

## Reps. Want To Add Lower Court Judges, But Divided On How

By **Andrew Kragie**

Law360 (February 24, 2021, 4:51 PM EST) -- A House hearing Wednesday showcased bipartisan interest in boosting the number of federal judges on busy lower courts, but also illustrated potential snags, from partisan fights over timing to the thorny question of adding appellate seats, especially in the Ninth Circuit.



Rep. Darrell Issa, R-Calif., left, talks with Rep. Jim Jordan, R-Ohio, during a House Judiciary Subcommittee on Courts, Intellectual Property and the Internet hearing on "The Need for New Lower Court Judgeships, 30 Years in the Making" in Washington on Tuesday, Feb. 23, 2021. (Photo by Caroline Brehman/CQ Roll Call via AP Images)

Democrats on the House Judiciary Committee convened the hearing with district judges and law professors to galvanize support for a comprehensive bill that would add judgeships to overburdened courts, a goal that has eluded Congress for 30 years despite interest on both sides of the aisle.

The judiciary is expected to give lawmakers new **recommendations** next month, an update that could inspire legislation to add seats in California, Texas, New York, Florida and about a dozen other states.

"I fear that in many ways litigants see that the courtroom doors are closing rather than opening," Arizona U.S. District Judge Diane J. Humetewa told lawmakers. The backlog of cases caused by the shortage of judges "really does damage to what courtrooms are meant to be: public forums."

Chief U.S. District Judge Kimberly J. Mueller of the Eastern District of California described workloads so overwhelming that cases are sometimes docketed to a "Judge NONE." She said staff juggle urgent matters like "triage nurses" while judges try to manage cases rushing by like chocolates on the production line on "I Love Lucy."

Marin K. Levy, a Duke University law professor, made the case for new circuit judges too. Appeals courts have adapted to rising caseloads by empowering staff attorneys to manage lower-profile cases with little judicial supervision, she said. Oral arguments have been curtailed and many appeals are resolved with "cursory" unpublished decisions.

Lawmakers were receptive.

"We imagine a system of open and equal justice accessible to everyone, where each and every case is closely supervised by a federal judge who ensures that the case is resolved both fairly and efficiently," said Rep. Hank Johnson, the Georgia Democrat who chairs the subcommittee on court administration. "This vision falls apart if the judicial system doesn't have enough judgeships to ensure that disputes are not only resolved correctly but also without unjustifiable expense and delay."

The panel's top Republican, California Rep. Darrell Issa, agreed that "justice delayed is justice denied" and lamented how slow courts can push people into alternatives like mediation. He endorsed new judgeships, pointing to his plan to add 52 new district judgeships that **won committee approval in September 2018**.

"We ran out of time to get it through the Senate. That should not happen [this time]. We must work diligently through the early days of this Congress," Issa said. "We need to send a clear message that this is going to become law. ... I believe there is broad agreement here."

However, he also raised contentious issues. Issa said the new judgeships should have an effective date of 2025 or later, so that both parties have a shot at controlling the presidency and naming the new judges.

Partisans generally balk at giving the other party more judicial vacancies to fill. Republicans still rue a lower-court expansion in the late 1970s that gave President Jimmy Carter dozens of extra appointments. A last-minute **GOP proposal last year** would have divided 65 district judgeships between 2021 and 2025.

Several Democrats pushed back on the idea of delayed or staggered effective dates, saying it would limit President Joe Biden's ability to diversify the bench after President Donald Trump's **appointees were 85% white and 76% male**.

"President Biden has committed to building a judiciary that truly represents America, and by expanding the courts we can help him achieve that goal faster," said Rep. Mondaire Jones, D-N.Y.

Issa also brought up the Ninth Circuit, the only appeals court where the judiciary has recently requested reinforcements. Republicans have long sought to break up the sprawling circuit, whose historical liberal tilt has been **diminished** by Trump's 10 appointees.

"Today the Ninth Circuit is relatively balanced, and perhaps this is the most nonpartisan time to reorganize the Ninth Circuit," Issa said.

The GOP's witness, Vanderbilt Law School professor Brian T. Fitzpatrick, argued the 29-member court is unwieldy and disproportionately reversed by the U.S. Supreme Court, a statistical assertion **debated among scholars and fact-checkers**.

Fitzpatrick endorsed a split that would keep Northern California with northwestern states and Southern California with southwestern states, making the Golden State the only one divided between federal circuits.

Democrats have long resisted a split and are unlikely to accept the proposal in a compromise deal. Although the party controls both chambers of Congress, they would need some Republican support to avoid a Senate filibuster.

GOP lawmakers grumbled about the timing of Wednesday's hearing, noting that Democrats did not seek new judgeships after they reclaimed the House majority two years ago.

"Well, we had a Republican president," said Rep. Steve Chabot, R-Ohio. "Now we have a Democrat president. So one of the first orders of business for this committee is to hold a hearing with the goal of adding new federal judges."

Rep. Dan Bishop, R-N.C., forecast another cause for opposition when he suggested that "expanding lower courts may be a ploy to render the Supreme Court less able effectively to manage them."

The partisan considerations illustrate why experts say adding new judgeships **remains a long shot**.

However, a Democratic House aide said the hearing was promising.

"It's been a while since there's been as much interest in doing this," the aide said. "It's a really heavy lift ... but if you were to bet, your odds would be better than before."

--Editing by Adam LoBelia.