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ANALYSIS

# Federal Judicial Vacancies: The Trial Courts

*By Alicia Bannon*

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## INTRODUCTION

Recent public attention on federal judicial vacancies has largely focused on the appellate courts. Yet, since 2009, the slow pace of nominating and confirming judges has also precipitated a crisis in the district courts — the trial level courts that resolve the vast majority of federal cases. As of July 1, 2013, there were 65 vacancies in the district courts out of a total of 677 judgeships,<sup>1</sup> creating a vacancy rate of almost 10 percent. Only 23 nominees are currently pending before the Senate, while 18 district court judges have been confirmed since the start of 2013.<sup>2</sup> The Administrative Office of the United States Courts anticipates that four additional vacancies will open by July 15, 2013, followed by seven more vacancies by January 2014.<sup>3</sup>

The high number of vacant judgeships limits the capacity of district courts to dispense justice and affects the millions of Americans who rely on district courts to resolve lawsuits and protect their rights. District courts are the workhorses of the federal judicial system, resolving legal disputes, conducting civil and criminal trials, and overseeing cases from filing to termination. These courts touch the lives of everyone from the small business owner in a contract dispute, to the family targeted by consumer fraud, to the artist protecting her copyright from infringement. When district courts are not functioning efficiently, it reverberates throughout our entire judicial system.

This analysis examines data on district court vacancies and judicial workloads since 1992. Its findings suggest that judicial vacancy levels are sufficiently high that it is affecting the functioning of our courts.

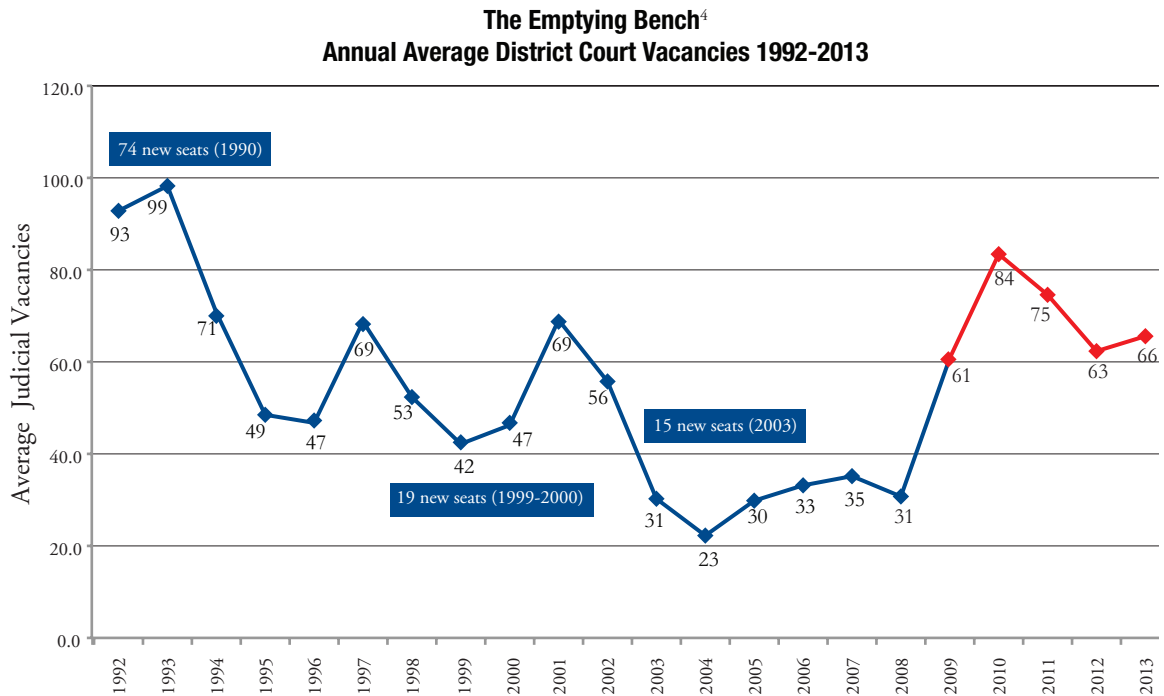
- **Breaking with historical patterns, district court vacancies have remained high throughout Barack Obama's presidency.** District courts typically see brief peaks in vacancies after a presidential election, followed by a sharp decline in subsequent years. Yet, during the Obama administration, after district court vacancies spiked in 2009 they never returned to their previous level and, in fact, have grown further. **For the first time since 1992, the average number of district court vacancies has been greater than 60 for five straight years, from 2009-2013.**
- **Together, high vacancy levels and heavy caseloads are leaving sitting judges with unprecedented workloads.** Counting both full-time active judges and part-time senior judges, the number of pending cases per sitting judge reached an all-time high in 2009 and was higher in 2012 than at any point from 1992-2007.
- **Vacancies are hurting districts with the greatest needs.** Judicial emergencies, a measure by the Administrative Office of the United States Courts of vacancies in districts with the most acute need for judges, have been higher in 2010-2012 than at any other point since 2002 (the last year for which comparable data is available).

These findings demonstrate the urgent need for the President and Senate to act to fill district court vacancies. Indeed, our findings suggest that to fully address the increasing district court workload, more judgeships are required — further highlighting the importance of filling vacant seats now.

# ANALYSIS

## I. District Court Vacancies Are at Historically Unsustainable Levels

Figure 1



The chart above shows annual averages for United States District Court vacancies from 1992-2013. The red numbers show the number of vacancies from 2009-2013.

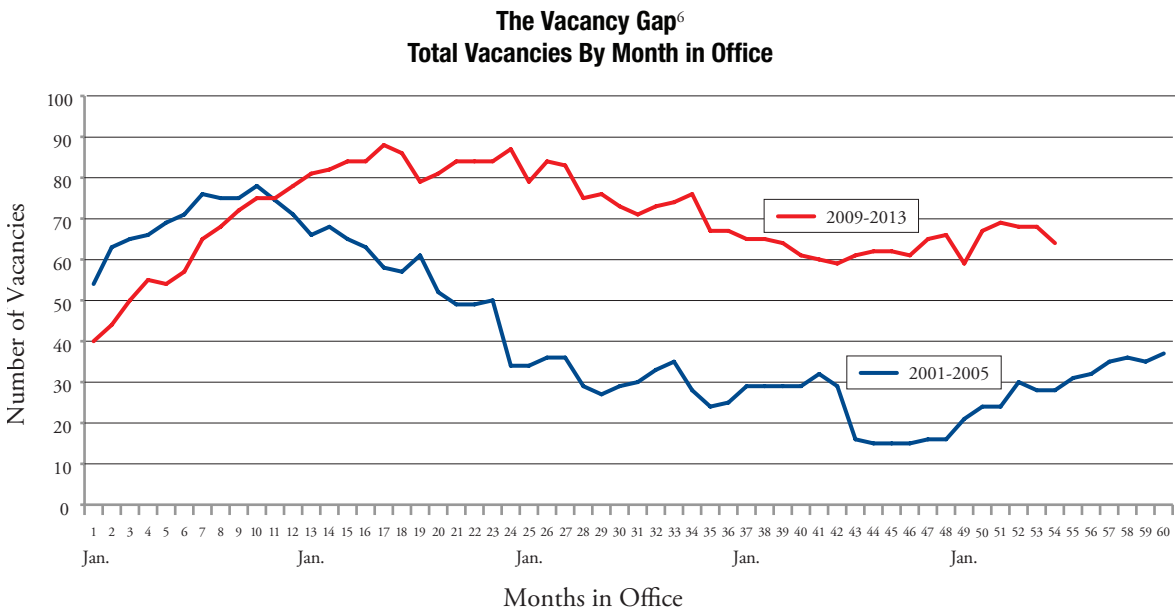
Judicial vacancies usually increase at the start of a new administration, as can be seen in the peaks in 1993, 2001 and 2009. There are also usually jumps when a president begins a second term, as was the case in 1997, 2005 and 2013. (This chart also reflects increases in vacancies due to the creation of new judgeships: 74 in 1990, 9 in 1999, 10 in 2000, and 15 in 2003.) This increase in vacancies at the start of a new presidential term may in part reflect the decisions of judges who waited for the outcome of a presidential election before choosing to leave active service. It may also reflect the slower pace of judicial confirmations during an election season, as well as the delay a new administration may have in submitting nominations.

As Figure 1 shows, vacancies usually plunge dramatically after these post-election spikes: average vacancies dropped by 28 percent in 1994, 24 percent in 1998, and 19 percent in 2002, never again coming close to the post-election peak in the four years that followed. However, while the jump in vacancies in 2009 was consistent with past experience, the 2009 vacancy spike never went down and, in fact, has increased.<sup>5</sup>

Since 2009, the annual average number of district court vacancies has been 61, 84, 75, 63 and 66. As the chart shows, the average number of vacancies has never fallen below the 61 open seats in 2009 — the only time since 1992 that there have been that many open seats for a five-year period. From 2009-2013, the district court vacancy rate has varied between 9 and 12 percent; in the decade prior, only one year, 2001, had a vacancy rate within that range. And, while average vacancies declined from 2010 through 2012, in 2013 it has ticked up again to 66.

The contrast with past experience is even more striking when one plots the number of vacancies by the months of a president’s term in office. President Obama is now in his 55th month in the White House. The chart below shows how the number of monthly judicial vacancies during his presidency compares to that of his immediate predecessor, President George W. Bush. (Missing data do not permit a similar comparison to Bill Clinton’s presidency.)

**Figure 2**



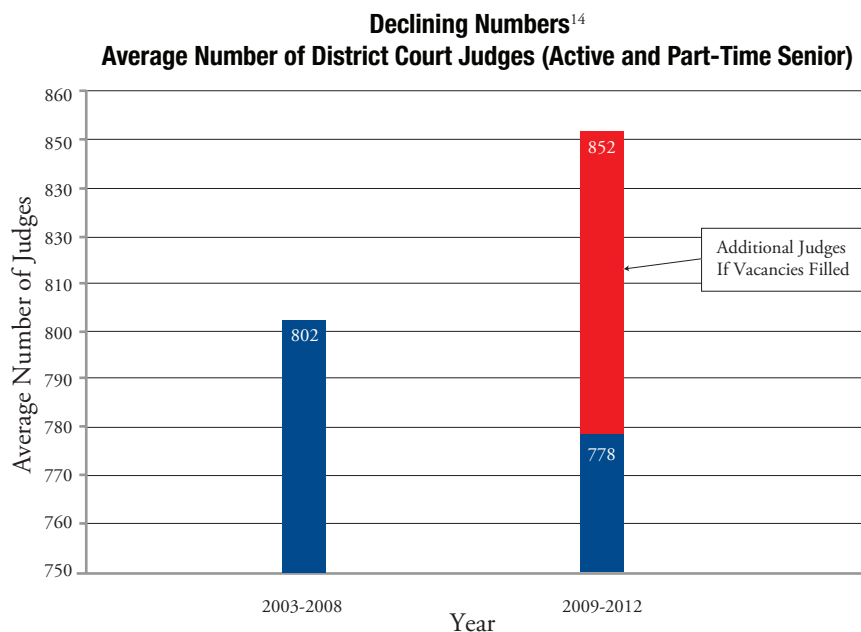
As this chart shows, Obama began his first term with 26 percent fewer vacancies than did Bush (54 vs. 40). Yet, before the end of Obama’s first year in office, the number of vacancies surpassed the number of vacancies at the same point in Bush’s term, and monthly vacancies have been substantially higher ever since.

Several factors likely account for the unusually high and sustained level of district court vacancies since 2009. District courts experienced an atypically large number of retirements during the first three years of the Obama presidency, leading to a surge in the number of open seats,<sup>7</sup> while at the same time, fewer total district court nominees were confirmed during President Obama’s first term than in other recent administrations.<sup>8</sup> Nominees also faced record wait times from nomination to confirmation in the Senate as compared to other recent administrations,<sup>9</sup> and the President also trailed his predecessors with respect to the number of judges nominated during his first three years in office.<sup>10</sup> Finally, many home state senators have been slow to recommend nominees to the President, particularly in states with two Republican senators, which has delayed the process of identifying nominees.<sup>11</sup>

The resulting sustained high level of judicial vacancies has troubling implications for district courts and their ability to effectively resolve cases. When judges retire from active service, they typically take on what is known as “senior status,” continuing to work part-time, with an average of about 50-60 percent of an active judge’s caseload.<sup>12</sup> When the system of judicial appointments is healthy and vacancies are filled, senior judges increase courts’ capacity. But, in a system where vacancies continue to grow, the ranks of senior judges are not large enough to absorb the increased workload of the remaining full-time judges.

Figure 3 compares the number of sitting judges from 2003-2008 with the number from 2009-2012 (2003 was the last time additional judges were authorized for the district court). Senior judges are counted as half-judges because of their reduced workload. As the chart shows, counting senior judges, there were 24 fewer district court judges on average in 2009-2012 as compared with 2003-2008 (778 vs. 802). In contrast, if all vacancies had been filled in 2009-2012, there would have been an average of 50 *more* judges available to hear cases as compared with 2003-2008 (852 vs. 802).<sup>13</sup>

**Figure 3**

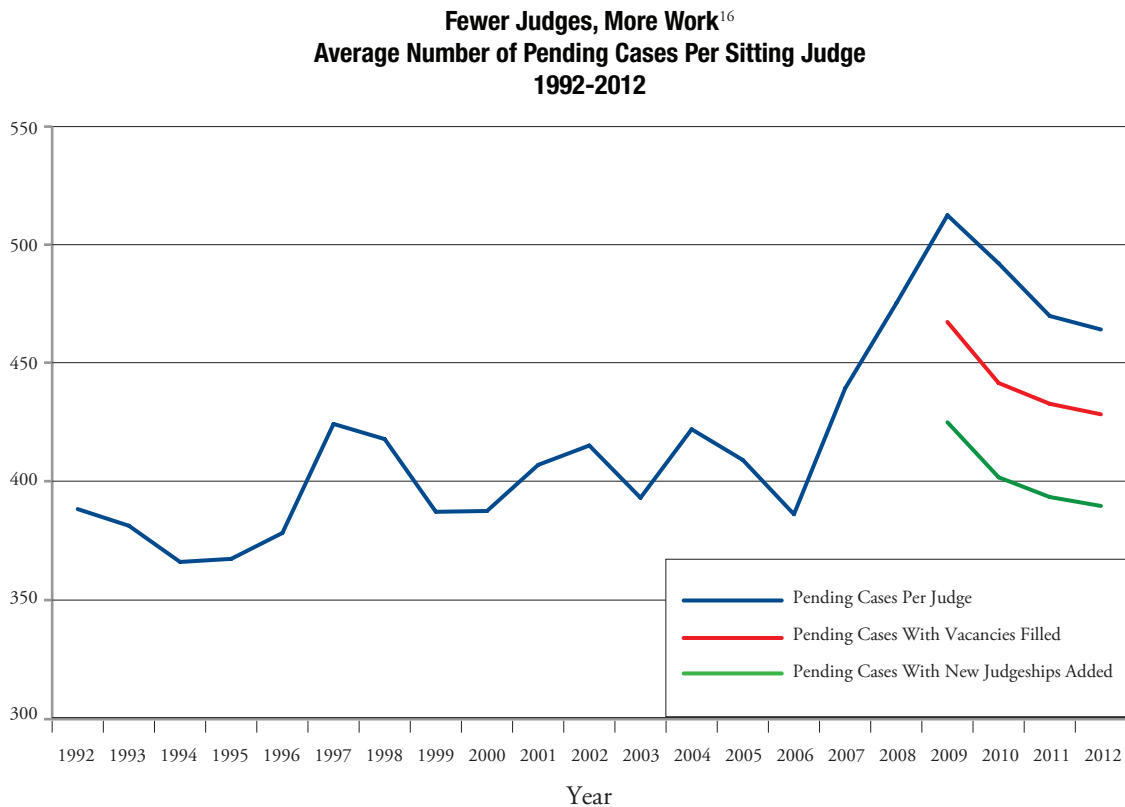


## II. District Court Workloads Are Reaching New Heights

This judge shortage is also increasing the average number of cases that district court judges are handling.

Figure 4 shows the yearly average number of pending cases for each sitting district court judge, including those on senior status counted as half-judges. The red line estimates what the per-judge caseload would have been during 2009-2012 if all vacancies had been filled. The green line estimates per-judge caseload with all vacancies filled and the addition of 85 new judgeships, the number recommended by the Judicial Conference of the United States, the policy-making body of the federal courts.<sup>15</sup>

Figure 4



As this Figure shows, the number of pending cases per sitting judge reached an all-time high in 2009 and was higher in 2012 than at any point from 1992-2007. A judge in 1992 had an average of 388 pending cases on his or her docket. By 2012, the average caseload had jumped to 464 cases — a 20 percent increase. The average per-judge caseload in 2009-2012 was likewise 13 percent higher than the average for the preceding four years.<sup>17</sup>



Growth in overall district court caseloads is one reason for this growing burden. The total number of pending felony and civil cases has grown by nearly 40 percent since 1992, and by more than 17 percent since 2003, the last time new district court judgeships were created. It reached an all-time high in 2009, followed by a slight decline in 2010-2012, due principally to the termination of tens of thousands of asbestos cases in the Eastern District of Pennsylvania in 2010-2012 and a decline in the filing of new asbestos cases in that district in 2012.<sup>18</sup>

The growth in total pending cases itself reflects both an increase in the number of filed cases and an inability of judges to clear their dockets. Total filed cases have increased by more than 45 percent since 1992, while total “weighted filings,” the number of filed cases weighted by an estimate by the Administrative Office of the U.S. Courts as to how time-consuming they are likely to be, has grown by more than 13 percent since 1999 (the last year for which comparable data is available).<sup>19</sup> Meanwhile, older cases are increasingly clogging district court dockets. Since 2000, cases that are more than three years old have made up an average of 12 percent of the district court docket, compared to an average of 7 percent from 1992-1999.

As Figure 4’s red line indicates, the 2009-2012 vacancy crisis has significantly exacerbated the burden on sitting judges from these record caseloads. Had all vacancies in 2009-2012 been filled, judges would have had an average of 42 fewer pending cases on their dockets each year — still higher than historic levels, but a significantly less stark disparity than exists now. In fact, to fully compensate for the increased caseloads more judgeships are required — reinforcing the necessity of at least filling existing vacant seats. The green line in Figure 4 estimates what per-judge caseloads would be if all 2009-2012 vacancies had been filled and Congress had authorized and filled the 85 additional judgeships recommended by the Judicial Conference of the United States. In that circumstance, pending cases per judge would be similar to the levels of the late 1990s. Indeed, Figure 5, which lists additional judgeships authorized by Congress since 1960, suggests that the creation of new seats is long overdue. No new judge seats have been added to the district courts since 2003, and the last large-scale increase in the number of judges was in 1990.

**Figure 5**

**No New Judgeships Since 2003<sup>20</sup>**  
**Additional Judgeships Authorized By Congress Since 1960**

	Permanent Judgeships Added	Temporary Judgeships Added	Temporary Judgeships Converted to Permanent	
1961	61	2	4	
1966	30	5		
1970	58	3	4	
1978	113	4		
1984	53	8	2	
1990	61	13	8	last major increase
1999	9			
2000	10			
2002 ( <i>took effect in 2003</i> )	8	7	4	most recent increase

**Authorized Judgeships in 1960:**  
 241 permanent seats, 4 temporary seats

**Authorized Judgeships in 2012:**  
 667 permanent seats, 10 temporary seats

Importantly these figures actually *understate* the benefit from filling judgeships. An increase in the number of sitting judges in 2009-2012 would have enabled courts to clear backlogs and led to fewer pending cases in subsequent years. Alternatively, if the surge in per-judge workloads is not addressed now, judges in future years will be left to address the backlog.

### III. Judicial Emergencies Hit Record High

Because caseloads in individual districts vary, aggregate data on district court caseloads is only one piece of the larger story. For example, weighted filings per judgeship grew by more than six percent in the Southern District of New York from September 2011 to September 2012, while falling more than 12 percent in the Southern District of Texas.<sup>21</sup>

One way to gauge the severity of the vacancy problem is to examine the number of “judicial emergencies” declared by the Administrative Office of the U.S. Courts.<sup>22</sup> The Office relies upon a variety of measurements to declare an emergency, including the number of filed cases in each district, weighted by an estimate of the relative judge-time, on average, that different case types require.<sup>23</sup>

Figure 6

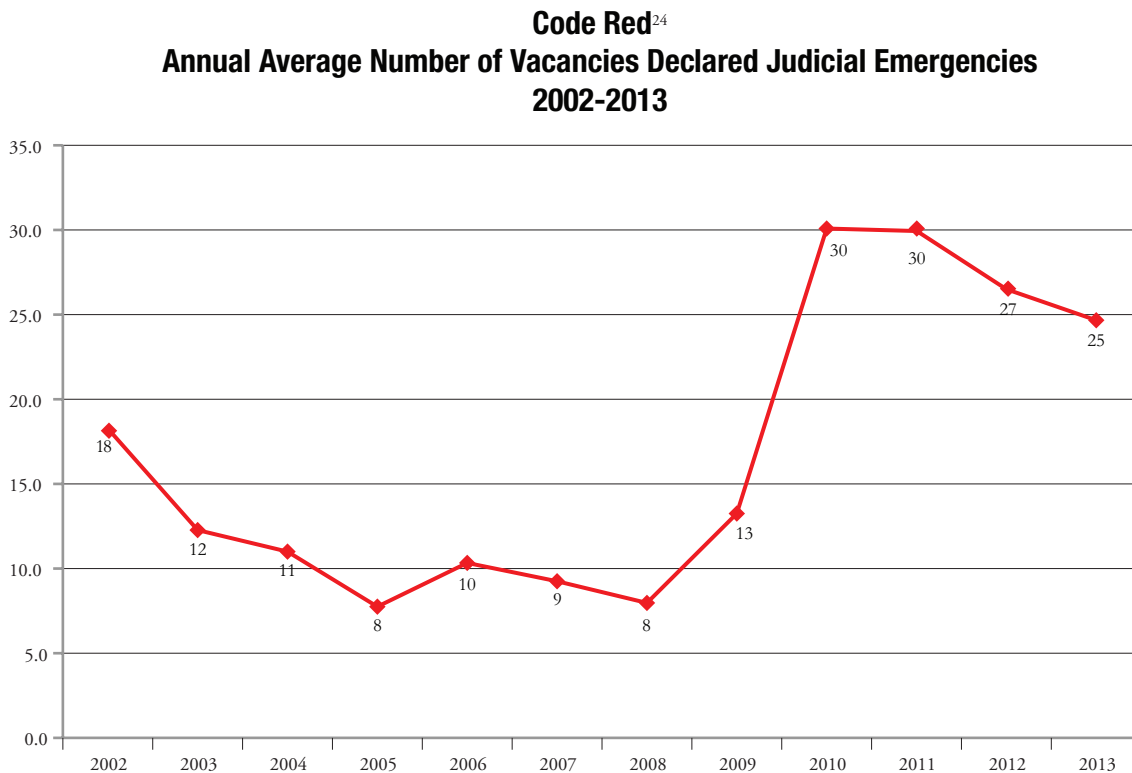


Figure 6 shows the average number of declared judicial emergencies from 2002 through 2013.<sup>25</sup> (Because of changes in how judicial emergencies are calculated, comparative data is only available for this period.) Since 2010, the federal district courts have been hobbled by an unprecedented number of judicial emergencies. 2013 saw an average of 25 judicial emergencies — more than three times the average in 2008, and more than 2.5 times the average from 2002-2008. This data suggests that vacancies are hurting the courts that need judges most.

## **CONCLUSION**

Justice delayed due to overworked judges can too often mean justice denied. The ongoing vacancy crisis in the district courts is unprecedented, and judges and litigants are paying the price as dockets grow. Action is urgently required to fill vacant district court judgeships, so that the courts are capable of delivering justice despite increasing caseloads.

## ENDNOTES

- <sup>1</sup> Administrative Office of the United States Courts, Article III Vacancies – As of July 1, 2013, <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies.aspx> (last visited July 1, 2013).
- <sup>2</sup> *Id.*; Administrative Office of the United States Courts, Judicial Confirmation Listing, <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/ConfirmationListing.aspx> (last visited July 1, 2013).
- <sup>3</sup> Administrative Office of the United States Courts, Future Vacancies in the Federal Judiciary, <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/FutureJudicialVacancies.aspx> (last visited July 1, 2013).
- <sup>4</sup> *See* Administrative Office of the United States Courts, Archive of Judicial Vacancies, <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/ArchiveOfJudicialVacancies.aspx/> (last visited July 1, 2013) (monthly data on judicial vacancies). Calculation of annual averages on file with author. 2013 annual vacancy average based on monthly data through June 1, 2013.
- <sup>5</sup> Vacancies in 2006-2008 also broke with past patterns, creeping up further in 2006-2007 before declining again in 2008. Total vacancy levels in 2005-2008 were at historic lows, however, and were less than half what was seen in 2009-2013.
- <sup>6</sup> *See* Administrative Office of the United States Courts, *supra* note 4 (monthly data on judicial vacancies). Due to missing data, the November 2001 vacancy level is estimated using an average of the vacancies in October and December 2001.
- <sup>7</sup> *See* RUSSELL WHEELER, BROOKINGS INSTITUTION, JUDICIAL NOMINATIONS AND CONFIRMATIONS AFTER THREE YEARS – WHERE DO THINGS STAND? 2 (2012), *available at* [http://www.brookings.edu/-/media/research/files/papers/2012/1/13%20nominations%20wheeler/0113\\_nominations\\_wheeler.pdf](http://www.brookings.edu/-/media/research/files/papers/2012/1/13%20nominations%20wheeler/0113_nominations_wheeler.pdf).
- <sup>8</sup> *See* BARRY J. McMILLION, CONGRESSIONAL RESEARCH SERVICE, PRESIDENT OBAMA’S FIRST-TERM U.S. CIRCUIT AND DISTRICT COURT NOMINATIONS: AN ANALYSIS AND COMPARISON WITH PRESIDENTS SINCE REAGAN 10 (2013) (President Obama had fewer district court nominees confirmed than did his past three predecessors, but more confirmed judges than President Ronald Reagan).
- <sup>9</sup> *See Id.* at 14-15 (President Obama’s district court nominees had longer median and average wait times from nomination to confirmation than did the nominees from his past four predecessors).
- <sup>10</sup> *See* ALLIANCE FOR JUSTICE, THE STATE OF THE JUDICIARY: JUDICIAL SELECTION AT THE BEGINNING OF PRESIDENT OBAMA’S SECOND TERM 10 (2013), *available at* <http://www.afj.org/judicial-selection/state-of-the-judiciary-march-2013.pdf>.
- <sup>11</sup> *See* Alliance for Justice, Judicial Vacancies Without Nominees (June 13, 2013), *available at* <http://www.afj.org>.

org/judicial-selection/judicial-vacancies-without-nominees.pdf (last visited June 20, 2013).

- <sup>12</sup> See Hon. Frederic Block, *Senior Status: An “Active” Senior Judge Corrects Some Common Misunderstandings*, 92 CORNELL L. REV. 533, 540 (2007) (senior judges on average carry approximately 50 percent of an active judge’s workload, but amounts vary widely across districts); Stephen B. Burbank et al., *Leaving the Bench, 1970-2009: The Choices Federal Judges Make, What Influences Those Choices, And Their Consequences*, 161 U. PA. L. REV. 1, 29 (2012) (senior district court judges with chambers and staff carry approximately 63 percent of an active judge’s caseload). This Analysis counts senior judges as one-half of an active judge; the results are similar if senior judges are counted as 60 percent of an active judge.
- <sup>13</sup> Note, however, that the number of magistrate judges, judicial officers who are appointed by the court for four- or eight-year terms, has also increased in recent years, from 583 in 2003 to 640 in 2012 (including full-time and part-time judges, as well as retired magistrate judges recalled to service). See ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS (1997 through 2012), tbl. U.S. Magistrate Judge Positions Authorized by the Judicial Conference, *available at* <http://www.uscourts.gov/Statistics/JudicialBusiness/archive.aspx>. Although duties vary widely across districts, magistrate judges frequently handle pre-trial matters and adjudicate petty and misdemeanor cases; they may also conduct trials with the consent of the parties. The high level of district court vacancies still impacts overall judging capacity even taking into account increased assistance by magistrate judges, however, both because magistrate judges have limited powers and because courts would have the assistance of district court judges *and* magistrate judges if vacancies were filled.
- <sup>14</sup> ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, *supra* note 13, tbl. Status of Article III Judgeship Positions. Yearly data is as of September 30. Total judges are calculated as the sum of active judges plus senior judges counted at half-time.
- <sup>15</sup> The Judicial Conference recommends the creation of 65 additional permanent and 20 additional temporary judgeships. See Judicial Conference Judgeship Recommendations (Mar. 2013), *available at* <http://www.uscourts.gov/uscourts/JudgesJudgeships/docs/judgeship-recommendations.pdf>.
- <sup>16</sup> Graph calculated by dividing total pending cases by the total number of active and senior judges (counted as half-judges). Data on the number of active and senior judges is from ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, *supra* note 13, tbl. Status of Article III Judgeship Positions. Data on pending cases is from Administrative Office of the United States Courts, Federal Court Management Statistics (1997 through 2012), *available at* [http://www.uscourts.gov/Statistics/FederalCourtManagementStatistics/FederalCourtManagementStatistics\\_Archive.aspx](http://www.uscourts.gov/Statistics/FederalCourtManagementStatistics/FederalCourtManagementStatistics_Archive.aspx). Yearly data is as of September 30. Calculations are on file with author.

- <sup>17</sup> Although the number of magistrate judges has also increased, from 486 in 1992 to 640 in 2012 (including full-time and part-time judges, as well as retired magistrate judges recalled to service), similar patterns of per-judge caseloads hold when magistrate judges are treated as the equivalent of a part-time judge. *See* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, *supra* note 13, tbl. U.S. Magistrate Judge Positions Authorized by the Judicial Conference. Calculations on file with author.
- <sup>18</sup> *See* Administrative Office of the United States Courts, Federal Court Management Statistics (1997 through 2012), *supra* note 16; ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: DISTRICT COURT SUMMARY (2012), *available at* <http://www.uscourts.gov/Statistics/JudicialBusiness/2012/us-district-courts.aspx>; ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS SUMMARY 17 (2011), *available at* [http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/JudicialBusiness2011\\_Summary.pdf](http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/JudicialBusiness2011_Summary.pdf); ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 21 (2010), *available at* <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/JudicialBusinesspdfversion.pdf>.
- <sup>19</sup> “Weighted filings” are calculated by the Administrative Office of the United States Courts by apportioning weights to different categories of filed cases based on the amount of time they are expected to require. *See* Administrative Office of the United States Courts, Federal Court Management Statistics, Explanation of Selected Terms (Sept. 2012), <http://www.uscourts.gov/viewer.aspx?doc=/uscourts/Statistics/FederalCourtManagementStatistics/2012/explanation-of-selected-terms-september-2012.pdf>. Due to changes in the weighting formula, consistent data prior to 1999 is not available. Total weighted filings have fluctuated significantly, peaking in 2004 and rising again to near-peak levels in 2012.
- <sup>20</sup> Administrative Office of the United States Courts, U.S. District Courts: Additional Authorized Judgeships, <http://www.uscourts.gov/JudgesAndJudgeships/Viewer.aspx?doc=/uscourts/JudgesJudgeships/docs/district-judgeships.pdf> (last visited June 19, 2013).
- <sup>21</sup> Administrative Office of the United States Courts, Federal Court Management Statistics (Sept. 2012), *available at* <http://www.uscourts.gov/Statistics/FederalCourtManagementStatistics/district-courts-september-2012.aspx>.
- <sup>22</sup> District court judicial emergencies are defined as any vacancy where weighted filings are in excess of 600 per judgeship, or any vacancy in existence more than 18 months where weighted filings are between 430 to 600 per judgeship, or any court with more than one authorized judgeship and only one active judge. *See* Administrative Office of the United States Courts, Judicial Emergencies, <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/JudicialEmergencies.aspx> (last visited June 4, 2013).
- <sup>23</sup> The impact of judicial emergencies can also vary across districts, because the emergency designation does not account for the assistance of senior judges or visiting judges. *See* RUSSELL WHEELER & SARAH BINDER, BROOKINGS INSTITUTION, DO JUDICIAL EMERGENCIES MATTER? NOMINATION AND CONFIRMATION DELAY

DURING THE 111<sup>TH</sup> CONGRESS 2 (2011), *available at* [http://www.brookings.edu/-/media/research/files/papers/2011/2/16%20judicial%20emergencies%20wheeler%20binder/0216\\_judicial\\_emergencies\\_wheeler\\_binder.pdf](http://www.brookings.edu/-/media/research/files/papers/2011/2/16%20judicial%20emergencies%20wheeler%20binder/0216_judicial_emergencies_wheeler_binder.pdf). Nevertheless, the emergency designation provides more information than overall vacancy levels about the likely burden an open seat will pose.

- <sup>24</sup> See Administrative Office of the United States Courts, *supra* note 4 (monthly data on judicial emergencies). 2013 annual average based on monthly data through June 1, 2013. Calculation of annual averages for judicial emergencies on file with author.
- <sup>25</sup> Judicial emergencies as a percentage of all vacancies has been relatively constant since 2002. Judicial emergencies were an average of 33 percent of all vacancies from 2002-2008 and an average of 35 percent of all vacancies from 2009-2012.

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