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NOTES

Visiting Judges

Marin K. Levy*

Despite the fact that Article III judges hold particular seats on particular courts, the federal system rests on judicial interchangeability. Hundreds of judges "visit" other courts each year and collectively help decide thousands of appeals. Anyone from a retired Supreme Court Justice to a judge from the U.S. Court of International Trade to a district judge from out of circuit may come and hear cases on a given court of appeals. Although much has been written about the structure of the federal courts and the nature of Article III judgeships, little attention has been paid to the phenomenon of "sitting by designation"—how it came to be, how it functions today, and what it reveals about the judiciary more broadly.

This Article offers an overdue account of visiting judges. It begins by providing an origin story, showing how the current practice stems from two radically different traditions. The first saw judges as fixed geographically, and allowed for visitors only as a stopgap measure when individual judges fell ill or courts fell into arrears with their cases. The second assumed greater fluidity within the courts, requiring Supreme Court Justices to ride circuit—to visit different regions and act as trial and appellate judges—for the first half of the Court's history. These two traditions together provide the critical context for modern-day visiting.

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* Associate Professor of Law, Duke University School of Law.

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The Article then presents a thick descriptive analysis of contemporary practice. Relying on both qualitative and quantitative data, it brings to light the numerous differences in how the courts of appeals use outside judges today. While some courts regularly rely on visitors for workload relief, others bring in visiting judges to instruct them on the inner workings of the circuit, and another eschews having visitors altogether in part because the practice was once thought to be used for political ends.

These findings raise vital questions about inter- and intra-circuit consistency, the dissemination of culture and institutional knowledge within the courts, and the substitutability of federal judges. The Article concludes by taking up these questions, reflecting on the implications of visiting judges for the federal courts as a whole.

INTRODUCTION

In February 2015, the Ninth Circuit issued an opinion in a closely followed insider-trading case, *United States v. Salman*.[1] The issue at hand—whether evidence of a family relationship between the insider and the "tippee" is sufficient to show that the insider received a personal benefit when passing

1. 792 F.3d 1087 (9th Cir. 2015).

on the insider information[2]—was a point of particular interest, since a major case in the Second Circuit, *United States v. Newman*, had recently held such evidence to be insufficient.[3] The Ninth Circuit ultimately rejected the Second Circuit approach, thereby creating a circuit split on the issue.[4] But what made the story truly riveting was the author of the *Salman* opinion: Jed Rakoff, a district judge for the Southern District of New York[5] and an outspoken critic of the *Newman* decision,[6] who was sitting by designation. Regarding the Second Circuit's earlier decision, Judge Rakoff wrote on behalf of the Ninth Circuit that "*we* would not lightly ignore the most recent ruling of *our sister circuit* in an area of law that it has frequently encountered," but "[o]f course, *Newman* is not binding on *us*."[7]

It is astonishing that a district judge for the Southern District of New York—whose opinions are ordinarily subject to reversal by the Second Circuit—can author an opinion for the Ninth Circuit creating a conflict with his own reviewing court. Even more astonishing is that this conflict produced Supreme Court review, and that the visiting judge's opinion was ultimately upheld.[8] But the episode is not entirely anomalous. Despite the fact that Article III judges are nominated for particular seats on particular courts,[9] the federal system functions with judicial interchangeability virtually every day. Hundreds of judges each year sit by designation on other federal courts, whether in different locations or different points in the judicial hierarchy.[10] Officially, the practice of "borrowing" judges exists as a way to ease particularly high

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2. *Id.* at 1091–92.

3. *See* United States v. Newman, 773 F.3d 438 (2d Cir. 2014).

4. *See Salman*, 792 F.3d at 1091–94.

5. *Id.* at 1088.

6. *See* Peter J. Henning, *Judge Rakoff Ruling on Tips May Help Prosecution on Insider Trading Cases*, N.Y. TIMES (July 7, 2015), https://www.nytimes.com/2015/07/08/business/dealbook/judge-rakoff-ruling-on-tips-may-help-prosecution-on-insider-trading-cases.html [https://perma.cc/X4B4-SPQH].

7. *Salman*, 792 F.3d at 1092 (emphasis added).

8. *See* Salman v. United States, 137 S. Ct. 420 (2016).

9. For example, a recent announcement of judicial candidate nominations specifically noted each nominee and the court on which they would serve if confirmed by the Senate. *See* Press Release, The White House, Office of the Press Secretary, President Donald J. Trump Announces Judicial Candidate Nominations (Feb. 12, 2018), https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-eleventh-wave-judicial-nominees [https://perma.cc/65UU-FNAV] ("If confirmed, Mark J. Bennett of Hawai'i will serve as a Circuit Judge on the U.S. Court of Appeals for the Ninth Circuit. . . . If confirmed, Nancy E. Brasel of Minnesota will serve as a District Judge on the U.S. District Court for the District of Minnesota.").

10. According to the most recent statistics by the Administrative Office of the U.S. Courts, 292 judges visited the U.S. courts of appeals in the twelve-month period ending September 30, 2017, including 36 circuit judges, 256 district judges, and 8 judges from courts of special jurisdiction. *See* JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2017 ANNUAL REPORT OF THE DIRECTOR, ADMIN. OFF. U.S. CTS. tbl.V-2 (2017) [hereinafter JUDICIAL BUSINESS OF THE UNITED STATES COURTS (2017)], http://www.uscourts.gov/sites/default/files/data_tables/jb_v2_0930.2017.pdf [https://perma.cc/2H2Q-5FXW].

workloads.[11] If a given circuit has a relatively large caseload one year and could use relief, judges from other circuits, district judges from both within and outside of the circuit, and other Article III judges may then be fielded to assist the court.[12] From September 2016 to September 2017, visiting judges of all kinds were involved in deciding approximately 4,300 federal appeals.[13] Nearly 2,000 of those appeals were decided on the merits after oral argument—representing almost 30 percent of such cases in the federal courts.[14]

Although much scholarship has examined the structure of the federal courts and the nature of Article III judgeships, almost none has focused on the phenomenon of visiting judges.[15] The handful of existing articles on the subject have focused on important but relatively narrow aspects of sitting by designation. For example, a few have examined how different types of visitors perform—mainly by looking to how often they write majority opinions or dissents as compared to "home" judges.[16] Yet larger questions loom about the

11. See, for example, a discussion of how "visiting and senior judges provide short-term relief." THE FEDERAL BENCH—ANNUAL REPORT, ADMIN. OFF. U.S. CTS. (2016), http://www.uscourts.gov/statistics-reports/federal-bench-annual-report-2016 [https://perma.cc/2NAN-492L].

12. *See* 28 U.S.C. § 291 (2012) (circuit judges); 28 U.S.C. § 292 (2012) (district judges); 28 U.S.C. § 293 (2012) (judges from the U.S. Court of International Trade); 28 U.S.C. § 294 (2012) (retired Supreme Court Justices).

13. Specifically, in the twelve-month period ending September 30, 2017, visiting judges provided services in 4,356 appeals at the U.S. Courts of Appeals. *See* JUDICIAL BUSINESS OF THE UNITED STATES COURTS, *supra* note 10, at tbl.V-2. To give some perspective, 54,347 cases were terminated in the Courts of Appeals during this time. *See id.* at tbl.B-1. That said, relatively few appeals are decided in the federal courts on the merits, following oral argument—only 6,913 in this timeframe. *Id.* Visiting judges participated in 1,916 such appeals. *See id.* at tbl.V-2.

14. *See supra* note 13.

15. Happily, this is beginning to change. While this Article was in the publication process, a new book on the subject went to press. *See* STEPHEN L. WASBY, BORROWED JUDGES: VISITORS IN THE U.S. COURTS OF APPEALS (Quid Pro Books 2018). Drawing in part on earlier work, *see* Stephen L. Wasby, *"Extra" Judges in a Federal Appellate Court: The Ninth Circuit*, 15 LAW & SOC'Y REV. 369 (1980), *Borrowed Judges* discusses the findings of an important set of interviews, in 1977 and 1986, of Ninth Circuit judges—both the views of those who received visitors and those who had visited. *See* WASBY, *supra*, at 11–71. The book also takes on questions of how circuit precedent functions when visitors contribute to case law and the impact for en banc and Supreme Court review. *See id.* at 157–80, 199–228.

Peter Graham Fish's wonderful history of judicial administration also touches on visiting judges. *See generally* PETER GRAHAM FISH, THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION (1973).

16. *See, e.g.*, James J. Brudney & Corey Ditslear, *Designated Diffidence: District Court Judges on the Courts of Appeals*, 35 LAW. & SOC'Y REV. 565 (2001); Justin J. Green & Burton M. Atkins, *Designated Judges: How Well Do They Perform?*, 61 JUDICATURE 358 (1978).

There are two excellent works that are exceptions, both of them unpublished. First, Jeffrey Budziak's dissertation analyzes whether chief judges select visitors who share their policy preferences, the voting behavior of visitors, and whether cases decided with visiting judges are cited differently from cases decided without visitors. *See* Jeffrey Budziak, Fungible Justice: The Use of Visiting Judges in the United States Courts of Appeals 11 (2011) (unpublished Ph.D. dissertation, The Ohio State University), https://etd.ohiolink.edu/!etd.send_file?accession=osu1312564916&disposition=inline [https://perma.cc/YRR9-DHHM].

practice, and more broadly about our court system and the judges who populate it. How did the federal courts come to have visitors? What was the original rationale, and was there resistance to having judges from outside the court help to decide—and even sometimes cast the deciding vote in—important matters? How does the practice function today? How do judges—both those who have received visitors and those who have "gone abroad," so to speak—view sitting by designation? To what extent do courts rely on visitors, and is that reliance uniform or does it vary from court to court? This Article takes up these questions, and in so doing, seeks to offer a broader descriptive and normative account of visiting judges and the presumed interchangeability of Article III judges on which the practice rests.

Part I begins by tracing the origins of judges sitting by designation. The direct line runs back to the early nineteenth century. Prior to this point, federal lower court judges were understood to be "immobile"[17] or even "frozen,"[18] as they were not permitted to sit on a court apart from their own.[19] But in 1814, Congress for the first time authorized a visiting arrangement, when the judge for the Southern District of New York was permitted to sit as a judge in the Northern District to assist a Northern District judge in poor health.[20] This arrangement was then generalized in 1850, when Congress provided that judges could be "certified" to a nearby court to offer assistance.[21] The measure was understood to be an emergency stopgap, however—to be used only in extreme cases of illness or disability.[22] In the decades that followed, the practice was expanded to assist with workload pressures more generally.[23] But when former-President Taft proposed a system of "judges-at-large"—in which a number of floating judges would be placed with various courts as needed—he met significant resistance.[24] Taft eventually abandoned his proposal for a "flying squadron of judges"[25] and instead, as Chief Justice, helped create what became the Judicial Conference of the United States, which coordinates the assignment of judges from one circuit to another.[26] And so it has remained that judges can assist courts beyond their own, though they must be tethered to a particular district or circuit.

Second, Professor Tracey George empirically tests the purported advantages and disadvantages of using visiting judges, and then considers from a normative perspective whether the practice should continue in light of her empirical findings. *See* Tracey E. George, The Fungibility of Federal Judges (Dec. 22, 2004) (unpublished manuscript) (manuscript on file with author).

17. *See* Budziak, *supra* note 16, at 11.

18. *See* FISH, *supra* note 15, at 14.

19. *Id.*

20. An Act of Apr. 9, 1814, ch. 49 § 2, 3 Stat. 120.

21. An Act of July 29, 1850, ch. 30, 9 Stat. 442.

22. *See infra* notes 88–105 and accompanying text.

23. *See* An Act of Oct. 3, 1913, ch. 19, 38 Stat. 203.

24. *See* FISH, *supra* note 15, at 25; *see also infra* notes 151–175.

25. FISH, *supra* note 15, at 28 (quoting William H. Taft, *Possible and Needed Reforms in the Administration of Justice in The Federal Courts*, 45 ANN. REP. A.B.A. 250, 250–51 (1922)).

26. *See infra* notes 185–186 and accompanying text.

A second history is yet more distant, but still a relevant precursor to visiting in the present day: circuit riding. Though not discussed extensively in the literature,[27] Supreme Court Justices were required to "ride circuit" for the first 120 or so years of the Supreme Court's existence.[28] This practice entailed physically visiting, and then helping to constitute, the circuit courts across the country.[29] This lineage is relevant not only because it shows how certain federal judges were not always "fixed" geographically, but also because it reveals a tradition of fluidity within the court structure. Members of the Supreme Court were Justices during part of the year, but then circuit judges alongside (similarly "moonlighting") district judges in the remainder.[30] In short, judges have long been pulled from their particular offices and brought together to configure new courts.

Part II moves from the past to the present, and focuses on where visitors are making the largest contribution today: the courts of appeals.[31] Relying on

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27. Writing in 2003, Joshua Glick, in his definitive history on the subject, wrote that circuit riding is "not a topic that is given much direct attention in Supreme Court history." *See* Joshua Glick, Note, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753, 1753 (2003). One notable exception is Wythe Holt, *"The Federal Courts Have Enemies in All Who Fear Their Influence on State Objects": The Failure to Abolish Supreme Court Circuit-Riding in the Judiciary Acts of 1792 and 1793*, 36 BUFF. L. REV. 301 (1987).

Since Glick's note, a few articles have been published on the subject (all advocating, for various reasons, that the Justices take up circuit riding once again). *See, e.g.*, Steven G. Calabresi & David D. Presser, *Reintroducing Circuit Riding: A Timely Proposal*, 90 MINN. L. REV. 1386 (2006); Craig S. Lerner & Nelson Lund, *Judicial Duty and the Supreme Court's Cult of Celebrity*, 78 GEO. WASH. L. REV. 1255 (2010); David R. Stras, *Why Supreme Court Justices Should Ride Circuit Again*, 91 MINN. L. REV. 1710 (2007).

Finally, a number of works touch on the subject, particularly those that delve into the 1801 Judiciary Act, its subsequent repeal, and the 1802 Judiciary Act. *See, e.g.*, JOSH CHAFETZ, CONGRESS'S CONSTITUTION 102–04 (2017); ALISON L. LACROIX, THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM 202–10 (2010); CHARLES GARDNER GEYH, WHEN COURTS & CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM 53–65 (2006); Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465, 477–505 (2018); James E. Pfander, *Judicial Compensation and the Definition of Judicial Power in the Early Republic*, 107 MICH. L. REV. 1 (2008) (throughout); Jed Glickstein, Note, *After Midnight: The Circuit Judges and the Repeal of the Judiciary Act of 1801*, 24 YALE L.J. & HUMAN. 543 (2012) (throughout).

28. *See* Glick, *supra* note 27, at 1754.

29. *See* Stras, *supra* note 27, at 1715.

30. *See* GEYH, *supra* note 27, at 53.

31. *See* George, *supra* note 16, at 10 (noting that "[d]istrict courts have also used senior and visiting judges, although visiting judges are much less important than they are to the work of circuit courts."). According to the most recent data provided by the Administrative Office of the United States Courts, in the twelve-month period ending September 30, 2017, visitors to the U.S. District Courts—including judges from other districts, the courts of appeals, or other Article III courts—terminated 1,674 civil cases and 1,790 criminal defendants. *See* JUDICIAL BUSINESS OF THE UNITED STATES COURTS (2017), *supra* note 10, at tbl.V-1. To provide context, during this time, the United States District Courts cumulatively terminated 289,595 civil cases, *see id.* at tbl.C-4, and terminated 75,337 criminal defendants, *see id.* at tbl.D-1. Even taking into account that terminating cases at the district court is work that is done alone (and not with two other judges, as on the court of appeals), it is clear that when compared to the contribution of visiting judges at the court of appeals, *see supra* notes 13 and 14 and accompanying text, the contribution of such judges at the district court is far less substantial.

qualitative data from inside the judiciary, this Part provides a detailed descriptive account of the use of visiting judges at the federal appellate courts. This description is based on interviews with thirty-five judges and senior members of the clerk's offices of five circuit courts. What emerges from these interviews is an interesting picture. None of the interviewed judges relished the thought of having strangers join them on the bench; all noted that they would prefer to sit with their own colleagues.[32] And indeed, one of the courts in this study had stopped using the practice altogether.[33] But most of the judges generally acknowledged the workload benefits that came with the practice, even while quite a few noted the limits of receiving visitors.[34]

And yet the meaningful benefit to the judges went beyond the caseload relief so often stated as the rationale for visiting. Many emphasized the opportunity for judges, particularly new district judges, to learn about the inner workings of the court and the appellate judges themselves. As several judges described it, they were in a "teaching relationship" with the new judges, and could not only convey the mechanics of the appellate process, but could also educate the district judges about the appellate culture.[35] Many of the judges noted that the benefits could run both ways, and so it might be helpful for them to sit by reverse designation and visit the trial court. But none of the circuits surveyed here had such a tradition (several judges stated that they did not know enough to take on the assignment and feared ultimately being reversed).[36]

Part III moves from the qualitative to the quantitative, using data on visiting judges to further the descriptive analysis of contemporary practice. Publicly available information provided by the Administrative Office of the United States Courts confirms that some of the circuits—such as the D.C. Circuit—do not rely on visiting judges.[37] It also confirms that while many district judges routinely visit the courts of appeals, very few courts of appeals judges visit district courts.[38] To further fill in the picture of modern day visiting, this Part looks to a unique dataset, created from the oral argument panels of all twelve regional circuits over a five-year span. These data can show, for example, not simply how many district judges a particular circuit relied on, but specifically where those judges hailed from. This Part presents those findings, and reveals significant inter and intra-circuit differences.

Finally, Part IV moves to the normative and considers the implications of these findings for the federal courts. First, it addresses questions of consistency across circuits. Divergent practices concerning visiting judges would be understandable if visitors were brought in solely for workload relief. (Indeed,

32. *See infra* notes 343–346 and accompanying text.
33. *See infra* notes 314–316 and accompanying text.
34. *See infra* notes 354–357 and accompanying text.
35. *See infra* notes 375–385 and accompanying text.
36. *See infra* notes 421–442 and accompanying text.
37. *See infra* note 467 and accompanying text.
38. *See infra* note 282 and accompanying text.

from this standpoint, it would be questionable if courts with relatively low caseloads routinely borrowed other judges.) And yet, if there are recognized net benefits to having district judges sit by designation for training purposes, is it problematic that only some of the circuits follow the practice?

Second, apart from inter-circuit consistency, Part IV examines the question of inter-district (or intra-circuit) consistency. The findings of the quantitative study reveal significant discrepancies regarding where the visitors are drawn from—even among visiting district judges from within a given circuit. There are good reasons for some of these differences; it is plainly easier as a logistical matter, and far less expensive, to fill seats with judges from across the street than from several hundred miles away. And yet, if sitting by designation is important for learning the culture and norms of the circuit, and potentially can even lower one's reversal rate over time,[39] it may well be problematic that there are such differences in where the visitors are visiting from.

Third and finally, Part IV considers matters of consistency across the court hierarchy. If it is useful for district judges to sit on the court of appeals to learn firsthand how that court functions, one may well wonder about the practice of reverse designation—whether it would be beneficial for appellate judges to try cases. There are no doubt risks associated with this practice that do not exist with visiting the court of appeals (namely, at the court of appeals there are two other judges to assist the visitor). But if there are important benefits to be gained—as the judges in the qualitative study suggest there are—it is worth asking if the practice of visiting should be expanded in this direction.

Ultimately, judges sitting by designation is more than a curious facet of modern-day courts. What began as a means for self-help within the system—a way for some courts to assist other courts in need—now carries out other, critical functions. It is important to understand this practice more fully, and what it says about the nature of judging and the federal courts as a whole.

I.
TWO HISTORICAL ACCOUNTS

The history of judges sitting by designation is a tale of two substantially different accounts of Article III judgeships. The first is the direct line to modern-day visiting, and begins with a conception of judges as fixed to particular courts. In the early days of the federal judiciary, lower court judges were expected to serve only in the office to which they had been nominated and

39. *Cf.* Mark A. Lemley & Shawn P. Miller, *If You Can't Beat 'Em, Join 'Em? How Sitting by Designation Affects Judicial Behavior*, 94 TEX. L. REV. 451 (2016) (examining reversal rates at the Federal Circuit and suggesting that appellate review was affected by the personal relationships that were developed when district judges sat by designation).

the same language," and so the experience is "like having junior circuit judges" join the court.[365]

C. *Training New Judges*

The previous Section provides one account of the use of visiting judges in the federal courts. In that account, which hews to the practice's original intent, visitors are brought in during times of need and provide a clear benefit to the system at large, even though judges are keenly aware of the limits of that benefit.

However, a second and very different account of visiting judges also emerged from these interviews. In several of the courts studied here, judges expressed that the practice of visiting could be a tool to educate new district judges within the circuit and instill in them the court's values. A point that has received limited attention in the literature,[366] sitting by designation, according to these members of court, provides a key component of judicial socialization and training.[367]

Almost all of the courts studied here had a tradition of inviting new in-circuit district judges to sit by designation. In the First Circuit, a senior court official stated that district judges "often sit in their first year."[368] The Second Circuit noted a similar practice. As one judge—who himself was once a district judge who had sat by designation on the court—explained, "It is sort of customary here . . . . When judges are new, they try to work them in a little bit."[369] A former chief judge confirmed the practice, noting that "somewhere in the second year" of being a district judge, "it's good [for district judges] to sit."[370] A senior member of the clerk's office for the Third Circuit mentioned a similar tradition: "New district judges come on the bench, after a year or two, then they get invited to sit by designation."[371] A court official for the Fourth

365. Interview with a Judge of the U.S. Court of Appeals for the Second Circuit (Mar. 6, 2012) (notes on file with author).

366. A few scholars have briefly mentioned this possibility. *See* Brudney & Ditslear, *supra* note 16, at 573 (noting, after describing the rationale of visiting as easing workload burdens, that "[s]ome circuits invoke a supplemental rationale or orientation to the circuit, asking new district judges to serve once within six months to a year of their appointment"); Richard B. Saphire & Michael E. Solimine, *Diluting Justice on Appeal: An Examination of the Use of District Court Judges Sitting by Designation on the United States Courts of Appeals*, 28 U. MICH. J.L. REFORM 351, 361 (1995) (describing one goal of sitting by designation as educating new district judges).

367. *See* Green & Atkins, *supra* note 16, at 360–61 (on judicial socialization and how it relates to judges sitting by designation).

368. Interview with a Senior Member of the Clerk's Office, U.S. Court of Appeals for the First Circuit, *supra* note 301.

369. Interview with a Judge of the U.S. Court of Appeals for the Second Circuit, *supra* note 356.

370. Interview with a Judge of the U.S. Court of Appeals for the Second Circuit, *supra* note 304.

371. Interview with a Senior Member of the Clerk's Office, U.S. Court of Appeals for the Third Circuit, *supra* note 306.

Circuit reported a similar policy: "When a judge comes on the bench, after say a year, they will be invited to see things from that side of the table."[372] Several judges of that court noted the practice as well. As one judge said, "Irrespective of whether or not there is a full court . . . the Fourth Circuit has a tradition of having the new district judges sit for two or three days . . . . [S]o even with a full court, we have them sit."[373] Another judge mentioned that the Fourth Circuit's tradition "in which every district judge in the circuit of a year or so is invited to sit with the circuit" dates back at least several decades."[374]

These comments suggest that the benefit of having new district judges sit is that they can become familiar with the judges of the court of appeals (and vice versa). As a senior judge on the Second Circuit put it, "[W]e have a practice of not too long after a new judge becomes a district judge to have that person sit with us. That is both to have the person get to know us and to have us know that person, and to have that person understand what the relationship is."[375] Another judge of that court said, "I think it's very helpful for the court as a whole . . . helpful for us to know the new district judges in the sense of having worked with them."[376] A senior judge for the Fourth Circuit made a similar point, saying that this practice exists "to give [new judges] an idea of what we're about and us them, quite frankly."[377] Another Fourth Circuit judge expanded on the point, tying it to socialization of judges more generally: "This is really one of the socialization practices of the Fourth Circuit going way back, the idea being when newly appointed district judges get to meet, and sit with, and have lunch and dinner, with circuit judges, the civility and collegiality of the circuit as a whole [comes across]."[378] He further added that the arrangement could have a positive effect on civility (through opinion writing) going forward: "[T]he idea is that a circuit judge who has actually met a district judge is less likely later on to use language that's too harsh or strident in an opinion."[379]

372. Interview with a Senior Member of the Clerk's Office, U.S. Court of Appeals for the Fourth Circuit, *supra* note 308. One Fourth Circuit judge suggested that new district judges are more than simply invited. He recounted how, when he was new to the bench, the chief judge of the Fourth Circuit at the time asked him to sit by designation. As he was quite busy, he asked, "How about the fall?," to which the chief judge said, "See you in June!" The Fourth Circuit judge concluded the story by saying, "So I sat in June." Interview with a Judge of the U.S. Court of Appeals for the Fourth Circuit, *supra* note 307.

373. *See* Interview with a Judge of the U.S. Court of Appeals for the Fourth Circuit, *supra* note 353.

374. Interview with a Judge of the U.S. Court of Appeals for the Fourth Circuit, *supra* note 313.

375. Interview with a Judge of the U.S. Court of Appeals for the Second Circuit, *supra* note 349.

376. Interview with a Judge of the U.S. Court of Appeals for the Second Circuit, *supra* note 303.

377. Interview with a Judge of the U.S. Court of Appeals for the Fourth Circuit (June 14, 2013) (notes on file with author).

378. Interview with a Judge of the U.S. Court of Appeals for the Fourth Circuit, *supra* note 313.

379. *Id.*

Beyond noting how visits were useful in having the judges get to know each other and acquainting the district judges with the ethos of the circuit, several subjects stressed the importance of the practice for training new judges. A former chief judge of the Second Circuit said that the practice exists so that a new judge "can see the process from the perspective from an appellate court, what we do and how it works."[380] In the words of one Fourth Circuit judge, "I think that's a great tradition, because there's such a difference between trial judging and appellate judging. And getting behind the scenes to see what goes into an appellate decision, I think give[s] the district court judges [an] awareness in terms of the importance."[381] A judge of the Second Circuit, who had visited as a district judge, described the tangible benefits of the tradition: "I thought it was well worth it, I thought for a number of reasons . . . it was helpful to see how the court of appeals work, the mechanics of it . . . . [I]t helps you be a better opinion writer."[382] Another Second Circuit judge, who had sat by designation as a district judge, said: "it's part of the education of the young judge."[383] He went on to say:

> It's absolutely helpful. If you do two days, for example, let's say you hear . . . a dozen cases roughly, and you see judges from other districts, from all around the circuit, you see judges who do things well, you see judges who do things not so well—both are instructive . . . . And you benefit from the exchange with the other two circuit judges.[384]

On this last point, a senior judge from the same circuit stressed that "[i]t's good to have people from the district court exchanging ideas with you."[385]

A few of the judges noted that the benefits from their exchanges ran in both directions. As one of the Second Circuit judges said, "I think it's helpful for the court of appeals to have a sitting district judge there, because some of the other judges on the court of appeals had not been trial judges, so it's helpful to bring that perspective to the court of appeals."[386] A senior judge from the same circuit noted that some new judges say, after visiting, "I learn I have to be more careful than I thought, because you can't correct my errors as much as I thought," so "[t]his is in a way a learning experience for a new district judge,

380. Interview with a Judge of the U.S. Court of Appeals for the Second Circuit (Feb. 29, 2012 & July 29, 2013) (notes on file with author).

381. Interview with a Judge of the U.S. Court of Appeals for the Fourth Circuit, *supra* note 353.

382. Interview with a Judge of the U.S. Court of Appeals for the Second Circuit (July 25, 2013) (notes on file with author).

383. Interview with a Judge of the U.S. Court of Appeals for the Second Circuit (July 25, 2013) (notes on file with author).

384. *Id.*

385. Interview with a Judge of the U.S. Court of Appeals for the Second Circuit, *supra* note 354.

386. Interview with a Judge of the U.S. Court of Appeals for the Second Circuit, *supra* note 382.

and when you're in that situation . . . you're in a teaching relationship."[387] As district judges gained more experience on the bench, having them visit helped remind the appellate judges of the "pressures" of being a district judge and the need for a "certain kind of decision-making by good judges who are still fully engaged."[388] The judge noted that "[i]n that situation we are learning more than we are teaching."[389]

Despite the benefits of in-circuit district judges visiting the court of appeals, not all circuits had such a tradition. Specifically, a senior court official of the D.C. Circuit said that no district judges had sat by designation.[390] When asked why the circuit did not have such an arrangement, one judge said, "That sounds like a really good idea to me . . . . I don't know why we don't do it—my guess is we like to do our work."[391] When I raised the fact that the D.C. Circuit covers only one district and so any district judge sitting by designation would necessarily be reviewing her colleagues' work, the judge responded: "That's obviously the answer. That's not fun. I've had one of my cases go en banc, I was affirmed but that is not a fun process at all. I was surprised at how sensitive I was to that."[392] Several D.C. Circuit judges made similar points. As one senior judge said, "I heard that some of the district judges had to reverse their own colleagues," which he thought was problematic.[393] Another senior judge worried that this could affect case outcomes: "District judges might be reluctant to reverse a colleague."[394] Another judge also thought it would be "hard" to have judges "reversing colleagues," though he did note a potential solution: "[W]e could assign them only to agency cases."[395] Still, the court has had only circuit judges sit.

Other courts have wrestled with similar concerns (which, indeed, were concerns originally associated with circuit riding[396]). A senior member of the clerk's office for the Third Circuit noted that they tried to not have district judges decide cases from their own districts.[397] The Fourth Circuit judges noted that this issue was dealt with in the opinion assignment process. As one judge said, "We have a rule: we won't assign an opinion reversing a district judge to

387. Interview with a Judge of the U.S. Court of Appeals for the Second Circuit, *supra* note 349.

388. *Id.*

389. *Id.*

390. *See* Interview with a Senior Member of the Clerk's Office, U.S. Court of Appeals for the D.C. Circuit, *supra* note 314.

391. Interview with a Judge of the U.S. Court of Appeals for the D.C. Circuit, *supra* note 318.

392. *Id.*

393. Interview with a Judge of the U.S. Court of Appeals for the D.C. Circuit, *supra* note 316.

394. Interview with a Judge of the U.S. Court of Appeals for the D.C. Circuit, *supra* note 328.

395. Interview with a Judge of the U.S. Court of Appeals for the D.C. Circuit (Apr. 30, 2012) (notes on file with author).

396. *See supra* notes 215–216 and accompanying text.

397. *See* Interview with a Senior Member of the Clerk's Office, U.S. Court of Appeals for the Third Circuit, *supra* note 306.

a district judge," calling this a matter of "gentility."[398] Another judge of the same circuit put it this way: "We never require a district court judge to reverse a fellow judge. We don't want to make anyone uncomfortable."[399]

Only the Second Circuit judges suggested that this issue was not as pertinent for their court, though the reasons as to why varied. As one former chief judge said of the potential discomfort of a district judge reversing a colleague, "We don't have that phenomenon."[400] He went on to suggest that this might be because, compared to the other courts in this set, the Second Circuit has "lots more judges" and, generally speaking, the court "[doesn't] have a high reversal rate."[401] Another former chief judge drew a comparison to the D.C. Circuit: "D.C. is in the same building one hundred percent. We have non-resident circuit judges and we can bring judges in from at least Brooklyn and six districts."[402] He suggested that for the times a district judge might hear a case from his own district, "you could do a recusal rule—as far as I know, we have never done that. I don't even know if district judges are upset when a district judge is on a panel and reverses . . . I haven't heard it anecdotally."[403] A senior judge of the same court also discussed why he thought the Second Circuit did things differently from the others in this set: "I guess it depends a lot on what the particular district is, how close they are to each other and things of that sort. I don't think it would really be the same thing in a district like the Southern District, which is so large, there are so many judges. While they're all judges of the same court, they are not necessarily that close to each other."[404]

Whatever the structural or institutional reasons, quite a few Second Circuit judges stated that they thought there were no issues with reversing colleagues. As one judge, who had been a district judge, said when asked if such a scenario could be awkward, "Not that I've ever seen. I've reversed and been reversed. That's the way it goes."[405] Another former district judge on the Second Circuit stated a similar view: "I had plenty of cases of my colleagues . . . I didn't feel I shouldn't be on a panel reviewing a . . . district judge [from my district]."[406] If anything, a few judges said there was the

398. Interview with a Judge of the U.S. Court of Appeals for the Fourth Circuit, *supra* note 307.
399. *See* Interview with a Judge of the U.S. Court of Appeals for the Fourth Circuit, *supra* note 353.
400. Interview with a Judge of the U.S. Court of Appeals for the Second Circuit, *supra* note 304.
401. *Id.*
402. Interview with a Judge of the U.S. Court of Appeals for the Second Circuit, *supra* note 380.
403. *Id.*
404. Interview with a Judge of the U.S. Court of Appeals for the Second Circuit, *supra* note 349.
405. Interview with a Judge of the U.S. Court of Appeals for the Second Circuit, *supra* note 356.
406. Interview with a Judge of the U.S. Court of Appeals for the Second Circuit, *supra* note 382.

possibility that a district judge would be harder on her colleagues, not easier. As one judge said, "I don't think there's any hesitancy in reversing your colleagues. And it's sometimes said there's no one who is tougher than their own colleagues or people who are new judges on our court who were district judges. So that suggests it's a problem because of the reverse."[407] The judge ultimately concluded, however: "I'm not sure it's that big of a deal."[408] Another judge of the same circuit said he had been told of some district court judges who are harder on others, but "I haven't seen it," he said.[409]

Only two Second Circuit judges mentioned that a presider might intervene to ensure, as in the Fourth Circuit, that a district judge not have the assignment of an opinion reversing a colleague. As one senior judge said, speaking of the district judges: "[A] lot of these people are very competitive," and so the presider has a responsibility when it comes to case assignment.[410] He then added, you should "never have an S.D.N.Y. judge reversing another S.D.N.Y. judge."[411] One judge who had previously been a district judge noted, "Different presiders do it different ways [and] some district judges are delighted to reverse their colleague. It depends a lot. I think there certainly are some presiders who, if [there is] a reversal within the same district, they might avoid assigning it to the district judge from the same district."[412] Ultimately, he concluded, "We're all grownups."[413]

In the courts that emphasized the benefits of having district judges sit by designation, several judges stated that they could see the benefits of sitting on the trial court—by "reverse designation." I was told that the logistics of such a visit were not a problem; appellate judges could get a short trial, for example, and would not have to handle pretrial motions.[414] Accordingly, it would be relatively easy for them to fit an assignment in between sittings at the courts of appeals.[415] (This would be particularly true for judges on a court, such as the D.C. Circuit, that does not hear cases over the summer,[416] or a court, such as the Fourth Circuit, that has only six sitting weeks during the year.[417])

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407. Interview with a Judge of the U.S. Court of Appeals for the Second Circuit, *supra* note 349.

408. *Id.*

409. Interview with a Judge of the U.S. Court of Appeals for the Second Circuit, *supra* note 354.

410. Interview with a Judge of the U.S. Court of Appeals for the Second Circuit, *supra* note 365.

411. *Id.*

412. Interview with a Judge of the U.S. Court of Appeals for the Second Circuit, *supra* note 383.

413. *Id.*

414. Interview with a Judge of the U.S. Court of Appeals for the Second Circuit, *supra* note 380.

415. *Id.*

416. *See* Aaron Nielson, *D.C. Circuit Review – Reviewed: Why does the Supreme Court's Term End in June?* (July 3, 2016), http://yalejreg.com/nc/d-c-circuit-review-reviewed-why-does-the-supreme-court-s-term-end-in-june-by-aaron-nielson [https://perma.cc/99JK-PZ76]; *see also* United

Regarding the benefits of such an arrangement, one former chief judge of the Second Circuit said, "For a judge who has never been a trial judge, I think there's a big institutional benefit to getting into the trench."[418] Others used similar language; a senior judge for the Fourth Circuit stated: "I think it's a good idea. You don't maybe have enough appreciation about how hard it was. I've done it once . . . [I was] down in the trenches."[419] Another senior judge of the Second Circuit emphasized that it was "a great idea" for judges without district court experience to visit the court below.[420]

Despite the general sense that it would be beneficial for the courts of appeals judges to sit by reverse designation, the practice was a rarity among those I spoke to. A senior court official of the D.C. Circuit noted that only one of their now senior judges had heard a case, and that this was "a long time ago."[421] A few others on the court mentioned that they would like to—one judge said, "I planned to do that . . . I think I'll benefit as an appellate judge" and a senior judge stated, "I'd like to do it"—but had not yet done so. A former chief judge of the D.C. Circuit said that he had "encouraged some of [his] colleagues to try a case," but still noted only one judge apart from himself had done so (the same judge mentioned by the senior court official).[422] A former chief judge of the First Circuit mentioned one judge who sat regularly on the district court and noted that "[j]udges who liked being district judges liked [sitting by reverse designation], but recently that's fallen off."[423] At the Second Circuit, a few judges mentioned that Judge Joseph Lumbard regularly tried cases, though he had not been on the court in close to two decades.[424] Similarly, there was one example noted in the Third Circuit—a particular judge who had wanted to try a patent case and then did so[425]—but another judge said that while reverse designation had happened more frequently under a previous chief judge, it "[i]sn't done here at all" now.[426] In the Fourth Circuit, one judge said that appellate judges sitting on the district court had been done "very

States Court of Appeals, District of Columbia Circuit, Oral Argument Calendar, https://www.cadc.uscourts.gov/internet/sixtyday.nsf/fullcalendar?OpenView&count=1000 [https://perma.cc/HKT3-RQQN] (noting only one argument between 6/1/2018 and 8/26/2018).

417. Levy, *Panel Assignment*, *supra* note 280, at 109.

418. Interview with a Judge of the U.S. Court of Appeals for the Second Circuit, *supra* note 380.

419. Interview with a Judge of the U.S. Court of Appeals for the Fourth Circuit, *supra* note 377.

420. Interview with a Judge of the U.S. Court of Appeals for the Second Circuit (Mar. 6, 2012) (notes on file with author).

421. Interview with a Senior Member of the Clerk's Office, U.S. Court of Appeals for the D.C. Circuit, *supra* note 314.

422. Interview with a Judge of the U.S. Court of Appeals for the D.C. Circuit, *supra* note 323.

423. Interview with a Judge of the U.S. Court of Appeals for the First Circuit, *supra* note 302.

424. *See* Interview with a Judge of the U.S. Court of Appeals for the Second Circuit, *supra* note 356; Interview with a Judge of the U.S. Court of Appeals for the Second Circuit, *supra* note 380.

425. *See* Interview with a Judge of the U.S. Court of Appeals for the Third Circuit, *supra* note 334.

426. Interview with a Judge of the U.S. Court of Appeals for the Third Circuit, *supra* note 305.

rarely," although he noted that he would seek designation, as "I love trial work, I love being close to where the real world is."[427]

Explaining why reverse designation has been so infrequent, some judges stated that they did not need the experience given their backgrounds. The Fourth Circuit judge who noted that the practice has rarely occurred in his circuit said, "You could list on one hand the judges who have not been trial judges."[428] A senior judge of the Second Circuit who had previously been a district judge responded, "I did that for seventeen years and I found I had more than plenty to do as a court of appeals judge."[429] One judge mentioned feeling this way, not because he was previously a trial judge, but because he had tried cases as a lawyer: "I don't have the same 'what is it like?' aspect . . . . It's important for courts of appeals judges to know what is going on in the district court. I just have a better gut feeling."[430] He concluded by saying that for him, "one more trial" at the district court would not add much.[431] By contrast, one prior district court judge on the Second Circuit felt that it was important to sit by reverse designation precisely because of his experience on the district court: "I think for some of us . . . besides that it's fun, besides some sense of obligation, it's earning your wings, showing you still have the right stuff."[432] He went on to say that, given that district judges routinely visit the courts of appeals, sitting by reverse designation would "redress an imbalance, even just symbolically," and that it "seems only fair that we do something in return."[433]

Several of the judges stated that they did not want to sit by designation because they were too apprehensive. As one D.C. Circuit judge put it:

> I'm not going to do it. It would be too terrifying. That's really, really hard work. I was approached about being a district judge many years ago . . . [and] I didn't have to think about it for a second. The answer was no. I need the time to do my job. There's no way I could do it. . . . That's a long way of saying, this is one appellate judge who will not be taking advantage of that opportunity.[434]

A senior judge on the same court said, "I don't know, being an appellate judge is so great. Why trouble your mind with being a district judge? We have time to think. What they have to do is much harder."[435]

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427. Interview with a Judge of the U.S. Court of Appeals for the Fourth Circuit, *supra* note 313.
428. *Id.*
429. Interview with a Judge of the U.S. Court of Appeals for the Second Circuit, *supra* note 420.
430. *See* Interview with a Judge of the U.S. Court of Appeals for the D.C. Circuit, *supra* note 395.
431. *Id.*
432. Interview with a Judge of the U.S. Court of Appeals for the Second Circuit, *supra* note 356.
433. *Id.*
434. Interview with a Judge of the U.S. Court of Appeals for the D.C. Circuit, *supra* note 318.
435. Interview with a Judge of the U.S. Court of Appeals for the D.C. Circuit, *supra* note 328.

Some judges specifically said that they feared making an error and ultimately getting reversed. As one judge for the Fourth Circuit said of sitting on the district court, "I think it's probably a decent thing. The only problem with it is that there are certain things that are so complicated now. For example, sentencing. That would be pretty hard for an appellate judge to do."[436] He went on to say that he would feel "pretty comfortable" trying a civil case, but something like sentencing, "I wouldn't do that myself. I wouldn't have the confidence that I would know everything I needed to know."[437] A Second Circuit judge said that such an arrangement was a "nice" idea but "risky for court of appeals judges to do."[438] A senior judge of the same circuit expanded on the point: "This has been done by people who had not had experience usually, as a district judge, because they wanted to see what it was like. And I think it's interesting and a good idea. I've talked about doing it but frankly, I never dared, in part because I had no experience."[439] Another judge of the Fourth Circuit mentioned the example of Chief Justice Rehnquist sitting by designation on the district court when he was on the Supreme Court and ultimately being reversed by a Fourth Circuit panel[440] (the implication being, he did not want to follow suit).[441] Another judge of the same court captured the sentiment of many of the judges from this study with this final quip: "If I did it, which I don't plan to, [it] would have to be diversity, civil. Almost reversal proof."[442]

In a similar vein, several of the judges interviewed noted the benefits of visiting another circuit—namely gathering important information about that circuit's laws and procedures[443]—but few had done so. As one Second Circuit judge said, it is a "good idea to know what people are doing in other circuits."[444] Another Second Circuit judge expanded on this point, noting the limitations of communication otherwise: "The more you see how other circuits work, the better your own circuit should be . . . [but we're] isolated from each circuit. We don't see each other very much, except at moot court [or] once

436. *See* Interview with a Judge of the U.S. Court of Appeals for the Fourth Circuit, *supra* note 353.

437. *Id.*

438. Interview with a Judge of the U.S. Court of Appeals for the Second Circuit, *supra* note 356.

439. Interview with a Judge of the U.S. Court of Appeals for the Second Circuit, *supra* note 349.

440. *See* Chief Justice Has Presided Over Only One Other Trial, DESERET NEWS (Jan. 10, 1999), https://www.deseretnews.com/article/677171/Chief-justice-has-presided-over-only-one-other-trial.html [https://perma.cc/G6EG-CWWC].

441. *See* Interview with a Judge of the U.S. Court of Appeals for the Fourth Circuit, *supra* note 307.

442. Interview with a Judge of the U.S. Court of Appeals for the Fourth Circuit, *supra* note 359.

443. For yet more benefits of visiting out of circuit, see Burbank, Plager & Ablavsky, *supra* note 57, at 36.

444. Interview with a Judge of the U.S. Court of Appeals for the Second Circuit, *supra* note 356.

every couple of years you go to a conference. You don't have that much contact."[445] A senior judge from the same circuit agreed, stating that visiting and receiving visitors "teaches us differences between our procedures and theirs and we can learn something from that."[446] That said, he noted that he had never accepted an invitation to visit: "No, no I never did . . . I've always thought it would be fun . . . I'd like to see the ethos of another court."[447] He also mentioned a colleague who had visited other circuits and "brought back things" that had helped the administration of their own court.[448] However, while some judges had chosen to visit abroad,[449] others expressed ambivalence or a lack of interest. In addition to the D.C. Circuit judges who said that they did not care to travel,[450] a senior judge of the Second Circuit said it is "hard to justify going out of circuit when we could use the labor over here."[451] He then followed up the point by saying, "[Also] why would I want to go to Cincinnati? And the Ninth Circuit . . . they're the hardest working people in the system!"[452]

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The interviews with members of these five circuit courts tell an important story about how sitting by designation functions today. It is certainly true that, as originally envisioned, the practice exists as a way to help courts in need. And particularly in times of judicial emergencies, it is plain how crucial the assistance of other judges has been. Yet, what cannot come through in statutes or even the legislative history of the practice is what judges think about it—and, indeed, what they consider to be the limitations of the practice. Quite telling was the judges' sense that visitors, while helpful, could not truly carry a full workload and that sitting with one's own colleagues was far preferable. What also cannot be gleaned from sources beyond these is why a court would stop using visitors and the concerns some judges shared about the practice being politicized.

Finally, the interviews reveal what many judges claimed to be a central benefit of having visitors: the opportunity to train new district judges and instill in them the ethos of the circuit. In some sense these district judges were like ambassadors—learning something to bring home, but also bringing an important perspective to the host institution. Many of the judges recognized that visiting other circuits would work similarly, thus tying the modern practice

445. Interview with a Judge of the U.S. Court of Appeals for the Second Circuit, *supra* note 382.

446. Interview with a Judge of the U.S. Court of Appeals for the Second Circuit, *supra* note 349.

447. *Id.*

448. *Id.*

449. *See supra* note 338 and accompanying text; Interview with a Judge of the U.S. Court of Appeals for the Second Circuit, *supra* note 420.

450. *See supra* notes 339–340.

451. Interview with a Judge of the U.S. Court of Appeals for the Second Circuit, *supra* note 365.

452. *Id.*

even more to the circuit riding of an older judiciary. The next Part brings in the consideration of quantitative data—what the panel numbers themselves tell—to complete the picture.

III.
PANEL DATA ON VISITING JUDGES

In building an account of a particular phenomenon, it can be important to use multiple kinds of data—qualitative and quantitative.[453] For instance, quantitative data can serve to confirm, or challenge, the narrative provided by qualitative data. And qualitative data can serve to explain the findings of quantitative data, as well as highlight further points of study. The goal of this Part is to use quantitative data, predominantly panel information about the courts of appeals from a unique dataset, to better inform our account of visiting judges today.

As noted at the outset, little has been written about visiting judges, but much of what has been written has focused on measuring the success of those judges by various metrics. An early study by Professors Justin Green and Burton Atkins examined just over 19,000 cases in the federal courts of appeals from the late 1960s and found that visiting judges dissented far less than home judges.[454] In an update of that study twenty years later, Professors Richard Saphire and Michael Solimine looked to data from the Federal Judicial Center on all appeals from 1987 to 1992[455] and found, like Green and Atkins, low rates of dissent among visitors, particularly district judges sitting by designation.[456] A more recent study by Professors James Brudney and Corey Ditslear examined district judge participation in over 1,100 appeals reviewing decisions by the National Labor Relations Board between 1986 and 1993[457] and found that district judges were significantly less likely to author majority opinions and to dissent from majority opinions than home judges.[458] Finally, a similar analysis by Professor Sara Benesh focused on a subset of appeals from the Ninth Circuit between 1925 and 1996 (using the Songer database)[459] and

453. *See, e.g.*, Adam S. Chilton & Marin K. Levy, *Challenging the Randomness of Panel Assignment in the Federal Courts of Appeals*, 101 CORNELL L. REV. 1 (2015); Levy, *Panel Assignment*, *supra* note 280 (using quantitative and qualitative methods, respectively, to explore assignment practices in the federal courts of appeals).

454. *See* Green & Atkins, *supra* note 16, at 369 (finding that out-circuit judges filed dissents in about one third of the cases expected, and district judges filed dissents in about one fourth).

455. *See* Saphire & Solimine, *supra* note 366, at 368.

456. *See id.* at 370 (noting that district judges authored dissents in 1.6 percent of dispositions by panels containing a visiting judge as compared to 3 percent by circuit judges).

457. *See* Brudney & Ditslear, *supra* note 16, at 566.

458. *See id.* at 581 (noting that appellate judges had a 12 percent probability of authoring a majority opinion whereas visiting district judges had an 8 percent probability, and that appellate judges had a 0.9 percent probability of writing a dissent whereas visiting district judges had a 0.3 percent probability).

459. *See* Sara C. Benesh, *The Contribution of "Extra" Judges*, 48 ARIZ. L. REV. 301, 308 (2006).