

# IN DEFENSE OF (CIRCUIT) COURT-PACKING

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## INTRODUCTION

Proposals to pack the Supreme Court have gained steam recently. Presidential candidate Pete Buttigieg endorsed a court-packing plan at the start of his campaign,<sup>1</sup> and several other candidates also indicated a willingness to consider such a plan, including Senators Elizabeth Warren and Amy Klobuchar.<sup>2</sup> Legal scholars have similarly called upon Congress to increase the size of the Supreme Court,<sup>3</sup> particularly following the heated confirmations of Justices Neil Gorsuch and Brett Kavanaugh.<sup>4</sup> These suggestions for Court reform have only gotten more pronounced with the recent passing of Justice Ruth Bader Ginsburg, the subsequent nomination of Judge Amy Coney Barrett, and the approach of November's general election.<sup>5</sup>

This discussion, however, overlooks a more feasible yet equally impactful proposal: increasing the number of federal circuit court judgeships. Alt-

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1. David A. Graham, *The Democrats Discover the Supreme Court*, ATLANTIC (June 4, 2019), <https://www.theatlantic.com/ideas/archive/2019/06/buttigieg-supreme-court-plan-and-democratic-party/590905/> [<https://perma.cc/Q6MA-MPSW>].

2. *Would You Support Adding Justices to 'Pack' the Supreme Court?*, WASH. POST, <https://www.washingtonpost.com/graphics/politics/policy-2020/voting-changes/supreme-court-packing/> [<https://perma.cc/QZ6K-ZYFE>].

3. See Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 175–77 (2019); Michael Klarman, *Why Democrats Should Pack the Supreme Court*, TAKE CARE (Oct. 15, 2018), <https://takecareblog.com/blog/why-democrats-should-pack-the-supreme-court> [<https://perma.cc/P969-9DJC>].

4. For an analytical perspective on the unprecedented and procedurally countermajoritarian nature of the Gorsuch and Kavanaugh appointments, see Xiao Wang, *Increasingly Antidemocratic? An Empirical Examination of the Supreme Court Nomination and Confirmation Process*, 11 CALIF. L. REV. ONLINE 242 (2020), [https://www.californialawreview.org/wp-content/uploads/2020/06/Wang\\_Increasingly\\_Antidemocratic\\_CalifLRevOnline\\_Vol11.pdf](https://www.californialawreview.org/wp-content/uploads/2020/06/Wang_Increasingly_Antidemocratic_CalifLRevOnline_Vol11.pdf) [<https://perma.cc/QNV8-PKPE>].

5. See, e.g., Astead W. Herndon & Maggie Astor, *Ruth Bader Ginsburg's Death Revives Talk of Court Packing*, N.Y. TIMES (Sept. 19, 2020), <https://www.nytimes.com/2020/09/19/us/politics/what-is-court-packing.html> [<https://perma.cc/QV6K-BRZV>]; Quinta Jurecic & Susan Hennessey, *The Reckless Race to Confirm Amy Barrett Justifies Court Packing*, ATLANTIC (Oct. 4, 2020), <https://www.theatlantic.com/ideas/archive/2020/10/skeptic-case-court-packing/616607/> [<https://perma.cc/GV4P-B24J>].

though many see the Supreme Court as having the final word on the law,<sup>6</sup> it is circuit courts that are actually the last resort for most litigants. In the mine-run case, their jurisdiction is mandatory—a civil litigant or criminal defendant that loses in district court can seek review before their regional circuit court of appeal as a matter of right, and the circuit court must thereafter issue a decision.<sup>7</sup> On the other hand, Supreme Court review is typically discretionary. Of the thousands of certiorari petitions filed, the Court hears only about eighty cases a year, making plenary review of most issues impossible.<sup>8</sup> Members of the Court have all but admitted this fact. As the late Justice Ginsburg acknowledged, the Court is not a “super appellate court” designed to “error-correct[]”: it “couldn’t manage [that] workload” and will therefore “step in only when the law needs clarification.”<sup>9</sup>

I want to use this piece to make three arguments. *First*, that circuit courts matter—that, in fact, they matter much more than the Supreme Court on many issues. *Second*, that there are sound, nonpartisan reasons for increasing the number of circuit judges today. And *third*, that, whatever the outcome of November’s general election, it is possible to expand the circuit courts in a manner that supplies necessary judicial resources while also promoting democratic accountability.

### I. WHY DO CIRCUIT COURTS MATTER?

Circuit court decisions often represent the final word on issues of federal law. The most commonly invoked reason behind this phenomenon is the capacity constraint: that is, the Supreme Court simply cannot review every case. Although the number of certiorari petitions has increased, the number of cases granted has stayed constant—between sixty and 100—over the past twenty-five years.<sup>10</sup> The Supreme Court may want to promote legal uniformity, but it (and we) must accept a high degree of dis-uniformity in the

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6. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) (“We are not final because we are infallible, but we are infallible only because we are final.”).

7. See 28 U.S.C. § 1291 (“The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . .”).

8. See *Supreme Court Procedure*, SCOTUSBLOG, <https://www.scotusblog.com/reference/educational-resources/supreme-court-procedure/> [https://perma.cc/25S8-4VCV] (“Of the 7,000 to 8,000 cert petitions filed each term, the court grants certiorari and hears oral argument in only about 80.”); see also Ryan J. Owens & David A. Simon, *Explaining the Supreme Court’s Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1244 (2012) (“Congress [has] passed legislation . . . remov[ing] virtually all of the Court’s mandatory jurisdiction, leaving Justices free to select the cases they wish[] to hear.”).

9. Ruth Bader Ginsburg, Just., Remarks at CUNY School of Law (Mar. 11, 2004), in 7 N.Y. CITY L. REV. 221, 237 (2004).

10. *Supreme Court Caseloads, 1880–2015*, FED. JUD. CTR., <https://www.fjc.gov/history/exhibits/graphs-and-maps/supreme-court-caseloads-1880-2015> [https://perma.cc/M2FK-FZ8Y]; *Final Stat Pack for October Term 2019*, SCOTUSBLOG 31–32 (2020), <https://www.scotusblog.com/wp-content/uploads/2020/07/Final-Statpack-7.20.2020.pdf> [https://perma.cc/RGG2-T3W2].

legal system. Unresolved circuit splits abound.<sup>11</sup> Such splits touch on almost every area of the law, from immigration,<sup>12</sup> to eminent domain,<sup>13</sup> to search and seizure,<sup>14</sup> to discrimination,<sup>15</sup> to cybersecurity,<sup>16</sup> and so on. As Deborah Beim and Kelly Rader have observed, most of these “intercircuit splits are never resolved by the Supreme Court.”<sup>17</sup> In fact, “[o]nly one-third are resolved,” leaving “numerous contemporaneous, growing splits” unresolved.<sup>18</sup>

In addition to such discrete splits, the Supreme Court has also increasingly employed tools that devolve power back to the circuits. These tools may not necessarily create a formal split in any single case, but they do provide leeway so that the circuit court functionally has the last word on most matters. Consider, for example, the increased use of balancing tests over categorical rules in Supreme Court case law.<sup>19</sup> Whatever the merit of any particular balancing test, the long-term effect of instituting such tests is to confer deference to the lower courts applying the tests.

By its nature, a balancing test sets forth a number of factors to evaluate. A lower court can generally weigh such factors in whatever way it chooses, and it can always rebalance the factors differently and come out another way

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11. See, e.g., *Current Circuit Splits*, 14 SETON HALL CIR. REV. 279 (2018); *Circuit Splits*, MARQ. UNIV. L. SCH. FAC. BLOG, <https://law.marquette.edu/facultyblog/category/circuit-splits/> [<https://perma.cc/BV9N-SSWX>].

12. *United States v. Estrada*, 876 F.3d 885, 888 (6th Cir. 2017) (noting a circuit split on whether aliens have a constitutional right to be informed of discretionary relief from deportation).

13. ILYA SOMIN, *THE GRASPING HAND: KELO V. CITY OF NEW LONDON AND THE LIMITS OF EMINENT DOMAIN* 182 (2015) (“[F]ederal and state courts have been all over the map in their efforts to apply *Kelo*’s strictures against ‘pretextual’ takings” with “no consensus in sight.”).

14. Wayne A. Logan, *Constitutional Cacophony: Federal Circuit Splits and the Fourth Amendment*, 65 VAND. L. REV. 1137, 1155–56 (2012) (noting the “persistence of Fourth Amendment circuit splits”).

15. *Clemens v. Centurylink Inc.*, 874 F.3d 1113, 1116–17 (9th Cir. 2017) (acknowledging circuit split between Ninth Circuit and D.C. Circuit on the form of remedies available for Title VII discrimination).

16. *In re U.S. Off. of Pers. Mgmt. Data Sec. Breach Litig.*, 928 F.3d 42, 58 (D.C. Cir. 2019) (splitting with the Third and Fourth Circuits on standard plaintiffs must satisfy to assert data breach claims).

17. Deborah Beim & Kelly Rader, *Legal Uniformity in American Courts*, 16 J. EMPIRICAL LEGAL STUD. 448, 449 (2019).

18. *Id.*

19. See Patrick M. McFadden, *The Balancing Test*, 29 B.C. L. REV. 585, 605 (1988) (charting increased use of balancing tests from mostly zero to one Supreme Court cases per term in 1960s and 1970s to double-digit cases by late 1980s); Jonathan R. Nash, *Aiming for Simplicity, Supreme Court Makes Things More Complicated*, HILL (July 13, 2016, 9:43 AM), <https://thehill.com/blogs/pundits-blog/the-judiciary/287520-aiming-for-simplicity-supreme-court-opts-for-complexity> [<https://perma.cc/4VM6-SXCU>] (discussing use of balancing tests in more recent Supreme Court terms).

in a future case.<sup>20</sup> This entire process (intentionally or unintentionally) discourages Supreme Court review. After all, the Court is reluctant to second-guess *how* a lower court weighs, balances, or applies facts to factors, because doing so would be classic error correction, which is not the Court’s business.<sup>21</sup>

Finally, aside from capacity constraints and efforts to devolve power, the discretionary nature of Supreme Court review gives the Court a chance to pass on even the most pressing legal issues. As Rule 10 of the Supreme Court Rules states, “[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons.”<sup>22</sup> What constitutes “compelling” is in the eye of the beholder. The Court, for instance, recently declined to grant certiorari on several qualified immunity cases, including cases concerning excessive force by police—*notwithstanding* nationwide protests on the matter.<sup>23</sup> Even conservative outlets described these cases as “fractured decisions” in an area beset by “legal, practical, and moral infirmities.”<sup>24</sup> Declining review here only underscores the importance of federal circuit courts: for now and the future, they are the final arbiters regarding what official conduct is and is not protected by qualified immunity.

The above reasons both reinforce and magnify the extraordinary transformation of the federal circuit courts that has taken place over the past several years. The Senate has confirmed fifty-three circuit judges during President Donald Trump’s tenure—just two shy of the number of circuit judges President Barack Obama appointed over eight years.<sup>25</sup> To be sure,

20. See T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 972 (1987) (“A frequent criticism of balancing is that the Court has no objective criteria for valuing or comparing the interests at stake.”).

21. See Ginsburg, *supra* note 9, at 237.

22. SUP. CT. R. 10.

23. *E.g.*, *Baxter v. Bracey*, 140 S. Ct. 1862, 1862 (2020) (mem.) (Thomas, J., dissenting from the denial of certiorari).

24. Robert Barnes & Ann E. Marimow, *Supreme Court Refuses to Reconsider Immunity that Shields Police Accused of Brutality*, WASH. POST (June 15, 2020, 11:58 AM), [https://www.washingtonpost.com/politics/courts\\_law/supreme-court-refuses-to-reconsider-immunity-that-shields-police-accused-of-brutality/2020/06/15/1cfc444c-ae7f-11ea-8f56-63f38c990077\\_story.html](https://www.washingtonpost.com/politics/courts_law/supreme-court-refuses-to-reconsider-immunity-that-shields-police-accused-of-brutality/2020/06/15/1cfc444c-ae7f-11ea-8f56-63f38c990077_story.html) [<https://perma.cc/LCM3-L8P3>]; Jay Schweikert, *Two Recent En Banc Decisions Exemplify the Injustice, Impracticality, and Persistent Confusion Inherent to Qualified Immunity*, CATO INST. (Aug. 22, 2019, 2:35 PM), <https://www.cato.org/blog/two-recent-en-banc-decisions-exemplify-injustice-impracticality-persistent-confusion-inherent> [<https://perma.cc/88UB-GLJC>] (discussing split between *Cole v. Carson*, 935 F.3d 444 (5th Cir. 2019) (en banc), *cert. denied sub nom. Hunter v. Cole*, No. 19-753, 2020 WL 3146695 (U.S. June 15, 2020) (mem.), and *Kelsay v. Ernst*, 933 F.3d 975 (8th Cir. 2019) (en banc), *cert. denied* 140 S. Ct. 2760 (2020) (mem.)).

25. Leigh Ann Caldwell & Sahil Kapur, *McConnell Reaches Milestone on Judges by Filling Final Circuit Court Vacancy*, NBC NEWS (June 24, 2020, 12:37 PM), <https://www.nbcnews.com/politics/congress/mcconnell-reaches-milestone-judges-filling-final-circuit-court-vacancy-n1232011> [<https://perma.cc/ZGM2-MBKH>]; Carl Hulse, *McConnell*

President Obama did nominate more than fifty-five circuit judges. But “[d]uring Obama’s last two years as president, the McConnell-led Senate majority confirmed the fewest judges in more than half a century, including only two [circuit] court judges.”<sup>26</sup> That blockade lifted after President Trump’s election. Because of the sheer volume of newly appointed judges, seven circuits now have more Republican than Democratic appointees: the Second, Third, Fifth, Sixth, Seventh, Eighth, and Eleventh.<sup>27</sup> The volume of these appointments has already reverberated through a number of en banc decisions which, by their nature, definitively set the law for the circuit at issue.

In *United States v. Christian*,<sup>28</sup> for instance, the Sixth Circuit upheld a search warrant issued on a suspect’s home for illegal drugs. On the surface, probable cause was—in the majority’s view—“not a close call.”<sup>29</sup> The search warrant was five pages long, supported by surveillance of the property, and backed by information from a confidential informant.<sup>30</sup> It was directed at the home of an individual with several prior drug convictions.<sup>31</sup>

But the dissent refuted each of these points. As it noted, the search warrant was not really five pages long. The substantive allegations were confined to a single page, with the remaining pages filled with “generic information” such as the investigating officer’s name and qualifications.<sup>32</sup> The surveillance of the property showed only an individual “walking away from the area of the Residence and then leaving that area in a car”—without any evidence that the individual purchased drugs from the residence (or even went into the residence).<sup>33</sup> There were no details offered regarding the “veracity or reliability” of the informant.<sup>34</sup> And the suspect’s criminal history showed only minor possession offenses, with the most recent occurring several years prior.<sup>35</sup> These defects, though, did not trouble the majority. Although it acknowledged that there were “possible contradiction[s]” to the warrant, it attributed such shortcomings to the “haste of a criminal investigation” and

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*Nears His Benchmark*, N.Y. TIMES (June 18, 2020), <https://www.nytimes.com/2020/06/18/us/mcconnell-courts-justin-walker.html> [<https://perma.cc/G7J6-64FZ>].

26. Sam Berger, *Conservative Court Packing*, CTR. FOR AM. PROGRESS (Apr. 3, 2019, 9:01 AM), <https://www.americanprogress.org/issues/democracy/news/2019/04/03/468234/conservative-court-packing/> [<https://perma.cc/8R7A-YSAP>].

27. *Flipping Circuit Courts*, SENATE REPUBLICAN POL’Y COMM. (Dec. 10, 2019), <https://www.rpc.senate.gov/policy-papers/flipping-circuit-courts> [<https://perma.cc/P7WS-52HM>].

28. 925 F.3d 305 (6th Cir. 2019) (en banc).

29. *Christian*, 925 F.3d at 311.

30. *Id.* at 308.

31. *Id.*

32. *Id.* at 329 (Gilman, J., dissenting).

33. *Id.* at 321.

34. *Id.* at 322.

35. *Id.* at 327.

concluded, under the “totality of the circumstances,” that it should “defer[]” to the judgment of the officers on the scene.<sup>36</sup>

The vote in *Christian* was eleven to seven—a straight party-line vote, with all six of President Trump’s appointments joining the majority.<sup>37</sup> The opinion’s implications are troubling. If every aspect of a search warrant is defective, it is difficult to see how viewing the warrant in its “totality” can transmogrify it into something that passes constitutional muster. By extension, it is hard to understand how probable cause can, post-*Christian*, still serve as a meaningful check on government power.

Even courts that have not formally flipped have been impacted by compositional changes. Although Democratic appointees continue to slightly outnumber Republican appointees in the Ninth Circuit, members of the court have become increasingly “reluctant to ask for 11-judge panels to review conservative decisions because the larger en banc panels, chosen randomly, might be dominated by Republicans.”<sup>38</sup> That is, in fact, what happened in *California v. Azar*.<sup>39</sup> The court, sitting en banc, upheld a federal regulation—known as the “gag rule”—which prevented health care providers from referring patients to abortion providers.<sup>40</sup> The decision was seven to four, with two Trump appointees (Judges Eric Miller and Kenneth Lee) comprising the swing votes.<sup>41</sup>

*Christian* and *Azar* highlight different aspects of the trends described above. *Christian* did not, for one, create a circuit split. It involved judges assessing a variety of facts and factors and viewing them through the “totality of the circumstances”—the very sort of balancing test that devolves power to circuit courts and discourages Supreme Court review. And, unsurprisingly, the Supreme Court denied certiorari in *Christian*.<sup>42</sup> Similarly, *Azar* did not establish a discrete split in authority. The Ninth Circuit’s interpretation of the rule will nevertheless—given the court’s size—affect nearly one-fifth of the U.S. population.<sup>43</sup> Plaintiffs in *Azar* did not petition for certiorari, thus precluding a change in interpretation for the foreseeable future.

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36. *Id.* at 309–10 (majority opinion) (quoting *Florida v. Harris*, 568 U.S. 237, 244 (2013), and *Illinois v. Gates*, 462 U.S. 213, 235 (1983)).

37. *Id.* at 306.

38. Maura Dolan, *Trump Has Flipped the 9th Circuit—And Some New Judges Are Causing a ‘Shock Wave’*, L.A. TIMES (Feb. 22, 2020, 7:06 AM), <https://www.latimes.com/california/story/2020-02-22/trump-conservative-judges-9th-circuit> (on file with *Michigan Law Review*). In most courts, sitting en banc means that a case is reheard in front of all of the judges of the court. However, given the Ninth Circuit’s size, that can be logistically challenging. Accordingly, an en banc panel is formed by the Chief Judge and ten randomly drawn circuit judges.

39. 950 F.3d 1067 (9th Cir. 2020) (en banc).

40. *Azar*, 950 F.3d at 1068, 1104–05.

41. *Id.* at 1068.

42. *Christian v. United States*, 140 S. Ct. 414 (2019) (mem.).

43. *Hearing on Oversight of the Structure of the Federal Courts Before the Subcomm. on Oversight, Agency Action, Federal Rts. & Fed. Cts. of the S. Comm. on the Judiciary*, 115th Cong.

The foregoing is not meant as a criticism of Supreme Court practice. There may be good reasons to permit legal divisions to percolate, be it through discrete or more subtle circuit splits. As Justice Felix Frankfurter once observed, “[i]t may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening.”<sup>44</sup> My point is more descriptive. The law is interpreted, often definitively, by the circuit courts—shining a light on their importance.

## II. WHY SHOULD WE INCREASE THE NUMBER OF CIRCUIT JUDGES?

The Constitution vests Congress with the power to both establish federal circuit courts and expand the number of authorized circuit judgeships.<sup>45</sup> As a foundational, commonsense principle, the number of authorized circuit judgeships should grow as the country grows. More people equals more disputes equals more judges needed to adjudicate those disputes. To illustrate this point from a historical perspective, I constructed a dataset comparing the total number of authorized judgeships against the U.S. population, from 1869 (when the circuit courts were created) to the present.<sup>46</sup> My findings are below.<sup>47</sup>

The history of circuit-judge growth can be organized across four eras. The first, beginning in 1869 and lasting to 1970, saw a steady increase in the number of circuit judges. During this era, growth in circuit judges mirrored

7 (2018) (written testimony of J. Diarmuid F. O’Scannlain), <https://www.judiciary.senate.gov/imo/media/doc/07-31-18%20O%20Scannlain%20Testimony.pdf> [<https://perma.cc/9WKM-DR8R>].

44. *Maryland v. Balt. Radio Show, Inc.*, 338 U.S. 912, 918 (1950).

45. See U.S. CONST. art III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time establish.” (emphasis added)).

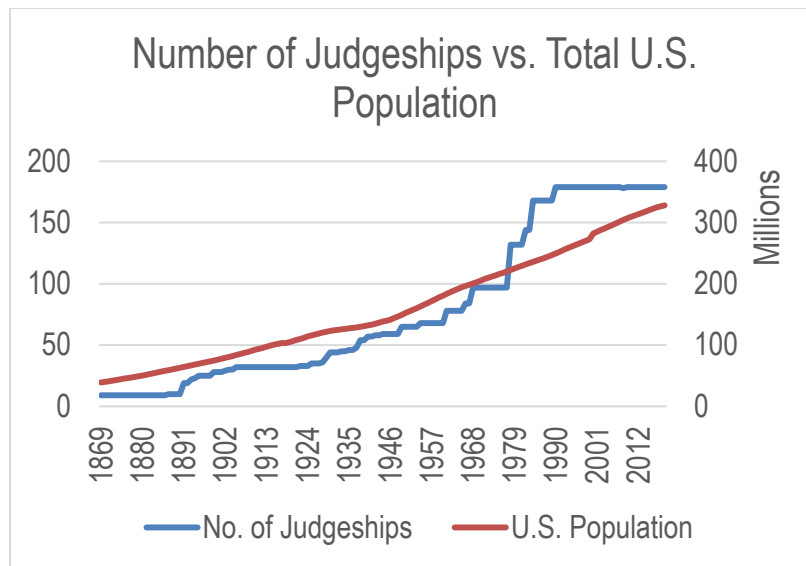
46. Some may consider population too crude a measure and argue instead for an examination of the total number of cases filed. But that position faces two constraints. One, there is little historical data on caseloads, making a longitudinal analysis impossible. And two, appeals do not necessarily track the number of cases filed in federal district court. Many immigration cases, for instance, start with a hearing before an immigration judge and jump directly to federal circuit court, without going through district court. See 8 U.S.C. § 1252.

47. For judicial data, see *Chronological History of Authorized Judgeships in U.S. Court of Appeals*, U.S. CTS., <https://www.uscourts.gov/sites/default/files/appealschronol.pdf> [<https://perma.cc/HRN2-CRWE>]. For population data, see *National Population Totals and Components of Change: 2010–2019*, U.S. CENSUS BUREAU (Mar. 26, 2020), <https://www.census.gov/data/tables/time-series/demo/popest/2010s-national-total.html> [<https://perma.cc/T5JE-QAB4>] (for data from 2010 to 2019); U.S. CENSUS BUREAU (Aug. 24, 2016), <https://www2.census.gov/programs-surveys/popest/tables/2000-2009/state/totals/> [<https://perma.cc/38Y2-HS8Y>] (for data from 2000 to 2009); *Historical National Population Estimates: July 1, 1900 to July 1, 1999*, U.S. CENSUS BUREAU (Apr. 11, 2000), <https://www2.census.gov/programs-surveys/popest/tables/1900-1980/national/totals/popclockest.txt> [<https://perma.cc/2GCH-9U2A>] (for data from 1901 to 1999); and BUREAU OF THE CENSUS, U.S. DEP’T OF COM., *HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970*, at 8 (1975), <https://www.census.gov/history/pdf/histstats-colonial-1970.pdf> [<https://perma.cc/ZA3A-WWVA>] (for data from 1869 to 1900).

that of the population as a whole—as the country grew, the number of circuit judges increased too.

Beginning in 1970 and extending through 1980, a disparity between the number of authorized judgeships and the growth of the country emerged. While the country continued to grow, the number of circuit judges stagnated. Congress closed this gap in 1978 with Public Law 95-486.<sup>48</sup> Passed under President Jimmy Carter, the law increased the number of authorized circuit judgeships and effectively ensured that growth in circuit judges caught up with population growth.<sup>49</sup>

FIGURE 1



But the changes made by Public Law 95-486 were outpaced in the era that followed, from 1980 to 1992. In this period, taking place during the Ronald Reagan and George H.W. Bush Presidencies, the number of circuit judges jumped by 40 percent, far outpacing overall population growth.

In the final era, no new circuit judgeships have been added since 1991. However, because of the dramatic rise in judges during the preceding era, population growth did not catch up to and outpace growth in circuit judges until about ten years ago.<sup>50</sup> Yet since then, the U.S. population has continued

48. Act of Oct. 20, 1978, Pub. L. No. 95-486, 92 Stat. 1629 (providing for the appointment of additional district and circuit judges).

49. *See id.*

50. Between 2008 and 2009, one judgeship from the D.C. Circuit was transferred to the Ninth Circuit, but the overall total remained the same. Court Security Improvement Act of 2007, Pub. L. No. 110-177, sec. 509, § 44(a), 121 Stat. 2534, 2543 (2008).



to grow, while the number of circuit judges has remained constant—creating a concomitant deficit in judicial resources at the appellate level.

There are two potential challenges to the foregoing analysis. *First*, while the ratio of circuit judges to population has decreased in recent years, the gap today is not as glaring as it has been in the past—for example, in the 1920s and 1930s. And *second*, the above dataset looks only at the number of authorized circuit judgeships without considering the workload of senior circuit judges.

The first critique highlights a valid shortcoming in the data. Namely, although examining the empirical relationship between population and authorized judgeships serves as a helpful indicator of judicial capacity and the corresponding need for judicial resources, this relationship alone does not fully account for increases in legal complexity. On this point, most law students, clerks, and practitioners agree: the law is complex, and seems to become more and more complex each year. The rise of the administrative state, the proliferation of technology, and the expansion of federal criminal jurisdiction all contribute to this intuitive understanding. Emerging empirical research appears to confirm that, in the past several decades, our legal systems, codes, and cases have become significantly more complex.<sup>51</sup> Put another way, litigating an immigration case in 2020 is very different from litigating an immigration case in 1920, given the increase in the number of administrative rules, the growing overlap of immigration with other areas of law, and the frequent shifts in executive action in the field.<sup>52</sup>

Indeed, Congress seems to have implicitly acknowledged this rise in complexity by significantly increasing the number of *district* court judges—that is, the trial court judges that generally review a lawsuit in the first instance. Since 1990, Congress has authorized eighty-eight new district judgeships through a series of increases that occurred under both Democratic and Republican presidential administrations.<sup>53</sup> Such actions allow district courts to handle more total cases or, as discussed above, more complex cases. Under such circumstances, a corresponding increase in the number of circuit judges seems well warranted—increased district court capacity would, by ex-

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51. See generally J.B. Ruhl & Daniel Martin Katz, *Measuring, Monitoring, and Managing Legal Complexity*, 101 IOWA L. REV. 191, 195–97 (2015) (describing ways to measure increasing complexity of Tax Code); Paul Lippe, Daniel Martin Katz & Dan Jackson, *Legal by Design: A New Paradigm for Handling Complexity in Banking Regulation and Elsewhere in Law*, 93 OR. L. REV. 833, 836 (2015) (observing “the exponential rise of legal complexity”); Peter H. Schuck, *Legal Complexity: Some Causes, Consequences, and Cures*, 42 DUKE L.J. 1, 9 (1992) (“The legal system as a whole exhibits a marked tendency to become more complex . . .”).

52. *Garcia v. U.S. Citizenship & Immigr. Servs.*, 168 F. Supp. 3d 50, 54 (D.D.C. 2016) (“[O]ur Byzantine immigration laws and administrative regulations are second or third in complexity [only] to the Internal Revenue Code.” (quoting *Santiago v. Holder*, 312 F. App’x 867, 868 (9th Cir. 2009) (Pregerson, J. dissenting))).

53. See *U.S. District Courts: Additional Authorized Judgeships*, U.S. CTS., <https://www.uscourts.gov/sites/default/files/districtauth.pdf> [https://perma.cc/6CWG-44DU] (showing sixty-one authorized district judgeships in 1990, nine in 1999, ten in 2000, and eight in 2002).

tension, almost certainly result in an increased demand for appellate case review.<sup>54</sup>

This conclusion dovetails with the second critique described above: whether, given this increase in demand, senior judges can address the deficit in judicial resources at the circuit court level. To be sure, there is little doubt that senior circuit judges “are critical to the federal Judiciary” since, “[w]ithout senior judges, some appellate courts would face ‘a disastrous build-up of backlogs,’ ‘severe[.]’ problems ‘administer[ing] justice in a timely fashion,’ or even a ‘total breakdown in the trial of civil cases.’”<sup>55</sup> But senior judges are at best a partial solution to a much larger problem. First, as a legal matter, there are serious questions as to whether senior judges are unconstitutional; at the very least, their status raises serious constitutional questions regarding the Appointments Clause.<sup>56</sup> Second, senior circuit judges generally cannot hear en banc cases—which, as noted above, are often complex, wide-ranging in scope, and critically important to shaping the law of a circuit.<sup>57</sup> Third, senior circuit judges may choose how many and what types of cases they want to hear—and most such judges do not carry a full caseload (or anywhere close).<sup>58</sup> Hence, although senior judges represent about 40 percent of the federal judiciary, they oversee only about 15 percent of the total federal docket.<sup>59</sup>

The data bears these points out: notwithstanding the presence of senior circuit judges, the recent failure to grow the number of active, authorized circuit judgeships has significantly hampered the administration of justice. The emerging caseload crisis has been well chronicled.<sup>60</sup> Excluding the Federal Circuit, there has been a 21 percent increase in the number of cases filed,

54. See *Court of Appeals Caseloads, 1892–2016*, FED. JUD. CTR., <https://www.fjc.gov/history/exhibits/graphs-and-maps/court-appeals-caseloads-1892-2016>.

55. David R. Stras & Ryan W. Scott, *Are Senior Judges Unconstitutional?*, 92 CORNELL L. REV. 453, 455 (2007) (footnotes omitted) (emphasis added) (first quoting Wilfred Feinberg, Foreword, *Senior Judges: A National Resource*, 56 BROOK. L. REV. 409, 413 (1990); then quoting *Senior Judges Help District Courts Keep Pace*, THIRD BRANCH, May 1994, at 1; and then quoting MARK MENDENHALL, 1990 NINTH CIRCUIT JUDICIAL CONFERENCE REPORT (1990), reprinted in 132 F.R.D. 83, 85 (1991)).

56. *Id.* at 456–57.

57. See 28 U.S.C. § 46(c) (“A court in banc shall consist of all circuit judges in regular active service . . .”).

58. Stras & Scott, *supra* note 55, at 462, 471.

59. See Francis X. Shen, *Aging Judges*, 81 OHIO ST. L.J. 235, 243–44 (2020); Zachary D. Clopton & Andrew D. Bradt, *Party Preferences in Multidistrict Litigation*, 107 CALIF. L. REV. 1713, 1737 n.107 (2019). These numbers aggregate both senior district and circuit judge caseloads; unfortunately, there is no data showing caseloads solely at the appellate level. See Ed Whelan, *Taking Senior Status—Part I*, NAT’L REV.: BENCH MEMOS (Apr. 12, 2019, 12:02 PM), <https://www.nationalreview.com/bench-memos/taking-senior-status-part-1/> [<https://perma.cc/94AV-8XGU>] (“But the courts keep confidential the caseload of each senior judge, so it’s impossible to know how much to count a senior judge . . .”).

60. See, e.g., Roger J. Miner, “*Dealing with the Appellate Caseload Crisis*”: *The Report of the Federal Courts Study Committee Revisited*, 57 N.Y.L. SCH. L. REV. 517 (2012–2013).

terminated, and pending in the circuit courts between 1990 and 2019.<sup>61</sup> That has led to several negative ramifications. Bert Huang, for instance, has found that, because of a surge in cases in the Second and Ninth Circuits, these Circuits “began to reverse district court rulings less often.”<sup>62</sup> These Circuits engaged in “lightened scrutiny” of district courts—in other words, they were no longer doing their job (or doing their job as rigorously).<sup>63</sup> Other legal commentators similarly acknowledge that “the federal bench is long overdue for a comprehensive judgeship bill” because, “[d]espite the explosive growth in federal district and appellate caseloads over the years,” there has been “no increase in appellate court judgeships” for decades.<sup>64</sup>

There are, in short, meaningful nonpartisan reasons to increase federal circuit judgeships. Absent an influx of judicial resources, everyone suffers: circuit judges find it harder to do their job, district judges are subject to less scrutiny, and litigants are deprived of a fair forum of review.<sup>65</sup>

### III. HOW SHOULD WE INCREASE THE NUMBER OF CIRCUIT JUDGES?

Before addressing how to increase the number of circuit judges, two points are worth noting. *First*, expanding the number of circuit judges is far more feasible than packing the Supreme Court. The last time court-packing for the Supreme Court was seriously contemplated was, famously, by President Franklin Roosevelt in the 1930s.<sup>66</sup> But President Roosevelt’s plan was defeated—not just because of the Court’s “switch in time,” but also because “from the moment it was announced,” political resistance to Roosevelt’s plan was “vehement, geographically widespread, and bipartisan.”<sup>67</sup> As Richard Pildes observes, “FDR’s legislative assault on the Court destroyed his political coalition, in Congress and nationally, and ended his ability to enact major domestic policy legislation, despite his huge electoral triumph in 1936.”<sup>68</sup> Consequently, “[i]n the near century since, court-packing has been treated as a political third rail—making the Court’s current size look like an en-

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61. Table 2.1: U.S. Court of Appeals—Cases Filed, Terminated, and Pending (Summary), U.S. CTS., [https://www.uscourts.gov/sites/default/files/data\\_tables/jff\\_2.1\\_0930.2019.pdf](https://www.uscourts.gov/sites/default/files/data_tables/jff_2.1_0930.2019.pdf) [https://perma.cc/TJ8Q-DWMR].

62. Bert I. Huang, *Lightened Scrutiny*, 124 HARV. L. REV. 1109, 1114–15 (2011).

63. *Id.* at 1115.

64. Steven G. Calabresi & Shams Hirji, *Proposed Judgeship Bill* (Northwestern Univ. Pritzker Sch. of L. Pub. L. & Legal Theory Series, No. 17-24, 2017), <https://archive.thinkprogress.org/uploads/2017/11/calabresi-court-packing-memo.pdf> [https://perma.cc/E4QF-5ZX4].

65. See, e.g., Huang, *supra* note 62, at 1145 (“Persistent imbalance in judicial burdens across circuits creates a perplexing problem, [including] the inequality of forcing some courts to do more with less[] and the consequent risk that litigants in those courts might have a harder time winning an appeal.”).

66. See, e.g., Epps & Sitaraman, *supra* note 3, at 153.

67. Richard H. Pildes, *Is the Supreme Court a “Majoritarian” Institution?*, 2010 SUP. CT. REV. 103, 130–31.

68. *Id.* at 132.

trenched, quasiconstitutional norm.”<sup>69</sup> In 1869, there were nine Supreme Court Justices.<sup>70</sup> There remain nine today. But there is no corresponding norm for circuit judges. In 1869, there were nine circuit judges.<sup>71</sup> Today there are 179, an increase of around one per year.<sup>72</sup>

*Second*, increasing the number of circuit judges in the near future is likely inevitable, a fact recognized by actors from both parties. Republican Congressmen have regularly called to either split and/or increase the number of judgeships in the Ninth Circuit to accommodate for the increase in legal claims.<sup>73</sup> In addition to these proposals, in 2008 and 2013, Democratic Senator Patrick Leahy introduced bills to add twelve and five circuit court seats, respectively.<sup>74</sup> In 2017, the Federal Judicial Conference recommended adding five circuit court seats.<sup>75</sup> The relevant question is not whether Congress will increase the number of circuit judges. It is when, where, and by how much.

Answering this last question—how much—may be a political landmine. A core anxiety is that the parties will engage in an arms race: Democrats increase in Phase One, Republicans increase in Phase Two, Democrats retaliate in Phase Three, and so forth.<sup>76</sup> To avoid such a result, Congress might consider the following: (1) a one-time increase, (2) followed by annual single-judge increases.

On (1), there is no perfect solution for how large any one-time increase should be. On one end, Steven Calabresi and Shams Hirji previously proposed adding between 61 and 262 circuit judgeships, in a direct effort to “undo[] President Barack Obama’s judicial legacy.”<sup>77</sup> That proposal was criticized as unserious and risibly partisan from both sides of the political aisle.<sup>78</sup>

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69. Epps & Sitaraman, *supra* note 3, at 164.

70. *Authorized Judgeships*, U.S. CTS. (2019), <https://www.uscourts.gov/sites/default/files/allauth.pdf> [<https://perma.cc/7TCN-7JJA>].

71. *Id.*

72. *Id.*

73. See, e.g., CONG. RSCH. SERV., RL33189, PROPOSALS IN THE 109TH CONGRESS TO SPLIT THE NINTH CIRCUIT COURT OF APPEALS (2006).

74. Federal Judgeship Act of 2008, S. 2774, 110th Cong. § 2(a) (2008); Federal Judgeship Act of 2013, S. 1385, 113th Cong. § 2(a) (2013).

75. *Judicial Conference Asks Congress to Create New Judgeships*, U.S. CTS. (Mar. 14, 2017), <https://www.uscourts.gov/news/2017/03/14/judicial-conference-asks-congress-create-new-judgeships> [<https://perma.cc/7WS6-47D9>].

76. I am unsure whether this concern is well founded. After all, if political gamesmanship is inescapable, how did the political parties manage to increase the number of circuit judges over the past 150 years without triggering a death spiral?

77. Calabresi & Hirji, *supra* note 64, at 1, 15, 21.

78. See Ilya Somin, *The Case Against Court-Packing*, WASH. POST (Nov. 27, 2017, 3:30 P.M.), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/11/27/the-case-against-court-packing/> [<https://perma.cc/8DVK-RHUE?type=image>]; Richard Primus, *Rulebooks, Playgrounds, and Endgames: A Constitutional Analysis of the Calabresi-Hirji Judgeship Proposal*, HARV. L. REV. BLOG (Nov. 24, 2017), <https://blog.harvardlawreview.org/rulebooks->

A similar uproar would presumably ensue if Democrats proposed a one-time increase of 53 circuit judges to offset President Trump's judicial legacy.

A historical perspective could help. As noted, the number of circuit judges has grown on average by about one per year—but all growth ceased in 1991.<sup>79</sup> To make up for lost time, the next president could, in 2021, seek a one-time increase of thirty additional circuit judgeships. Alternatively, Congress could pass a judgeship bill combining the recommendations from recent legislation: twelve circuit judges proposed in 2008 by the Senate, five in 2013 by the Senate, and five in 2017 by the Federal Judicial Conference—for twenty-two judgeships total.<sup>80</sup> These numbers are germs for thought, not full-service prescriptions. The final number added at any one time must leave room for and reflect the realities of political negotiation.

On (2), I selected a continual, one-judge increase because that number approximates both average historical growth in the number of judges and U.S. population growth (between 0.48 and 0.73% over the past five years, which equates to between 0.9 and 1.3 judges per year).<sup>81</sup> Continually increasing the number of circuit judges provides an automated mechanism to address future caseload increases.

Such a mechanism also has the added benefit of conferring democratic legitimacy on the Judiciary. Allowing a popularly elected president an additional opportunity to name circuit judges during his or her tenure creates more democratic accountability within the judicial branch: that is, when my party wins, I get to appoint more judges; and when your party wins, you get to appoint more judges. That feature may help deflect commonly invoked critiques of judicial countermajoritarianism.<sup>82</sup>

For both (1) and (2), political actors must also address *where* the new circuit judgeships are created. A neutral proposal could apportion judgeships based on increases in caseload or population. On the other hand, a more politically conscious proposal could allow for bargaining, where some seats are accorded based on sociopolitical considerations while others are allocated based on population. Leaving this question open provides necessary room for negotiation between the parties.

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playgrounds-and-endgames-a-constitutional-analysis-of-the-calabresi-hirji-judgeship-proposal [https://perma.cc/3F3H-3PKT].

79. See *supra* Figure 1; see also *supra* note 72 and accompanying text.

80. See *supra* notes 74–75 and accompanying text.

81. Sandra Leigh Johnson, *Drops in Natural Increase, Net International Migration Resulted in 0.5% Annual Growth to 328.2 M*, U.S. CENSUS BUREAU (Dec. 30, 2019), <https://www.census.gov/library/stories/2019/12/new-estimates-show-us-population-growth-continues-to-slow.html> [https://perma.cc/5R6N-HMYT].

82. See, e.g., Wang, *supra* note 4 (discussing tethering judicial institutions to majoritarian nomination and confirmation processes).

So much attention has been paid to the makeup of the Supreme Court. But that focus obscures the importance of the federal circuit courts. These courts matter a great deal. They are the “super-appellate” courts that can address issues and correct errors in ways the Supreme Court cannot. Both parties have, over time, increased the number of circuit judges to meet rising demand for judicial resources. Given the stagnation during the past thirty years, it appears ripe to increase that number again. On this score, a transparently partisan proposal could lead to undesirable knock-on effects. An approach that instead provides a one-time increase, followed by single-judge increases each following year, might represent an enduring solution for all actors.