includes thirteen temporary judgeships, explained below at note 12. Not included are district judges serving in territorial courts. We have also excluded from our tallies the nine authorized (life-tenured) judgeships on the Court of International Trade (see 28 U.S.C. § 251).

late courts until 1891.[4] The Act provided a small federal judiciary because it created a very limited federal jurisdiction, principally founded on admiralty, federal crimes, and diversity of citizenship. There was no general federal question jurisdiction until 1875.[5] Until the twentieth century, most federal judicial districts had only one judgeship. Congress created most new judgeships by creating new districts. The separate courts of appeals created in 1891 were primarily three-judge courts well into the twentieth century.

Figure 1 shows the increase in district judgeships since 1789 and courts of appeals judgeships since 1891. The increase has been accelerating since World War I and especially since mid-century. (Since 1950 the numbers of district and of circuit judgeships have both roughly tripled.[6])

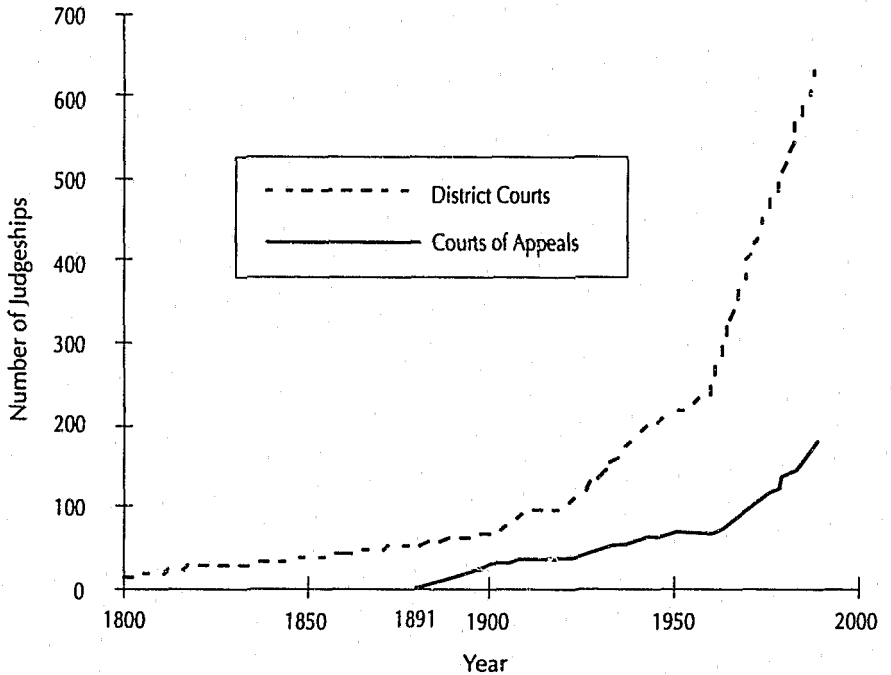
Identifying the factors driving this increase is not central to this paper, although, as Figure 2 suggests, the increase is not simply a function of a growing population. Figures 3 and 4 show that filings have grown faster than judgeships.

4. The 1789 Act also created circuit courts, which were primarily trial courts, but no separate judgeships for them. Rather, the circuit courts were staffed by the district judges and Supreme Court justices. The circuit courts had some appellate jurisdiction over the district courts. In 1869, Congress created nine separate circuit judgeships, one each to attend the circuit courts in each circuit and thus relieve the justices of some circuit-riding duties. Act of Apr. 10, 1869, 16 Stat. 44 (1869).

5. Act of Mar. 3, 1875, 18 Stat. 470 (1875).

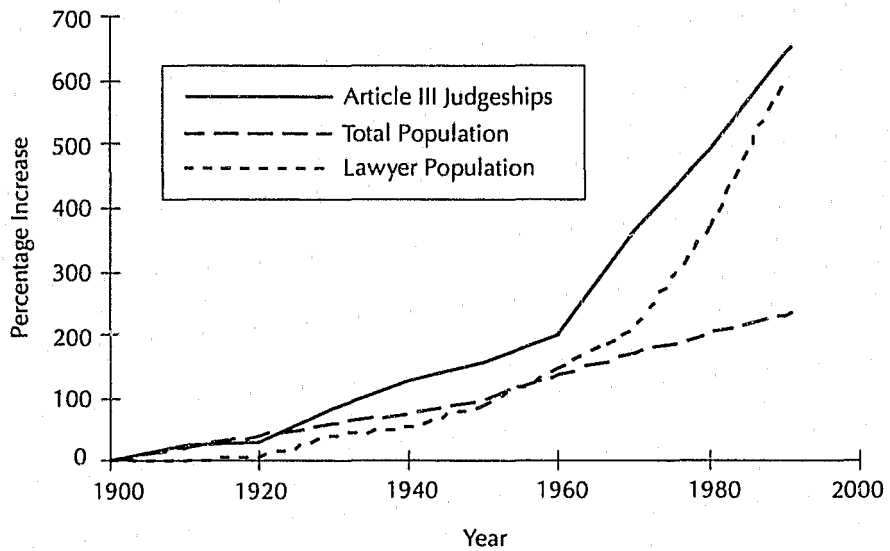
6. From 65 to 179 authorized circuit judgeships and from 212 to 649 authorized district judgeships (including thirteen temporary judgeships). Based on data in History of the Authorization of Federal Judgeships, Including Procedures and Standards Used in Conducting Judgeship Surveys, Tables 5 & 6 (1991) (report prepared by the Analysis and Reports Branch, Statistics Division, Administrative Office of the U.S. Courts) (hereinafter Judgeship Authorization).

Figure 1
Number of judgeships, 1800–1991



Source: Judgeship Authorization, *supra* note 6, at Table 7; 1991 Annual Report of the Director of the Administrative Office of the U.S. Courts 126, at Table 29.

Figure 2
Percentage increase since 1900 in total population, lawyer population, and Article III judgeships



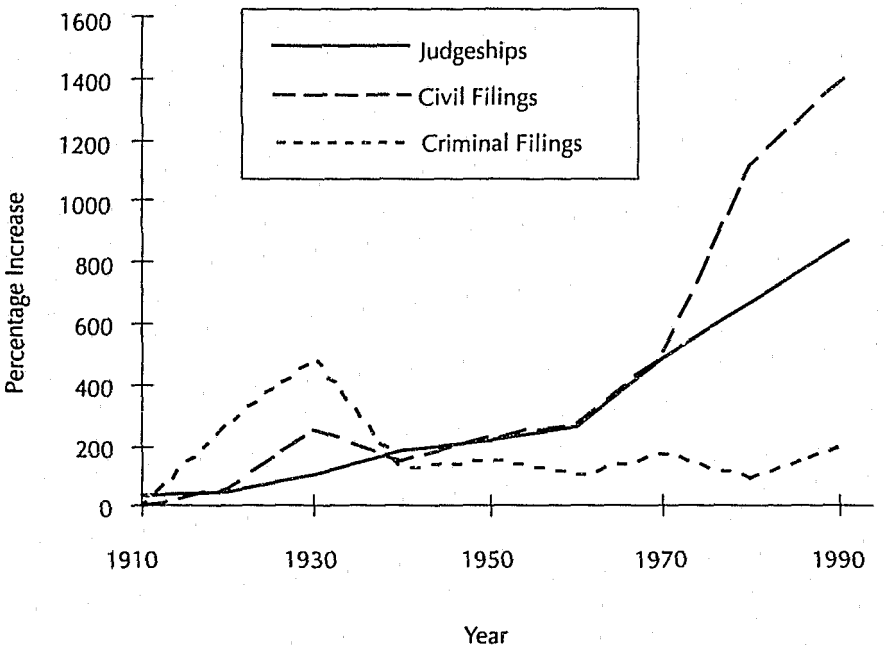
Note: Lines show percentage increases over 1900, not numerical increases.

Source: Data on judgeships from Judgeship Authorization, *supra* note 6, at Table 7.

Data on U.S. lawyer population are from American Bar Foundation, Lawyer Statistical Report: A Statistical Profile of the U.S. Legal Profession in the 1980s, at 4, Table 1.1.1, *Total Population, Lawyer Population, and Population/Lawyer Ratio in Selected Years* (1985) (see source for qualifications); American Bar Foundation, 1971 Lawyer Statistical Report, at 5, Table 1, *National Distribution of Lawyers by City Size and Sex, 1948–1970;* David S. Clark, *Adjudication to Administration: A Statistical Analysis of the Federal District Courts in the Twentieth Century,* 55 S. Cal. L. Rev. 65, 94–95 (1981).

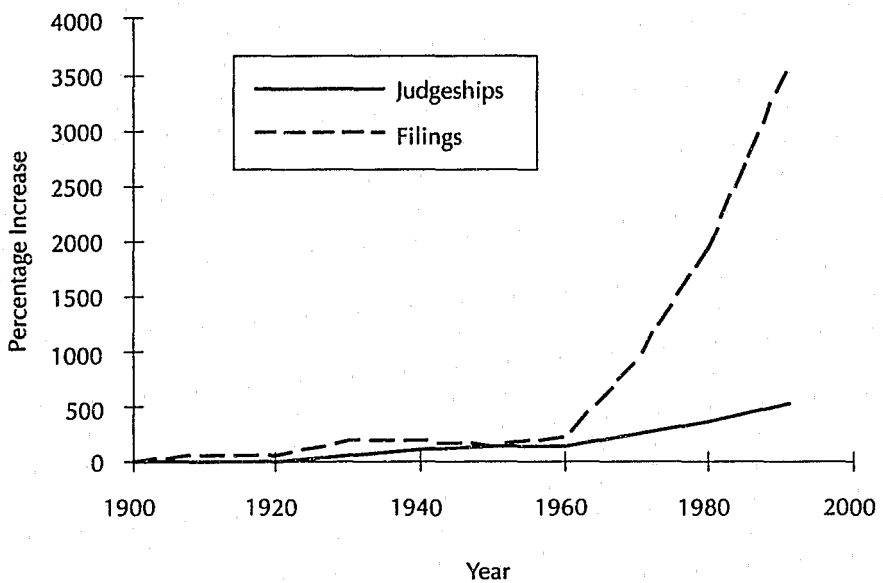
Data on U.S. population are from U.S. Bureau of the Census, Statistical Abstract of the United States: 1992, at 8, Table 2, Population: 1900 to 1991 (see source for qualifications).

Figure 3
Percentage increase since 1910 in district court judgeships and cases filed in the district courts



Note: Lines show percentage increases over 1900, not numerical increases.
Source: Data from 1991 Annual Report of the Director of the Administrative Office of the U.S. Courts at Tables 5, 8; Richard Posner, The Federal Courts 350–52, at Table B.2 (1985).

Figure 4
Percentage increase since 1900 in circuit judgeships and cases filed in the courts of appeals



Note: Lines show percentage increases over 1900, not numerical increases.
Source: Data from 1991 Annual Report of the Director of the Administrative Office of the U.S. Courts at Tables 5, 8; Richard Posner, The Federal Courts 350–52, at Table B.2 (1985).

Current procedures for creating judgeships

Since 1964, the Judicial Conference has submitted periodic legislative proposals for additional judgeships. Those "judgeship bills" are based on surveys of judgeship needs conducted by the Judicial Conference Committee on Judicial Resources (and predecessor committees) and, more particularly, its Subcommittee on Judicial Statistics.[7] The Conference has adopted a numeric standard that the de-

7. The surveys were roughly quadrennial from 1964 to 1980, when they became biennial. *See* Judgeship Authorization, *supra* note 6, at 2–4. Before 1987 and

sired workload for a district judge is no more than 400 *weighted filings* per year and for a circuit judge, a benchmark of 255 *merits dispositions*.[8] The Conference considers more than these standards in developing judgeship recommendations, however.[9] A 1993 General Accounting Office report characterized as "reasonable" the Conference's method of developing judgeship recommendations, while recognizing limitations in the Conference's workload measures and "the judgmental nature of much of the Conference's decisionmaking."[10]

Of course, Congress is under no obligation to adopt the Judicial Conference recommendations, and it occasionally provides more or fewer judgeships and for different courts than those recommended by the Conference.[11]

Finally, Congress sometimes creates temporary judgeships to meet caseload pressures regarded as temporary. The judgeship is "temporary" in that a future vacancy (e.g., the first occurring after five years) will not be filled. The temporary judgeship thus creates no permanent increase in the court's authorized judgeships.[12]

the creation of the Resources Committee, the Court Administration Committee and its Statistics Subcommittee developed judgeship proposals.

8. "Weighted filings" is a statistical construct that adjusts the number of raw district court filings in light of the relative burden that different types of cases impose on judges. Those relative burdens are in turn based on time studies that the Federal Judicial Center conducts for the Statistics Subcommittee. The "merits dispositions" figure for appellate courts is a rough measure of dispositions by judicial action.

9. The Statistics Subcommittee also consults with judges and court managers, who may argue that filing data underestimate the true judicial burden in a court or conversely that, despite the need for additional judgeships based on formula, the court does not desire the additional judgeships because it believes any benefits they would provide are outweighed by their costs in efficiency and collegiality. (This latter argument is most often made by appellate courts.)

10. U.S. General Accounting Office, Federal Judiciary, How the Judicial Conference Assesses the Need for More Judges 1 (1993).

11. *See infra* note 105.

12. Pub. L. No. 101-650, § 203(c), 104 Stat. 5101, established thirteen temporary judgeships in thirteen districts but provided that the first vacancy in each district occurring five years or later would not be filled. *See* 28 U.S.C.A. § 133.

Adjusting workload, procedures, and capacity to promote system effectiveness

Debate over the size of the judiciary—life-tenured and other judges and supporting staff—immediately faces two other elements: the workload of the judiciary (often but not always framed in terms of the appropriate scope of federal jurisdiction) and the judiciary's procedures (including the entire range of issues under the umbrella term "case management").[13]

Four aspects of this debate are particularly relevant to the current inquiry. First, size is rarely considered in isolation. Size, workload, and procedure affect one another, and proposals for change in one almost always implicate the others. For example, instead of expanding capacity, one might favor restricting jurisdiction (e.g., diversity of citizenship jurisdiction) or resisting demands to increase jurisdiction (e.g., bringing most gun crimes into federal courts). Or, to accommodate expanded sentencing hearings, one might favor abbreviating civil procedure instead of expanding capacity. Or one might favor increasing judgeships or staff—or creating additional forums—to accommodate increased workload without restrictions on jurisdiction.

Second, as implied above, "size" of the judiciary can refer to the number of circuit and district judges or to the total judicial plant, which also includes bankruptcy and magistrate judges, staff attorneys, law clerks, probation officers, and other support staff.

Third, although workload and procedures have been debated in terms of both expansion *and* restriction, the debate over size has until now *only* been about expansion. Faced with growing federal caseloads and seeing limited relief by way of additional procedural or jurisdictional changes, the judiciary has historically sought additional judgeships. Chief Justice Burger's request for ABA help in getting more judgeships to implement the Speedy Trial Act represents a recurring theme: "see that Congress gives 'us the tools,' and we will do the job."[14] On the other hand, Congress has occasionally been skeptical about the judiciary's judgeship requests. Many

13. Within the context of this three-part scheme, we include court structure and alternative dispute resolution as part of the judiciary's procedures.

14. Burger, *State of the Judiciary—1975*, 61 A.B.A. J. 439, 443 (1975).

judges, moreover, fear that enlarging their number, however necessary that may be, makes it more difficult to operate the courts and to attract the best lawyers to serve as judges.

Fourth, precisely how one proposes to manipulate capacity, workload, and procedure reflects one's sense of the problem to be solved and the values to be protected. Distinguished commentators have advocated quite different approaches. Justice Scalia, among others, has spoken about the "continuing deterioration"[15] of the federal courts. He compared them to what he perceived them to be when he graduated from law school in 1960: "forums for the 'big case'—major commercial litigation under the diversity jurisdiction, and federal actions under . . . laws regulating interstate commerce." More recently there has been "an explosion of new federal causes of action . . . which often involve matters that are, in monetary terms (and hence, in terms of the amount of time that counsel can ordinarily devote to them), insignificant." He listed several examples, ranging from certain Title VII cases to a $200 fee-splitting dispute between a bank and a real estate broker brought under the federal Real Estate Settlement Procedures Act of 1974.[16] He lamented the changes that had been made to accommodate the increased workload: the "constant, and generally effective pressure . . . to increase the *number* of federal judges . . . that helps the docket [but] aggravates . . . the problem of image, prestige and (ultimately) quality," and "what is known as caseload management—essentially enabling the federal courts to dispose of the increasing number of routine cases more efficiently" but in the process changing judges into case processors.[17] His proposed solution was to create Article I courts for "large categories of high-volume, relatively routine cases—Social Security disability cases, for example, and freedom of information actions"—with tightly constricted appeal rights, and "greater specialization among [new] federal Article III tribunals," to divert business "from the regular federal

15. Remarks by Justice Antonin Scalia before the Fellows of the American Bar Foundation and the National Conference of Bar Presidents, Feb. 15, 1987, at 11 (manuscript).

16. *Id.* at 3–4.

17. *Id.* at 7 (emphasis in original).

courts" and thus give those regular courts "a chance of remaining in the future what they have been in the past."[18]

The opposing view has been expressed by, among others, Circuit Judge Stephen Reinhardt. In an October 1992 letter (subsequently published) to the chairs of the House and Senate Judiciary Committees, he characterized as "wholly meritless" the view "that we must remain small so that the quality of judges will remain high" and "wholly misguided" the view "that the federal courts should remain elite in the sense that we should handle only sophisticated problems involving large business interests" rather than "the kinds of cases that affect individual rights and involve the problems of the poor, the oppressed, the disabled and the victims of discrimination." Judge Reinhardt also said that the federal courts, particularly the courts of appeals, are not "doing the same quality work that we did in the past" and that new "expediting" procedures "ensure that individual cases will get less attention . . . . [W]e now all too often give cases second class treatment."[19] His proposed solution reflects his assumption that Congress would be unwilling to make changes necessary to stop "flooding the federal courts with run-of-the-mill narcotics cases that should more properly be handled in our state system" and to ease the burdens and additional trials and appeals that he says are caused by the Sentencing Guidelines and mandatory minimum sentences.[20] Thus, he proposed "simply that Congress double the size of the courts of appeals" and expand them even more if it creates additional district judgeships.[21]

In summary, then, proposals to change the interlocked variables of workload, procedure, and size implicate one's view of the role of the federal courts.

18. *Id.* at 9–10.
19. Reinhardt, *Too Few Judges, Too Many Cases,* 79 A.B.A. J. 52 (1993).
20. *Id.* at 53.
21. *Id.* at 52–53.

The idea of a moratorium

Fixing a permanent limit on the number of district and circuit judges is a controversial proposal that has gained prominent adherents and opponents in the last several years.

In 1983, Judge Richard Posner wrote that his "first solution" to the problems of the courts of appeals was "to stop creating new federal district judgeships," which he called a "stopgap measure," pending "fundamental reforms" of changed litigation incentives and reallocated jurisdiction.[22] The 1990 report of the Federal Courts Study Committee warned that the federal judiciary would soon reach "the limits of [its] natural growth" and referred sympathetically to (but did not endorse) "suggest[ions] that 1,000 is the practical ceiling on the number of judges if the Article III judiciary is to remain capable of performing its essential functions without significant degradation of quality."[23] The Committee recommended more judgeships to handle the expanded federal criminal caseload[24] but stated that "the ultimate solution to the federal courts' caseload crisis" was not "[m]ore judgeships" but rather "returning the federal courts to their proper limited role."[25] In his 1991 Year-End Report, Chief Justice Rehnquist called for "some additional judicial resources . . . in the short run" but warned of "the long-term implications of expanding the federal judiciary," pointing to others' concern that "a federal judiciary rising above 1,000 members will be of lesser quality [and] an almost unmanageable size with an increasingly incoherent body of federal law."[26]

In January 1993, Judge Jon Newman asserted that the number of federal judgeships "must be held at 1,000 because once that number is exceeded, it will be only a matter of time until the federal judiciary grows to 2,000, 3,000, and then 4,000. Growth of that magnitude will seriously impair the federal judiciary's ability to perform the vital tasks assigned to it under our system of govern-

22. Posner, *Will the Federal Courts of Appeals Survive Until 1984? An Essay on Delegation and Specialization of the Judicial Function*, 56 S. Cal. L. Rev. 761 (1983).

23. Report of the Federal Courts Study Committee 8 (April 2, 1990).

24. *Id.* at 35, 112, 160.

25. *Id.* at 36.

26. Rehnquist, 1991 Year-End Report of the Federal Judiciary 2–4.

ment."[27] In a February 1993 report to the Judicial Conference Committee on Long Range Planning, the Judicial Conference Committee on Court Administration and Case Management recommended a set of organizational changes, including limiting the federal judiciary "to the present number of authorized judgeships, along with any increases for which need has been established . . . at the time of the adoption of a Long Range Plan, but not to exceed 1,000 judgeships." The Committee also recommended capping the size of each circuit at twelve judges, and reducing the number of circuits to ten.[28]

There has also been substantial opposition to the concept of a moratorium. The Federal Courts Study Committee itself, while rejecting more judgeships as the "ultimate solution," also recognized "the need for increasing judgeships as caseload mounts, because there is a finite limit to the number of cases to which a judge can provide meaningful attention."[29] At its September 1990 meeting, the Judicial Conference endorsed the following resolution proposed by the Committee on Judicial Resources after considering the Federal Courts Study Committee recommendations. Specifically, the Conference

> [a]greed to support the concept of maintaining a relatively small Article III judiciary through limitations on the jurisdiction and caseload of the courts, but opposed

27. Newman, *1,000 Judges—The Limit for an Effective Federal Judiciary,* 76 Judicature 187 (1993) (hereinafter Newman, *1,000 Judges*); Judge Newman offered a similar analysis in Newman, *Restructuring Federal Jurisdiction: Proposals to Preserve the Federal Judicial System,* 56 U. Chi. L. Rev. 761 (1989) (hereinafter Newman, *Restructuring*).

28. Report of the Judicial Conference Committee on Court Administration and Case Management to the Judicial Conference Committee on Long Range Planning, Feb. 16, 1993, at 2, 7 (hereinafter Court Administration Committee Report). The Judicial Conference's Committee on Long Range Planning, its Committee on the Judicial Branch, and the Statistics Subcommittee of the Conference's Committee on Judicial Resources are all examining the idea of a permanent limit on the number of federal judges. The notion of a moratorium has been noted in the popular press. *See* Schmitt, *Push for More Judges Gains Political Steam,* Wall St. J., Feb. 24, 1993, at B12; Labaton, *Clinton Expected to Change Makeup of Federal Courts,* N.Y. Times, Mar. 8, 1993, at A1.

29. Report of the Federal Courts Study Committee 116 (April 2, 1990).

any efforts to set a maximum limit on the number of Article III judgeships.[30]

An October 1992 Federal Judicial Center survey asked all federal judges about their support for or opposition to a wide array of policy choices concerning federal court size, structure, procedure, jurisdiction, and governance, including "Cap the number of Article III appellate judges" and, separately, "district judges." A majority of active district judges and more than 40% of active appellate judges strongly or moderately opposed a cap, while a quarter of active district judges and a third of active appellate judges strongly or moderately supported it.[31] The specific numbers are shown in Table 1, along with responses to questions about adding more judges. (Respondents were presumably less familiar with the arguments about the capping issue than they were with more long-standing issues, such as restricting diversity jurisdiction.)

Both moratorium supporters and moratorium opponents include judges appointed by Democratic and Republican presidents.

30. Report of the Proceedings of the Judicial Conference of the United States, Sept. 12, 1990, at 93.

31. The Center sent the survey instrument, Planning for the Future: Survey of United States Judges, October 1992 (hereinafter Survey), to all active and senior judges, bankruptcy judges, and magistrate judges. The Center is using the results in its statutorily mandated study of "structural alternatives for the Federal Courts of Appeals" (Federal Courts Study Committee Implementation Act of 1990, section 302(c), as amended) and in its support for the Judicial Conference Committee on Long Range Planning and other Judicial Conference committees.

The results cited were tabulated in December 1992, reflecting an overall return rate of greater than 80%.

Table 1
Selected survey responses

Type of Judge	Policy Choice	Support	Oppose
Active Appellate	Add more appellate judges	24.6%	51.4%
	Cap number of Article III appellate judges	34.0%	41.8%
Active District	Add more district judges	37.9%	36.7%
	Cap number of Article III district judges	25.6%	57.5%

Note: The category "Support" includes those who selected either "strongly support" or "moderately support." "Oppose" includes those who selected either "strongly oppose" or "moderately oppose." The responses do not total 100% in any case because some judges selected either "have mixed feelings" or "no opinion."

Part II: Capping the Size of the House of Representatives and the Supreme Court

Congress has twice imposed statutory moratoria on the size of government institutions that had previously grown incrementally to accommodate increasing population or workload. We discuss both of these moratoria here because they provide an instructive historical context, not because they necessarily furnish precedents applicable to the federal district and circuit courts.

The House of Representatives

In 1929, Congress ended nearly a decade of debate by setting the membership of the House of Representatives at 435.[32] Congress had increased the size of the House after each decennial census but one, and in 1921, the House Census Committee recommended increasing it again from 435 to 483 but capping the size at 500. Proponents argued that effective representation demanded a larger body, especially because the Nineteenth Amendment had doubled the voting population, and because of increased legislative and constituent work. A minority position called for maintaining the membership at 435,[33] citing the additional cost and decreased efficiency of a larger body and arguing that additional staff and more sophisticated communications would enable the same number of members to do more work.[34] In 1929 Congress by statute fixed the House at 435 members and adopted a scheme for automatic periodic reapportionment of the 435 seats to reflect population shifts. The House has had 435 members essentially since 1911.[35]

32. *See infra* the appendix.

33. House Census Committee, Apportionment of Representatives, H.R. Rep. No. 1173, 66th Cong., 3d Sess. 29 (1921).

34. *Id.* at 29–30.

35. This number does not include delegates with limited voting rights from U.S. territories and the District of Columbia added as recently as 1973. Jefferson's Manual and Rules of the House of Representatives of the United States, 101st Cong., §§ 740, 741 (1988).

The Supreme Court

In 1869, Congress set the size of the Supreme Court at nine. Congress had increased the Court's size from six justices, as established by the 1789 Judiciary Act, to ten in 1862.[36] The increases reflected geographic and population growth: each justice served one of the regional circuits as a circuit judge and, together with the district judges, constituted the system's chief trial court, the circuit court. As Congress added circuits, it added justices to serve as circuit judges.

In 1861, in his first state of the union message, President Lincoln warned that "the country has outgrown our present judicial system." The problem was that the country's legal activity required more circuits than the number then authorized, but adding enough justices to the Supreme Court to serve all the circuits that were needed would make the Supreme Court "altogether too numerous for a judicial body of any sort." His solution was to set the Supreme Court at a "convenient number" and break the link between the number of justices and the structure of the judicial system.[37]

The next year Congress instead created a Tenth Circuit for California and Oregon and expanded the Court from nine to ten,[38]

In 1961, the House increased its membership temporarily to 437 to accommodate the new states of Alaska and Hawaii but returned to 435 following the 1960 census. *See* 2 U.S.C. § 2a, Temporary Increase in Membership, § 9 of Pub. L. No. 85-508, 72 Stat. 339 (1958); § 8 of Pub. L. No. 86-3, 73 Stat. 4 (1959).

Some observers are calling for an increase in the size of the House. Yates, *A House of Our Own or a House We've Outgrown? An Argument for Increasing the Size of the House of Representatives*, 25 Colum. J. L. & Soc. Probs. 157, 180 n.150 (1992); Lind, *A Radical Plan to Change American Politics*, The Atlantic, Aug. 1992, at 73; Kromkowski & Kromkowski, *Why 435? A Question of Political Arithmetic*, 24 Polity 129, 134 (1991).

36. Act of July 15, 1862, 12 Stat. 576. See generally on the growth of circuits and the size of the Supreme Court R. Wheeler & C. Harrison, Creating the Federal Judicial System (Federal Judicial Center 1989).

37. Message to Congress of Dec. 3, 1861, *in* 5 The Works of Abraham Lincoln 41–42 (R. Basler ed. 1953).

38. Act of July 15, 1862, "To Amend the Act of Third of March, 1837 . . . ," 12 Stat. 576 (1862). In 1855, Congress had created a separate California circuit—a tenth circuit not so named, and staffed not by a Supreme Court justice but by the

but an 1866 statute forbade replacement nominations until the Court consisted of seven members.[39] Congress and the Court sought to create a Court of more manageable size and to make it easier for Congress to raise judicial salaries.[40] A growing Supreme Court caseload, however, prompted reconsideration of the goal of a seven-member Court, and there was concern as well with the eight-member court then sitting (which could reach ties).

In response to these concerns, Congress increased the number of justices to nine, reduced the number of circuits to nine, and created nine separate judgeships for the circuit courts to relieve the justices of some circuit-riding duties.[41] No one probably expected that the 1869 statute would set the number of justices for over a century. It had that effect in part because Congress did not increase the number of circuits until after it had effectively relieved the justices of any circuit-riding duties.[42] Thus the concept of a nine-member Court had time to become a fact of judicial life.

Separate courts of appeals and broadened discretionary jurisdiction have allowed the Court to stay current with its work with the same number of justices it had in 1869. There have been, to be sure, occasional discussions of expanding the Court. In the years before the enactment of the 1891 circuit court act, as the Court became seriously backlogged, Congress considered an eighteen-member Supreme Court, with nine justices serving on the circuits through a rotational scheme.[43] In the 1930s, President Roosevelt proposed increasing the Court's size for every justice over the age of seventy, both to shorten case disposition time and to dilute the

first-ever separate circuit judge. Congress abolished the separate California circuit when it rearranged the circuits in 1869.

39. Act of July 23, 1866, "To Fix the Number of Justices of the Supreme Court of the United States, and to Change Certain Judicial Circuits," 14 Stat. 209 (1866).

40. S. Kutler, Judicial Power and Reconstruction Politics 49–63, esp. at 54–55 (1968).

41. Act of Apr. 10, 1869, 16 Stat. 44 (1869).

42. The Circuit Court Act of 1891 virtually eliminated circuit riding. Act of Mar. 3, 1891, 26 Stat. 826 (1891). In 1929, Congress split the Eighth Circuit to create the Tenth Circuit. Act of Feb. 28, 1929, 45 Stat. 1346 (1929).

43. F. Frankfurter & J. Landis, The Business of the Supreme Court 79, 82–83 (1928). Similar schemes had been debated in the 1860s; *see* S. Kutler, *supra* note 40, esp. at 58.

impact of anti-New Deal justices. In 1972, before recommending a national court of appeals to help the Supreme Court with its workload, the Freund commission dismissed as "counter-productive" an increase in the number of justices, paraphrasing Chief Justice Hughes's 1937 prediction that "there would be more judges to hear, more to consult, more to be convinced."[44]

Relevance to current proposals to limit the number of circuit and district judgeships

These histories illuminate five aspects of the debate over a cap on Article III judgeships. First, both Congress and the Supreme Court are unitary bodies. In each, size affects the ability to function as a group, a fact that argued in support of capping the size of each. By contrast, the more than 800 district and circuit judges do not function as a unitary body (although there may be other reasons to justify capping their numbers).

Each appellate court is itself a unitary body, however, although each does much of its work in panels. Size affects the relationships among the members of each appellate court, and the total number of judgeships is an important factor in determining the best structure for the appellate judiciary.

44. Report of the Study Group on the Caseload of the Supreme Court 7 (1972).

Table 2
House and Senate employees,
overall legislative branch appropriations

	House of Representatives			Senate			
Year	Members' Staff	Per Member	Committee Staff	Senators' Staff	Per Senator	Committee Staff	Budget (in 1989 dollars)
1891	NA	NA	62	39	.46	41	NA
1916	NA	NA	105	72	.75	198	NA
1930	870	2	112	424	4	163	NA
1947	1,440	3	167	590	6	232	$343.1
1967	4,055	9	571	1,749	18	509	$832.2
1977	6,942	16	1,776	3,554	36	1,028	$1,971.9
1989	7,569	17	1,986	3,837	38	1,013	$1,804.6

Note: The 1967 figures for committee staff are based on 1965 data. Budget figures are in millions of dollars and reflect 1989 constant dollars. Staff do not include employees of support agencies (e.g., Library of Congress, General Accounting Office, Congressional Budget Office, and Office of Technology Assessment).

Source: Data are from Norman Ornstein, et al., Vital Statistics on Congress, 1991–1992 (1992). House and Senate staff are from *id.* at 126, Table 5-2; committee staff are from *id.* at 130, Table 5-5; legislative appropriations are from *id.* at 136, Table 5-9. Constant 1989 dollar figures were calculated for this paper using the Consumer Price Index.

Second, both the House and the Court operate differently than they would without a cap. We cannot specify, obviously, how either would operate had they increased in size beyond 435 or nine, but part of the increased use of staff in both may be due to restrictions on the number of principals. Table 2 shows the increase in House and Senate staff over the last century. The increase is obviously a product of other factors in addition to the moratorium on House members (the principal-to-staff ratio has grown slightly more in the Senate), but 435 members probably need more staff, per member, to do the work that might otherwise fall to, say, 870 members. Chambers and central legal staff have also helped the Supreme Court keep abreast of its workload.

Third, both the House and the Court are better able to handle the effects of a cap than are the district and circuit courts. Legislators can be active participants in determining how much additional work is brought into their institution; they do not have to introduce, much less take seriously, every piece of legislation proposed to them. The Supreme Court has by now an almost wholly discretionary jurisdiction. In contrast, under current law, district and circuit judges must give due consideration to every case brought to them.

Fourth, in both cases, fixing the size of the institution required abandoning the principle that membership would increase as population grew. The House has used a reapportionment scheme that reallocates seats based on relative population shifts. As some areas gain representation, others lose it. Before its cap, the Supreme Court's size was a function of the number of circuits, which in turn reflected national expansion and growth. Justices were often selected with reference to the circuits they would serve. Now, although the Court still assigns its members "as circuit justices,"[45] geography is no more than a minor factor in selecting justices.

Fifth, the long-standing ceilings on the size of both the House and the Supreme Court are statutory[46] rather than constitutional. Although their sizes could thus be changed by statute, as they were throughout the nineteenth century, in fact both statutory provisions have gained the weight of tradition and, in the case of the Court, perhaps of "constitutional convention."[47]

45. 28 U.S.C. § 42.

46. The House is fixed by 2 U.S.C. §§ 2a, 2b and the Supreme Court by 28 U.S.C. § 1 ("The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum."). A reduction in the Court's size would have to protect sitting justices' tenure.

47. One observer has recently characterized the size of the Supreme Court as a "constitutional convention." Wilson, *American Constitutional Conventions: The Judicially Unenforceable Rules That Combine with Judicial Doctrine and Public Opinion to Regulate Political Behavior,* 40 Buff. L. Rev. 645, 674 (1992).

Part III: A Moratorium on New Circuit and District Judgeships: The Case For and Against

None of the writings supporting the moratorium have carried the argument beyond a statement of the numerical ceiling to be imposed and a description of the conditions promoters believe a ceiling would alleviate. We know of no analysis of the details of implementing a moratorium.

To inform the debate on alternative approaches to the size of the judiciary, Section A presents a summary brief for capping the judiciary, and a response in opposition to each point in the brief. Section B provides some concluding comments. We use only readily available data to analyze the competing arguments.

A. The arguments

The argument for a moratorium begins with the assertion that any further significant increase in the size of the federal judiciary will change the institution's fundamental character to the serious detriment of the nation. The federal judiciary must not grow significantly larger if it is to protect its effective working relations, prevent undue i. ter- and intra-court conflicts, avoid an unacceptable number of mediocre appointments, and provide the public with an effective and respected forum. All these conditions are essential to maintaining a federal judiciary of the kind and quality that the country expects. Furthermore, as the judiciary grows, it must present increasingly unpalatable budget requests to Congress; a large court system will be unlikely to get the resources it needs to function effectively.

Without the drastic action of an explicit moratorium, however, the federal judiciary *will* grow significantly. A moratorium will prevent that growth in two ways. It will hold constant the number of judgeships, and it will force Congress to restrain the need for more judges by limiting the federal judicial workload to disputes that most need the federal forum. Finally, a moratorium is practical. It

can work through a reapportionment approach somewhat analogous to that applied to the House of Representatives.

More specifically, moratorium proponents make these arguments:

1. Continuing increases in the size of the federal judiciary will eventually create unacceptable problems:
   a. Unchecked expansion of district and circuit judgeships vitiates the historic understanding, based on federalism, that the federal judiciary is a specialized body of limited jurisdiction.
   b. Cohesiveness and efficiency will be impaired.
   c. The quality of federal courts will decline because:
      (1) As the number of judgeships increases, the ability of the office to attract the most qualified individuals will decline.
      (2) As the number of vacancies to be filled increases, it will become increasingly difficult for executive and legislative branches to nominate and confirm with sufficient care.
   d. A larger federal judiciary will require more resources than Congress will be willing to appropriate.
2. Without an explicit moratorium, the federal judicial workload will continue to grow, leading Congress to continue to add more judgeships to the system.
3. A moratorium will allow the courts to avoid growing larger because it will force Congress to control jurisdictional expansion and restrict unnecessary access to the courts, and it will force the courts to develop more efficient procedures.
4. A cap on the number of judgeships can be successfully implemented.
   a. A statutory change can be effective.
   b. Only an unequivocal cap, identified and argued for as such, will assist the federal courts.
   c. Geographic shifts in demand for judicial services can be accommodated.

Opponents of a cap maintain that a ceiling on the number of circuit and district judgeships will exacerbate, not solve, the problems that moratorium supporters believe beset the federal courts. Whether or not a moratorium is in place, Congress will surely expand jurisdiction in response to new claims pressed by constituents, although its statutes will be empty gestures if there are insufficient judges to hear the cases that result. The federal caseload will increase, in fact, even if no new federal causes of action were created, simply because more people will turn to the federal courts as population grows. Congress, though, would be incapable of the carefully calibrated adjustments to jurisdictional statutes that might otherwise restrain federal filings.

Unless the number of judges keeps relative pace with the legal problems needing their attention, meaningful access to the federal judicial forum will be denied to many citizens whose claims entitle them to that forum. The same number of judges will be forced to handle a greatly increased number of cases, to the point that few cases will get the judicial attention they require.

A moratorium would also impede efforts to increase gender, ethnic, and racial diversity on the federal bench. And a moratorium would require relocating judgeships geographically to accommodate the shifts of judicial business, threatening the historic sense that federal courts reflect local legal and social cultures, and thus creating additional legislative disincentives to make the moratorium work effectively.

These basic facts, opponents contend, demand rejection of the moratorium proposal but still accommodate more than one approach to ensuring an effective judiciary. One approach favors adding judges if and when necessary but would avoid large increases in judgeships by having the judiciary embark on a vigorous campaign of maximizing procedural innovations, promoting structural change where necessary, and working even more closely than at present with Congress and the executive to restrict federal judicial workload to disputes that truly need the federal forum. Another approach favors a significant expansion—perhaps a doubling or more—of the number of judgeships. In this view, the nation must invest the comparatively small sums necessary to provide judgeships sufficient to ensure fair hearings to all persons entitled

to the federal forum, particularly those disadvantaged elements of society that tend to get inadequate attention when judicial resources are at a premium.

We turn to an analysis of the arguments for and against imposing a ceiling on the number of judgeships.

1. Continuing increases in the size of the federal judiciary will eventually create unacceptable problems

a. *Unchecked expansion of district and circuit judgeships vitiates the historic understanding, based on federalism, that the federal judiciary is a specialized body of limited jurisdiction*

The argument

The lower federal judiciary was created in 1789, and should remain today, as courts of limited, specialized jurisdiction, to decide cases that Congress believed needed disposition by judges appointed for life, rather than a term, and selected and compensated by the national government. Continued expansion of federal jurisdiction in response to interest group demands leads inevitably to continued growth in the federal judiciary. Such unchecked growth calls into question the basic principle of a federal judicial system and will soon make the federal judiciary "indistinguishable from state court systems."[48] Fixing permanently the size of the federal judiciary will oblige Congress to restrict federal jurisdiction, and oblige the executive to limit its prosecutorial activity to cases that need the federal forum.

The response

It is easier to say that federal courts should exercise a specialized jurisdiction than it is to enunciate precise and accepted rules by which to allocate cases between federal and state forums. Federal prosecutors, for example, may proceed against a small-time drug seller as the opening step in a prosecution that, if carried to a successful conclusion, is clearly a federal case. Federal civil jurisdiction has always been shaped by legislative perspectives about which

48. Newman, *1,000 Judges, supra* note 27, at 194.

interests need federal courts—from the commercial interests for which the first Congress enacted a diversity of citizenship jurisdiction, to victims of racial and other forms of arbitrary discrimination for which more recent Congresses have enacted civil rights statutes.

It is unwise to posit a desired size for the federal courts and then try to allocate them a jurisdiction appropriate to that size. We must first decide on the function of the federal courts—what *should* they be doing? Once this decision is made, the appropriate size of the federal judiciary can be determined. The effect of fixing size before understanding the work to be done will be to shut off practical access to the federal courts by those who may need it most and to preclude Congress from strengthening individual rights or passing new legislation that could be effectively enforced in the federal courts.

b. *Cohesiveness and efficiency will be impaired*

The argument

Bigness harms court operations. Size poses particular threats to the operation of the federal appellate courts, in terms of both intra- and intercircuit conflicts and relations among the judges. Above a certain size, collegial appellate courts do not operate effectively. In 1964, the Judicial Conference Special Committee on the Geographic Organization of the Courts, while recommending more judgeships for the Fifth Circuit, also recommended splitting it into two circuits, citing the long-recognized proposition that "nine is the maximum number of active judgeship positions which can be allotted to a court of appeals without impairing the efficiency of its operation and its unity as a judicial institution."[49] The Judicial Conference Committee on Court Administration and Case Management has this year stated that twelve judges is the "functional limit" for "a body of judges small enough to function truly as a court" and thus create and preserve "[t]he law of the circuit with its attendant predictability."[50] Judge Newman states that his Court of Appeals for the Second Circuit, now at thirteen, is "managing, but as I con-

49. Report of the Judicial Conference of the United States, March 1964, at 14–15.

50. Court Administration Committee Report, *supra* note 28, at 7.

template our court in the middle of the next century numbering, at current trends, fifty or sixty judges, I despair. It will not be a court; it will be a stable of judges, each one called upon to plough through the unrelenting volume, harnessed on any given day with two other judges who barely know each other."[51]

Efforts to preserve comparatively small appellate courts without limiting the overall number of judgeships also produce bad consequences: dividing the circuits and increasing their number, destroying, in Judge Newman's words, "the unitary nature of the federal judicial system, with a small number of cohesive circuits," and bringing about "an inevitable decline in the coherence of a body of federal law," essentially unreviewable by the Supreme Court.[52] That is a prospect that proponents of more judgeships are reluctant to face. Judge Reinhardt, in proposing a doubling of the appellate judges, concedes "[t]here are disadvantages to bigness" but writes them off as "insignificant in comparison to the disadvantages of . . . an inadequate number of judges."

The work of district courts is not collegial in the same sense as that of the appellate courts, but appellate court workload is tightly bound to district court output. It would be folly to cap the number of appellate judgeships without doing the same for district judgeships, unless one favors putting access to the courts of appeals on a discretionary basis. Judge Reinhardt's proposal for doubling the number of circuit judges assumes "the size of the district courts remaining the same" and concedes that any increase in district judges would require a more than two-fold increase in circuit judges,"[53] an outcome that he does not specifically embrace. A further reason for limiting the size of district courts is the difficulty of managing large administrative units.

Growth expands workloads faster than the courts' ability to cope with them. As Judge Newman explains, "as case volume rises . . . [t]he inevitable response is to add more judges. But then . . . judges are added at a rate that always falls far short of the rate of increase in case volume." In the Second Circuit, he notes, over forty-five years, "the case filings increased more than ten times; the number of

51. Newman, *1,000 Judges*, *supra* note 27, at 188.
52. *Id.*
53. *Id.*

judges slightly more than doubled. Case filings *per judge* more than quadrupled."[54] Just as enlarging highways is not an ultimate cure for traffic congestion, increasing the number of judgeships is not an ultimate cure for docket congestion.

The response

Continued growth in filings without more judgeships would be worse than any deleterious effect that bigness will have on the courts. Between 1960 and 1991, appellate filings per judgeship increased from 57 to 252, and district filings per judgeship have increased from 356 to 391. Had a moratorium been enacted in 1960, filings per appellate judgeship at the 1991 filing levels would be 618, and filings per district judgeship would be 1,035. Some might say that a cap would have helped restrain the increase in filings, either because Congress would have restricted jurisdiction or the queue would have discouraged litigants who would otherwise have filed. As explained on page 41ff., a cap would not lead Congress to reduce jurisdiction. But, for the sake of argument, even had filings increased by only half as much as they did between 1960 and 1991, filings in 1991 would be 337 per appellate judgeship and 777 per district judgeship.[55]

Moreover, it is not true that most judges believe that the federal judicial system is so large now that the qualities of inter- and intracircuit consistency are in danger. In the Center's survey of all federal judges, 83% of the respondents said that they regarded intracircuit and intercircuit inconsistencies to be no problem (11%), a small problem (38%), or a moderate problem (34%). The remaining judges said that inconsistencies were a serious problem

54. Newman, *1,000 Judges, supra* note 27, at 188 (emphasis in original).

55. The calculations are based on the following data:

	1960		1991	
Type of Court	Filings	Judgeships	Filings	Judgeships
Circuit	3,889	68	42,033	167
District	87,421	245	253,477	649

For 1960, from Annual Report of the Director of the Administrative Office, 1970, Table 1, at 91, and Table 2, at 96; for 1991, from Annual Report, 1991, Table 1, at 81, Table 5, at 86, Table 8, at 90 (excludes the Federal Circuit).

(9%), a grave problem (1%), or declined to express an opinion (7%)

There are also ways to deal with problems of diminished collegiality other than a ceiling on the number of judgeships. The structure created by the 1891 Evarts Act need not continue to shape our appellate procedures. Serious restructuring to accommodate needed judges is preferable to limiting the availability of judges to hear cases that Congress now and in the future determines should have a federal forum. The literature is replete with alternative structures that could be considered and adapted to the goal of preserving collegiality and consistency.[56] In the final analysis, however, as Judge Carolyn King of the Court of Appeals for the Fifth Circuit puts it, "we have had and will have a great number of judges. That reality is simply a fact of life and something that judges would do well to recognize. There is no point in clinging to the past if the future arrived years ago."[57]

c. *The quality of federal courts will decline because:*

(1) *As the number of judgeships increases, the ability of the office to attract the most qualified individuals will decline*

The argument

The federal judicial system's value to the nation depends on its being regarded as a quality forum. That is why Congress looks to the federal courts to deal with the most troublesome and important problems. It is regarded as a quality forum largely because of the quality of the people who have been willing to trade the prospect of very high incomes for the opportunity to join a respected corps of jurists doing important public work. As the judiciary grows, the attraction of the position declines. In 1954, Justice Frankfurter, bemoaning the impact of diversity jurisdiction on the federal caseload, endorsed a House Judiciary Committee conclusion that recent new judgeships "'had done much to alleviate the problem' but . . . that merely multiplying judges is no solution." He went on:

56. Some but by no means all the possibilities are displayed in Report of the Federal Courts Study Committee (April 2, 1992), esp. at 116–121.

57. King, *Commentary, A Matter of Conscience*, 28 Hous. L. Rev. 955, 959 (1991).

"inflation in the number of the district judges, . . . will result, by its own Gresham's law, in a depreciation of the judicial currency and the consequent impairment of the prestige and efficacy of the federal courts."[58]

The judiciary today seems to share Justice Frankfurter's concern. As noted above, in the Center's recent survey of all federal judges, only a quarter of the active appellate judges strongly or moderately supported adding more appellate judgeships, and half of them strongly or moderately opposed such additions. Even district judges, whose courts have traditionally been regarded as capable of absorbing additional judgeships, were evenly split on the issue (37.9% versus 36.7% among active district judges).[59]

It is unfair, moreover, to see a moratorium as an effort by sitting judges to protect their "club." Moratorium supporters know that the political consensus necessary for a moratorium will not develop until many of them are no longer active judges. As Judge Newman put it, "[m]y concern, at age 60, is not at all with personal prestige but solely with the nature and functioning of the federal judiciary well into the twenty-first century, a time when, whatever the hereafter holds, I am confident that my prestige will matter not at all."[60]

The response

Justice Frankfurter offered his oft-quoted warning of depreciation in the judicial currency in 1954, when the number of district and circuit judges was 313. Judge Newman, citing this warning and an even earlier observation by then-Professor Frankfurter, states that the "point is no less valid because it has been made before."[61] However, the fact that some people have always worried about a depreciation of the judicial currency, even though its occurrence is far from apparent, inevitably raises doubts about the validity of the point.

58. Lumberman's Mut. Casualty Co. v. Elbert, 348 U.S. 48, 59 (1954) (Frankfurter, J., concurring).

59. *See* Survey, *supra* note 31, and accompanying text and Table 1.

60. Newman, *1,000 Judges*, *supra* note 27, at 187.

61. *Id.* at 188.

Since 1954, the number of district and circuit judges has more than doubled.[62] There is no evidence reflecting any decline in those years in either the quality of the people serving on the federal bench or the attraction of the position. That only a third of appellate judges and a quarter of district judges support a cap indicates that the present incumbents are not greatly concerned over a "depreciation of the judicial currency." Moreover, by 1985, the last year for which data are readily available, the pool from which judges are drawn had increased: there were more lawyers per federal judgeship then than there were in 1957.[63] There is no reason to believe that the pool is not adequate to supply excellent judges in increasing numbers.

The threat to the judiciary lies not in diminished prestige but in poor working conditions. Judge Frank Coffin reported that he has "been far less concerned with a Gresham's Law of Position, which dictates a cheapening of the currency of prestige with increased numbers, than with the increasing pressures in the name of efficiency and productivity. If the work is rewarding and important, there will be more than sufficient prestige."[64] And many lawyers are available to serve. As Judge Reinhardt has written, the nation's circuit judges are "all fine individuals," but there are many "other persons in the legal community who are just as fine, just as qualified and just as talented as we are," and they are eager to serve.[65] And not all prospective candidates for the bench are necessarily attracted by the "big case" for which Justice Scalia expressed a preference—even assuming that "major commercial litigation . . . and federal actions under . . . laws regulating interstate commerce" made up a larger part of the docket in 1960 than they do now, a perception challenged by one who has examined the data.[66]

62. From 313 to 828 authorized district and circuit judgeships. *See* Judgeship Authorization, *supra* note 6, at Table 7.

63. In 1985, there were 911 lawyers for each federal judge, up from 838 in 1957 and from 761 in 1966. Statistical Abstract of the United States, No. 319, at 188 (Jan. 1991).

64. Coffin, *Research for Efficiency and Quality: Review of Managing Appeals in Federal Courts (Book Review)*, 138 U. Pa. L. Rev. 1857, 1867 (1990).

65. Reinhardt, *supra* note 19, at 52.

66. Galanter, *The Life and Times of the Big Six; or, the Federal Courts Since the Good Old Days*, 1988 Wis. L. Rev. 921, 922.

It bears mention also that imposing a moratorium on new judgeship creation will slow the arrival on the federal bench of women and minorities in greater numbers.[67]

None of this denies that federal judgeships today are insufficiently attractive to some lawyers who would make excellent federal judges. But that has always been true, and any moratorium under current conditions would render federal judgeships even less attractive by increasing the judicial workload.

(2) As the number of vacancies to be filled increases, it will become increasingly difficult for the executive and legislative branches to nominate and confirm with sufficient care

The argument

The large number of judgeships that even now must be filled has led to a decline in selectivity, threatening to undermine the historically high standards of the federal judicial office. This is so for two reasons.

First, as the total number of nominees grows, the selection process will be less able to give adequate consideration to each nominee. Appointments to life-tenured federal judgeships totaled thirteen in 1953, forty-three in 1954, and twenty-three in 1955.[68] By contrast, in 1990, 1991, and 1992, there were, respectively, fifty-eight, fifty-eight, and sixty-six such appointments,[69] well over one a week during the periods when the committees are actively processing nominations. The courts are rapidly approaching the point where the selection process will be incapable of the thorough investigation necessary to ensure that nominees meet the standards of the federal bench.

67. Obviously, the chance to appoint women and minorities to the courts of appeals would be further reduced were Congress to adopt the Court Administration and Case Management Committee's recommendation—to let the federal appellate bench decrease from 179 judges to 120 through attrition.

68. Compiled from the prefatory pages of the Federal Supplement for the years in question.

69. Telephone conversation with Amy Nash, Nominating Clerk, U.S. Senate Committee on the Judiciary, Mar. 5, 1993. These figures include Claims Court appointments.

Second, the requirement to fill large numbers of vacancies reduces appointing authorities' sense of responsibility for the judges they put in office. Any appointment to a small bench is highly visible, restraining Presidents and senators from putting forward marginal nominees. A large bench changes things. Judge Newman cites state officials who say: "'That court has 127 judges—they'll never even notice' [an appointee with "dubious credentials".]" The appointment is made. Few notice. The episode has been repeated in many states."[70] And, as Judge Newman observed even four years ago, there are "a few indications that the increase in the number of federal judges . . . has not been accompanied by the maintenance of customarily high standards in their selection, the quality of their work, and in the functioning of the federal court system."[71]

The response

There is no reason to believe that, even with a growing judiciary, the average increase in the number of nominees will be more than marginal. Without sacrificing standards, the Senate can well process more than an average of six appointments per month to the district courts and courts of appeal, the largest number handled in recent years. Most of the work is done by staff, and hearings on most of these nominations take only a few minutes.

The assumption that appointments made at a somewhat greater rate will necessarily receive less attention and care is unproved. The addition of a judge to the federal bench will always be noticed by a substantial number of persons, and the politics of the appointment process alone tend to focus attention on prospective nominees.

There are, moreover, ways to protect the integrity of the selection process without denying the federal judiciary necessary resources. They include merit selection systems that use broad-based commissions to screen potential nominees, expanding the executive branch and Senate resources devoted to the task, and raising judges' salaries and benefits. None is foolproof, but all are less risky than a lack of needed judges.

70. Newman, *1,000 Judges*, *supra* note 27, at 187–88.
71. Newman, *Restructuring*, *supra* note 27, at 763.

d. A larger federal judiciary will require more resources than Congress will be willing to appropriate

The argument

At close to $3 billion,[72] the federal judicial budget has become a consequential item. It has grown over 1,000% in the last twenty years (as compared to a 330% increase in the legislative budget and a 435% increase in the executive branch budget).[73] The judiciary's resource needs are already encountering congressional resistance as the nation faces massive deficits. The cost of operating the federal courts is primarily a function of the number of judges. The annual costs of maintaining active and senior Article III judges, as currently calculated by the Administrative Office, are depicted in Table 3. Creating no new judgeships is the best way to contain the growth of the federal judicial budget and related budgets (such as the $7 billion to $8 billion projected for the current federal courthouse building program).[74]

72. The total of all federal judicial appropriations for fiscal 1993 is $2.47 billion. The request for fiscal 1994 is $3.16 billion. Administrative Office of the U.S. Courts, The Judiciary, Budget in Brief, Fiscal Year 1994, Table 4, at 33 (Jan. 1993).

73. The appropriations to support the federal judicial system (not including the Supreme Court) have grown from $186 million in fiscal 1973 to $2.4 billion in 1992, an increase of 1,196%. In the same twenty-year period, the total appropriations for the legislative branch have grown to $2.035 billion, a 336% increase, and the executive branch's appropriations have increased by 435%.

The 1973 figures on which these calculations are based come from "1973 Actual Column" of 1975 U.S. Budget Summary, Table 3, at 45–47 (judiciary), 289 (legislative and executive). Figures for 1992 are from the President's January 1993 budget document, *Budget Baselines, Historical Data, and Alternatives for the Future*, Table 5.2, at 336. Judiciary budget calculations are less Supreme Court budgets (for 1992 drawn from 1992 Actual Column of the judiciary's fiscal 1994 budget request document). Executive branch figures were reduced by $117.111 billion in offsetting receipts noted for the entire federal budget in 1992 and $8.363 billion in Undistributed Intragovernmental Transactions in 1973. The 1992 executive branch appropriation used for these calculations is $1.464 trillion.

74. Slind-Flor, *Court Orders*, Nat'l L.J., Dec. 14, 1992, at 34.

Table 3
Direct and indirect costs of supporting one federal judge
(in thousands of dollars)

	Circuit	District	Senior Circuit	Senior District
Salaries, benefits, direct chambers support	$475.9	$395.7	$269.9	$261.7
Court operations & maintenance (e.g., travel, furniture, rent, security)	$338.1	$299.4	$299.2	$283.6
Total annual recurring cost	$814.0	$695.1	$569.1	$545.3

Source: Administrative Office of the U.S. Courts, Cost to the Judiciary of Establishing a New Judgeship (effective Jan. 1, 1993) (as revised Nov. 17, 1992).

Congress, even as it has increased the courts' budget dramatically, has not been fully funding the needs of the fast-growing federal judiciary. In 1993, the judiciary received considerably less than it requested,[75] and the future is not rosy. Without a moratorium, the judiciary faces the prospect of more judges but increasingly inadequate financing.

The response

Resource considerations should not drive important policy judgments concerning the need for federal courts to ensure the fair and adequate administration of justice. In any case, even with its recent growth, the entire third branch of government still uses only about two-tenths of one percent of the entire federal budget. The combined budgets of two suburban Washington, D.C., counties, Fairfax and Montgomery, equal that of the entire federal judicial system. The federal courts are one of the nation's great public bargains. Even if the costs of the courts were to double, the impact would not be out of proportion to the social benefits that Congress

75. *See, e.g., 102nd Congress Adjourns: Results Are Mixed Bag for Judiciary,* The Third Branch, October 1992, at 1 ("Congress handed the Judiciary its leanest budget in recent years, funding the judicial branch at about $200 million below the amount needed just to stay even with the services provided in fiscal year 1992.").

and the public have always seen in the work of an independent and effective federal judiciary.

It is illusory to argue that capping the size of the federal courts will save public money. In the diminished federal judicial future that a moratorium would create, the public would bear the costs in one way or another. Some suits would not be filed and some crimes would not be prosecuted. Some litigation would be driven into the state courts, already understaffed and underfunded in many states. Avoiding a breakdown in the state courts may require infusion of federal funds to support state justice systems, a financing arrangement that may not be as efficient as providing adequate federal courts. Impaired access to the federal courts may also deter people altogether from settling their disputes through the established adjudicatory processes, impelling them instead to seek private alternatives, including potentially destructive efforts at self-help.

2. Without an explicit moratorium, the federal judicial workload will continue to grow, leading Congress to continue to add more judgeships to the system

The argument

Moratorium opponents are correct that the economic, social, and political factors that have traditionally led to increases in federal litigation, and thus in judgeships, will continue if left to their own devices. But adding judgeships will only invite greater workload increases. The point is that the country needs dramatic action to break the current cycle and reorder our thinking about the federal courts. Under the current approach, as the federal courts' capacity is increased, time to disposition declines temporarily, thus attracting to the federal courts litigants who would otherwise have filed in state courts or not have filed at all. Soon the courts are clogged again and the call goes out for more judgeships, and the cycle starts again. As noted above, adding or enlarging highways may temporarily relieve congestion, but it is not a permanent solution.

The response

If the federal judicial workload continues to grow, there must be adequate numbers of judgeships to handle the workload. The courts can become more efficient and they can argue more forcefully for sensible jurisdictional statutes and prosecution policies, but they must not be deprived of the ability to handle increased caseloads. Enlarging highways may not reduce traffic, but does any responsible person think the nation should stop highway construction for that reason? Phrased differently, where would we be had we stopped expanding highways 30 years ago? As noted earlier, had Congress imposed a moratorium in 1960, filings per judge today would be totally beyond the system's ability to handle.

As the population grows in size and diversity, and new social and economic problems confront the country, the need for federal courts to protect individual rights and enforce federal legislation will increase rather than diminish. That is not to say, however, that some of the pressure for additional judgeships might not be lessened by a reexamination by Congress and the Executive of the criminal jurisdiction now exercised by the federal courts and the sentencing laws (particularly mandatory minimum sentences) under which they must operate.

3. A moratorium will allow the courts to avoid growing larger because it will force Congress to control jurisdictional expansion and restrict unnecessary access to the courts, and it will force the courts to develop more efficient procedures

The argument

Congress. By creating a fixed-size judiciary, Congress would assume the obligations to weigh carefully whether the courts can absorb any particular additional jurisdiction, to adjust jurisdictional statutes to contain workload increases that result from population and other demographic factors, and to authorize necessary procedural and structural adjustments to ensure efficient case processing.

A cap would not preclude Congress from enlarging federal court jurisdiction in response to newly emerging needs, but Congress must be certain the courts can absorb the work and, if they cannot, enact offsetting reductions. As the Court Administration and Case Management Committee put it, "When the sun rises on new causes of action or crimes, it must set on some old ones."[76] For example, if Congress were to create new multi-party, multi-forum jurisdiction, it should in exchange restrict access to conventional diversity jurisdiction. Congress now weighs the budgetary impact of new programs to keep spending within overall limits; it can use this experience to weigh judicial impact to keep workload within overall limits.

Congress would also need to adjust jurisdictional statutes from time to time as workload grows and population increases. There are numerous relatively minor legislative and policy adjustments that would prevent some transfers from state courts and discourage or obviate certain other litigation, and a moratorium would give Congress a strong incentive to enact them. For example, Congress could bar removal under the Employee Retirement Income Security Act (ERISA)[77] of state law wrongful discharge actions; eliminate a private cause of action under the Racketeer Influenced and Corrupt Organizations Act (RICO);[78] eliminate resident plaintiff diversity of citizenship jurisdiction and raise the jurisdictional minimum for diversity actions to $250,000;[79] and bar removal of seamen's personal injury actions under the Jones Act.[80] To ensure that cases needing the federal forum are not shunted off to state courts, it has been suggested that Congress might provide the federal courts with discretionary authority to grant requests to proceed in the federal forum "under compelling circumstances."[81]

The state courts are appropriate forums for many cases now in the federal courts. As Judge Newman concedes, the state courts, too, "are swamped, and they do not wish to grow." But, he adds,

76. Court Administration Committee Report, *supra* note 28, at 6.
77. 29 U.S.C.A. §§ 1001–1461 (1974).
78. Court Administration Committee Report, *supra* note 28, at 8.
79. *See* 28 U.S.C. § 1332.
80. 46 U.S.C. App. § 688.
81. Newman, *Restructuring, supra* note 27, at 772. *See generally id.* at 770–76.

"these courts are already geared to handle high volume . . . . A reallocation of 70,000 cases from federal courts to state courts would reduce federal court volume by 30 percent while increasing state court volume only 1 percent."[82] Moreover, Congress can provide funds to help state courts absorb the slight increase in cases that would otherwise have gone on federal dockets.

A moratorium would also increase legislative interest in authorizing alternatives to traditional forms of litigation that are now not authorized. For example, the Federal Judicial Center, at Congress's direction, evaluated the limited court-annexed mandatory arbitration program authorized in ten courts. The Center recommended in 1992 that Congress broaden the authorization to allow all ninety-four districts to adopt, at their option, either mandatory or voluntary arbitration.[83] Congress has yet to adopt this recommendation. An Article III judiciary fixed in size could increase the incentive for Congress to do so. It would also encourage Congress to amend 42 U.S.C. § 1997e either to require state prisoner civil rights plaintiffs to seek prior resort to (but not necessarily exhaustion of) state prison grievance procedures, or make it easier for federal judges to certify those procedures as fair and effective. Congress could establish alternative forums for cases involving student loan defaults and veterans' benefits; at present, the courts act as little more than collection agencies in these cases. Furthermore, the executive branch could remove first-time, small-scale criminal offenders from the system by using diversion programs or minimum charges for such offenders.

Courts. A moratorium would oblige the courts "to become models of case management simply to manage likely increases in filings within present jurisdictional structures"[84] and would oblige Congress to encourage innovation.

Some innovations could be adopted without legislative authorization. The 1990 Civil Justice Reform Act showed that modest bench–bar planning could lead to procedural innovations to reduce cost and delay in the processing of civil cases. The Court Ad-

82. Newman, *1,000 Judges, supra* note 27, at 194.

83. B. Meierhoefer, Court-Annexed Arbitration in Ten District Courts (Federal Judicial Center 1990).

84. Court Administration Committee Report, *supra* note 28, at 6.

ministration and Case Management Committee has recommended several innovations, including a two-track method of appellate review that it believes would allow the appellate courts to reduce their number through attrition from 179 judgeships to 120.[85]

Other changes would require legislation. For example, the Committee has also proposed that the current twelve circuits be merged into ten and that ninety-four districts be merged into ten district courts, one per circuit.[86] Ten districts rather than ninety-four would reduce the "attendant cadres of administrative staff, repeated in structure, if not in number, in all" ninety-four districts,[87] and "the installation of professional managers would relieve judges of administrative duties while reserving to them authority over policy issues arising from administrative matters."[88]

The response

Congress. The judicial workload should be determined by societal needs, not by reference to an arbitrary limit on the number of judges. And, as a practical matter, to assume that a moratorium would induce Congress to hold constant the federal judicial workload is to ignore the dynamics of the political process. And to assume Congress *could* hold constant the federal judicial workload is to ignore the effects of population growth and to attribute an unrealistic degree of precision to caseload analysis.

Capping the number of Article III judges will not stop Congress from responding to constituent pressures for increased federal involvement in law enforcement and the resolution of particular civil disputes. Congress must weigh constituent demands against any concerns about federal judges' workload. What appears apolitical to a judge does not necessarily appear so to a legislator. Most of the proposals described above as "relatively minor legislative and policy adjustments," or variations on those proposals, were urged in 1990 by the Federal Courts Study Committee[89] and endorsed by the

85. *Id.* at 8–9.
86. *Id.* at 7, 9–10.
87. *Id.* at 10.
88. *Id.* at 5.
89. The Report of the Federal Courts Study Committee (April 2, 1990) recommended prohibiting removal of ERISA cases under $10,000 (pp. 43–44), re-

Judicial Conference, but few have even been introduced in Congress. That is because federal jurisdiction is inherently a product of needs for federal protection of rights and interests as perceived by various groups in society and articulated through representative government. Those needs can be expected to expand. Congress is unlikely to accept a moratorium even if it believes it has been extravagant in expanding jurisdiction.

Moreover, federal court workload is not only a function of legislation that creates new causes of action. Even without jurisdictional expansion, the dockets of the federal courts will grow as population grows, as the number of lawyers increases,[90] and as the economy becomes more national and international in character. As the number of federal prosecutors and investigators grows, criminal filings will increase (the ratio of assistant United States attorneys to federal district judges grew from 3.8 to 1, to 7 to 1, from 1980 to 1990).[91] Minorities and other victims of discrimination will continue to apply to independent, life-tenured federal judges for redress of grievances. Complex multi-district litigation that the federal courts are uniquely positioned to resolve will increase.

pealing both the Jones Act (and allowing seamen to bring claims under an amended Longshore and Harbor Workers' Compensation Act) and the Federal Employees Liability Act (and subsuming railway employees' claims under existing workers' compensation systems) (pp. 62–63), prohibiting in-state plaintiff diversity suits and raising the jurisdictional amount to $75,000 and indexing the new floor (p. 42), amending 42 U.S.C. § 1997e to make it easier for federal judges to certify state inmate grievance procedures as "fair and effective" and thus permit a stay of 120 days before proceeding with the federal suit (pp. 48–50), and limiting federal prosecutions that could be brought as well in state court (pp. 35–38).

Congress has adopted one committee jurisdiction recommendation, however. Pub. L. No. 101-650, tit. III, § 310, enacts the committee recommendation broadening federal jurisdiction by authorizing federal courts to assert pendent jurisdiction over parties without an independent federal jurisdictional base. *See* Report of the Federal Courts Study Committee 46–47 (April 2, 1990).

90. *See* Figure 2, *supra* at p. 6.

91. There were 1,954 assistant U.S. attorneys in 1980 (*see* Annual Report of the Attorney General of the United States 1980, at 70). There were 516 authorized district judgeships (*see* Annual Report of the Director of the Administrative Office of the U.S. Courts 1980, at 129). The 1991 figures were 4,017 and 575 (*see* U.S. Department of Justice, Legal Activities, 1991–1992, at 3; Annual Report of the Director 7).

It would not be enough simply for Congress to withdraw certain outright grants of jurisdiction and decline to create others. Congress would need constantly to be adjusting statutory provisions respecting standing and amount in controversy, at a level of detail and monitoring that is wholly unrealistic to expect.

Furthermore, even were Congress willing to try to balance workload increases with workload decreases, it would need reliable assessments of the number of judges required by a new cause of action or a growing population and identification of corresponding jurisdictional restrictions. But efforts to predict the impact of legislation on the courts, which Chief Justice Burger proposed in 1972,[92] have found little favor in Congress. Although the Administrative Office of the U.S. Courts has made noteworthy strides in assessing the likely budgetary impact on the courts of certain types of legislation, it is not yet feasible to make accurate, broadly accepted predictions of workload impacts. Only after statutes are enacted and become subject to litigation can their true impact be gauged—in fact, the impact is often not clear until long after enactment.

Even uncontroverted impact assessments would not produce the carefully calibrated caseload balancing anticipated by moratorium supporters. Assume, for example, that there is general agreement that a statutory change would create additional workload equivalent to that of eight district judges.[93] Congress would assume, plausibly, that the slight additional workload would be evenly distributed across the system and that, with 1,000 judges, the system could absorb that workload and would not need offsetting jurisdictional changes to reduce the workload by an equivalent amount. The system would absorb the additional work through almost imperceptible procedural adjustments and slightly longer workdays for some judges. This process would be repeated constantly until

92. Burger, *State of the Federal Judiciary—1972*, 58 A.B.A. J. 1049, 1050 (1972).

93. In 1978, for example, the Department of Justice's Office for Improvements in the Administration of Justice estimated that legislation then pending to subject Veterans Administration rulings to review in federal district courts would require eight new federal district court judgeships. Davis & Nejelski, *Justice Impact Statements: Determining How New Laws Will Affect the Courts*, 62 Judicature 18, 24 (1978). The authors noted that they could not assess the impact of other sections of the legislation, such as one increasing the $10 cap then in place on attorneys' fees.

the fixed-size judiciary became an institution much different from the one in place when the moratorium was imposed.

Are the state courts a proper repository for what the proponents of a ceiling regard as excess federal jurisdiction? While capping supporters propose shifting large numbers of cases to the state courts, they also recognize that states have yielded time and again to the temptation of appointing what one capping proponent calls judges of "dubious credentials."[94] Furthermore, it is not enough to say that the state courts, although burdened, are nevertheless equipped to handle large caseloads. The most recent compilation of state court filing data by the National Center for State Courts—for 1991—also compares state and federal workloads, noting that "the state general jurisdiction judiciary handles over 52 times as many civil and criminal cases with only 15 times as many judges as the federal judiciary." The report recognizes that part of this difference may be explained by greater complexity of federal court cases. But, adds the report, the fact of that greater complexity, and certainly its magnitude between state and federal cases, has not yet been verified. Thus the report suggests examining such evidence "before tampering with so fundamental an institution as the state courts."[95]

Courts. One of two massive changes—or perhaps both—would overwhelm a judiciary of fixed size facing an expanding workload: a much greater role for staff and severely truncated procedures.

Those who worry about an expanding judiciary cite the prospect of staff domination, but in fact, staff domination is the likely consequence of a moratorium. The growth to date in bankruptcy and magistrate judges, law clerks, staff attorneys, and

94. Newman, *1,000 Judges, supra* note 27, at 187. In 1989, Judge Newman proposed a discretionary federal jurisdiction to allow the federal courts to hear specific cases, among classes of cases shifted to state jurisdiction, when those specific cases demanded the federal forum. *See* Newman, *Restructuring, supra* note 27.

95. B. Ostrom, State Court Caseload Statistics: Annual Report 1991, at 40, 44 (1993).

other staff[96] would be modest compared with what would be necessary if Congress stopped creating judgeships. The House has had 435 members since 1911, but its workload is much greater than it was in 1911. One result has been to transform the House into a corporate structure of 435 separate offices. In each, the member sets general policy and attends to numerous matters but is obliged to leave at least some consequential decisions to permanent staff members. The House had little choice but to limit its size, because it must function as a unitary body. The federal judiciary has other options.

Furthermore, judges would be so busy managing their judicial workload that they would lose control of much administrative decision making. It may be comforting to put faith in what the Court Administration and Case Management Committee calls "professional managers [who] would relieve judges of administrative duties while reserving to them authority over policy issues arising from administrative matters."[97] The dominant lesson of public administration in the modern era, however, is the futility of trying to separate policy making from administrative implementation.

96. The growth in judgeships and court personnel is shown in the following table:

Article III Judgeships, Judicial Personnel, and Staff Per Judgeship since 1900

Year	Judgeships	Personnel	Per Judgeship	Year	Judgeships	Personnel	Per Judgeship
1920	140	1,820	13.0	1980	663	13,190	19.9
1940	250	2,218	8.9	1991	828	23,586	28.4
1960	328	5,182	15.8				

See Judgeship Authorization, *supra* note 6, at Table 2. Judgeships are district and circuit judges only. 1991, 1980, and 1960 data include all federal judicial employees except Supreme Court Justices and personnel. Data for 1991 Personnel figures: 1991 AO Report, 127, Table 28. Data for 1980 Personnel figures: 1980 AO Report, 152, Table 19. Data for 1960 Personnel figures: 1960 AO Report, 205. 1940 and 1920 figures include all judicial employees, less the number of Article III judgeships, as listed by U.S. Bureau of the Census, Historical Statistics of the United States, Colonial Times to 1970, Bicentennial Edition, pt. 2, 1102 (1976) (see source for qualifications).

97. Court Administration Committee Report, *supra* note 28, at 5.

In addition, jurisdiction would become, if not by statute then by practice, more discretionary. The Supreme Court functions well with nine members only because Congress has allowed its docket to become almost totally discretionary. Congress might authorize the courts of appeals to exercise a certiorari-like jurisdiction, or it might establish an appellate section within the district courts. The Court Administration and Case Management Committee "would urge adoption of either"[98] alternative if its two-track case management approach is unable to sustain ten appellate courts of twelve judges each.[99] Otherwise, the courts of appeals will be forced either to deny most cases any but the most cursory review or to elevate the decisional role of staff. In the district courts, the search for settlements will become not so much an effective aspect of case management as a driving imperative. The relatively crude approach of a moratorium on new judgeships will encourage equally crude implementation, such as higher filing fees to regulate a growing flood of litigants competing for the dwindling capacity of the federal courts. And, as Judge Carolyn King of the Court of Appeals for the Fifth Circuit notes, "when there is simply not enough judicial time to go around, the temptation is to give shorter shrift to the cases brought by our most vulnerable citizens[, who] are frequently without effective advocates."[100]

The moratorium opponents' point is not to criticize staff increases, or jurisdictional alterations, or structural changes, but rather that such changes should be debated on their merits instead of being allowed to occur in some uncharted way because of the pressure created by keeping the number of judges finite while workload grows. Most of the problems moratorium proponents want to solve could be met, as some argue, by a more deliberate policy of planned slow growth, a policy several circuits have already embraced, or, as others argue, by a policy of significantly increased growth.

98. *Id.* at 9.
99. *Id.*
100. King, *supra* note 57, at 963.

4. A cap on the number of Article III judgeships can be successfully implemented

a. *A statutory, as opposed to a constitutional, solution will suffice*

The argument

The experiences of the House and the Supreme Court show that a constitutional amendment is not necessary to effect a durable moratorium on the size of a major institution of government. Thus the nation can experiment with a ceiling without being locked into a constitutional bind. A statute will suffice to set a limit on the number of district and circuit judges. Such a statute will be as permanent as Congress elects to make it. Congress will retain the authority to deal with serious emergencies by statutory amendment. Yet the very process of developing the moratorium will involve Congress and the judiciary in hearings, analysis, study, and compromise, and those processes will impress upon both judges and legislators the need not to tamper lightly with the size of the judiciary, just as it will fix in the mind of Congress the need for controlling the judicial workload. The statute fixing a new judgeship moratorium, like that capping the House, will need to specify a mechanism for adapting a fixed-size judiciary to geographic shifts in workload. Section c on page 50 describes such an approach. The temporary assignment authority will be available to accommodate special needs during the transition.

The response

A statute would be insufficient to maintain a permanent ceiling on the number of district and circuit judgeships, even if statutes have been able to limit the size of the House and the Supreme Court. An effort to increase the size of the Court would entail a major national debate. Similarly, any effort to increase the size of the House would implicate every other member of the House, diluting voting strength and posing the potential for much greater dilution once the precedent were set.

By contrast, an effort to add one or two judgeships to seriously overburdened districts or circuits would inevitably be less noticed. A judgeship or two could be slipped into a major piece of legisla-

tion after consultation with other members who might be under pressure for additional judgeships. Such a change would obviously not have the visibility of changing the size of the Supreme Court, and it would not pose any threat to legislators' relative power as members of the body to be changed. The dike, once breached, would quickly crumble, undermining the moratorium.

b. *Only an unequivocal cap, identified and argued for as such, will assist the federal courts*

The argument

Some in the judiciary are sympathetic to the idea that courts should not grow significantly but are reluctant to endorse a flat limit on the number of judges. They prefer "slow growth"—requesting judgeships only when absolutely necessary. Such an approach will be disastrous. Congress can only assume that if the judiciary does not request judgeships, it does not perceive a need for more judgeships, and Congress will continue to expand jurisdiction.

Rather than slow growth, the judiciary, working with Congress and the executive, needs to formulate a vision for the future, to include a precise proposal for a maximum number of judgeships and identify the jurisdictional, prosecutorial, and structural changes necessary to make the moratorium effective (including continuing legislative adjustment to account for population growth). Further, the judicial leadership must go before Congress with its proposal. asserting forcefully that the federal judiciary in 1993 faces a new day with new needs, just as the House and Supreme Court did in earlier years.

The response

While it is true that the judiciary needs to present Congress with a bold vision of the judiciary's future, proposing a moratorium, which is a bad idea, is not the way to do it. That vision could reflect either a slow-growth or a large-growth policy, but either approach would have the judicial leadership present to Congress, the executive branch, and the nation a comprehensive, strategic plan and a long-range plan, clearly describing the desired future for the nation's federal judicial system and how to achieve it.

The judiciary could make a slow-growth policy effective if it wished to do so. Such a policy would include four elements:

(1) a judiciary-wide program of testing and reporting case management innovations, including a judiciary-designed and imposed version for the appellate courts of the Civil Justice Reform Act of 1990[101] (for example, the judiciary could test the effectiveness of the two-track proposal for appeals proposed by the Committee on Court Administration and Case Management);[102]

(2) consideration, in cooperation with Congress, of structural or procedural changes designed to preserve collegiality and consistency at the appellate level;

(3) similar cooperative efforts with Congress and the executive branch to restrict federal filings to cases that truly deserve the federal forum; and

(4) requests for judgeships when the need is demonstrably clear, coupled with statutory change to allow reassignment of vacant judgeships as proposed on the following page.

Alternatively, the judiciary could adopt an approach based on the view expressed by Judge Reinhardt among others, viz., that "it is time to start thinking 'big.' Incremental increases will not solve our problem. Neither will a continuing deterioration of our work."[103] That vision as well would consist of several elements, some of them similar to those outlined above:

(1) close analysis of any changes, both to the structure of the courts and their governance arrangements, necessary for the effective functioning of a judiciary of perhaps 2,000 or more district and circuit judges;

(2) a program to test case management innovations appropriate for a large judiciary;

(3) serious examination of budgeting and financing, to achieve economies of scale and restrain the cost of the much larger judicial system; and

101. 28 U.S.C. §§ 471–482.
102. *Supra* note 28.
103. Reinhardt, *supra* note 19, at 54.

(4) efforts to work with Congress and the executive branch to restrict federal filings to cases that truly deserve the federal forum, even the much larger forum contemplated by the large growth approach.

c. *Geographic shifts in demand for judicial services can be accommodated*

The argument

With a moratorium on new judgeships, the system would need a way to rearrange its finite number of judges to respond to changing geographic distribution of workload. Over time, the number of Article III judgeships has grown more rapidly in some regions than in others. Table 4 shows the percentages that district and circuit judgeships in each circuit constituted of all such judgeships in 1960 and in 1990. For example, in 1960, the nine judges on the Court of Appeals for the District of Columbia Circuit constituted 11.5% of all circuit judges. In 1990, the twelve judges on that court constituted only 6.7% of all circuit judges. Similar shifts can be expected to continue.

Table 4
Circuit and district judges in each circuit as a percentage of all circuit and district judges, respectively, 1960 and 1990

	Circuit Judgeships		District Judgeships	
Circuit	1960	1990	1960	1990
D.C.	11.5% (9)	6.7% (12)	6.1% (15)	2.3% (15)
First	3.8% (3)	3.4% (6)	3.7% (9)	4.4% (29)
Second	7.7% (6)	7.9% (13)	12.7% (31)	9.6% (62)
Third	9% (7)	7.8% (14)	11.0% (27)	9.6% (62)
Fourth	3.8% (3)	8.4% (15)	6.5% (16)	8.0% (52)
New Fifth*	5.1% (4)	9.5% (16)	7.3% (18)	12.0% (78)
Sixth	7.7% (6)	8.9% (16)	9.8% (24)	9.7% (63)
Seventh	7.7% (6)	6.1% (11)	7.8% (19)	7.1% (46)
Eighth	9% (7)	6.1% (11)	8.6% (21)	6.6% (43)
Ninth except:*	11.5% (9)	15.6% (28)	6.5% (16)	5.4% (35)
Cal./Ariz.			8.2% (20)	9.9% (64)
Tenth	6.4% (5)	6.7% (12)	5.7% (14)	5.7% (37)
Eleventh*	3.8% (3)	6.7% (12)	6.1% (15)	9.7% (63)
Fed. Cir.*	12.8% (10)	6.7% (12)		
Total judgeships	78	179	245	649

*New Fifth and Eleventh Circuits based on circuit judges residing in, and districts in, the states of the new Fifth Circuit (Louisiana, Mississippi, and Texas) and the current Eleventh Circuit (Alabama, Florida, and Georgia). Federal Circuit numbers for 1960 are the former Courts of Claims and of Customs and Patent Appeals. Circuit judgeships for the Ninth Circuit are for the entire circuit, but Ninth Circuit district judges are broken down between the districts in California and Arizona and all other Ninth Circuit districts. This breakout is necessary because the large size of the Ninth Circuit obscures relative increases and decreases. Percentages do not total 100 because of rounding.

Source: Data derived from Judgeship Authorization, *supra* note 6, at Tables 5, 6.

The amendment to 28 U.S.C. § 44 shown below, and a similar amendment to 28 U.S.C. § 133 for district judgeships, could provide for gradual and continual readjustment of judgeships to accommodate shifts in need. (Italics denote new language.)

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

(a) The President shall appoint, by and with the advice and consent of the Senate, *250* circuit judges for ~~the several circuits as follows~~ the courts of appeals.

(b) [Good behavior tenure, unchanged]

(c) *Upon appointment, a circuit judge shall be permanently assigned to one of the thirteen circuits established pursuant to section 41.*

(1) The circuit of assignment will be determined by joint vote of the Committees on the Judiciary of both the House of Representatives and the Senate, after consultation with the Chief Justice of the United States and consideration of the list mandated in subsection (3).

(2) For each vacancy that occurs in the office of circuit judge, the committees shall announce the circuit of assignment for the replacement judge within five days of certification by the Chief Justice of the existence of said vacancy.

(3)The Director of the Administrative Office of U.S. Courts shall maintain for public inspection a list of circuits, showing for each circuit such indices of judicial workload as the Judicial Conference shall establish.

(d) [Residence of judges, unchanged]

(e) [Salary of judges, unchanged]

Under this statute, whenever a vacancy occurs through retirement or death, the Judiciary Committees would determine whether a circuit (or a district in the case of a district judge vacancy) had a greater need for a judge than the circuit or district of the vacancy, and if so, provide that the judgeship would be reassigned to such a circuit or district. The committees would consider a variety of factors to determine "need," but their actions would have to stand public comparison with a list maintained by the Administrative Office, under the supervision of the Judicial Conference. That list would take into account weighted filings, time to disposition, the use of senior judges, and other relevant factors to ensure that standing on the list reflected true need and not low productivity. Around fifty to sixty vacancies occur each year, so this procedure

would enable Congress to respond rapidly to true judgeship needs and at the same time to correct the disequilibrium of judicial resources across the system. This process would be the functional equivalent of congressional redistricting.[104]

The response

Judgeships are tied to the political culture of their localities. Congress is not likely to establish a system under which some areas lose the opportunity to replace judges who retire or die. The existing process for creating and filling judgeships would be fundamentally altered, and the opportunities to reward friends and supporters with judicial nominations would diminish.

Furthermore, periodic omnibus judgeship bills, whatever their defects, allow both the judicial branch and Congress to weigh numerous quantitative factors as well as important less tangible factors to produce comprehensive resolution. Reassigning a judgeship on the average of once a week will hinder careful comparative analysis of need, because the heavy pressure for a new judge in a fixed-number system would preclude thorough debate about the best reassignment. The list called for by the statute will itself become an object of bickering and contention as legislators and judges argue over how to make it truly responsive to judgeship need. And it will require constant updating and analysis with monthly adjustments for the impact of newly assigned judges.

On the other hand, one might conclude that the proposed statutory amendment is sound. If so, its merit is as great without an artificial moratorium as with one. The existing process is slow, often unresponsive to need, and heavily encumbered with party politics. Judgeships are not necessarily created in the courts that need them the most.[105] As the Court Administration and Case Man-

104. It would also occasionally be necessary to realign or combine circuit and district boundaries of circuits or districts that grew disproportionately larger than other circuits or districts.

105. The last request by the Judicial Conference for new federal judges was made in 1990. The Judicial Conference requested that seventy-six new district court judgeships be created. *See* Judgeship Authorization, *supra* note 6, at Table 2. Congress responded by authorizing seventy-four judgeships, but many were not in the districts identified by the Judicial Conference. For example, although in 1990 there was no Judicial Conference request for a new district court judgeship in

agement Committee puts it, the "retirement of a [district] judge in a modestly burdened court . . . provides a new judge and a senior judge to that court while judges in a nearby heavily burdened court will face continued overwork and growing backlogs."[106] Indeed, by adopting the proposed statute's scheme for reallocating vacant judgeships, Congress could work many of the benefits that are claimed for capping while retaining the discretion to create additional judgeships when relocation will not suffice.

B. Comment

The debate whether Congress should cap the size of the judiciary, increase its size incrementally, or create a much larger federal bench rests on a conglomeration of empirical evidence, subjective hunch, and policy preferences about the operation and the purposes of the federal judiciary. The pressure for change in the status quo is strong and some kind of change may be inevitable. The size of the federal judiciary may be frozen, or it may expand gradually or be substantially increased in short order. Alternatively, change may come through procedural adjustments or major structural realignment. As the Chief Justice recently said, with particular reference to the courts of appeals, "Although no consensus has yet developed around any particular set of changes to the status quo—and to be sure any alternatives will present practical and political difficulties—it is safe to say that change will come."[107]

In considering the proper size of the judiciary as a general matter, and moratorium proposals in particular, policy makers should ask:

Wyoming, Congress created an additional judgeship in the district. *Id.* at Table 2. The same was true for D. Me., D.N.H., M.D. Pa., M.D.N.C., W.D. Tenn., D. Haw., E.D. Wash., D. Utah, N.D. Fla., and M.D. Ga. *Id.* For each district that received a judgeship not requested by the Judicial Conference, another district was denied a new judgeship despite a Judicial Conference recommendation.

106. Court Administration Committee Report, *supra* note 28, at 10.

107. Welcoming Remarks by Chief Justice Rehnquist, 1993 Federal Judicial Center Workshop for Judges of the U.S. Courts of Appeals, Feb. 8, 1993, at 5 (manuscript).

1. Are there, as the Federal Courts Study Committee said, "limits [on the] natural growth" of the federal judiciary (of which a cap would be merely an instrument), or is it "natural" for the federal judiciary to evolve into a larger, structurally more complicated institution (as it did when separate courts of appeals were created in 1891)? Is the proposal for a moratorium a serious proposal or simply a tactic on the part of those who favor slow growth for the federal courts? Is it likely that the legislative and executive branches will take this debate seriously?

Whether or not there is some "natural" basis for accepting or rejecting a moratorium, and whatever the pragmatic justifications advanced by its supporters, the idea is arguably no less plausible than were the proposals to limit the size of the House and the Supreme Court when they were offered—both of which are now conventional. The same can be said of the various internal adjustments of judicial administration, such as Article I courts, appellate courts with more than twenty judges, and magistrate judges, to name a few. On the other hand, the House and the Supreme Court offer precedents for capping the courts that are dubious at best. The idea of capping the judiciary may have little more going for it than its novelty, and novelty is hardly the same as wisdom: other proposals of the past, such as no lower federal courts and eighteen-member Supreme Court sitting in panels, seem bizarre today.

2. Is the debate over a moratorium simply a different form of the debates over alternative ways for the federal courts to do their business?

Were the Congress to cap the number of Article III judges, it would not necessarily render moot the debate over how the federal courts should process litigation, including the question of how they should be structured to process litigation, particularly at the appellate level. For example, even if caseloads did remain relatively constant, there would still be proposals to equalize the number of judges in the circuits and control inter- and intracircuit conflict. And, if caseload continued to grow in a fixed-judgeship system, it would press the consideration of discretionary jurisdiction, staffing alternatives, and other issues.

3. Can the judiciary commit itself to any of these approaches without consensus about the principal mission of the federal

courts? Can that mission be stated with enough precision to be neither a platitude nor special pleading for a particular point of view?

Proposals for major and immediate expansion in judgeships rest on the view that there are many disputes, particularly disputes involving those on the margins of society, that the federal courts should resolve but are not resolving adequately because there are not enough district and circuit judges. But there is a strong belief within the judiciary that many such cases, while surely deserving of effective resolution, do not need the federal forum for their resolution and, in fact, that their presence in the federal caseload may frustrate the system's ability to redress civil rights and civil liberties violations, as well as other disputes, of national importance that cannot be effectively redressed elsewhere.

The proposal for a permanent ceiling rests on the axiom that the federal courts are courts of limited jurisdiction. The logic of the proposal would have them become courts of an even narrower jurisdiction. More than 800 Article III judges now exercise what some regard as too broad a jurisdiction and others regard as necessary and wise, if not too limited. But in any case, if a 1,000 judge cap were imposed, and if population continued to grow, it seems inevitable that at some point—perhaps in thirty years—the federal courts either would be severely restricted in the cases they could hear, or would have to use procedures that are, at the very least, much more efficient than those they use today. Even granting that there is more efficiency to be wrung out of the system, at some point procedural innovations will compromise due process. At that point, maintaining a ceiling will be feasible only if there is consensus that federal jurisdiction should be curtailed, probably significantly beyond what it is today. That, however, hardly closes the case. Different people have different views on which disputes, within the broad range of eligibles, should fall within the federal courts' limited jurisdiction.

Finally, determining the size of the federal judiciary implicates questions of public policy as well as those of law and administration. The three branches of government share responsibility for confronting all these questions and fashioning a mutually acceptable resolution to them.

Appendix

As noted in the text, the efforts leading up to the 1929 statute that fixed the size of the House of Representatives at 435 do not necessarily offer a precedent for efforts to cap the number of district and circuit judgeships. Nevertheless, those supporting a cap and those opposing it have both expressed interest in the House experience, and for that reason we include this brief appendix, which describes some of the major events leading to the decision to limit the size of the House.

Determining the Size of the House of Representatives: A Historical Review

by Edward Sussman

For most of its history, the size of the House membership increased as the population of the nation grew, but since early in the twentieth century the size of the House has been maintained at 435 seats.[1] This brief essay summarizes debates over the proper size of the House and efforts to change its size. It first treats the Constitutional period and then describes nineteenth-century efforts to restrict the size of the House. The major part of the essay describes the debates in the 1920s, which led to the decision to stop expanding the number of representatives and the statutory provisions now in place effecting that decision.

The Constitutional Period

The Constitution, in Article I, § 2, provides that membership in the House is to be apportioned among the states according to population. This provision evolved from debate over whether the Constitution should adopt a formula specifically linking growth in the number of representatives to the size of the population. An initial proposal—one representative for every 40,000 inhabitants—was

1. This is with the exception of seats provided for Alaska and Hawaii following their admission as states. Following the 1960 census, however, the House was once again reapportioned based on 435 seats, rather than 437.

significantly altered to allocate membership "not exceeding 1 for every 40,000." Madison explained that the change was necessary to keep the size of the House from expanding indefinitely.[2] The change secured the authority of Congress to adjust upwards the number of inhabitants each member could represent, and implicitly, to impose a ceiling on the number of seats in the House.[3] The significance of this change (and the possibility that under the proposed formulation Congress might also decrease the size of the House) was discussed at greater length during the ratification process. A later proposal guaranteed that every state would have at least one representative in the general legislature, regardless of the state's population.[4] On the final day of the convention, September 17, the number 40,000 was changed to 30,000 at the request of George Washington, who stated that "[t]he smallness of the proportion of Representatives had been considered by many members of the Convention, an insufficient security of the rights and interests of the people."[5]

That Washington was moved to make his only recorded comment at the Philadelphia convention on the matter of House size—and the comment itself—indicate the salience of the issue to those who debated the Constitution. It was generally accepted that the Senate should be a more deliberative body than the popular branch of Congress, and that a small number of members would proceed with "more coolness, with more system, & more wisdom."[6]

The size of the House was a point more in contention. For example, Madison, reacting to a proposal to constitute the first House at sixty-five members, argued that a "*majority* of a *Quorum* of 65 was too small a number to represent the whole inhabitants of the U. States; They would not possess enough of the confidence of the

2. II Records of the Federal Convention of 1787, at 221 (Farrand ed. 1937) (Madison's notes).

3. *Id.*

4. *Id.*, vol. I at 223.

5. *Id.* at 644.

6. *Id.* vol. I, at 151. Madison argued that so far as the Senate was concerned "additional number would [not] give additional weight to the body." On the contrary it appeared to him that "their weight would be in an inverse ratio to their number." He used as an example the Roman Tribunes, which he said "lost their influence and power, in proportion as their number was augmented."

people, and wd. be too sparsely taken from the people, to bring with them all the local information which would be frequently wanted."[7] Madison later pointed to Pennsylvania, Virginia, and, most significantly, the boroughs of England as examples of regions where legislators representing a minority of the population had failed to relinquish power to new majorities. Elbridge Gerry maintained that "the larger the number the less danger of their being corrupted. The people are accustomed to & fond of a numerous representation, and will consider their rights better secured by it. The danger of excess in the number may be guarded agst. by fixing a point within which the number shall always be kept."[8]

The same themes occurred in the state ratification debates. In New York, Publius, in Federalist 58, asserted that the Congress could be trusted to exercise its power to increase the number of representatives from sixty-five. But once the House has reached a sufficient size to ensure adequate local information and sympathy with the whole population, he stated that it ought not to add more representatives. In large assemblies, he argued, power ends up being wielded by the few because large numbers of men are more easily led by passion than by reason, and because more members will have "limited information and weak capacities."[9] "The countenance of the government may become more democratic, but the soul that animates it will be more oligarchic. The machine will be enlarged, but the fewer, and often the more secret, will be the springs by which the motions are directed," he wrote.[10]

The first Congress saw efforts to amend the Constitution with respect to House size. The first of twelve proposed amendments (the last ten of which became the Bill of Rights) would have quickly brought the House to about 100 members; subsequent reapportionment would have been carried out until the House reached 200 members. After 200 members, reapportionment would have continued but increases to the size of the House would have become

7. *Id.* at 568.

8. *Id.* at 569.

9. Alexander Hamilton, John Jay, James Madison, The Federalist Papers 381 (Modern Library 1937).

10. *Id.* at 382.

discretionary, with representation not to exceed one seat for every 50,000 persons.[11]

The failure of the proposed amendment allowed the House to evolve under the terms of Article I, Section 2 (as altered by the Fourteenth Amendment with respect to the population basis for apportioning representatives). Table 1 on the following page shows the ten-year growth in the House from the first Congress through 1990.

11. Phillip B. Kurland & Ralph Lerner (eds.), V The Founders' Constitution 40–41 (1987) from the Congressional Record, March 4, 1789. The full text of "Article the First" as it went to the states is as follows:

> After the first enumeration required by the first article of the Constitution, there shall be one Representative for every thirty thousand, until the number shall amount to one hundred, after which the proportion shall be so regulated by Congress, that there shall be not less than one hundred Representatives, nor less than one Representative for every forty thousand persons, until the number of Representatives shall amount to two hundred; after which the proportion shall be so regulated by Congress, that there shall not be less than two hundred Representatives, nor more than one Representative for every fifty thousand persons.

Table 1
U.S. Population, Size of the House of Representatives, Members Per Capita

Year	Population	Number of House Members	Ratio of House Members to Population
1789*	3,929,214	65	1/60,449
1790	3,929,214	105	1/37,000
1800	5,308,483	141	1/38,000
1810	7,239,881	181	1/40,000
1820	9,638,453	213	1/45,000
1830	12,866,020	240	1/54,000
1840	17,069,453	223	1/77,000
1850	23,191,876	234	1/99,000
1860	31,443,321	241	1/130,000
1870	39,818,449	292	1/136,000
1880	50,155,783	325	1/154,000
1890	62,947,714	256	1/177,000
1900	75,994,575	386	1/197,000
1910	91,972,266	433	1/212,000
1920	105,710,620	435	1/243,000
1950	150,697,361	435	1/346,000
1960	179,323,175	437	1/410,350
1970	203,302,031	435	1/467,000
1990	248,709,873	435	1/572,000

* Population figures for 1789 are actually those for 1790, the year of the first census.

Source: All figures, except 1789 and 1960, are from Christopher St. John Yates, *A House of Our Own or a House We've Outgrown? An Argument for Increasing the Size of the House of Representatives*, 25 Colum. L. & Social Probs. 157, 180 n.150 (1992) (citing Michael L. Balinski & H. Peyton Young, Fair Representation 156–70 (1982), and U.S. Bureau of the Census, Statistical Abstract of the United States 9 (1991)). For 1789 and 1960, the figures for the number of members are from George B. Galloway, History of the House of Representatives 22 (1976). The 1960 population statistic is from U.S. Bureau of the Census, Statistical Abstract of the United States (1992).

The Nineteenth Century

While the overall trend of the nineteenth century regarding the size of the House was substantial growth (from 141 seats in 1800 to 386 seats in 1900),[12] the mid-nineteenth century also brought two serious attempts to limit the size of the House. The first attempt arose in the Senate on June 9, 1842. It was eventually successful in reducing the number of seats despite a substantial increase in population since the 1830 census (from 12 million to 18 million persons).[13] However, the 1842 reduction imposed no permanent limit on the size of the House and the House again increased in size following the 1850 census. Significantly, though, a majority of the members of Congress made it plain that they wished to permanently limit the growth of the House. In 1850 legislation approving the taking of the seventh decennial census, Congress inserted provisions to freeze the size of the House at 233 seats.[14] The Secretary of the Interior was to be exclusively responsible for subsequent reapportionment.[15] However, the statutory limit was undone by subsequent legislation. In 1852, an additional member was added, and in 1862 eight additional seats were approved.[16] A new apportionment statute at the time of the 1870 census replaced the 1850 statute altogether.[17]

1920–1929 Debate

By 1920, the House had grown to 435 members. In 1921, the House Census Committee once again recommended increasing the size of the House. However, at the time the recommendation was made, concern began to be expressed that the size of the House was becoming unmanageable. In anticipation of this criticism, the committee also recommended adopting a constitutional amendment

12. See *supra* Table 1.

13. *See* Cong. Globe, 27th Cong., 2d Sess. 620 (June 13, 1842, for debate on the question.

14. *See* Charles A. Kromkowski & John A. Kromkowski, *Why 435? A Question of Political Arithmetic,* 24 Polity 129, 133 n.15 (1991).

15. *Id.*

16. *Id. See* 10 Stat. 25, 12 Stat. 353 (1852).

17. *Id.*

capping the size of the House at 500 members. In the meantime, the increase to 483 seats would have prevented any state from losing members, despite substantial movement and growth in the nation's population, primarily representing a shift away rural and agricultural states toward states with large cities.[18] Without the increase, eleven states were to lose seats through reapportionment and eight states were to gain seats.[19]

A report issued by the House Census Committee explained its recommended increase from 435 to 483 on a number of grounds.[20] These included the population growth in the United States and the idea that "legislative bodies must be more representative of the people"; the inclusion of women as eligible voters since the 1911 census; the comparison of the U.S. ratio of representatives to population to the generally lower ratio in other countries; the increased constituent work of the House, especially with the return of soldiers from World War I; and the increased legislative work of the House.[21] The report also pointed out that Congress had never failed to increase the size of the House after every decennial census since the founding, with only one exception.[22]

However, in response to "the growing sentiment throughout the country that the size of the House should be limited in number" the committee recommended a constitutional amendment capping the House at 500.[23] The report did not elaborate a further justification for the constitutional cap, other than stating that the sentiment of the citizens ought to be tested through the amendment process.[24]

18. Congressional Quarterly, Origins and Development of Congress 142 (1982) (hereinafter Origins); see also Kromkowski, *supra* note 14, at 134. The large waves of European immigration to U.S. cities in the early part of the century likely played a role in the increased population of urban areas.

19. *Id.*

20. House Census Committee, Apportionment of Representatives, H.R. Rep. No. 1173, 66th Cong., 3d Sess., pt. 1 (Jan. 8, 1921) (hereinafter 1921 Report).

21. *Id.* at 3–4.

22. *Id.* at 3. The exception was in 1842, although the report incorrectly lists it as 1843. *See supra* at notes 12–17 and accompanying text.

23. 1921 Report, *supra* note 20, at 4.

24. *Id.*

A minority position accompanying the report called for maintaining the size of the House at 435.[25] The minority report said that the cost of adding members was too high; that the efficiency of the body would not be increased with more members; that increased membership meant that the body would become "more unwieldy and cumbersome"; that increased membership would add delay in the transaction of business; that additional staff could "care for any increase in the work required of Members"; that members had at their disposal better facilities for transportation, communication, and association with constituents and thus did not need more members to manage the additional work created by the growth in population; and, finally, that it would be unwise to lock in a future Congress with a constitutional amendment.[26]

The full House took up debate on the proposal on January 18 and 19, 1921. The debate spans more than fifty pages in the Congressional Record.[27] Numerous speakers refer to the editorial positions of newspapers regarding the size of the House.[28] The debate broke along both political and regional lines. The regional split was most apparent; most states threatened with losing seats opposed limiting the size of the House. These were generally smaller states, southern states, and agricultural states. Larger states and states with urban centers generally supported the limit.

On one side were those who believed that corporate interests would more easily control a House of smaller size and that representation of local interests would be threatened by increasing the number of citizens each member represented. On the other side were those who argued that the expense of increasing the size of the House was unjustified by the benefits of increasing the membership, and that the addition of members decreased the effectiveness and efficiency of the body as a whole.

Eventually, the House voted by 267 to 76 not to increase the membership and to reapportion the existing seats; however, the Senate failed to act on the bill.[29] Thus began a fight within the

25. *Id.* at 29.
26. *Id.* at 29–30.
27. *See* 66 Cong. Rec. 1626–56, 1676–94 (1921).
28. *See, e.g.*, Remarks of Mr. Blanton, *id.* at 1638; Mr. Hersey, *id.* at 1641.
29. Origins, *supra* note 18, at 143–44.

Congress that continued for most of the decade. Despite repeated attempts to either increase the size of the House (460 members was also proposed) or to reapportion the existing seats, Congress could not resolve the impasse until a special session was called in 1929.[30]

By then, the focus of the debate had shifted to reforming the method of apportionment. A January 5, 1929, report by the House Census Committee noted that in order to prevent any state from losing a seat under the current apportionment method, an increase to 483 members would no longer be sufficient. Further shifts and growth in the population meant 535 seats would be required to keep any state from losing a seat.[31] In order to break the possibility of a recurring deadlock between those opposed to any increase in the size of the House and those blocking redistricting under the existing size and formula, the committee proposed that reapportionment of the existing 435 seats become automatic following each decennial census.[32] The bill was characterized by the committee as being drawn in anticipation of a possible "emergency" situation that might prevent "fair and equitable" representation for millions of people if Congress failed to reapportion following the 1930 census, as it had following the 1920 census. The committee explicitly stated that Congress might yet choose to increase the size of the House to 535, to 475, or to leave it where it is: "In this bill there is no suggestion made to any future Congress as to what the size of the House membership shall be."[33]

The House passed the bill by voice vote on January 11, 1929, but a threatened filibuster by senators from states faced with a loss of seats postponed a Senate vote. President Hoover called a special session of Congress in April 1929, with the matter of reapportionment listed among the priorities of business.[34] This time the census committee's bill passed.[35]

30. *Id.*

31. House Census Committee Report, Apportionment of Representatives, H.R. Rep. No. 2010, 70th Cong., 2d. Sess. 3–4 (Jan. 5, 1929).

32. *Id.* at 4.

33. *Id.* at 6.

34. Origins, *supra* note 18, at 144.

35. *Id.*

Afterword

In 1961, a reexamination of the question of the size of the House was prompted by the admission of Alaska and Hawaii to the Union.[36] Proposals emerged to maintain representation at the 1951 ratio of one member per 345,000 rather than readjust the ratio to one member per 413,000 in order to keep the House at 435.[37] The proposal would have increased the size of the House to 517 seats. Proponents of the measure asserted that both the constituent and legislative workload had expanded greatly; that any space limitations on housing new members could be overcome; and that stricter House rules could control an enlarged membership.[38] The growth in the size of the federal judiciary during the same time period was pointed to as an analogy for the House.[39] Ultimately, no permanent expansion was approved.

The right of delegates from non-voting territories of the United States and the District of Columbia to participate in House business has also expanded in recent years. In March 1993, a federal district judge rejected a challenge to procedures adopted by the 103d Congress allowing delegates from the District of Columbia and four U.S. territories (Puerto Rico, Guam, U.S. Virgin Islands, and American Somoa) to participate in some floor votes of the House when sitting as a "committee of the whole."[40] However, these delegates have not been granted the right to vote on the final passage of legislation.[41]

36. Increasing the Membership of the House of Representatives and Redistricting Congressional Districts: Hearings Before Subcomm. No. 3 of the House Comm. on the Judiciary, 87th Cong., 1st. Sess. (1961).

37. *Id.* at 25 (proposal by Rep. Whitten).

38. *See A House of Our Own,* 25 Colum. J. L. & Social Probs., *supra* note accompanying Table 1 on p. 63, at 186.

39. *Id.*

40. *See* Kent Jenkins, Jr. & Michael York, *Judge Calls Norton's Vote Legal but Meaningless,* Washington Post at A1 (March 9, 1993).

41. *Id.*

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