

# 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.*

---

DOI: <https://doi.org/10.15779/Z38ZK55M67>

Copyright © 2019 California Law Review, Inc. California Law Review, Inc. (CLR) is a California nonprofit corporation. CLR and the authors are solely responsible for the content of their publications.

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

Thanks to Jennifer Behrens, Joseph Blocher, Stephen Burbank, Curt Bradley, Josh Chafetz, Guy Charles, Sean Chen, Adam Chilton, Zach Clopton, Peter Fish, Maggie Gardner, Tracey George, Tara Grove, Bert Huang, Nancy King, Mark Lemley, Maggie Lemos, Richard Re, Judith Resnik, Stephen Sachs, Matt Shapiro, Wickliffe Shreve, and the participants of the Columbia Law School Judicial Process Colloquium, the Tenth Annual Junior Faculty Federal Courts Workshop, and the Vanderbilt Law School Faculty Workshop. Thanks also to Jacob Adrian and Mike Schietzelt for excellent research assistance, and the editors of the CALIFORNIA LAW REVIEW for exceptional editing. And a special thanks to Winston Bowman of the Federal Judicial Center as well as the Judges and Clerks of the D.C., First, Second, Third and Fourth Circuits, without whom this Article would not be possible. All views expressed here, as well as any errors and solecisms are, of course, my own.

*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.....	68
I. Two Historical Accounts .....	74
A. The Frozen Nature of Judgeships .....	75
B. The Fluidity of Circuit Riding .....	91
C. Bringing Visiting Judges to the Present.....	98
II. The Current View from the Courts .....	101
A. Methodology .....	101
B. Assisting with Caseloads .....	104
C. Training New Judges .....	112
III. Panel Data on Visiting Judges .....	122
A. Methodology .....	124
B. Discrepancies Across Circuits .....	125
C. Discrepancies Within Circuits .....	127
IV. Implications of Visiting Judges for the Judiciary.....	130
A. Consistency Across Circuits .....	135
B. Consistency Within Circuits .....	137
C. Consistency Within the Judicial System as a Whole.....	138
Conclusion .....	140

#### INTRODUCTION

In February 2015, the Ninth Circuit issued an opinion in a closely followed insider-trading case, *United States v. Salman*.<sup>1</sup> 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<sup>2</sup>—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.<sup>3</sup> The Ninth Circuit ultimately rejected the Second Circuit approach, thereby creating a circuit split on the issue.<sup>4</sup> 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<sup>5</sup> and an outspoken critic of the *Newman* decision,<sup>6</sup> 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*.”<sup>7</sup>

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.<sup>8</sup> But the episode is not entirely anomalous. Despite the fact that Article III judges are nominated for particular seats on particular courts,<sup>9</sup> 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.<sup>10</sup> Officially, the practice of “borrowing” judges exists as a way to ease particularly high

---

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](http://www.uscourts.gov/sites/default/files/data_tables/jb_v2_0930.2017.pdf) [<https://perma.cc/2H2Q-5FXW>].

workloads.<sup>11</sup> 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.<sup>12</sup> From September 2016 to September 2017, visiting judges of all kinds were involved in deciding approximately 4,300 federal appeals.<sup>13</sup> 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.<sup>14</sup>

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.<sup>15</sup> 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.<sup>16</sup> 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://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”<sup>17</sup> or even “frozen,”<sup>18</sup> as they were not permitted to sit on a court apart from their own.<sup>19</sup> 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.<sup>20</sup> This arrangement was then generalized in 1850, when Congress provided that judges could be “certified” to a nearby court to offer assistance.<sup>21</sup> The measure was understood to be an emergency stopgap, however—to be used only in extreme cases of illness or disability.<sup>22</sup> In the decades that followed, the practice was expanded to assist with workload pressures more generally.<sup>23</sup> 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.<sup>24</sup> Taft eventually abandoned his proposal for a “flying squadron of judges”<sup>25</sup> 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.<sup>26</sup> 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,<sup>27</sup> Supreme Court Justices were required to “ride circuit” for the first 120 or so years of the Supreme Court’s existence.<sup>28</sup> This practice entailed physically visiting, and then helping to constitute, the circuit courts across the country.<sup>29</sup> 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.<sup>30</sup> 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.<sup>31</sup> Relying on

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.<sup>32</sup> And indeed, one of the courts in this study had stopped using the practice altogether.<sup>33</sup> 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.<sup>34</sup>

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.<sup>35</sup> 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).<sup>36</sup>

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.<sup>37</sup> It also confirms that while many district judges routinely visit the courts of appeals, very few courts of appeals judges visit district courts.<sup>38</sup> 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,<sup>39</sup> 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).



confirmed; there was no visiting to speak of.<sup>40</sup> But since 1814, Congress has permitted judges to sit by designation, and that permission has expanded over time.<sup>41</sup> Specifically, it has grown to encompass different reasons for visits, beginning with the physical disability of a single judge and moving outward to workload relief for the court as a whole. Furthermore, it has grown to encompass visiting across the entire federal judicial system, with visitors initially coming from the same circuit to now any Article III court. But this expansion has faced limits—attempts in the early twentieth century to create a set of judges-at-large to assist other courts were squarely rejected.<sup>42</sup> Thus, while this fixed-in-place view of Article III has become less rigid over time, it continues to see judges as necessarily tied to a particular court in a particular place.

Beyond this direct history, visiting should also be understood in relation to a more remote historical phenomenon: circuit riding. Between 1789 and 1911, the Justices of the Supreme Court rode circuit each year,<sup>43</sup> meaning that they traveled across the country and, alongside district judges, sat on circuit courts to decide cases.<sup>44</sup> The practice began in part out of necessity, as it would have been difficult to fund a new complement of circuit court judges.<sup>45</sup> And yet it also had recognized benefits, as it was thought that the Justices would bring a great deal to, and take something from, the courts they were visiting.<sup>46</sup> The view of Article III judges associated with circuit riding thus sees them as mobile, both geographically and also within the federal judicial hierarchy.

This Part traces these two lineages of modern-day visiting. It begins with an account of how sitting by designation was born and grew up. It then describes the historical arc of circuit riding as a practice. Finally, this Part concludes by considering how visiting today fits within these lineages.

#### A. *The Frozen Nature of Judgeships*

In one respect, the first quarter century of the federal courts represented an age of immobility. As courts scholar Peter Graham Fish put it, “[f]or many years the organization of the federal courts was based not only on frozen

---

40. See *infra* notes 47–53 and accompanying text.

41. See *infra* Subpart I.A.

42. See *infra* notes 165–175 and accompanying text.

43. See Stras, *supra* note 27, at 1713. Technically, the Justices were expected to ride circuit only until 1891, when the Evarts Act relieved them of their duties. Still, at least one Justice continued riding circuit until the circuit courts were abolished in 1911. See *infra* notes 238–244 and accompanying text.

44. See Calabresi & Presser, *supra* note 27, at 1391.

45. See Stras, *supra* note 27, at 1715; Glick, *supra* note 27, at 1757 (noting that the first Congress “felt that the early federal payroll could not accommodate a separate set of circuit judges”).

46. See Glick *supra* note 27, at 1757–61 (noting several important benefits attendant with circuit riding, including how Supreme Court Justices could provide important interpretations of federal law in some of the earliest federal trials and how the Justices could help ensure uniformity of federal law).

district boundaries but on frozen judges within those confines as well.”<sup>47</sup> Those frozen district boundaries were set by the first Judiciary Act in 1789, which divided the country into three circuits<sup>48</sup> and, within those, thirteen districts.<sup>49</sup> Each district was authorized one district judge.<sup>50</sup> (The circuits, for their part, which had a mix of original and appellate jurisdiction,<sup>51</sup> were to be constituted by a single district judge and two Supreme Court Justices.<sup>52</sup>) Throughout this time, lower court judges were not permitted to sit outside of their own district.<sup>53</sup> Even if a district judge recused himself from a particular case (meaning, effectively, that there was no judge in the district to hear the case), that case was then transferred out to the next circuit court—no outside judge stepped in.<sup>54</sup> Judges were appointed and confirmed to particular seats on particular courts,<sup>55</sup> and that was where they served.

As with so many things, change came from perceived necessity.<sup>56</sup> As Professor Stephen Burbank, Judge S. Jay Plager, and Professor Gregory Ablavsky have written, throughout this time the courts lacked any sort of provision for disability or retirement.<sup>57</sup> Accordingly, when a judge was not keeping up with his workload due to illness, solutions were limited—and dismal at that. In theory he could be removed (following conviction after trial

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

48. See Judiciary Act of 1789, ch. 20, § 4, 1 Stat. 73. The Districts of Maine and Kentucky were not placed into any of the circuits, however. *Id.*

49. See *id.* § 2.

50. See *id.* § 3.

51. Specifically, these courts could hear, among other cases, diversity of citizenship cases, major federal crimes, and appeals from the district courts of some larger civil cases and admiralty cases. See *id.* §§ 11, 12; see also RUSSELL R. WHEELER & CYNTHIA HARRISON, FED. JUD. CTR., CREATING THE FEDERAL JUDICIAL SYSTEM 4 (2005), <https://www.fjc.gov/sites/default/files/2012/Creat3ed.pdf> [<https://perma.cc/3LPY-DART>].

52. See Judiciary Act of 1789, ch. 20, § 4, 1 Stat. 73.

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

54. See An Act of May 8, 1792, ch. 36, § 11, 1 Stat. 275 (noting that the case in question should be “forthwith certified to the next circuit court of the district, which circuit court shall, thereupon, take cognizance thereof, in the like manner, as if it has been originally commenced in that court, and shall proceed to hear and determine the same accordingly”).

55. It is worth noting that it was quite common for district judges in the early days to be appointed to two district courts in the states that had more than one district. Indeed, according to the Federal Judicial Center, there are nearly ninety examples of this phenomenon. See Correspondence with Winston Bowman, Historian of the Federal Judicial Center (July 13, 2017) (notes on file with author). This continues in some districts even in modern times. For example, Judge James H. Payne was nominated and confirmed to the Eastern, Northern, and Western Districts of Oklahoma. See *History of the Federal Judiciary, Biographical Directory of Article III Federal Judges: James H. Payne*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/payne-james-h> [<https://perma.cc/2X8Q-FC26>].

56. Cf. PLATO, THE REPUBLIC 53 (Benjamin Jowett trans., Libris Ordo 2017) (“[N]ecessity is the mother of invention.”).

57. See Stephen B. Burbank, S. Jay Plager & Gregory Ablavsky, *Leaving the Bench, 1970–2009: The Choices Federal Judges Make, What Influences Those Choices, and Their Consequences*, 161 U. PA. L. REV. 1, 4 (2012).

on articles of impeachment)<sup>58</sup> or he could resign (without remuneration).<sup>59</sup> Congress could also create another judgeship, but such a measure would have been considered drastic—an expensive enlargement of what was then a very small federal judiciary.<sup>60</sup> And so although it has been suggested that judges were not authorized to visit other courts until 1850,<sup>61</sup> it is perhaps not surprising that a visiting scheme arose even earlier out of the need of a judge and his district.<sup>62</sup>

A close historical examination reveals that the judge for the Southern District of New York was authorized to hold court for the judge of the Northern District when those districts were first created<sup>63</sup> in 1814<sup>64</sup>—apparently due to the ill health of Judge Tallmadge of the Northern District.<sup>65</sup> Judges Tallmadge and William P. Van Ness (locally known as Aaron Burr’s “second” in his duel with Alexander Hamilton<sup>66</sup>) had been serving together as the two judges for the District of New York since New York obtained a second judgeship in 1812.<sup>67</sup>

58. In the early 1800s there were several proposed constitutional amendments for altering the procedure for removing Article III judges in order to make it easier to do so (motivated, at least in part, by the failed attempt to remove Supreme Court Justice Samuel Chase). See MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 147 (1996). That said, no judge to date has been impeached, much less removed, for simply being ill.

59. See Burbank, Plager & Ablavsky, *supra* note 57, at 4.

60. See *supra* note 50 and accompanying text.

61. See FISH, *supra* note 15, at 14; Budziak, *supra* note 16, at 11.

62. The first hint of a visiting scheme can be detected in the infamous Midnight Judges Act in 1801. In addition to creating sixteen dedicated judgeships for the circuit courts, it provided that: [I]n case of the inability of the district judge . . . to perform the duties of his office . . . it shall be the duty of such circuit court . . . to direct one of the judges of said circuit court, to perform the duties of such district judge, within and for said district, for and during the period the inability of the district judge shall continue.

Judiciary Act of 1801, ch. 4, § 25, 2 Stat. 89 (repealed 1802). See also Charles Gardner Geyh, *Informal Methods of Judicial Discipline* 142 U. PA. L. REV. 243, 272 (1993); James E. Pfander, *The Chief Justice, the Appointment of Inferior Officers, and the “Court of Law” Requirement*, 107 NW. U. L. REV. 1125, 1159 n.178 (2013). But the scheme was short-lived, as the 1801 Act was soon repealed by the aptly named Repeal Act, ch. 8, 2 Stat. 132 (1802), and there were no longer any circuit judges who could assume such visiting duties. I am aware of no judges who took on such responsibilities in the interim.

Congress again enacted legislation to respond to judges facing disability only a few years later, in 1809. But this act specified that the cases pending before the given district judge could be removed to the circuit court (i.e. the cases would go out, instead of having outside judges come in). See Act of March 2, 1809, ch. 27, 2 Stat. 534; see also Burbank, Plager & Ablavsky, *supra* note 57, at 7; Pfander, *supra*, at 1159 n.178.

63. The Judiciary Act of 1801 divided New York into two judicial districts: the District of New York and the District of Albany. Judiciary Act of 1801, ch. 4, § 6, 2 Stat. 89. That Act was soon repealed and the single district restored. An Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132.

64. An Act of Apr. 9, 1814, ch. 49, 3 Stat. 120. The first section of the Act divided the former District of New York into the Southern and Northern Districts. *Id.*

65. In the words of H. Paul Burak, Chairman of the Special Committee on History of the Federal Courts, “[I]ittle has been said of his judicial ability or work other than the fact that he was frequently absent due to illness . . .” H. PAUL BURAK, *HISTORY OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK* 3 (1962).

66. *Id.*

67. See An Act of Apr. 29, 1812, ch. 71, 2 Stat. 719.

Then when Congress split the District in “An Act for the better organization of the courts of the United States within the State of New York,” Judge Tallmadge was assigned to the Northern half and Judge Van Ness to the Southern half.<sup>68</sup> The same Act “made [it] the duty” of Judge Van Ness to hold district court “in the said northern district, in case of the inability, on account of sickness or absence, of the said Matthias B. Tallmadge to hold the same.”<sup>69</sup>

One might wonder why Congress created two separate districts within New York, if only then to permit (and in fact, require) one judge to assist the other. According to H. Paul Burak, former Chairman of the Special Committee on the History of the Federal Courts, there was “[a]nimosity between the two judges,” which “soon led Tallmadge to seek the separation of the State into two districts so that he might serve in one, unfettered by Van Ness.”<sup>70</sup> Judge Tallmadge’s lobbying efforts apparently paid off, though he may have had buyer’s remorse. Judge Tallmadge technically remained a judge of a separate district, but once Judge Van Ness was authorized to assist him, the latter conducted the majority of the work in the northern district as well as all the work in his own.<sup>71</sup>

To be sure, the Act of 1814 can be seen as representing a modest allowance; a single judge was given permission to visit a single court.<sup>72</sup> But it was a beginning in the history of visiting judges. As Judge Charles Merrill Hough remarked 120 years after the Southern District’s organization, “[w]hile the right of the District Judges in New York to sit as well in one District as the other, was a concession to Tallmadge’s physical weakness, it marks the beginning of the system of using Judges out of their own Districts in order to relieve press of business.”<sup>73</sup>

Judges Van Ness and Tallmadge were not quite done playing their part in the history of judicial administration. In 1817, a temporary session law specified in general terms that the United States District Court for the Northern District would be held by the judge of that court and the judge of the Southern District (and bestowed upon the judge of the Southern District an additional thousand dollars per annum as compensation).<sup>74</sup> As that law was set to expire after only one year, the House introduced a bill in March of 1818 “[r]especting the Districts Courts of the United States within the state of New York,” which

---

68. See ch. 49, § 2, 3 Stat. 120–21 (1814).

69. *Id.*

70. See BURAK, *supra* note 65, at 3.

71. *Id.*

72. What’s more, Judges Van Ness and Tallmadge had previously served the District of New York side by side, *see supra* note 67, making it less momentous that the judge of the southern half of the state could sit in the northern half.

73. See CHARLES MERRILL HOUGH, THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK: ITS GROWTH, AND THE MEN WHO HAVE DONE ITS WORK 1789–1919, at 19 (1934), <http://history.nysd.uscourts.gov/docs/Hough.pdf> [<https://perma.cc/WPB9-8ZKV>].

74. See An Act of Mar. 3, 1817, ch. 102, 3 Stat. 392.

directed the judge of the Southern District to “hold the said court, in, and for, the said northern district, . . . with the like power and authority, in all respects” in the event the judge of the Northern District was unable to preside “on account of sickness, absence or otherwise.”<sup>75</sup>

However, the passage of the bill was not entirely smooth. Upon its second reading, Representative John Forsyth of Georgia asked why the House was being called upon to legislate “so frequently” for the courts of the District of New York, and indeed why it had to be “an exception to the general judiciary system of the United States.”<sup>76</sup> When told this exception was due to Judge Tallmadge’s ill health,<sup>77</sup> Forsyth said pointedly that “[w]hilst his health did not allow him to attend his official duties, it allowed him to travel from New York to Charleston and back every year.”<sup>78</sup> Aside from throwing this bit of shade upon the judge of the Northern District, Forsyth went on to ask about the appropriate remedy for the judge’s apparent illness: “If the state of his health detain him from performance of his duties, and he do not quit his office, it is in the power of the House . . . to apply a remedy by an impeachment . . . .”<sup>79</sup> The response that came back from Representative Hugh Nelson of Virginia was that the Judiciary Committee had considered the matter and “been of a different opinion” from Forsyth but that in any event, the bill at present would need to be passed “in order that the court should not cease to be held.”<sup>80</sup> Notwithstanding Forsyth’s repeated objections,<sup>81</sup> the bill ultimately passed.<sup>82</sup>

The episode surrounding the passage of the 1818 Act is interesting for what it reveals about the decision-making process behind continuing the visiting arrangement in New York. There was at least some concern about permitting this sort of visiting as it meant making an “exception” within the larger federal system.<sup>83</sup> The tension between wanting as limited a remedy as possible and not wanting special treatment for special (New York) courts would continue to surface in the history of the practice.<sup>84</sup> Returning to the limited possibilities judges and Congress faced in such situations,<sup>85</sup> it is noteworthy that Congress eschewed other potential responses. Contrary to Forsyth’s suggestion, it did not impeach and replace the judge who was not

---

75. H.R. 117, 15th Cong. (1818).

76. 31 ANNALS OF CONG. 1183 (1818) (statement of Rep. Forsyth).

77. *Id.* (statement of Rep. Nelson).

78. *Id.* (statement of Rep. Forsyth).

79. *Id.*

80. *Id.* at 1184 (statement of Rep. Nelson).

81. *Id.* at 1223.

82. *See* An Act of Apr. 3, 1818, ch. 32, 3 Stat. 413.

83. *See supra* note 76 and accompanying text.

84. *See infra* notes 134–147.

85. Again, as Professor Burbank and his coauthors have noted, the options for this sort of situation at this time in the federal judiciary were bleak, and would remain so for decades. *See* Burbank, Plager & Ablavsky, *supra* note 57, at 4.

keeping up with his workload.<sup>86</sup> And though no one asked about an alternative possibility—creating another judgeship—Representative Arthur Livermore of New Hampshire went out of his way to note that the current plan would not create a new district or judgeship, and accordingly would “not . . . create any additional expense.”<sup>87</sup> It appears that Congress saw importing a neighboring judge as the best way (certainly the least politically contentious and most cost-effective way) to assist the court.

The use of visiting judges expanded significantly in 1850 when, for the first time, Congress created a general scheme that applied beyond any particular district. Once again, perceived need was the catalyst for creating the new law, and, once again, that need came from the state of New York. By the middle of the nineteenth century, one particularly well-regarded judge in New York had become overworked to the point of ill health.<sup>88</sup> Judge Samuel Rossiter Betts, who had been nominated to the United States District Court for the Southern District of New York by President John Quincy Adams in 1826,<sup>89</sup> had suffered the effects of a sharp increase in caseload.<sup>90</sup> And so, in 1850, Senator Bradbury of Maine introduced a bill “to provide for holding the courts of the United States, in case of the sickness or other disability of the judges of the district courts.”<sup>91</sup> The bill provided that in such circumstances, the circuit judge of the circuit in which the ailing district judge was located could

---

86. See *supra* note 58.

87. 31 ANNALS OF CONG., *supra* note 76, at 1184 (statement of Rep. Livermore).

88. According to Georgina Betts Wells’s biography of the judge, the following remarks were made at the time of Judge Betts’s resignation at the United States District Court:

Judge Betts rose early to eminence at the bar, and on the bench of the State of New York, and in December, 1826, . . . was appointed to the bench of this court . . . The wisdom of [this] selection was soon vindicated by the industry, ability and fidelity which he displayed as a judge of this court, and of the Circuit Court. With very slight interruptions from occasional ill health, the best power of his clear and cultivated intellect, and his careful and various learning and enlightened love of justice have been for that long judicial life devoted to the duties of his office, with an industry, ability and constancy as rare as they are honorable and useful to the community and to the nation . . .

GEORGINA BETTS WELLS, *LIFE AND CAREER OF SAMUEL ROSSITER BETTS* 26–27 (Maurice Sloop, New York 1934). Appleton’s *Cyclopedia of American Biography* also noted his reputation: “In 1823 Mr. Betts was appointed judge of the U.S. district court . . . and throughout the whole term presided with such dignity, courtesy, profundity of legal knowledge and patience of investigation that he came to be regarded as almost infallible in his decisions.” 1 APPLETONS’ *CYCLOPEDIA OF AMERICAN BIOGRAPHY* 253 (James Grant Wilson & John Fiske eds., 1888).

On the matter of workload, H. Paul Burak notes that “[t]he rapid growth in the population of New York and its unique position as a harbor and center of commerce produced, in Judge [Charles Merrill] Hough’s terms, a ‘legal harvest’, soon making the District Court a ‘busy’ tribunal.” See BURAK, *supra* note 65, at 5.

89. See *History of the Federal Judiciary, Biographical Directory of Article III Federal Judges: Samuel Rossiter Betts*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/betts-samuel-rossiter> [<https://perma.cc/68MP-WKE2>]; see also Michael J. Gerhardt & Michael Ashley Stein, *The Politics of Early Justice: Federal Judicial Selection, 1789–1861*, 100 IOWA L. REV. 551, 578–79 (2015) (noting the nominations of President Adams in 1826, including Samuel Rossiter Betts).

90. See *infra* note 95 and accompanying text.

91. CONG. GLOBE, 31st Cong., 1st Sess. 864 (1850) (statement of Sen. Bradbury).

designate another district judge within the same circuit to hold court.<sup>92</sup> If no circuit judge could make the designation, the President of the United States could then designate any district judge within the circuit, or any district within a circuit “next immediately contiguous” to the one of the sick or disabled judge.<sup>93</sup>

Senator Andrew Butler from the Committee on the Judiciary stressed the bill’s importance: “By the existing laws, if a district judge is sick, or unable from any cause to discharge his duties, there is no provision by which any other judge can be authorized to act in his place. The consequence is . . . he must break down.”<sup>94</sup> Turning then specifically to Judge Betts, the Senator said:

In New York the business has increased so much, as almost to break down the distinguished judge of that circuit (Judge Betts)—and we all know that he is distinguished for his ability and industry. He tries his best, and taxes his powers to hold all the courts he can, but his health is giving way; yet he hears five hundred causes in a year, and writes out, it is said, one hundred elaborate judgments. Now, it happens that sometimes he is sick, and then these causes accumulate and the cost is increased, so that the parties suffer by it.<sup>95</sup>

In an interesting move from a separation-of-powers perspective, the bill was then amended at the insistence of Senator Bradbury, the author of the bill, to read that the Chief Justice, rather than the President, would be authorized to detail a judge in the event that the circuit judge was not able to do so.<sup>96</sup> It then passed the Senate that same day.<sup>97</sup>

The legislative history from the House appears to show some concern over the bill. Representative James Brooks (not surprisingly of New York) spoke first on the matter, noting the situation with Judge Betts<sup>98</sup> and stating that he was “anxious” for the bill’s “immediate passage because of the state of public business in the city of New York.”<sup>99</sup> Instead, Representative George Jones of Tennessee successfully moved that the bill be referred to the Committee on the Judiciary.<sup>100</sup> His stated reason was that it contained “a very important provision, extending not only to New York, but to all the judges and

---

92. *Id.* at 898.

93. *Id.*

94. *Id.* (statement of Sen. Butler).

95. *Id.*

96. *Id.* (statement of Sen. Bradbury).

97. *Id.*

98. *Id.* at 1011 (statement of Rep. Brooks). Specifically, the Representative from New York declared that “[t]he district judge there is broken down by hard work, while the judges in Connecticut and Vermont who have no great amount of labor, would be happy to supply his place.” *Id.* Brooks concluded that since the health of Judge Betts had “given out,” he trusted that there would be no objection to the immediate passage of the bill. *Id.*

99. *Id.*

100. *Id.* (statement of Rep. Jones).

courts of the country” and so warranted the consideration of the Committee.<sup>101</sup> The bill was reported out of Committee two months later, and it was noted that the Committee had decided to report a general bill rather than a special act to address Judge Betts’s situation.<sup>102</sup> The bill passed, creating for the first time the authority for any district judge to sit by designation on a court that was not his own, provided that he was assisting a disabled judge and that he was not straying far.<sup>103</sup>

The use of visiting judges steadily expanded from that point on, with the next expansion occurring along the line of accepted reasons for seeking assistance. In 1852, the original act providing for holding court in the case of sickness or disability of a judge was amended to authorize the relevant circuit judge or Chief Justice to designate a visitor if it appeared to their satisfaction that “the public interests, from the accumulation or urgency of judicial business in any district, shall require it to be done.”<sup>104</sup> The new law went on to specify that the visiting judge would enjoy “the same powers within such district as if the District Judge resident therein were prevented by sickness or other disability from performing his judicial duties.”<sup>105</sup>

This expansion represented an important shift in the practice of visiting judges. Not only was Congress increasing the instances in which judges could be called upon to aid a particular court, but it was widening the lens of inquiry. Visitors no longer needed to be substitutes, coming to court to assist a particular judge. They could now come to provide relief to the court itself.

It seems that district courts in New York were, at least in part, once again the impetus for the law. In reporting on the bill to the Senate, Senator Butler—who had spoken in favor of the 1850 Act<sup>106</sup>—provided the context for the amending legislation.<sup>107</sup> He began by reporting that the original act “thus far has worked well,”<sup>108</sup> and that there was no sign that it had been overused.<sup>109</sup> Senator Butler went on to note that the bill at hand would be a welcome next step since it would “allow the judges of the district courts of the State of New York to call in the aid of other judges.”<sup>110</sup> This arrangement would be

101. *Id.*

102. *Id.* at 1439. Specifically, Representative Horace Thompson of Pennsylvania noted that the bill was particularly appropriate at the time given that there was a judge in the Southern District of New York who was in very bad health and not able to hold his court. Representative Thompson went on to note that instead of making the bill a special act in regard to the Southern District, the Committee on the Judiciary in the Senate had reported a general bill providing for all such cases, and that he thought nothing in it could be objectionable to anybody. *Id.* (statement of Rep. Thompson).

103. *See* An Act of July 29, 1850, ch. 30, 9 Stat. 442; FISH, *supra* note 15, at 14.

104. *See* An Act of Apr. 2, 1852, ch. 20, 10 Stat. 5.

105. *Id.*

106. *See supra* notes 94–95 and accompanying text.

107. CONG. GLOBE, 32d Cong., 1st Sess. 450 (1852) (statement of Sen. Butler).

108. *Id.*

109. *Id.*

110. *Id.*



beneficial, according to the Senator, as “[t]here are the judges of the district courts of the States of Vermont and New Hampshire . . . who have but very little to do, and might, when requisite, go to New York and do this business very well.”<sup>111</sup> The bill ultimately passed in both houses without incident.<sup>112</sup>

The next several decades saw significant changes to the organization of the federal courts, and the reliance on visitors.<sup>113</sup> In response to an increasingly congested Supreme Court,<sup>114</sup> Congress in 1891 created a new tier of intermediate appellate courts.<sup>115</sup> The Circuit Court of Appeals Act (known in common parlance as the Evarts Act) created a set of courts that would take appeals as of right from the federal district courts, and be reviewed by the Supreme Court.<sup>116</sup> (Though the original circuit courts would live on, their jurisdiction was curtailed considerably—to wit, they no longer had appellate jurisdiction over the district courts—and they would ultimately be abolished two decades later.<sup>117</sup>) Unlike the original circuit courts when they first came into existence, the circuit courts of appeals were bestowed with a dedicated set of judges, but not a full set.<sup>118</sup> Specifically, the courts were authorized two judges even though Congress expected them to decide cases in panels of three.<sup>119</sup> The third jurist was to be drawn from either “the Chief-Justice and the associate [J]ustices of the Supreme Court assigned to each circuit” or “the several district judges within each circuit,”<sup>120</sup> thereby keeping some family resemblance to the old circuit courts.<sup>121</sup>

And so it was that the federal courts of appeals had a visiting arrangement embedded within them from the beginning. District judges from the circuit could visit “up,” and Supreme Court Justices could visit “down.” But the visiting arrangement was not without limits. As with visiting between district

---

111. *Id.*

112. Specifically, it was engrossed and passed in the Senate the same day as Senator Butler’s remarks—February 3, 1852. *See id.* It then passed the House with an amendment on March 24, 1852, *see id.* at 845. The amendment was then concurred in the Senate on March 26, 1852, *see id.* at 878, and the President signed it on April 6, 1852, *see id.* at 984.

113. As one example, in 1863 Congress extended the disability provision to Justices riding circuit. *See* Act of March 3, 1863, ch. 93, 12 Stat. 768.

114. *See* FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 96–102 (1928).

115. Circuit Court of Appeals Act, ch. 517, 26 Stat. 826 (1891).

116. *See* Glick, *supra* note 27, at 1826.

117. Specifically, in the wake of the Evarts Act, the circuit courts only had original trial jurisdiction over “capital cases, tax cases, and diversity cases where the amount in controversy exceeded the district court’s limit.” *Id.* at 1827–28; *see also* FISH, *supra* note 15, at 6 (noting how the old circuit courts, “shorn of their appellate jurisdiction, lingered on for another two decades”).

118. Circuit Court of Appeals Act, ch. 517, 26 Stat. 826 (1891).

119. *Id.* § 2.

120. *Id.* § 3.

121. The original circuit courts, of course, were composed of two Supreme Court Justices and a district judge. *See supra* note 52 and accompanying text. For more on the history of circuit riding generally, *see infra* Subpart I.B.

courts at the time,<sup>122</sup> visitors could not come from all over the country. This limitation would eventually give way, with Congress proceeding with the district courts first.

Indeed, the practice of visiting judges saw its next major expansion roughly fifteen years later, regarding where a district court visitor could come from. In an Act of March 4, 1907, Congress broadened the pool of available designees, providing that if for “sufficient reason” it was “impracticable” to appoint a judge of a district within the same circuit, the Chief Justice could “designate and appoint the judge of any other district in another circuit to hold said courts.”<sup>123</sup> This amending law referred only to situations in which the judge being replaced was disabled, and did not extend to situations in which a court simply needed assistance for workload relief. But this amendment still represented a sizable shift. For the first time in the history of the federal courts, a judge from the Northern District of California could travel to sit by designation as a judge of the District of Maine.

The matter did not create much controversy. Both the House and Senate Judiciary Committees unanimously recommended that the bill pass.<sup>124</sup> Only in the House was there some pushback on the floor—Representative James Mann from Illinois, reserving the right to object, inquired as to what the bill would accomplish.<sup>125</sup> Thomas Jenkins from Ohio responded that it was a “very necessary bill,” and that “our attention has been called to many places throughout the United States where they are really suffering to-day for the want of the presence of a judge and can not have him because under the law an assignment can not be made.”<sup>126</sup> William Sulzer of New York then stated that it “is a good bill and it ought to pass,”<sup>127</sup> prompting Mann to withdraw his objection.<sup>128</sup> The measure passed.<sup>129</sup> (It should not be surprising that no similar measure was passed for the courts of appeals. As those courts had fairly large pools to draw upon already and only required a quorum of two to decide cases,<sup>130</sup> they did not face the need of their sister courts at this time.)

---

122. Specifically, the law required that the designated judge be either from the same circuit as the judge in need of assistance, or at least from a contiguous circuit. *See* An Act of July 29, 1850, ch. 30, 9 Stat. 442; *see also* FISH, *supra* note 15, at 14.

123. An Act of Mar. 4, 1907, ch. 2940, 34 Stat. 1417. Before such a designation could take place, the circuit judge of the “receiving” circuit had to issue a certificate of disability. The certificate was issued only once the judge determined that the judge within his circuit was truly disabled and that it would not be possible to designate a judge from within the circuit to assume his responsibilities. *See id.*; *see also* FISH, *supra* note 15, at 14.

124. *See* 41 CONG. REC. 4581 (1907) (statement of Rep. Jenkins).

125. *See id.* at 4580 (statement of Rep. Mann).

126. *See id.* (statement of Rep. Jenkins).

127. *See id.* at 4581 (statement of Rep. Sulzer).

128. *See id.* (statement of Rep. Mann).

129. *See id.*

130. Circuit Court of Appeals Act, ch. 517, 26 Stat. 826 (1891).

If one thinks of the expansion of permitting visitors at the district court as a natural progression—it began with local assistance for disabled judges,<sup>131</sup> then included local assistance for workload relief,<sup>132</sup> then included “foreign” assistance for disabled judges<sup>133</sup>—it is only logical that the next push was for “foreign” assistance for workload relief. And so it was, at least in part. In the words of Professor Fish, “[g]eneral intercircuit assignments received a major impetus” in 1913.<sup>134</sup> The judges in New York were once again the focal point of the story. Having a particularly large workload, the senior circuit judge of the Second Circuit (what we today call the chief judge<sup>135</sup>) had been angling for the ability to call upon judges from outside the circuit who were not “fully occupied” to assist the district courts.<sup>136</sup> Congress responded with the Act of October 3, 1913.<sup>137</sup> That Act provided that whenever the senior circuit judge certified that it would be “impracticable” to designate a judge from within the circuit to assist with the “accumulation or urgency of business,” the Chief Justice could “if in his judgment the public interests so require[d],” appoint a judge from another circuit to sit by designation.<sup>138</sup> But rather than create a general scheme for all courts, Congress gave only the Second Circuit permission to call upon foreign judges to help with a rising workload.<sup>139</sup>

The original bill considered by the Senate actually was intended to apply to all circuits “[w]henever it shall be certified by any senior circuit judge of any circuit.”<sup>140</sup> But this scheme soon fell to, in the words of then-Professor Felix Frankfurter and James Landis, “sectional prejudice.”<sup>141</sup> While it seemed unproblematic for New York to have visitors from afar, “totally different feelings were aroused by the thought of eastern judges holding court in southern or southwestern districts,”<sup>142</sup> and Congress subsequently amended the bill to make it applicable only to the Second Circuit.<sup>143</sup> When members of the House debated the bill, there was a question about whether it might not be preferable to have a uniform scheme.<sup>144</sup> Representative Henry Clayton of

---

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

132. An Act of Apr. 2, 1852, ch. 20, 10 Stat. 5.

133. See An Act of Mar. 4, 1907, ch. 2940, 34 Stat. 1417.

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

135. See 8 F.R.D. 343, 347 (1948) (modifying the title of “senior circuit judge” to “chief judge”).

136. FISH, *supra* note 15, at 14–15.

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

138. *Id.* at ch. 18.

139. *Id.*

140. 50 CONG. REC. 2132 (1913).

141. See FRANKFURTER & LANDIS, *supra* note 114, at 233.

142. *Id.*

143. 50 CONG. REC. 2237 (1913).

144. Specifically, Representative Joseph Sherley from Kentucky noted that the bill would make a “rule for a particular circuit,” and stated that while he did not necessarily “quarrel” with the proposed bill, he thought it might be preferable to keep the law “uniform and instead of making this apply to the second circuit, make it apply to all the circuits.” *Id.* at 5209 (statement of Rep. Sherley).

Alabama responded by saying that “[i]t seemed that [the bill] could not pass the Senate without this amendment making it applicable alone to the second circuit”<sup>145</sup> and further urging the House to pass the bill in any event since the situation in the Second Circuit was dire.<sup>146</sup> Ultimately his position won the day.<sup>147</sup>

Not surprisingly, other circuits soon wanted similar assistance for their district courts. The senior circuit judge of the Sixth Circuit, Arthur Denison, presented a clever argument in an attempt to gain the same relief given to the Second Circuit. Specifically, he argued that one could combine the 1913 Act with the general provision that foreign judges could assist in instances of disability to create the general power of the Chief Justice to assign foreign judges for workload matters.<sup>148</sup> The Chief Justice, unfortunately, did not look favorably upon such alchemy. Indeed, he flatly refused to allow a judge from Texas to sit by designation in the overwhelmed federal district court in Detroit on the ground that by specifying the Second Circuit and the Second Circuit alone in the 1913 Act, Congress clearly had not intended to create a common scheme for all federal courts.<sup>149</sup> As a result, outside of the Second Circuit, the assignment power of the Chief Justice was used only in the case of a given judge’s illness or disability.<sup>150</sup>

The decade that followed proved to be a critical time in the history of visiting judges, and indeed, judicial administration more broadly. Given the trajectory of the practice, and given the perceived needs of circuits beyond the Second, one might expect judicial reformers to have focused on pushing for the expanded use of drafting Article III judges. In fact, the years that followed the 1913 Act saw a much more radical proposal: a call for the creation of a new kind of judge—a mobile judge, who could come to the aid of courts in need.

Soon after leaving the presidency, William Taft became an outspoken proponent of creating a new set of judges-at-large for the federal judiciary.<sup>151</sup> The concept of itinerant judges was not new to Taft. During his time in office, Congress had created the short-lived United States Commerce Court,<sup>152</sup> which was staffed with judges who would sit on that court during part of the year and who could then assist other circuits as needed.<sup>153</sup> George Wickersham, the Attorney General under Taft, purportedly saw the court as the “first step”

---

145. *Id.* (statement of Rep. Clayton).

146. *Id.*

147. *See id.* at 5210.

148. *See FISH, supra* note 15, at 15.

149. *Id.* (citing Arthur C. Denison to Andrew J. Volstead, July 8, 1921, Legislative Files, House, H.R. 7110, 67th Cong. (National Archives, Washington, D.C.)).

150. *See id.* at 15–16.

151. *See* William H. Taft, *Address of the President*, 37 ANN. REP. A.B.A. 359, 383–85 (1914).

152. An Act of June 18, 1910, ch. 309, 36 Stat. 539.

153. *Id.* (providing that “said court shall be composed of five judges, to be from time to time designated and assigned thereto by the Chief Justice of the United States, from among the circuit judges of the United States”).

toward, in Professor Fish's words, an "administratively integrated federal judicial system."<sup>154</sup> The Commerce Court, though, was not long for this world—only a few years after it was created, Congress decided to abolish it.<sup>155</sup> The difficult question that emerged from the abolition of the court was what to do with the Article III judges who comprised it.<sup>156</sup> In a somewhat fitting conclusion, a few returned to their original courts while two others were eventually assigned to new ones.<sup>157</sup> And in the years that followed, Taft advocated for a broader version of the scheme.

In his 1914 "Address of the President" delivered at the annual meeting of the American Bar Association (as he was now President of that organization), Taft called for the creation of a set of judges-at-large.<sup>158</sup> After painting a picture of the federal judiciary in which some judges had "too much" to do and others "could do more," Taft proposed a system "by which the whole judicial force of circuit and district judges could be distributed to dispose of the entire mass of business promptly."<sup>159</sup>

Taft was sufficiently wedded to his proposal that "within hours" of being confirmed Chief Justice of the United States several years later, he wrote to Attorney General Harry Daugherty about judicial reform, including the system's need for judges who could be dispatched to assist overworked courts throughout the country.<sup>160</sup> Around the same time, the Attorney General appointed a special committee to consider reform proposals for the federal judiciary, which ultimately made several recommendations that dovetailed with Taft's plan.<sup>161</sup> Specifically, the committee recommended that Congress create district judges-at-large within each of the nine circuits, who could be assigned anywhere within the circuit by the senior circuit judge or anywhere throughout

---

154. FISH, *supra* note 15, at 25 (citing George W. Wickersham to Alexander W. Smith, December 9, 1910, Department of Justice Files, No. 144446, Sec. 1).

155. See Grove, *supra* note 27, at 482–84.

156. See FRANKFURTER & LANDIS, *supra* note 114, at 68.

157. See GEYH, *supra* note 27, at 81–85; see also *Commerce Court: 1910-1913*, FED. JUD. CTR., <https://www.fjc.gov/history/courts/commerce-court-1910-1913> [https://perma.cc/QXV7-PLCH]. Specifically, Judge Knapp was reassigned to the Fourth Circuit Court of Appeals in 1916, see *U.S. Court of Appeals for the Fourth Circuit: Succession Chart*, FED. JUD. CTR., <https://www.fjc.gov/history/courts/u.s.-court-appeals-fourth-circuit-succession-chart> [https://perma.cc/YSG4-5P4H], and Judge Mack was reassigned to the Second and Sixth Circuits in 1929, and then to the Second Circuit alone in 1930, see *U.S. Court of Appeals for the Second Circuit: Succession Chart*, FED. JUD. CTR., <https://www.fjc.gov/history/courts/u.s.-court-appeals-second-circuit-succession-chart> [https://perma.cc/XU7G-U3HD]. Many thanks to Winston Bowman of the Federal Judicial Center for pointing me to these reassignments.

158. Taft, *supra* note 151, at 383.

159. *Id.* at 384.

160. See FISH, *supra* note 15, at 26 (citing Taft to Harry M. Daugherty, June 3, 1921, Department of Justice Files, No. 144446, Sec. 2).

161. See *id.*; Walter F. Murphy, *Chief Justice Taft and the Lower Court Bureaucracy: A Study in Judicial Administration*, 24 J. POL. 453, 455 (1962); Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223, 275 (2003).

the country by the Chief Justice.<sup>162</sup> The committee further recommended that Congress create a judicial conference, which was to be made up of the Attorney General, Chief Justice, and all senior circuit judges, to meet regularly to consider matters of judicial administration, such as pressing workload issues.<sup>163</sup> Finally, the committee recommended expanding the use of visiting judges generally, such that the Chief Justice would have the authority to assign district judges to any court for any need.<sup>164</sup>

Congress soon considered bills to effectuate the committee's proposals, but portions were quickly met with resistance. In particular, the provision to have what Taft had dubbed a "flying squadron of judges"<sup>165</sup> ran aground.<sup>166</sup> There were several noted concerns, including that the provision would vest the Chief Justice with too much authority, as he would have the power to direct the judges-at-large.<sup>167</sup> Another set of concerns seemed to echo the "sectional prejudice" that was on display when Congress earlier considered whether to expand the use of visiting judges.<sup>168</sup> As Professor Justin Crowe has written, Democrats in particular were wary of the impact a more centralized system of administration would have on "judicial localism."<sup>169</sup> Taken at face value, the argument was that federal judges were not sufficiently fungible to assume each other's roles across the country. And yet it is impossible to ignore the darker undertones, particularly given southern Democrats' interest in avoiding "carpetbag judges" unfamiliar with the "conditions" in the South.<sup>170</sup>

An additional concern, as Professor Charles Murphy has noted, was that the proposal threatened to "upset established patronage arrangements."<sup>171</sup> This concern was on display during a hearing with Chief Justice Taft and Attorney General Daugherty before the House Judiciary Committee regarding the proposed bills.<sup>172</sup> The committee was already considering the addition of

162. See FISH, *supra* note 15, at 26; Murphy, *supra* note 161, at 455.

163. See Murphy, *supra* note 161, at 455–56.

164. *Id.* at 456.

165. 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).

166. See JUSTIN CROWE, BUILDING THE JUDICIARY: LAW, COURTS, AND THE POLITICS OF INSTITUTIONAL DEVELOPMENT 208 (2012); Murphy, *supra* note 161, at 458.

167. For a thoughtful discussion of this and related concerns voiced in response to the judges-at-large plan, see Theodore W. Ruger, *The Judicial Appointment Power of the Chief Justice*, 7 U. PA. J. CONST. L. 341, 356–58 (2004).

168. See *supra* note 141 and accompanying text.

169. See CROWE, *supra* note 166.

170. See *infra* notes 178–181.

171. See Murphy, *supra* note 161, at 458; see also Andrew D. Bradt, "A Radical Proposal": *The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831, 849–50 (2017) (noting that Taft's proposal "threatened the traditional patronage opportunity presented by federal judgeships"); Peter G. Fish, *William Howard Taft and Charles Evans Hughes: Conservative Politicians as Chief Judicial Reformers*, 1975 SUP. CT. REV. 123, 136 (1975) ("Such a departure from historic principles of localism fell before heated congressional opposition.").

172. *Additional Judges, United States District Courts: Hearings on H.R. 8875 Before the H. Comm. on the Judiciary*, 67th Cong. 1 (1921).

several judgeships across the country and when pressed, the Attorney General conceded that if the bill to create judges-at-large were to pass, the need for some of the previously contemplated judgeships would be obviated:

Mr. Walsh [Representative of Massachusetts]: [W]e have bills on the calendar for an additional judge for the eastern district of Oklahoma . . . Also for Minnesota; and the committee has favorably considered an additional judge for the eastern and western districts of Missouri. That [with two judges-at-large] would give that circuit six additional judges?

Mr. Daugherty: Yes. If these 18 judges at large are provided, you might reduce Missouri . . .

Mr. Dyer [Representative of Missouri]: I do not see why you should pick on Missouri, Mr. Attorney General. [Laughter.]<sup>173</sup>

In the end, Congress opted to create twenty-four standard district judgeships (including two in Missouri).<sup>174</sup> The provision for mobile judges died in the House Committee, and no attempt was made to revive it.<sup>175</sup>

What survived, however, were the other two main components of the committee's proposal—to create the Conference of Senior Circuit Judges and to expand the practice of visiting judges. The latter provision in particular still faced a “rough[ ] road.”<sup>176</sup> Some of the opposition echoed arguments made against the provision to create judges-at-large, stressing the need for “local” judicial actors.<sup>177</sup> Representative William Francis Stevenson, Democrat of South Carolina, noted that he was not eager to have “carpetbag judges” moved around the country.<sup>178</sup> Specifically, he said, “[y]ou propose to take men from Maryland or Virginia or Pennsylvania and send them down to South Carolina, where the practice is different.”<sup>179</sup> He continued, “we of my State, at least, have had enough of the transportation of judges from a distance down there to make decisions that are revolutionary and which will overturn the decisions with reference to the rights of property and rulings of the courts.”<sup>180</sup>

Senator Lee Slater Overman, Democrat of North Carolina, likewise challenged the same provision on the grounds that it seemed too similar to the provision creating mobile judges:

That bill provided for roaming judges: it provided that a judge from North Carolina might be sent to try cases in Oregon, although the North Carolina judge does not know anything about the laws in Oregon or the conditions in Oregon or the methods of life there.

---

173. *Id.* at 11–12.

174. *See* An Act of Sept. 14, 1922, ch. 306, 42 Stat. 837.

175. *See* Murphy, *supra* note 161, at 458.

176. *Id.*

177. *Id.*

178. 62 CONG. REC. 204 (1921) (statement of Rep. Stevenson).

179. *Id.*

180. *Id.*

Likewise, that bill provided that a judge might be taken from New Jersey and sent to North Carolina to try cases there, such a judge being entirely unacquainted with our laws and with our conditions. That is what is now proposed to be done—to sweep judges around all over the United States: to send them from one State to another. That proposition would not go down the throats of the Judiciary Committee.<sup>181</sup>

As it turned out, though the provision was indeed taken out in the Senate Judiciary Committee, the committee members later changed their minds and reinstated it with two provisos: The senior circuit judge of the “lending” circuit had to consent to the transfer, and the senior circuit judge of the “borrowing” circuit had to certify their need.<sup>182</sup>

Thus, a little over a century after Judges Tallmadge and Van Ness participated in the first visiting arrangement,<sup>183</sup> Congress allowed district judges from anywhere in the country to be certified to visit another court not simply because of the health of a single judge but for the health of a court and the public interest.<sup>184</sup> It further created a body of judges, referred to as the Conference of Senior Circuit Judges (today known as the Judicial Conference),<sup>185</sup> to serve as a key self-governing institution for the judiciary and help manage matters such as the caseload concerns of any individual court.<sup>186</sup>

It was this latter institution that twenty years later recommended the same courtesy be extended to the circuit courts. In the hearings before a Senate Judiciary subcommittee on the “designation of circuit judges to circuits other than their own,” D. Lawrence Groner, the Chief Justice<sup>187</sup> of the United States Court of Appeals, Washington, D.C. read a resolution of the Judicial Conference into the record:

The conference resolved that legislation was desirable authorizing the Chief Justice to assign circuit judges to temporary duty in circuits other than their own, the procedure of assignment to conform to that of existing legislation relating to the assignment of district judges to districts outside their circuits.<sup>188</sup>

---

181. 62 CONG. REC. 5103 (1922) (statement of Sen. Overman).

182. See Murphy, *supra* note 161, at 458.

183. See *supra* notes 63–69 and accompanying text.

184. An Act of Sept. 14, 1922, ch. 306, 42 Stat. 837.

185. See CROWE, *supra* note 166, at 200.

186. See Murphy, *supra* note 161, at 456.

187. The head judge of the D.C. Circuit was originally styled as “Chief Justice.” That position was changed to “Chief Judge” in the middle of the twentieth century. See An Act to Amend Various Statutes and Certain Titles of the United States Code for the Purpose of Correcting Obsolete References, and for Other Purposes, Sept. 3, 1954, 68 Stat. 1245 (clarifying that the Chief Justice of the United States Court of Appeals for the District of Columbia shall be known as the Chief Judge).

188. *Designation of Circuit Judges to Circuits Other Than Their Own: Hearing on S. 2655 Before the Subcomm. of the S. Comm. on the Judiciary*, 77th Cong., 2d Sess., 4 (1942) (statement of Hon. D. Lawrence Groner, Chief Justice, United States Court of Appeals, Washington, D.C.).



The proposed bill did exactly that, following the same structure as the one created for district judges.<sup>189</sup> Justice Groner went on to note how well the visiting practice had worked at the district court—calling it a “matter of general satisfaction”—and how badly needed it was now for the appellate courts that were “very much overcrowded.”<sup>190</sup> Statements of various members of the bar and bench were read in favor of the bill—Judge Learned Hand went on record to say that “I am heartily in favor of this bill and think that it is a long overdue reform.”<sup>191</sup> George M. Morris, President of the American Bar Association, stated that “[t]his is such a sound idea. The only oddity about it is that it didn’t come forward long before it did.”<sup>192</sup> The bill allowing for circuit judges to visit other circuits, for reasons of the “volume, accumulation, or urgency of business” or “the disability or necessary absence” of a circuit judge, passed into law in the waning days of 1942.<sup>193</sup>

Stepping back, the original history of visiting judges tells an important story of the expectations of federal judges generally—that they were presumed fixed within their own court. It was only slowly and grudgingly that Congress eased the fixedness of federal judges when necessity called. And even then, there were (as there remain today) limitations on just how free and interchangeable Article III judges could be. While this picture may reflect our contemporary sense of the federal judiciary, it stands in marked contrast to a different (but ultimately related) practice within the federal courts: circuit riding.

### B. *The Fluidity of Circuit Riding*

In one respect, the first 120 or so years of the federal courts represented an age of fluidity. Throughout this period, Justices of the Supreme Court rode circuit<sup>194</sup>—meaning that they traveled around the country for a substantial portion of the year to sit on the federal circuit courts.<sup>195</sup> As with visiting judges, the practice of circuit riding has not received extensive treatment in the literature,<sup>196</sup> though its history has been artfully traced before.<sup>197</sup> What follows

---

189. *Id.* at 1–3.

190. *Id.* at 3–4.

191. *Id.* at 11.

192. *Id.* at 17 (statement of George M. Morris, President of the American Bar Association).

193. An Act to Amend the Judicial Code to Authorize the Chief Justice of the United States to Assign Circuit Judges to Temporary Duty in Circuits Other Than Their Own of Dec. 29, 1942, 56 Stat. 1094.

As for the remaining expansions of the practice, 1942 was also the year in which judges of the Court of Customs and Patent Appeals were authorized to serve on the courts of appeals. *See id.* The Chief Justice was authorized to assign district judges to courts of appeals of other circuits in 1948. *See* 62 Stat. 901 (1948). And the Court of International Trade judges could be assigned to district courts or the courts of appeals from that court’s inception in 1980. *See* 94 Stat. 1727 (1980).

194. *See* Glick, *supra* note 27, at 1754; *see also supra* note 43.

195. Glick, *supra* note 27, at 1766 (noting how the Justices had to spend nearly half of the year riding circuit).

196. *See supra* note 27.

is a brief account of circuit riding to contrast it with, and ultimately connect it to, sitting by designation.

The first Judiciary Act in 1789 established thirteen district courts to hear cases in the first instance<sup>198</sup> and a Supreme Court.<sup>199</sup> It further divided the districts into three circuits—the eastern, middle, and southern—and created courts of both original and appellate jurisdiction in those circuits, to be composed of two Justices of the Supreme Court and one district judge.<sup>200</sup> And so, from the beginning, the Justices had to perform their duties on the Supreme Court during one part of the year, and then ride out to the various federal circuit courts to decide cases as circuit judges in the remainder.<sup>201</sup>

One may well wonder why Congress created this particular arrangement instead of establishing a set of judgeships for the circuit courts. Circuit riding was meant to serve a host of functions,<sup>202</sup> including economy. Specifically, drafting the Justices and district judges to serve on the circuit obviated the need to pay for a new set of judges—a cost it was not clear the public fisc could bear in the early days of the country.<sup>203</sup>

But circuit riding was intended to provide benefits over and above cost savings. To wit, there was a perceived value in having Justices weigh in on questions of federal law at the appellate and even trial stages. As Joshua Glick has written, having Justices sit on the circuit courts helped ensure that “[authoritative] and correct answers be given to the critical legal questions” coming before the lower federal courts.<sup>204</sup> Ensuring that the “right” legal rules were fashioned was then meant to lead to two additional benefits. First, circuit riding was intended to bring about greater uniformity of federal law.<sup>205</sup> And

---

197. See generally Glick, *supra* note 27; see also Calabresi & Presser, *supra* note 27, at 1386 n.1 (noting that the authors were indebted to Glick’s informative work); Stras, *supra* note 27, at 1711 n.3 (describing Glick’s work as providing “a wonderful and thorough discussion of the history of circuit riding”).

198. Judiciary Act of 1789, ch. 20, §§ 2–3, 1 Stat. 73.

199. *Id.* § 1.

200. *Id.* §§ 4, 11, 12.

201. See Calabresi & Presser, *supra* note 27, at 1391.

202. In addition to the benefits circuit riding was thought to provide, there was also some precedent for the practice. In the words of Professor James Pfander, “circuit riding resembled the system of *nisi prius* courts in England, under which the judges of the courts of Westminster rode circuit throughout the realm to conduct jury trials of factual issues.” See James E. Pfander, *Marbury, Original Jurisdiction, and the Supreme Court’s Supervisory Powers*, 101 COLUM. L. REV. 1515, 1564 (2001).

203. See Glick, *supra* note 27, at 1757; Stras, *supra* note 27, at 1715.

204. Glick, *supra* note 27, at 1758.

205. See *id.* at 1761; Stras, *supra* note 27, at 1717 (“[C]ircuit riding enhanced the uniformity of federal law, which was an important consideration in light of the nation’s less than satisfactory experience under the Articles of Confederation.”).

second, the practice was meant to increase the public's sense of the legitimacy of the federal judiciary.<sup>206</sup>

The benefits of circuit riding were intended to extend beyond what the Justices could bring to the circuit courts, though; they were meant to include what the Justices would bring back with them to their own Court. Specifically, by adjudicating cases and spending time in towns and cities outside of Washington D.C., the Justices were to become more familiar with the laws and customs of different localities.<sup>207</sup> (Some familiarity was assumed since initially Justices were assigned to the circuit where each had lived and practiced.<sup>208</sup>) This enhanced legal knowledge could then inform, and be used to improve, the Justices' own decision-making at the Supreme Court.<sup>209</sup> In short, circuit riding cast the Justices as ambassadors—bringing information to and from various courts across the country.

Despite the numerous benefits that were meant to flow from circuit riding, the Justices strongly opposed the practice. In the words of Judge (then-Professor) David Stras, “[t]o say that most [J]ustices disliked circuit riding would be an understatement.”<sup>210</sup> First and foremost, the tours could be physically taxing, requiring extensive travel—indeed, the particularly treacherous southern circuit required two thousand miles of travel each year<sup>211</sup>—and all before the advent of railroads, cars, and airplanes. This was no small feat for the Justices, particularly some of the older members of Court.<sup>212</sup> In fact, the physical hardships endured during the early days of the practice led to health problems for several Justices.<sup>213</sup> Adding insult to injury, the Justices were required to pay for their own travel and accommodations during their tours, making the practice more unpopular still.<sup>214</sup>

In a different vein, the Justices believed that circuit riding created a problem with the structure of review. One of the main sources of cases to the Supreme Court was of course the circuit courts, meaning that the Justices would hear cases on appeal that some members of Court had previously heard

---

206. See FISH, *supra* note 15, at 8 (describing how a substantial portion of the Justices' time while riding circuit was spent on the “assimilation of state and local values”); Glick, *supra* note 27, at 1761; Stras, *supra* note 27, at 1717.

207. See Stras, *supra* note 27, at 1716.

208. See Glick, *supra* note 27, at 1763.

209. Furthermore, as David Fontana has argued, leaving the environs of Washington for at least part of the year was meant to increase the independence of the Justices from the legislative and executive branches. See David Fontana, *Federal Decentralization*, 104 VA. L. REV. 727, 759 (2018).

210. See Stras, *supra* note 27, at 1718.

211. See *id.*

212. See Glick, *supra* note 27, at 1766.

213. *Id.*; see Calabresi & Presser, *supra* note 27, at 1391 (describing how Justice James Iredell died at the age of forty-eight “in part because of the rigors of circuit riding in the southern circuit, where roads and accommodations were still quite scarce”).

214. See Calabresi & Presser, *supra* note 27, at 1391; Stras, *supra* note 27, at 1718.

below.<sup>215</sup> Although the Justices attempted to solve the problem by adopting an internal practice by which members of the Court would not decide any appeals that they had personally heard at the circuit court, such a solution was not feasible in every case—sometimes all of the Justices were needed for a quorum.<sup>216</sup> Given all of the challenges associated with circuit riding, the Justices lobbied for the abolition of the practice from the start.<sup>217</sup>

Congress soon made changes to the Justices' assignments, but not the changes most of the Justices had hoped for. Based on the pleas of Justice James Iredell, who had been assigned to the perilous southern circuit, Congress passed the Judiciary Act of 1792, which stated that “no judge, unless by his own consent, shall have assigned to him any circuit which he hath already attended, until the same hath been afterwards attended by every other of the said judges.”<sup>218</sup> (It helped Justice Iredell's cause that his brother-in-law was Senator Samuel Johnston of North Carolina.<sup>219</sup>) Though the measure was enacted to reduce the burdens that circuit riding placed on any one single Justice, it had the effect—or simply reflected the view—of an increased fluidity within the federal judiciary. No longer were Justices tied to the Circuit from which they originally hailed.<sup>220</sup> Following the Judiciary Act of 1792, any Justice could end up riding any of the circuits across the country—and in fact, the expectation was that they would rotate.<sup>221</sup>

Moderate relief for all of the Justices was soon forthcoming. The Judiciary Act of 1793 reduced the circuit riding responsibilities of the Justices by requiring only one Justice—instead of two—to sit on each circuit court.<sup>222</sup> But the burdens associated with circuit riding were still thought to be substantial, and even contributed to John Jay's refusal of the Chief Justiceship following his stint as New York's governor.<sup>223</sup>

Significant, even if temporary, relief came in the form of the Judiciary Act of February 19, 1801.<sup>224</sup> The “Midnight Judges Act,” passed by the outgoing Federalist Congress at the behest of President John Adams, abolished circuit

215. See Glick, *supra* note 27, at 1762. District judges did not face such problems, as the Judiciary Act of 1789 specified that they not hear on appeal at the circuit court any case they had decided in the first instance. See Judiciary Act of 1789, ch. 20, § 4, 1 Stat. 73.

216. See Glick, *supra* note 27, at 1762–63.

217. See *id.* at 1766–67 (describing how “[s]tarting in the first term of the Supreme Court, the [J]ustices complained bitterly about their circuit duties” and how the Justices then “regularly exchanged correspondence with political figures” in an effort to “persuade Congress to eliminate or overhaul the circuit riding system”); see also Resnik, *supra* note 161, at 273 (describing how the justices joined in a petition to Congress to end their circuit riding obligations).

218. Judiciary Act of 1792, ch. 21, § 3, 1 Stat. 253.

219. See Glick, *supra* note 27, at 1771.

220. See *supra* note 208 and accompanying text.

221. See Glick, *supra* note 27, at 1777 (noting the opposition of some of the Justices to the new “rotation requirement”).

222. Judiciary Act of 1793, ch. 22, § 1, 1 Stat. 333.

223. See Glick, *supra* note 27, at 1781.

224. Judiciary Act of 1801, ch. 4, 2 Stat. 89 (repealed 1802).

riding and created sixteen circuit court judgeships (to be filled by Adams).<sup>225</sup> The Jeffersonian Republicans responded the next year by passing the Repeal Act of 1802, which abolished the new judgeships and required the Justices to take up their circuit riding duties once again.<sup>226</sup>

There were immediate questions surrounding the Repeal Act's constitutionality.<sup>227</sup> Specifically, there were some who doubted whether Congress could require the Justices to ride circuit without separate appointments to, and commissions for, both courts.<sup>228</sup> Even Chief Justice Marshall apparently held this view.<sup>229</sup> And yet, despite misgivings, the Justices collectively decided that they should recommence their circuit riding duties in the fall of 1802.<sup>230</sup>

The constitutionality of circuit riding was soon put squarely to the Justices in *Stuart v. Laird*.<sup>231</sup> In what is now famous reasoning,<sup>232</sup> the Court rejected the arguments against circuit riding in a short opinion by Justice Paterson.<sup>233</sup> Rather than declare the practice clearly in line with the Appointments Clause, the Court instead decided that since the Justices had not earlier found circuit riding to be unconstitutional, the matter was settled and circuit riding should go on. In the words of Justice Paterson:

Another reason for reversal is, that the judges of the supreme court have no right to sit as circuit judges, not being appointed as such, or in other words, that they ought to have distinct commissions for that purpose. To this objection, which is of recent date, it is sufficient to observe, that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction . . . the question is at rest, and ought not now to be disturbed.<sup>234</sup>

---

225. See 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 185–88 (1926); Kathryn Turner, *The Midnight Judges*, 109 U. PA. L. REV. 494, 494–95 (1961).

226. The Repeal Act, ch. 8, § 1, 2 Stat. 132 (1802); see also Calabresi & Presser, *supra* note 27, at 1394; Glick, *supra* note 27, at 1786.

227. See WARREN, *supra* note 225, at 222.

228. See BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY* 176 (2005).

229. See *id.* at 163–72; Glick, *supra* note 27, at 1790 (citing Letter from John Marshall to William Cushing (Apr. 19, 1802), reprinted in 6 *THE PAPERS OF JOHN MARSHALL* 108 (Charles E. Hobson ed., 1990)).

230. See Glick, *supra* note 27, at 1791.

231. 5 U.S. 299 (1803).

232. *Stuart* is now cited as a prominent example of the Court's view that constitutional meaning can be fixed from early practice. See, e.g., Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 424 n.47 (2012); Vasav Kesavan & Michael Stoke Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L. J. 1113, 1167 n.226 (2003).

233. *Stuart*, 5 U.S. at 309.

234. *Id.* at 309.

Thus, a unanimous Supreme Court upheld the constitutionality of a practice that the Justices had pressed for so long to end—a practice that would endure for more than another century.

In the decades that followed, circuit riding became even more onerous as the Supreme Court's own docket rapidly increased.<sup>235</sup> Congress, in response, made some modest adjustments to the Court's obligations. For example, the Act of June 17, 1844 limited the amount of circuit riding each Justice was required to undergo in a given year.<sup>236</sup> Of particular note, the landmark Judiciary Act of 1869 created the only set of dedicated circuit judges at the time, and reduced the Justices' circuit riding commitment to once every two years.<sup>237</sup>

A complete solution to the Court's problems finally came in the form of the Evarts Act in 1891. As noted earlier, the Circuit Court of Appeals Act,<sup>238</sup> as it was formally known, significantly shifted the structure of the federal courts.<sup>239</sup> It created a new tier of intermediate appellate courts—the federal courts of appeals we know today.<sup>240</sup> Although the Evarts Act maintained the old circuit courts, they no longer had appellate jurisdiction over the district courts, thereby considerably shrinking their caseload.<sup>241</sup> Furthermore, under the Act, the Justices were made “competent” to sit as judges of the courts of appeals but they were not required to do so or to sit on the old circuit courts.<sup>242</sup> Accordingly, almost all of the Justices stopped riding circuit.<sup>243</sup> Chief Justice Fuller is the only notable outlier; he went on to hear more than forty cases on the Fourth Circuit in the twenty years that followed.<sup>244</sup>

Congress soon formalized what most of the Court had already brought into practice—the end of circuit riding. In the Judicial Code of 1911—Congress's unification of statutes pertaining to the judiciary—Congress abolished the old circuit courts, and with it, circuit riding.<sup>245</sup> Thus, roughly a century and a quarter after it began,<sup>246</sup> the practice of Supreme Court Justices venturing out into various parts of the country to hear cases ended quietly.

---

235. See FRANKFURTER & LANDIS, *supra* note 114, at 34–50 (detailing the growth in the Supreme Court's caseload between the early 1800s and the early 1840s).

236. An Act of June 17, 1844, ch. 96, 5 Stat. 676. Specifically, Justices would no longer have to attend “more than one term of the circuit court within any district of such circuit in any one year.” *Id.*

237. An Act to Amend the Judicial System of the United States, ch. 22, 16 Stat. 44 (1869).

238. Circuit Court of Appeals Act, ch. 517, 26 Stat. 826 (1891).

239. See FISH, *supra* note 15, at 6.

240. See Glick, *supra* note 27, at 1826.

241. See *supra* note 117.

242. Circuit Court of Appeals Act, ch. 517, § 3, 26 Stat. at 827 (1891).

243. See Glick, *supra* note 27, at 1828.

244. *Id.*

245. See Judicial Code of 1911, ch. 231, 36 Stat. 1087; see also CROWE, *supra* note 166, at 192 (noting how the Judicial Code was “a significant piece of judicial institution building” by, first, “abolishing circuit courts once and for all,” which meant it “eliminated circuit riding”).

246. See *supra* notes 198–201 and accompanying text.

Despite some recent calls to resurrect the practice,<sup>247</sup> circuit riding in its traditional form remains a practice of the past, and not a fixture of our present.

Like the practice of visiting judges, circuit riding might be seen initially as a mere oddity of the federal courts—a curious habit that was ultimately dropped. But circuit riding in fact carries with it a great significance. Specifically, it demonstrates a fluidity of the federal system during the first 120 years of the Court’s existence along two key dimensions.

The first dimension is geographic. Justices were not always tied down to their posts.<sup>248</sup> Instead, the system relied upon them traveling to different courts across the states for a substantial part of the year. To be sure, the members of the Court did not have free reign; they had to go to the circuit to which they were assigned in a given year.<sup>249</sup> But it was understood that one was not meant to be “fixed”—one could be a Justice of Washington one part of the year, and then a judge of the southern circuit during the other part.<sup>250</sup> Circuit riding critically reveals that there was an assumed fluidity of place for these positions.

Second, circuit riding reveals fluidity within the judicial hierarchy. One was expected to be a Justice of the Supreme Court for part of the year and then a judge of the circuit court, sitting alongside a district judge, the next. Now, as some scholars have pointed out in regard to the constitutional challenges to the practice, circuit riding duties were meant to be encompassed in the role of Supreme Court Justices. That is, being a Justice meant also being a circuit judge.<sup>251</sup> While this is true, the critical point remains—it was built into the system from the very start that one could serve at the top of the judicial hierarchy and, in short order, serve as a trial or appellate judge on a different court.

Stepping back, it is certainly true in some respects that the federal judiciary was “frozen” during much of its early days.<sup>252</sup> But upon a close examination of past practice, it emerges that courts were allowed to borrow other judges quite early on—a practice that expanded over time to help ailing judges and later, overworked courts. And from circuit riding, it is clear that

---

247. See generally Calabresi & Presser, *supra* note 27; Lerner & Lund, *supra* note 27; Stras, *supra* note 27.

248. That location shifted in the early days of the Court—starting with New York City, then moving to Philadelphia, and finally ending in Washington D.C. See *Homes of the Court*, SUP. CT. HIST. SOC’Y, <http://www.supremecourthistory.org/history-of-the-court/home-of-the-court> [https://perma.cc/LZQ7-FRSA].

249. Even though the Judiciary Act of 1789 did not specify how assignments would be made, the Court decided that the Justices should be assigned to the circuit from which they hailed; they were not free to choose. See Judiciary Act of 1789, ch. 20, 1 Stat. 73; Glick, *supra* note 27, at 1828.

250. And, during the time immediately following the Judiciary Act of 1792, one could then be a judge of the eastern circuit the next year, and so on. See *supra* notes 218–221 and accompanying text.

251. See Glick, *supra* note 27, at 1839 (arguing that Congress simply gave the members of the Supreme Court “extra responsibilities as part of the package of duties associated with the office of Justice”).

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

there was some interchangeability of judges embedded within the judiciary from the very start. Justices were able to cross the country and cross courts both as a way to provide knowledge and experience to the circuits, and as a way to gain knowledge and experience for their home Court. It is these two different strands that came together to produce modern-day visiting.

### C. *Bringing Visiting Judges to the Present*

Visiting judges can be found throughout the federal courts today, but their contribution is felt most significantly in the courts of appeals. The courts that were born dependent upon the assistance of outside judges continue to rely on such help each year—more than the district courts to a considerable degree. All told, visiting judges sat with the appellate courts some 324 times between September 2016 and September 2017, and participated in 4,356 out of 54,347 decisions.<sup>253</sup> Within that set, they helped decide 1,916 out of 6,913 cases on the merits after oral argument—or nearly 30 percent.<sup>254</sup> (By contrast, the district courts received 205 visitors who terminated 3,464 out of 364,932 cases.<sup>255</sup>)

Focusing on the courts where visitors make the most substantial contribution, the courts of appeals, it is worth noting that judges from all parts of the judiciary come to sit by designation. Specifically, district judges from in and outside the circuit, other circuit judges, and judges from Article III courts of “special” jurisdiction—the Federal Circuit and the U.S. Court of International Trade—all lend their services.<sup>256</sup> Representing the top tier, retired Associate Justice Sandra Day O’Connor routinely visited the courts of appeals after she left the Supreme Court, and retired Associate Justice David Souter has frequently visited the First Circuit since his departure from the Court.<sup>257</sup>

As to how the visiting arrangements are made, the apparatus established in the 1920s to govern the practice of visiting judges<sup>258</sup> is largely in place today. There are no roving judges, to be sure, but judges are consistently authorized to sit for reasons related to the disability of a judge or the workload demands of a court. And the process for administering these visits remains a bifurcated one.

---

253. See JUDICIAL BUSINESS OF THE UNITED STATES COURTS (2017), *supra* note 10, at tbl.V-2, tbl.B-1.

254. See *id.*

255. 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 terminated 1,674 civil cases and 1,790 criminal defendants. See *id.* at tbl.V-1. During this time, the U.S. District Courts cumulatively terminated 289,595 civil cases, see *id.* at C-4, and terminated 75,337 criminal defendants, see *id.* at D-1. As noted earlier, 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), when compared to the contribution of visiting judges at the Court of Appeals, the contribution of such judges at the district court appears to be less significant.

256. See *id.* at tbl.V-2.

257. See *infra* notes 479–481.

258. See An Act of Sept. 14, 1922, ch. 306, 42 Stat. 837.



Specifically, if help is sought from within a circuit, the chief circuit judge has the authority to make the assignment.<sup>259</sup> That discretion is not unconstrained, however. If the judge being drafted is an active judge, the chief judge of her district must consent.<sup>260</sup> If the drafted judge is senior, the judge herself must consent.<sup>261</sup> Notably absent from this scheme is the consent of an active judge being asked to visit. The origins of this omission can be found with Chief Justice Taft and Attorney General Daugherty. They were apparently able to convince House Committee members back in 1921 that with respect to the visiting arrangement for the district courts, “the matter of assignment to another district ought not to rest on the assent of the judge proposed to be transferred, . . . but . . . it should be the duty of such judge to accept the assignment.”<sup>262</sup> This notion carried over into the eventual bill,<sup>263</sup> and then later to the act extending the scheme to circuit courts.<sup>264</sup> The upshot of these different statutory provisions is that chief judges have robust authority when making intracircuit assignments.<sup>265</sup>

This process stands in marked contrast to the one for intercircuit assignments. If help is sought from outside a circuit, “a higher level of authority” is required beyond the consent of any chief judge: namely, the permission of the Chief Justice of the United States.<sup>266</sup> The chief judge of the would-be borrowing court must certify that assistance is needed and submit a request for aid to the Judicial Conference Committee on Intercircuit Assignments.<sup>267</sup> Consistent with Taft’s vision for a centrally administered judiciary, that committee in turn handles the arrangements of visits and submits the formal request to the Chief Justice.<sup>268</sup> Once again, if the judge being assigned is active, her chief judge must approve (along with the chief judge of the borrowing circuit).<sup>269</sup> And once again, if the judge being assigned is senior,

---

259. See 28 U.S.C. § 291(b) (2012) (circuit judges); *id.* § 292(b) (district judges); *id.* § 294(c) (senior judges).

260. *Id.* § 295.

261. *Id.* § 294(c).

262. See FISH, *supra* note 15, at 29–30 (quoting US House Committee on the Judiciary, *Additional District Judges for Certain Districts, etc.*, Report to Accompany H.R. 8875, H.R. Rep. No. 482, at 4, 67th Cong. (1921)). By contrast, senior judges have more control over the amount of work they take on for the courts, thereby making the requirement of consent for a visit a natural one. See Burbank, Plager & Ablavsky, *supra* note 57, at 35.

263. See An Act of Sept. 14, 1922, ch. 306, 42 Stat. 837.

264. An Act to Amend the Judicial Code to Authorize the Chief Justice of the United States to Assign Circuit Judges to Temporary Duty in Circuits Other Than Their Own of Dec. 29, 1942, 56 Stat. 1094.

265. See 28 U.S.C. § 294(c) (2012); see also *infra* Part II.B.

266. 28 U.S.C. §§ 291(a), 292(d) (2012) (active judges); *id.* § 294(d) (senior judges).

267. *Id.* §§ 292(d), 292(e) (active judges); § 294(d) (senior judges).

268. NICHOLLE STAHL-REISDORFF, FED. JUD. CTR., *THE USE OF VISITING JUDGES IN THE FEDERAL DISTRICT COURTS: A GUIDE FOR JUDGES & COURT PERSONNEL* (2001), <https://www.fjc.gov/sites/default/files/2012/VisiJud3.pdf> [<https://perma.cc/4YX4-MNG5>].

269. 28 U.S.C. § 295 (2012).

she must consent to the assignment,<sup>270</sup> though no consent is needed if the judge is active.

There is one final complication when bringing in a foreign judge: intercircuit assignments must comport with the so-called “lender/borrower rule.”<sup>271</sup> The nonstatutory rule dates back to 1997, when it was approved by Chief Justice William Rehnquist, and states that “a circuit that lends active judges may not borrow from another circuit within the same time period of the assignment; a circuit that borrows active judges may not lend within the same period of the assignment.”<sup>272</sup> (Senior judges are exempt from this rule.<sup>273</sup>)

The wisdom of such a rule seems self-evident given the official rationale for visiting judges—that it is a means of supporting overburdened courts.<sup>274</sup> That said, a former chief circuit judge suggested in an interview that the rule was adopted at least in part to limit potential abuses of the system (specifically, to reduce the incidents of judges taking visiting assignments as a means to “visit their grandkids” when the lending court was in arrears).<sup>275</sup>

Regardless of how the visitor is selected to come to court, once she is selected, the mechanics of the visit are functionally the same. Generally speaking, the visitor is assigned to a panel for a particular sitting, and may hear cases for a few days or as much as a week. True to the practice’s name, often the judge is physically “visiting”—meaning she is present at court for the sitting, though sometimes visitors join by videoconference. After hearing cases, the judge conferences with the other two (home) judges and is assigned particular opinions to author. She then returns to her own chambers, often continuing to correspond with the in-circuit judges as opinion drafts are circulated and any remaining matters are resolved.<sup>276</sup>

In sum, whether it is the chief judge or the Chief Justice who officially permits the arrangements, the federal courts of appeals today call on judges of

---

270. *Id.* § 294(d).

271. STAHL-REISDORFF, *supra* note 268, at 3.

272. *Id.*

273. *Id.* Furthermore, according to the Federal Judicial Center, “The rule may be relaxed in appropriate situations, provided the chief judge of the lending circuit or court is consulted to ensure that the needs of that circuit or court are met first.” *Id.*

274. *See id.* at v (in the words of Barbara Rothstein, then Director of the Federal Judicial Center, “judges, circuit executives, clerks, and others seek ways to more effectively and efficiently manage rising caseloads in the federal courts. Using visiting judges is one method that has been successful.”).

275. Interview with a judge of the U.S. Court of Appeals for the Second Circuit (Oct. 19, 2012) (notes on file with author). *See also* Burbank, Plager & Ablavsky, *supra* note 57, at 36 (noting reasons why judges might be attracted to visiting out of circuit, and thus why eligible judges might be interested in taking senior status, including the ability to travel to warmer climates in the winter and to visit one’s family).

276. This understanding of the logistics of visiting came from the sum of the interviews for this project, and then was confirmed by a former chair of the Judicial Conference Committee on Intercircuit Assignments. *See* Correspondence with a former chair of the Judicial Conference Committee on Intercircuit Assignments (Sept. 4, 2018) (notes on file with author).

all types. This Part has sought to provide a historical account of how this arrangement came to be. The next Part presents a detailed qualitative account of how it functions today.

## II.

### THE CURRENT VIEW FROM THE COURTS

With a sense of the lineage of visiting judges in place, one can turn to how the practice operates today and what its rationales are. While a review of the statutory framework for sitting by designation is a first step, it provides only an outline. Painting in the rest of the picture requires speaking with the judges and other judicial actors who administer, and experience, the practice throughout the year.<sup>277</sup>

This Part presents the findings of a multiyear qualitative study on the use of visiting judges in the federal courts. Specifically, it rests on thirty-five in-depth interviews with judges and senior members of the clerk's offices of five of the courts of appeals, as well as with a former chair of the Judicial Conference Committee on Intercircuit Assignments. The findings provide an account of how sitting by designation functions on the ground, and also reveal several surprising aspects of the practice.

The necessity justification often invoked for visiting<sup>278</sup> came through in many of the judges' and court administrators' comments, but the same subjects were quick to note the practice's limitations. Several of the judges in particular discussed how visitors could be overly deferential, and how they could not be expected to write opinions in significant cases, thereby shifting work back to the "home" judges.

More surprising was the discussion of a different rationale for having visitors: to train newly appointed district court judges. Though not one of the original reasons behind creating visiting arrangements in the first instance, nearly all of the courts surveyed here deliberately had new district judges come and sit for this purpose, wholly apart from workload concerns. In this way, the modern use of visiting judges appears to function not only for assistance, as originally envisioned, but also for the exchange of ideas among the judges themselves, thereby echoing the rationales for circuit riding.

#### A. Methodology

It has long been understood that qualitative methods, and especially interviewing, are often necessary to gather information about particular

---

277. As noted earlier, this is not the first study to rely on interviews to gather information about visiting judges. In 1977, Professor Stephen Wasby conducted interviews to better understand the practice in the Ninth Circuit. See Wasby, "Extra" Judges in a Federal Appellate Court: The Ninth Circuit, *supra* note 15.

278. See *supra* note 274 and accompanying text.

practices and institutions within the legal field.<sup>279</sup> As I have written about elsewhere, gathering data about court practices often requires interviewing the key actors who serve on, and administer, the courts, including judges and members of the clerk's offices.<sup>280</sup> This form of data collection is essential where, as here, one seeks to gather information regarding a practice about which little public information is available, and in particular when one is seeking to learn what the subjects themselves think about the practice.

In the interest of performing an in-depth review, it was necessary to focus on a subset of the federal courts. As the use of visitors is most prevalent at the courts of appeals,<sup>281</sup> and as it is far more common for judges to visit "up" (meaning for district judges to sit by designation on the courts of appeals) than to visit "down,"<sup>282</sup> I focused on a number of the circuit courts. To facilitate in-depth, in-person interviews in particular, and consistent with past research,<sup>283</sup> I focused on a subset of the twelve regional circuit courts: the D.C., First, Second, Third, and Fourth Circuits.<sup>284</sup> To be clear, this is not a random sample of the courts and there are some commonalities among them. For example, they all encompass states that are in the Eastern part of the country and they are all relatively compact geographically<sup>285</sup>—factors that could ultimately affect visiting practices. That said, there are also key differences across the circuits that make them useful for study; for instance, as further discussed below, one circuit does not permit visitors, and the other four use them to varying degrees.

To select interview subjects, I conducted convenience sampling in some of the most heavily judge-populated areas within each circuit. Specifically, I contacted every judge in a given area by email and then met with those who were willing to do so.<sup>286</sup> For the D.C. Circuit, I contacted all active and senior judges in Washington, D.C. as of April 2012. Out of thirteen judges in this set,<sup>287</sup> I interviewed eight, as well as a senior member of the clerk's office. For

---

279. See, e.g., ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 289–92 (1991) (describing the use of in-person and telephone interviews); Stewart Macaulay, *Lawyers and Consumer Protection Laws*, 14 *LAW & SOC'Y REV.* 115, 118–20 (1979) (describing the use of in-person and telephone interviews).

280. See Marin K. Levy, *Panel Assignment in the Federal Courts of Appeals*, 103 *CORNELL L. REV.* 65, 79 (2017) [hereinafter Levy, *Panel Assignment*]; Marin K. Levy, *The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts*, 61 *DUKE L.J.* 315, 326–27 (2011).

281. See *supra* notes 253–255 and accompanying text.

282. *JUDICIAL BUSINESS OF THE UNITED STATES COURTS* (2017), *supra* note 10, at tbl.V-1 (showing how only 17 court of appeals judges visited the district court in the twelve-month period ending September 30, 2017, whereas 205 district judges visited the courts of appeals during this time).

283. See Levy, *Panel Assignment*, *supra* note 280, at 327.

284. I originally selected these circuits because these were the courts I had the greatest prior knowledge of and the closest proximity to.

285. *Id.*

286. I began with a standard request letter that I then tailored to each judge and senior member of the clerk's office.

287. The set consisted of Judges Merrick Garland, Karen Henderson, Judith Ann Wilson Rogers, David Tatel, Janice Rogers Brown, Thomas Griffith, Brett Kavanaugh, Harry Edwards,

the First Circuit, I contacted all of the judges in Boston as of April 2012. Of the three judges in this set,<sup>288</sup> I interviewed one, as well as a senior member of the clerk's office. In the Second Circuit, I contacted all of the judges in Manhattan, Brooklyn, New Haven, and Hartford between the spring of 2012 and the summer of 2013. Out of the twenty judges in this set,<sup>289</sup> I interviewed thirteen and a senior member of the clerk's office. In the Third Circuit, I contacted all of the judges in Philadelphia between the spring of 2012 and the summer of 2013. Out of the four judges in this set,<sup>290</sup> I interviewed three and a senior member of the clerk's office. Finally, in the Fourth Circuit, I contacted all of the judges in Baltimore, Alexandria, Raleigh, and Richmond as of June 2013. Out of the seven judges in this set,<sup>291</sup> I interviewed five and a senior member of the clerk's office. To be clear, this is not a random sample of judges within each court. However, the judges I interviewed included a substantial mix along what are generally considered to be relevant dimensions: seniority, sex, and party of the appointing president. Furthermore, there was a substantial mix along dimensions most relevant to this study: judges who sat on courts with and without visitors, judges who had visited other circuits while on the bench, and judges who had previously been district judges who had sat by designation on the courts of appeals. Finally, for a study of this kind, there was wide participation of the judicial actors contacted; including all judges and members of the clerk's office contacted, I had a participation rate of roughly 67 percent.

The majority of interviews were conducted in person (in chambers when I interviewed a judge, and in the clerk's office when I interviewed a member of that office), although a few took place by telephone. A few interviews lasted only fifteen minutes, but most ran between half an hour and one hour. The interviews were all semi-structured; I asked each subject a set list of questions about the use of visiting judges in his or her circuit, although we also discussed topics that arose over the course of the interview<sup>292</sup> and further discussed matters related to another study I was conducting.<sup>293</sup> As a way to ensure that each subject was as candid as possible, I did not record the interviews and I assured each person I interviewed that I would not quote him or her by

---

Laurence Silberman, Stephen Williams, Douglas Ginsburg, David Sentelle, and A. Raymond Randolph.

288. The set consisted of Judges Sandra Lynch, Michael Boudin, and Norman Stahl.

289. The set consisted of Judges Robert Katzmann, Dennis Jacobs, José A. Cabranes, Reena Raggi, Debra Ann Livingston, Gerard Lynch, Denny Chin, Raymond Lohier, Susan Carney, Christopher Droney, Jon Newman, Amalya Kearse, Ralph Winter, John Walker, Pierre Leval, Guido Calabresi, Chester Straub, Robert Sack, Barrington Daniels Parker, Jr., and Joseph McLaughlin.

290. The set consisted of Judges Theodore McKee, Marjorie Rendell, Anthony Scirica, and Dolores Korman Sloviter.

291. The set consisted of Judges Paul Niemeyer, Diana Gribbon Motz, Roger Gregory, Allyson Kay Duncan, Andre Davis, Barbara Milano Keenan, and James Wynn.

292. For a discussion of semi-structured interviews, see generally MARGARET C. HARRELL & MELISSA A. BRADLEY, *DATA COLLECTION METHODS: SEMI-STRUCTURED INTERVIEWS AND FOCUS GROUPS* (2009).

293. See generally Levy, *Panel Assignment*, *supra* note 280.

name.<sup>294</sup> This is why, consistent with past practice, I attribute my findings to “a judge” or “a senior member of the clerk’s office” within a given circuit.<sup>295</sup>

As with any study that relies on interviewing, this study is limited to the information provided by the subjects,<sup>296</sup> and it is possible that the subjects were not fully forthcoming or that their memories were imperfect. I tried to mitigate these possibilities by interviewing multiple subjects in each circuit and cross-checking information. Moreover, one can look to external indications of the subjects’ accuracy with respect to several of the study’s findings—and indeed, in Part III, I consider quantitative data on the courts’ panels, much of which is consistent with the accounts provided by the judges.<sup>297</sup> With this limitation in mind, the next Sections present the findings of the study, which provide an important window into how judges conceive of, and respond to, the practice of visiting judges today.

### B. *Assisting with Caseloads*

As the historical account shows, the practice of visiting judges has been, officially, about necessity. Visitors are to be called upon when a judge is physically disabled or a court is struggling with a particularly large caseload. Indeed, Chief Justice Warren Burger suggested that the work of visiting judges had been crucial to the continued functioning of the appellate courts.<sup>298</sup> This view has been reflected in institutional planning for the federal judiciary, with both the Judicial Conference’s 1995 Long Range Plan for the Federal Courts<sup>299</sup> and 2010 Strategic Plan<sup>300</sup> stressing the workload contributions of visiting

---

294. Assurances of anonymity are not uncommon in interview-based studies about the federal judiciary. See, e.g., Tracey E. George, Mitu Gulati & Ann C. McGinley, *The New Old Legal Realism*, 105 NW. U. L. REV. 689, 709 n.98 (2011); Mitu Gulati & Richard A. Posner, *The Management of Staff by Federal Court of Appeals Judges*, 69 VAND. L. REV. 479, 480 (2016).

295. See Levy, *Panel Assignment*, *supra* note 280, at 327. For the present Article, I omit the location of the interviews and use only male pronouns when referring to subjects to further protect each subject’s identity.

296. See, e.g., George, Gulati & McGinley, *supra* note 294, at 709.

297. See *infra* Parts III.B and III.C.

298. Address by Chief Justice Warren E. Burger, 1977 Report to the American Bar Association (Feb. 13, 1977) reprinted in 63 A.B.A.J. 504, 509 (1977). Scholars have shared this view as well. See Brudney & Ditslear, *supra* note 16, at 565 (“[T]he circuits invite such participation principally because there are not nearly enough active and senior appellate judges to meet the demands of a burgeoning appeals court docket.”).

299. See JUDICIAL CONF. OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS 98–99 (1995), [http://www.uscourts.gov/sites/default/files/federalcourtslongrangeplan\\_0.pdf](http://www.uscourts.gov/sites/default/files/federalcourtslongrangeplan_0.pdf) [https://perma.cc/33AT-XDZF] (noting that inter-circuit and intra-circuit assignments have been “critical to the judiciary’s success in meeting workload demands to date” and encouraging their use to stem future workload problems).

300. See JUDICIAL CONF. OF THE U.S., STRATEGIC PLAN FOR THE FEDERAL JUDICIARY 8 (2010), [http://www.uscourts.gov/sites/default/files/strategicplan2010\\_1.pdf](http://www.uscourts.gov/sites/default/files/strategicplan2010_1.pdf) [https://perma.cc/2M5T-AJK3] (recommending further reliance on visiting judges as a way to relieve “overburdened and congested courts”). Thanks to Stephen Burbank for this insight.

judges. It is therefore unsurprising that many of the subjects interviewed here emphasized how their use of visitors directly related to their caseload needs.

A senior member of the clerk's office for the First Circuit began by noting that his Circuit's use of visiting judges "depends on caseload and vacancies . . . [i]t's really tied to need."<sup>301</sup> A former chief judge of the same circuit explained how he determined how many visitors were needed in any given term: "When I was chief, the question was, was there a blank on the calendar? Does the projection need a space [for a visitor]?"<sup>302</sup> A judge for the Second Circuit stated that "right now we need visiting judges," so the practice "is very important for us."<sup>303</sup> Emphasizing the point, a former chief judge of the same circuit noted that while the court's use of visitors "goes up and down," historically visitors have been on "about forty percent of panels."<sup>304</sup> A Third Circuit judge likewise said that the use of visitors on his court has "come and gone"—fluctuating depending on need.<sup>305</sup> A senior member of the clerk's office for the Third Circuit said that when there were a significant number of vacancies on the court, "[w]e were having a hard time keeping our head above water" and relied on visitors more heavily.<sup>306</sup> Similar comments were made regarding the Fourth Circuit. As one Fourth Circuit judge put it, "[i]t's about numbers," specifically referring to how many judges are on the court at a given time and how many cases they expect to hear.<sup>307</sup> A senior court official similarly explained that the "use of visiting judges is affected by the mathematics" and is as simple as determining how many judges they have and, accordingly, how many are needed to round out the panels.<sup>308</sup>

Beyond relying on visitors to assist with the caseload in normal times, the members of the courts noted that it was particularly important to have additional help in times of judicial emergencies<sup>309</sup> or when all of the judges of a particular court were recused from a particular case. A former chief judge of

---

301. Interview with a Senior Member of the Clerk's Office, U.S. Court of Appeals for the First Circuit (June 18, 2012) (notes on file with author).

302. Interview with a Judge of the U.S. Court of Appeals for the First Circuit (June 18, 2012) (notes on file with author).

303. Interview with a Judge of the U.S. Court of Appeals for the Second Circuit (Aug. 2, 2013) (notes on file with author).

304. Interview with a Judge of the U.S. Court of Appeals for the Second Circuit (Mar. 10, 2012) (notes on file with author).

305. Interview with a Judge of the U.S. Court of Appeals for the Third Circuit (Apr. 25, 2012) (notes on file with author).

306. Interview with a Senior Member of the Clerk's Office, U.S. Court of Appeals for the Third Circuit (Apr. 20, 2012) (notes on file with author).

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

308. Interview with a Senior Member of the Clerk's Office, U.S. Court of Appeals for the Fourth Circuit (June 12, 2013) (notes on file with author).

309. Judicial emergencies are defined based on caseload, the number of vacancies, and the length of those vacancies in a given circuit court. See *Judicial Emergency Definition*, ADMIN. OFF. U.S. CTS., <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/judicial-emergencies/judicial-emergency-definition> [<https://perma.cc/X4NH-YXMS>].

the Second Circuit described how much his court had relied on visitors during a judicial emergency. He said that, to find sufficient help during this time, he “went through the district court alphabetically, and the Court of International Trade alphabetically” (noting with some humor that the judges at the end of the alphabet complained).<sup>310</sup> But, emphasizing how much his court required outside assistance, the judge said that, in addition to using his alphabetical process, he used the “mirror over the mouth” test: testing if the potential visitor was alive and, if so, drafting him or her.<sup>311</sup> Other judges reported visiting on other courts in times of mass recusal. Specifically, one Second Circuit judge reported sitting by designation on the Third Circuit at a time when all of the Third Circuit judges could not sit on a particular case.<sup>312</sup> A judge for the Fourth Circuit recalled sitting on the same panel for the Third Circuit (which was prompted by a wife of one of the judges having been a victim in a fraud scheme), and a separate appeal in the Third Circuit a year later.<sup>313</sup>

By contrast, one of the courts in this study—the D.C. Circuit—almost never brought in visitors. According to a senior member of the clerk’s office, the use of visiting judges in the D.C. Circuit “stopped just under [Chief Judge] Mikva, just before Harry Edwards [was chief judge].”<sup>314</sup> The court has used visitors fewer than a handful of times, and only when all the judges recused themselves.<sup>315</sup> One senior judge stated that ending the use of visiting judges in the D.C. Circuit was a “conscious decision.”<sup>316</sup>

If visiting judges are used solely as a means of easing large caseloads, it stands to reason that courts with smaller caseloads would not employ them. Specifically, given that the D.C. Circuit has the lowest caseload of all twelve regional circuits,<sup>317</sup> it should not be surprising that it does not bring in visitors. One D.C. Circuit judge said that, while he had never heard the matter discussed, he surmised that the decision to not have visitors was due to the court’s “incredibly shrinking docket.”<sup>318</sup> He continued: “[T]he truth of the

---

310. Interview with a Judge of the U.S. Court of Appeals for the Second Circuit, *supra* note 275.

311. *Id.*

312. See Interview with a Judge of the U.S. Court of Appeals for the Second Circuit (Oct. 18, 2012) (notes on file with author).

313. See Interview with a Judge of the U.S. Court of Appeals for the Fourth Circuit (July 17, 2013) (notes on file with author).

314. Interview with a Senior Member of the Clerk’s Office, U.S. Court of Appeals for the D.C. Circuit (Apr. 30, 2013) (notes on file with author).

315. *Id.*

316. Interview with a Judge of the U.S. Court of Appeals for the D.C. Circuit (May 10, 2010 and Apr. 30, 2012) (notes on file with author).

317. See JUDICIAL BUSINESS OF THE UNITED STATES COURTS (2017), *supra* note 10, at tbl.B-1.

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



matter is, I'm going to be down to 25 sittings next year . . . So that's the obvious reason to me . . . [t]here's no need [for visitors]."<sup>319</sup>

Yet, none of the other D.C. Circuit judges tied the lack of visitors to a lack of need. Instead, several judges attributed it to the relative complexity of their cases, harkening back to one set of concerns about Taft's proposal for judges-at-large: outside judges simply lack the necessary legal background to decide *these* cases.<sup>320</sup> As one senior judge put it, the "visiting judges weren't up to speed enough on administrative law."<sup>321</sup> Another judge added credence to this theory, noting that administrative law "involves some getting used to . . . I'm far better equipped today than I was five years ago."<sup>322</sup> A former chief judge of the court underscored the point: "Our docket is so different from the usual docket, we found it wasn't efficient . . . Other circuits are not familiar with big administrative cases."<sup>323</sup> This same judge suggested that part of the problem was that visiting judges "didn't want those cases" and so "our workload was heavier."<sup>324</sup> Another former chief judge reported the same: "Some of the [D.C. Circuit] judges didn't like the use of visitors. [The visitors] didn't want to carry the big cases. They didn't have the practice with it."<sup>325</sup> However, not all of the judges on the court thought the difficulty of administrative law justified the lack of visitors. As one judge said, "I imagine people might also speak in terms of the complexity of our docket. That's something of a red herring. With good clerks and enough time, you can figure this out."<sup>326</sup>

More surprisingly, several of the judges noted that the D.C. Circuit's decision to cease hosting visitors was tied to a concern about how the practice was purportedly politicized under a particular former chief judge. As one senior judge explained, it was understood that this former chief judge had been "using liberals"—that is, that he had been deliberately inviting liberal judges to sit and decide cases.<sup>327</sup> Another senior judge stated that "there was a feeling that the process of having visitors had led to skewed decisions . . . There was a sense that [the] results were being skewed," because—put "crudely"—the visitors were "lefties."<sup>328</sup> Other judges reported similar concerns. One judge said that

319. *Id.*

320. *See supra* note 181 (arguing that a North Carolina judge trying to hear cases in Oregon would not know enough of the relevant law).

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

322. Interview with a Judge of the U.S. Court of Appeals for the D.C. Circuit (Apr. 26, 2012) (notes on file with author).

323. Interview with a Judge of the U.S. Court of Appeals for the D.C. Circuit (Apr. 26, 2012) (notes on file with author).

324. *Id.*

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

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

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

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

the “genesis” of not having visitors was “some concern about circuit law and potential skewing.”<sup>329</sup> A former chief judge of the circuit said the same. When asked about possible skewing of case outcomes based on the use of visiting judges in the past, he stated: “[t]hat was the fear.”<sup>330</sup>

Notably, no judges or judicial actors from other circuits mentioned concerns about the use of visiting judges being politicized. Instead, several noted how familiarity and even friendship might play a role in a visiting judge’s selection. As a former chief judge of the First Circuit said, “It’s more a matter of a pool of people. Somebody seems to like it, [then they] may frequently come back. It’s not programmed.”<sup>331</sup> A former chief judge of the Second Circuit made similar comments in terms of inviting judges: “[i]f you get a good judge, you want him back.”<sup>332</sup> Speaking of being invited himself, he said: “You have friends on those courts. They’ll put your name in and you can be invited. Then a relationship is built.”<sup>333</sup> A senior member of the clerk’s office for Third Circuit stated, “Judges get certified . . . then our chief contacts people,” and there are “certain judges we go back to” because they are good to work with.<sup>334</sup> For all this candid discussion of visitor selection, there was no suggestion—outside of the D.C. Circuit—that the process has been political.

In addition to being unusual for not importing judges, the D.C. Circuit also stands out as a circuit that rarely exports its own judges. Only the First Circuit, among this set, was similar. (A senior court official for the First Circuit noted that visiting out happens only “occasionally”<sup>335</sup> and a former chief judge agreed that it has “not been that frequent.”<sup>336</sup>) A senior member of the D.C. Circuit’s Clerk’s Office stated that “no senior judge has visited another circuit” and that there was only one active judge who had done so.<sup>337</sup> The one active judge reported that the experience provided a “pretty good perspective on a different docket” and that he “picked up things that were different,

---

329. Interview with a Judge of the U.S. Court of Appeals for the D.C. Circuit, *supra* note 322 (notes on file with author).

330. Interview with a Judge of the U.S. Court of Appeals for the D.C. Circuit, *supra* note 323 (notes on file with author).

331. Interview with a Judge of the U.S. Court of Appeals for the First Circuit, *supra* note 302. As an example of someone in this pool, the former chief judge mentioned a judge who visited consistently from the Federal Circuit. *Id.*

332. Interview with a Judge of the U.S. Court of Appeals for the Second Circuit, *supra* note 312.

333. *Id.*

334. Interview with a Senior Member of the Clerk’s Office, U.S. Court of Appeals for the Third Circuit, *supra* note 306. A former chief judge of the circuit reported something similar: “Usually we contact the judges,” but “[s]ometimes after judges go senior, they call up.” Interview with a Judge of the U.S. Court of Appeals for the Third Circuit (Apr. 20, 2012) (notes on file with author).

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

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

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

informative.”<sup>338</sup> But other judges confirmed that he was an outlier. One senior D.C. Circuit judge said flatly that he was “not interested” in visiting another court.”<sup>339</sup> Another senior judge stated that he had never been tempted to visit, as “I like the cases we have here” and “I don’t have to travel.”<sup>340</sup>

Although the D.C. Circuit was the only circuit in this study to avoid using visiting judges altogether, one court—the Third Circuit—had made a concerted effort to reduce its number of visitors. A former chief judge of the circuit described how he decided to limit the use of visiting judges by slightly increasing the number of cases per sitting. He said there were two reasons for doing so, the first one fiscal: “It cuts down on the overall court budget. You save a little bit of money with [the] judge’s per diem and travel.”<sup>341</sup> The second reason had to do with the legitimacy, or at least perceived legitimacy, of a decision in which a visitor casts the deciding vote: “[I]f you had a split and another circuit’s judge, not a Third Circuit judge, [was] adding to the majority,” that, in his view, was “not the best way to do things.”<sup>342</sup>

Even among the circuits that have relied on visitors routinely, there was some reluctance expressed about the practice. Some reluctance stemmed from the view that it was simply preferable to decide cases with one’s true colleagues. As one Third Circuit judge stated, it is “easier to have all of our judges” on a panel, because “[w]e live and breathe the body of law that we create.”<sup>343</sup> He ultimately concluded that the process is more “thoughtful” if only Third Circuit judges participate.<sup>344</sup> A senior judge of the D.C. Circuit echoed the sentiment: “For myself, one of the great strengths of our court [is that it is] very small; we know each other very, very well. I can’t imagine doing it with a judge I didn’t know.”<sup>345</sup> Based on these considerations, he “would not have visitors.”<sup>346</sup> But some judges noted that they did not have the luxury to consider collegiality concerns, given the needs of their court. As one Second Circuit judge explained, “There’s back and forth about the fact that the more you use visiting judges, the less you . . . deal with your regular colleagues on the court, and there’s some concern about the effect on collegiality, but right now we need visiting judges.”<sup>347</sup> And so, for his court, “the collegiality point is beside the point.”<sup>348</sup>

---

338. Interview with a Judge of the U.S. Court of Appeals for the D.C. Circuit, *supra* note 322.

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

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

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

342. *Id.*

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

344. *Id.*

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

346. *Id.*

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

348. *Id.*

Some of the reluctance to having visitors stemmed from concerns that the judges sitting by designation might be overly deferential. As one senior judge of the Second Circuit put it:

[T]here are some visiting judges who are from other circuits who are very deferential in cases where they think that the law of their circuit or the approach of their circuit might be different from the approach of our circuit, so they are less likely to dissent. That is, in a case where if it came up in their own circuit, they probably would dissent but you have two judges going the same way . . . the visiting judge will not dissent.<sup>349</sup>

The judge was quick to note that not every visiting judge acts this way—some are “very sure of what the law is, and they want to tell us”<sup>350</sup>—but over-deference was still a general concern. A judge of the Third Circuit made a similar comment, noting that visiting judges “defer a little to you.”<sup>351</sup> He stated this was true even of retired U.S. Supreme Court Justice Sandra Day O’Connor: “[Justice] O’Connor was very quiet” and seemed to express the view that “this is your court, I’m not going to come in and tell you what your law should be.”<sup>352</sup> Other judges had similar thoughts about the Justice. As a judge for the Fourth Circuit said, “She doesn’t really take the lead, and I give her a lot of credit for that . . . [F]rankly it would be helpful if she said more,” but “[s]he’s not here to reorganize the railroad.”<sup>353</sup>

Further reluctance stemmed from the widespread recognition that one would prefer not to have a “foreigner” authoring an opinion in a significant appeal. As a senior judge from the Second Circuit put it, “It’s rare that you ask a visitor to take on a major case.”<sup>354</sup> Instead, he said, “It’s expected [that] a judge from the circuit will decide it.”<sup>355</sup> An active judge from the same circuit, who himself had sat by designation when he was a district judge, agreed: “I think there’s a feeling when there’s a circuit law [that] it should be a circuit judge writing it.”<sup>356</sup> A judge from the Third Circuit suggested the same was true in his court: if there is an “important” matter to your court, “you don’t want a district court or other circuit judge” authoring the opinion.<sup>357</sup> For these

---

349. Interview with a Judge of the U.S. Court of Appeals for the Second Circuit (Aug. 9, 2013).

350. *Id.*

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

352. *Id.*

353. Interview with a Judge of the U.S. Court of Appeals for the Fourth Circuit (July 31, 2013) (notes on file with author).

354. Interview with a Judge of the U.S. Court of Appeals for the Second Circuit (Mar. 5, 2012) (notes on file with author).

355. *Id.*

356. Interview with a Judge of the U.S. Court of Appeals for the Second Circuit (Mar. 5, 2012) (notes on file with author).

357. Interview with a Judge of the U.S. Court of Appeals for the Third Circuit, *supra* note 305. This same judge added that it can be “harder to critique their writing” than it is to critique a colleague’s writing. *Id.*

judges, the end result was that visitors did not pull the same weight as one of their own colleagues.

Some of these concerns about the use of visiting judges were ameliorated in the eyes of the judges and court administrators by selecting certain types of visitors. Two circuits—the First and the Third—noted that they currently relied more on circuit judges than district judges,<sup>358</sup> and a few Fourth Circuit judges mentioned that they preferred sitting with other circuit judges over district judges. One said, “Sitting with circuit judges was like sitting with my colleagues” whereas “district judges aren’t in the loop as much.”<sup>359</sup> A senior judge of the same circuit remarked, “There’s a real gap when a district judge sits with us.”<sup>360</sup>

In the Second Circuit, however, many of the judges expressed a strong preference for district judges.<sup>361</sup> As one senior judge from the Second Circuit put it, “I think [visiting is] easier with district judges,” noting that “[t]hey don’t really count as being strangers.”<sup>362</sup> He went on to say, “We have our own organic law. That’s why [it’s] better with district court judges.”<sup>363</sup> A former chief judge of the same circuit made similar remarks, saying that “we call on district judges,” because, among other things, “[t]hey follow our law” and “[w]e are all part of the same project.”<sup>364</sup> A senior judge of the Second Circuit made a similar point, noting that it was best to sit with the judges of the Southern District and the Eastern District in particular, because “we all speak

---

358. In the First Circuit, a court official said that “pretty much lately it’s been circuit judges” who have visited the court, aside from district judges who visit early in their tenure. Interview with a Senior Member of the Clerk’s Office, U.S. Court of Appeals for the First Circuit, *supra* note 301. A former chief judge of the circuit explained, “When district judges were less pressed, we’d use district judges a fair amount. Some liked it, but many more felt burdened, so we started using them less. These were not calculated policies, but respon[ses] to events.” Interview with a Judge of the U.S. Court of Appeals for the First Circuit, *supra* note 302. In the Third Circuit, a senior member of the clerk’s office stated, “We tend to take visitors from other circuits” (whereas other courts rely more on their own district court judges). Interview with a Senior Member of the Clerk’s Office, U.S. Court of Appeals for the Third Circuit, *supra* note 306.

359. Interview with a Judge of the U.S. Court of Appeals for the Fourth Circuit (June 12, 2013) (notes on file with author).

360. Interview with a Judge of the U.S. Court of Appeals for the Fourth Circuit, *supra* note 307 (notes on file with author).

361. One former chief judge, after stating that “the main thing is we call on district judges,” also noted the benefits of inviting judges from the Court of International Trade: “They don’t have a competing body of law. That’s one good reason to rely on them.” He said he therefore tried to make sure they have a “stable relationship” with the court. Interview with a Judge of the U.S. Court of Appeals for the Second Circuit, *supra* note 304.

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

363. *Id.*

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

the same language,” and so the experience is “like having junior circuit judges” join the court.<sup>365</sup>

### 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,<sup>366</sup> sitting by designation, according to these members of court, provides a key component of judicial socialization and training.<sup>367</sup>

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.”<sup>368</sup> 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.”<sup>369</sup> 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.”<sup>370</sup> 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.”<sup>371</sup> 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.”<sup>372</sup> 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.”<sup>373</sup> 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.<sup>374</sup>

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.”<sup>375</sup> 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.”<sup>376</sup> 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.”<sup>377</sup> 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].”<sup>378</sup> 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.”<sup>379</sup>

---

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.”<sup>380</sup> 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.”<sup>381</sup> 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.”<sup>382</sup> Another Second Circuit judge, who had sat by designation as a district judge, said: “it’s part of the education of the young judge.”<sup>383</sup> 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.<sup>384</sup>

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.”<sup>385</sup>

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.”<sup>386</sup> 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."<sup>387</sup> 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."<sup>388</sup> The judge noted that "[i]n that situation we are learning more than we are teaching."<sup>389</sup>

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.<sup>390</sup> 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."<sup>391</sup> 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."<sup>392</sup> 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.<sup>393</sup> Another senior judge worried that this could affect case outcomes: "District judges might be reluctant to reverse a colleague."<sup>394</sup> 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."<sup>395</sup> 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<sup>396</sup>). 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.<sup>397</sup> 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.”<sup>398</sup> 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.”<sup>399</sup>

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.”<sup>400</sup> 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.”<sup>401</sup> 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.”<sup>402</sup> 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.”<sup>403</sup> 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.”<sup>404</sup>

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.”<sup>405</sup> 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].”<sup>406</sup> 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.”<sup>407</sup> The judge ultimately concluded, however: “I’m not sure it’s that big of a deal.”<sup>408</sup> 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.<sup>409</sup>

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.<sup>410</sup> He then added, you should “never have an S.D.N.Y. judge reversing another S.D.N.Y. judge.”<sup>411</sup> 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.”<sup>412</sup> Ultimately, he concluded, “We’re all grownups.”<sup>413</sup>

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.<sup>414</sup> Accordingly, it would be relatively easy for them to fit an assignment in between sittings at the courts of appeals.<sup>415</sup> (This would be particularly true for judges on a court, such as the D.C. Circuit, that does not hear cases over the summer,<sup>416</sup> or a court, such as the Fourth Circuit, that has only six sitting weeks during the year.<sup>417</sup>)

---

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.”<sup>418</sup> 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.”<sup>419</sup> 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.<sup>420</sup>

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.”<sup>421</sup> 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).<sup>422</sup> 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.”<sup>423</sup> 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.<sup>424</sup> 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<sup>425</sup>—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.<sup>426</sup> 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.”<sup>427</sup>

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.”<sup>428</sup> 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.”<sup>429</sup> 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.”<sup>430</sup> He concluded by saying that for him, “one more trial” at the district court would not add much.<sup>431</sup> 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.”<sup>432</sup> 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.”<sup>433</sup>

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.<sup>434</sup>

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.”<sup>435</sup>

---

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.”<sup>436</sup> 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.”<sup>437</sup> A Second Circuit judge said that such an arrangement was a “nice” idea but “risky for court of appeals judges to do.”<sup>438</sup> 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.”<sup>439</sup> 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<sup>440</sup> (the implication being, he did not want to follow suit).<sup>441</sup> 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.”<sup>442</sup>

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<sup>443</sup>—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.”<sup>444</sup> 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."<sup>445</sup> 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."<sup>446</sup> 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."<sup>447</sup> He also mentioned a colleague who had visited other circuits and "brought back things" that had helped the administration of their own court.<sup>448</sup> However, while some judges had chosen to visit abroad,<sup>449</sup> 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,<sup>450</sup> 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."<sup>451</sup> 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!"<sup>452</sup>

\* \* \* \* \*

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.<sup>453</sup> 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.<sup>454</sup> 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<sup>455</sup> and found, like Green and Atkins, low rates of dissent among visitors, particularly district judges sitting by designation.<sup>456</sup> 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<sup>457</sup> and found that district judges were significantly less likely to author majority opinions and to dissent from majority opinions than home judges.<sup>458</sup> 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)<sup>459</sup> 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).



likewise found that visiting judges dissented far less than their home judge counterparts.<sup>460</sup> More up-to-date and cross-circuit research would be beneficial on this topic, but the findings from these studies are consistent with the concerns expressed by judges in the previous Part, suggesting that visitors might write fewer opinions, and be more deferential, than home judges.<sup>461</sup>

More recent scholarship has examined the extent to which the practice of visiting judges has been politicized. A pair of studies—one by Professors Todd Peppers, Katherine Vigilante, and Christopher Zorn from 2012<sup>462</sup> and another by Professor Jeffrey Budziak from 2015<sup>463</sup>—examined the selection of judges to sit by designation on individual courts of appeals. The former study resulted in findings “consistent with a pattern of a chief judge behavior motivated by policy considerations” when selecting judges to visit.<sup>464</sup> In a similar vein, the 2015 study concluded that “district court judges who share the ideological preferences of the chief judge are expected to visit the court of appeals more frequently than those with differing ideological views.”<sup>465</sup> To be sure, these studies cannot speak to the direct mechanism at work—for example, it may well be that chief judges are inclined to invite judges they know and think well of, and it may be that those judges are more likely to share the same ideology. But they do provide important information about the patterns of sitting by designation—and are consistent with the accounts of D.C. Circuit judges<sup>466</sup> (though no other circuit judges) detailing concerns about the politicization of the practice.

Beyond these studies are the raw data from the Administrative Office of the United States Courts, which can also confirm some of the findings from the qualitative study noted in Part II. For example, from September 30, 2012 to 2013 (the year covering many of the interviews), the Administrative Office data show that the D.C. Circuit received no visitors.<sup>467</sup> The data can also provide additional information about the type of visiting judges received by the circuits surveyed here—the First had four appellate judges and six district judges visit; the Second had nine appellate judges and thirty-seven district judges visit; the Third had six appellate judges and five district judges visit;

---

460. *See id.* at 313.

461. *See supra* notes 349–360 and accompanying text.

462. *See* Todd C. Peppers, Katherine Vigilante & Christopher Zorn, *Random Chance or Loaded Dice: The Politics of Judicial Designation*, 10 U.N.H. L. REV. 69 (2012).

463. Jeffrey Budziak, *The Strategic Designation of Visiting Judges in the U.S. Courts of Appeals*, 26 JUST. SYS. J. 233, 249 (2015).

464. *See* Peppers, Vigilante & Zorn, *supra* note 462, at 88.

465. *See* Budziak, *supra* note 463, at 249.

466. *See supra* notes 327–330 and accompanying text.

467. *See* JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2013 ANNUAL REPORT OF THE DIRECTOR, ADMIN. OFF. U.S. CTS., at tbl.V-2 (2013) [hereinafter JUDICIAL BUSINESS OF THE UNITED STATES COURTS (2013)], [http://www.uscourts.gov/sites/default/files/statistics\\_import\\_dir/V02Sep13.pdf](http://www.uscourts.gov/sites/default/files/statistics_import_dir/V02Sep13.pdf) [<https://perma.cc/NDM9-V2ED>].

and the Fourth had two appellate judges and twenty district judges visit.<sup>468</sup> Such information is noteworthy and can confirm, for example, that the Second Circuit drew heavily on district judges relative to the other circuits.<sup>469</sup> But there is much that these data do not include. They do not capture where, exactly, the visiting judges came from—were the appellate judges former Justices of the Supreme Court or judges from the Court of International Trade or judges from different circuits altogether?<sup>470</sup> Did the district judges come from inside the circuit, and if so—in light of how important visiting-as-training appears to be—from where, exactly? Were they evenly spread out across the districts within the circuit, or did they hail disproportionately from one court below?

To answer these questions, I rely on a unique dataset that contains the calendar information from all of the regional circuits over a five-year span. Part III.A below describes how the dataset was formed, and Parts III.B and III.C subsequently present the findings.

#### A. Methodology

The dataset for this project is based upon the calendar information of all twelve regional circuit courts in the federal system from September 1, 2008 to August 31, 2013.<sup>471</sup> It includes the oral argument panel data—including who visited each court—in this five-year span.

The data came directly from each court, and generally came in the form of calendar pages.<sup>472</sup> Typical calendar pages included the date and location of each sitting, the names of the judges on the panel, and sometimes the names of the cases being heard.<sup>473</sup> Altogether, these data from the courts constituted several thousand pages of information. To gather the specific information about each panel accurately, code was written to parse the individual calendar pages and pull the necessary information (say, regarding the date of the sitting and the name of each judge).<sup>474</sup> When code extraction proved unworkable with two of the circuits, due to the formatting of the calendar pages, hand-coding was

---

468. *Id.*

469. *See supra* notes 361–364 and accompanying text.

470. This information is noted at the end of the table but only in aggregate form. Accordingly, one cannot tell which court received the retired Supreme Court Justice, and so on. *See* JUDICIAL BUSINESS OF THE UNITED STATES COURTS (2013), *supra* note 467, at tbl.V-2.

471. This dataset was first used in previous work on panel assignments. *See* Chilton & Levy, *supra* note 453, at 24–31.

472. *See* Calendar Data for All Twelve Regional Circuits, 2008–2013 (notes on file with author).

473. For an example of a typical calendar page, see U.S. Court of Appeals for the First Circuit, <http://www.ca1.uscourts.gov/sites/ca1/files/calendar.pdf> [<https://perma.cc/B5A3-SA37>].

474. Thanks to Sean Chen for this work.

undertaken.<sup>475</sup> The result is a unique dataset, which contains roughly ten thousand panels across the federal courts of appeals in this timeframe.

For the analysis below, information regarding the panels with visiting judges was pulled for each circuit and tabulated. For the First Circuit, for example, there were 305 panels during this period, with 915 judge observations. The judge observations included the specific identities of each judge, which were then merged with the Federal Judicial Center's judicial biographical database to obtain each judge's commission. The observations were then sorted so that it was possible to see, for example, that retired Associate Supreme Court Justice David Souter had sat on thirty-seven different First Circuit panels.<sup>476</sup> Finally, the observations were grouped together by different categories of interest, as set out in the Sections that follow.

Before turning to the findings, a caveat is in order. For the purposes of this study, a panel was defined as a group of judges who sat to hear cases during a particular session of court on a particular day. Accordingly, three judges who heard a set of cases at 9 a.m. and then met again at 1 p.m. on the same day to hear more cases would count as two separate panels. This approach seemed consistent with the interpretation of most circuits, and past research.<sup>477</sup> It further had the advantage of conveying, in general terms, the relative contributions of the judges. For if, in the scenario described above, the group of judges who met twice in one day had been coded as only one panel, then a visiting judge who sat with two other judges for a single afternoon would have "counted" as much as a visiting judge who sat with two other judges for a five-day period. But it is important to bear in mind the flipside of this decision: a visiting judge who sits for a full week of court would have as many as five separate observations or counts in the findings detailed below.

### *B. Discrepancies Across Circuits*

This Section presents the data related to visiting judges across circuits, with a focus on the circuits surveyed in the qualitative study. The first column provides the judge totals or observations. As noted above, this figure comes from taking all of the panels in a particular circuit in the five-year period and totaling the number of judge observations from those panels. (So if there were 300 different panels in a particular circuit during the five-year period and three judges on each panel, there would be 900 judge totals.) To be clear, a single judge who appeared on ten different panels would be counted ten times—a point that should be kept in mind for the figures that follow.

---

475. Thanks to Jacob Adrian for this work. I then performed a verification process on the data by spot-checking between 10 and 20 percent of all panels in the code-extracted circuits, and 100 percent of the panels in the hand-coded circuits.

476. See *supra* note 472.

477. See Chilton & Levy, *supra* note 453, at 27.

Table 1 lists counts for the following categories: how many judges were “out-circuit,” meaning appellate judges from a different regional circuit; “out-district,” meaning district judges from outside the circuit; and “in-district,” meaning district judges from inside the circuit. Then Table 1 considers special categories—specifically, how many judges came from the Federal Circuit, the United States Court of International Trade, and the United States Supreme Court (as retired Associate Justices).

Table 1: The “Home” Location of Visiting Judges

	Judge Totals	Out-Circuit	Out-District	In-District	Fed. Circuit	Intl. Trade	Sup. Court
D.C.	1530	0	0	0	0	0	0
1st	915	46	3	29	17	0	37
2nd	4082	34	66	346	0	60	2
3rd	2007	27	33	84	10	12	4
4th	1791	37	0	172	0	0	9

First, and most plainly, these findings confirm the information provided by the D.C. Circuit.<sup>478</sup> At no point in this five-year span did the circuit draw on visitors of any kind.

Second, and quite strikingly, the data show directly where the visitors are coming from. One of the biggest sources of visitors for the First Circuit was the Supreme Court—and as the calendar pages show, this is due to the fact that retired Associate Justice David Souter sat on thirty-seven panels during this time.<sup>479</sup> (This figure is all the more remarkable given that Justice Souter did not step down from the Supreme Court until 2009<sup>480</sup> and, accordingly, did not sit by designation in the first year of this study.) By contrast, the other circuits enjoyed relatively few visitors from the Supreme Court—and those visits on the Second, Third, and Fourth Circuits were all from retired Associate Justice Sandra Day O’Connor.<sup>481</sup>

Other notable points also emerge. Looking to other Article III courts, the First Circuit had a relatively high number of visits from the Federal Circuit—a point consistent with the comment of a former chief judge of the First Circuit<sup>482</sup> that his court had quite a few visits from the Federal Circuit. In a similar vein,

478. See *supra* notes 314–316 and accompanying text.

479. See Calendar Data for All Twelve Regional Circuits, *supra* note 472.

480. See *History of the Federal Judiciary, Biographical Directory of Federal Judges: David Hackett Souter*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/souter-david-hackett> [https://perma.cc/FB3K-KR9S].

481. See *supra* note 472.

482. See *supra* note 331.

and again consistent with the comments of a former chief judge of the circuit,<sup>483</sup> the Second Circuit relied heavily on judges from the Court of International Trade—with sixty panel visits from members of that court (whereas several other circuits received no such visits).

Finally, it is interesting to see the extent to which the circuits drew from district courts within the circuit. Of note, the Second and Fourth Circuits relied considerably on judges from this category. The Second Circuit had 346 such visits, dwarfing the number of visits from the next largest group (66 visits from out-circuit judges). Similarly, the Fourth Circuit had 172 visits from in-circuit district judges, which was significantly larger than any other category. While a few judges of the Fourth Circuit expressed some reservations about sitting with district judges,<sup>484</sup> several Second Circuit judges described preferring to sit with such judges,<sup>485</sup> and a former chief judge noted how much the court relies on them.<sup>486</sup> Overall, these figures provide critical information about which courts the various circuits drew from.

### C. *Discrepancies Within Circuits*

In addition to examining where visitors come from in general terms—within or outside the circuit—it is vital to look to where, specifically, the judges hail from. As the previous Part notes, having district judges interact with courts of appeals judges can confer significant benefits upon those visitors. This Section therefore considers the district judges who sat by designation within their home circuit, and which district they originated from. Table 2 presents the findings, noting the number of visits from each district (and, to provide context, the number of authorized judgeships in each district).

---

483. *See supra* note 361.

484. *See supra* notes 359–360 and accompanying text.

485. *See supra* notes 361–365 and accompanying text.

486. *See supra* note 364 and accompanying text.

Table 2: The “Home” Location of In-District Judges

<u>Circuit</u>	<u>District</u>	<u>Visits</u>	<u>Authorized Judgeships</u>
<u>D.C. Circuit</u>			
	Dist. of Columbia	0	15
<u>First Circuit</u>			
	Maine	4	3
	Massachusetts	9	13
	New Hampshire	10	3
	Puerto Rico	2	7
	Rhode Island	4	3
<u>Second Circuit</u>			
	Connecticut	20	8
	New York, Eastern	87	15
	New York, Northern	8	5
	New York, Southern	199	28
	New York, Western	9	4
	Vermont	23	2
<u>Third Circuit</u>			
	Delaware	3	4
	New Jersey	14	17
	Pennsylvania, Eastern	53	22
	Pennsylvania, Middle	8	6
	Pennsylvania, Western	6	10
<u>Fourth Circuit</u>			
	Maryland	16	10
	North Carolina, Eastern	7	4
	North Carolina, Middle	13	4
	North Carolina, Western	20	4
	South Carolina	32	10
	Virginia, Eastern	37	11
	Virginia, Western	18	4
	Western Virginia, Northern	10	3
	Western Virginia, Southern	19	5

First, the data can again confirm what interviewees stated about the D.C. Circuit: that it does not have its district judges sit by designation.<sup>487</sup> At no point

487. See *supra* note 390 and accompanying text.

between September 2008 and August 2013 did any district judges visit the circuit court. Moreover, it is plain that D.C. is an outlier in this respect; all of the other courts of appeals had district judges sit at some point in this five-year span, and every district was represented.

Second, the data provide pertinent information about where, specifically, the district judges come from—information that is not provided by the Administrative Office. Of course, one must be cautious when drawing conclusions about the relative number of visits from each district, as the number of judges in each district necessarily impacts the equation. (It should not be surprising if a circuit has twice as many visits from district *X* when compared to district *Y*, if district *X* has twice as many district judges.) And one has to be more careful still given that the number of judgeships cannot tell the full story in any given district, as it does not convey the number of vacancies at any given time (which would effectively decrease the number of judges who are eligible to visit) or the number of senior judges (which would effectively increase the number of judges who are eligible to visit). Be that all as it may, it is still possible to make some observations with qualifications.

One can see from the data that several of the circuits seem to have a fairly even number of visits from each of their districts, keeping in mind the number of judgeships. Not all of the circuits follow this pattern, however. The most pronounced exception is the Second Circuit. In this time period, there were 199 visits from the Southern District as compared to 8 from the Northern District. Even if one adjusts for the number of judgeships in the district, there is still a considerable disparity: an average of 7.1 visits per judgeship in the Southern District as compared to 1.6 visits per judgeship in the Northern District. Such findings are particularly interesting to note in light of one Second Circuit judge’s comments that it is best to sit with judges of the Southern and Eastern Districts, as “we all speak the same language” and the experience is “like having junior circuit judges” join the court.<sup>488</sup>

\*                    \*                    \*                    \*                    \*

The quantitative data come together to further the account of visiting judges. They confirm some points provided by the interview data, though raise questions about other points—particularly the potential politicization of the practice—and thus also highlight avenues for future research. This Part has sought to bring a new dataset to bear on some of these matters, which, in turn, has brought to light significant disparities in how visiting judges are used—both across circuits and within circuits. The final Part considers implications of all of the Article’s findings for the judiciary as a whole.

---

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

## IV.

## IMPLICATIONS OF VISITING JUDGES FOR THE JUDICIARY

The federal courts of today are made up of judges who were each drawn from a particular part of the country to hold a seat on a particular court.<sup>489</sup> The practice of visiting judges is a departure from, and even in tension with, this vision of the courts—now a judge from the Southern District of New York can author an opinion for the Ninth Circuit Court of Appeals. As the judges themselves noted, the practice also carries some potential costs: the visitors might not have sufficient knowledge or training to perform the job well, and they might be overly deferential to their fellow panel members. Despite these concerns, I argue that the practice on the whole is a beneficial one due to the critical functions it carries out—namely, providing relief for overworked courts and transmitting critical institutional knowledge. This Part briefly makes the normative case for having visiting judges, before turning to potential ways of improving the practice.

Addressing whether we should have a system of visiting judges is a complicated task in light of the many, sometimes-conflicting justifications for its existence, each with its own set of costs and benefits. It is easiest to begin with the necessity rationale that first supported the practice in the early 1800s. While in some ways the judiciary's needs are not as stark as they were at that time—gone are the days of a single judge in a single district, who has no recourse for ill health<sup>490</sup>—they are still substantial today. Some circuits continue to be overburdened. For example, according to the Administrative Office, the Ninth Circuit had 383 appeals commenced per judgeship from September 2016 to September 2017, or nearly twenty-five percent more than the circuit average.<sup>491</sup> Absent relief from the outside, judges are faced with an unsavory set of choices—they can become overworked, they can find additional ways of reducing the time spent on cases (for example, fewer cases might receive oral argument),<sup>492</sup> or they can let their backlogs grow. Not only are these concerning choices for judges, but they of course have troubling

---

489. See *supra* note 9 and accompanying text.

490. Specifically, since 1919, federal judges in ill health have faced the following four options: resignation, retirement, service in senior status, and continued regular active service. See Burbank, Plager & Ablavsky, *supra* note 57, at 8.

491. Filed-appeals-per-judgeship is admittedly an imperfect measure of workload. It does not account for the contribution of senior judges, and therefore overestimates. It also does not account for the number of vacancies on the court, and therefore can underestimate. Still, it remains one (limited) tool for gauging a circuit's caseload. I arrived at these particular figures by taking the total number of cases commenced in the Ninth Circuit (11,096) and the appellate courts as a whole (50,506), and then dividing by the number of respective judgeships (29 and 167). See JUDICIAL BUSINESS OF THE UNITED STATES COURTS (2017), *supra* note 10, at tbl.B-1.

492. For a brief account of the various case management tools that have developed in response to rising caseloads at the courts of appeals, see Marin K. Levy, *Judicial Attention as a Scarce Resource: A Preliminary Defense of How Judges Allocate Time Across Cases in the Federal Courts of Appeals*, 81 GEO. WASH. L. REV. 401, 413–20 (2013).



ramifications for litigants. This is no doubt why the Federal Judicial Conference has continued to rely upon the use of visiting judges in institutional planning about the federal judiciary.<sup>493</sup> Beyond these sets of problems, there remain the cases of true necessity that arise when an entire court must be recused from a particular matter.<sup>494</sup> In light of these considerations, there is clearly much to be gained by having the flexibility to bring in judges from less congested and less conflicted courts to lend a hand.

To be sure, this solution comes with its limitations. As judges described in interviews (and as the data support), visits are an imperfect means of reducing the caseload.<sup>495</sup> Specifically, visiting judges often take less substantial writing assignments, meaning that in-circuit judges come out of sittings with more than a third of the work.

Beyond the limitations are the potential costs. With respect to appellate judges sitting on a different court of appeals, there are concerns about whether they know enough of the relevant substantive law (such as with administrative law in the D.C. Circuit<sup>496</sup>) and about the fact that they have their own “competing” body of law.<sup>497</sup> The larger concern is that such factors could contribute to inconsistent circuit law.<sup>498</sup> That said, there are mechanisms in place for mitigating such potential costs. A visitor must reach her decision alongside two other “home” judges at the court of appeals—and in this context, the fact that visitors generally tend to be deferential<sup>499</sup> is not a vice but a virtue. Additionally, for extreme cases there is en banc review.<sup>500</sup>

With respect to district judges visiting up, there are once again concerns that the judges lack the necessary background. One appellate judge noted that such judges “aren’t in the loop as much.”<sup>501</sup> On the other hand, another judge said that district judges were optimal to sit with “precisely because they shared the same body of law.”<sup>502</sup> And to the extent that such concerns are valid, they should again be mitigated by the additional panel members. A separate, and more substantial, concern with district judges is that they potentially experience some awkwardness when facing the possibility of reversing a colleague,<sup>503</sup>

---

493. See *supra* notes 299–300 and accompanying text.

494. See *supra* notes 312–313 and accompanying text.

495. See *supra* notes 354–357 and accompanying text; *supra* notes 458–461 and accompanying text.

496. See *supra* notes 320–325 and accompanying text.

497. Cf. *supra* note 361 (noting that a former chief judge of the Second Circuit suggested that it was useful to select visitors from the Court of International Trade precisely because they did not have a competing body of law).

498. See George, *supra* note 16, at 20–23.

499. See *supra* notes 349–353 and accompanying text; *supra* notes 355–361 and accompanying text.

500. Moreover, there does not appear to be much in the way of empirical support for the claim that visiting leads to greater inconsistencies in circuit law. See George, *supra* note 16, at 25–28.

501. See *supra* note 359 and accompanying text.

502. See *supra* note 364 and accompanying text.

503. See *supra* notes 392–399 and accompanying text.

which ultimately could affect their decision-making. But here, too, there are mitigation tools available. With the exception of the D.C. Circuit, which has only one district, the panel can refrain from hearing cases from the visitor's district, or at least the presider can refrain from assigning the visitor an opinion reversing a judge from her district.<sup>504</sup> A related concern with district judges sitting by designation is that they feel awkward at the prospect of disagreeing with a member of the court of appeals. One could imagine a situation in which a visiting district judge was "right" on a point of law, but was in the minority position on the panel and ultimately chose not to dissent. Here, deference would be a vice—and there is no clear way to mitigate its potential cost.

Concerns about necessary background and training once again surface—and are compounded—with respect to appellate judges visiting the district court. It is presumably these concerns that led several judges to discuss their fear of ultimately being reversed if they were to sit by reverse designation.<sup>505</sup> Unlike at the court of appeals, the concern is more significant in this context, as there are no other panel members to serve as a check. That said, there is the appeals process; if a judge at the trial court were to make a non-harmless error, such an error should be caught on review. (Indeed, this is precisely what happened when Chief Justice Rehnquist tried a case in the Fourth Circuit.<sup>506</sup>) Appellate review is not a perfect failsafe,<sup>507</sup> but it is nevertheless a meaningful check on errors that an appellate judge might make while sitting by reverse designation, thereby mitigating a potential cost at least to some degree.

Beyond the potential costs noted above, there is at least one more that is common to all of the various visiting arrangements: the potential cost to the legitimacy or perceived legitimacy of the courts. At least some judges were attuned to how a decision by a visitor might be received; as a former chief judge of the Third Circuit said, it would "not be the best" if an outside judge cast the deciding vote in a given case.<sup>508</sup> Other judges suggested that visitors should not author circuit opinions on significant matters.<sup>509</sup> The larger concern is that the individual litigants or public in general might not accept decisions rendered by visiting judges. There is some empirical work exploring this possibility,<sup>510</sup> and it seems ripe for qualitative research as well to further gain a sense of how great this cost might be.

---

504. See *supra* notes 397–399 and accompanying text.

505. See *supra* notes 436–442 and accompanying text.

506. See *supra* note 440.

507. See *supra* note 387 and accompanying text.

508. See *supra* note 342 and accompanying text.

509. See *supra* notes 354–357 and accompanying text.

510. See George, *supra* note 16, at 30–32. To get purchase on this question, George uses a litigant's decision to petition for certiorari as a neat proxy for acceptance of the decision. She ultimately finds evidence that the decision is, in fact, associated with the composition of the panel but that a multivariate analysis would be needed to establish that the relationship is a causal one. *Id.*

In short, there are clearly strong arguments for having a visiting system in place to help particularly overburdened courts.<sup>511</sup> The arrangement is not a perfect one, and there are potential costs associated with it. But there are ways of minimizing many of those costs through other court practices and procedures. All told, the visiting scheme is a sound, and crucial, self-help tool for the judiciary.

The calculus changes, though still comes out favorably, when one considers the second rationale for having visitors: training judges and transmitting institutional knowledge. Dating back to the first days of circuit riding, there has been the recognition that visiting a court in another part of the country can serve a critical educative function.<sup>512</sup> Particularly in light of the findings of the qualitative study, it is not hard to see how this is so. A judge from the Second Circuit visits the Eleventh and picks up a new case management tool,<sup>513</sup> or perhaps learns about a recent case law development that ultimately sheds light on an in-circuit question. As a senior member of the clerk's office for the Second Circuit said years ago, "The amount of information about each other that we don't know far exceeds what we do know."<sup>514</sup> By being directly exposed to the workings of another court, judges can learn important pieces of information—about judicial administration or legal developments—that can prove useful at home.

One could imagine this function being served by other means—including by meetings of the Judicial Conference itself. But the current alternatives do not seem up to the task. As a judge for the Second Circuit said, "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 every couple of years you go to a conference."<sup>515</sup> And while some information could be exchanged in reports or monographs—say, by the Federal Judicial Center—there is something particularly beneficial about "being in the room," as it were. Visiting outside of one's own circuit is a uniquely useful vehicle for information exchange.

The educative benefits become even more palpable when one considers visits within different parts of the judicial hierarchy. When district judges visit up, they learn more about the appeals process and, according to a few of the

---

511. One could alternatively take the position that it is better to let the caseload chips fall as they may, and if certain courts ultimately face significant backlogs or ultimately adopt various cost-saving measures that begin to be problematic, Congress can step in to increase the number of judgeships. Yet, given that Congress has not done so since 1990, it seems risky to rely on it doing so now. *See* Federal Judgeship Act of 1990, Pub. L. No. 101-650, § 202, 104 Stat. 5098, 5099 (codified as amended in scattered sections of 28 U.S.C.).

512. *See supra* notes 207–208 and accompanying text.

513. *See supra* note 448 and accompanying text.

514. *See* Levy, *supra* note 280, at 385.

515. *See supra* note 445, and accompanying text.

judges themselves, potentially become stronger opinion writers.<sup>516</sup> Visiting down holds much of the same promise. Particularly for a judge who has had no prior trial experience, it can be quite beneficial to learn more about what life is like at the district court. The appellate judge who might have been tempted to formulate a multi-part balancing test in some doctrinal area, for example, might now realize it is completely unworkable in application—an insight she would owe to sitting by designation. In sum, there are strong arguments in favor of having visitors as a way to relieve overburdened courts and even, at least to some extent, as a way to spread important institutional knowledge.

Moreover, it is worth recognizing as a positive matter that because of the strength of these arguments—particularly in the caseload context—the practice of visiting judges will almost certainly endure. Courts will continue to face needs, and importing judges will continue to be seen as the best (again, least politically contentious and most cost-effective<sup>517</sup>) way to meet those needs. To wit, there will continue to be times when an entire court will be recused from a particular matter, requiring outside judges to step in. And there will continue to be times when a court experiences a surge in filings or multiple vacancies, leading to a judicial emergency and the need for outside help. In short, regardless of whether one is persuaded that the practice of visiting judges is a feature and not a bug of the federal courts, that practice is not soon going away—there will inevitably be some exchange of judges in the federal system.

The next unavoidable normative question, then, is one about optimality. If the federal system will have some degree of visiting judges, how much is best? This is an important question, but a difficult one to answer with any sort of precision. Indeed, when I asked one judge about the right amount of visitors, he responded with “a sprinkling.”<sup>518</sup>

Not only does the question resist a precise answer, it plainly cannot be answered wholesale. Different circuits will have different needs—and perhaps dramatically so. Consider one circuit that is vastly overburdened and has a large number of district judges within its borders that are new to the court. It should have a substantially different visiting pattern than a circuit that has a below-average caseload and district judges who have all had ample assignments at the court of appeals in previous terms. Decisions about how to balance these various factors will need to be made at the retail level, and by the institutions that hold the relevant knowledge on the subject: the courts themselves.

Acknowledging that some variation will be justified does not, however, mean that all will. And acknowledging that the federal courts are best suited to make decisions about the use of visiting judges from an institutional

---

516. See *supra* notes 380–384 and accompanying text.

517. See *supra* note 87 and accompanying text.

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

competency perspective does not mean that there are no potential avenues for reform. A natural place to begin considering improvements to current practice is with the key disparities in how visitors are used across circuits, within circuits, and across the judiciary as a whole. The following Sections revisit these disparities in turn and discuss their potential as sites for additional scholarship and future reform.

#### A. Consistency Across Circuits

This study has demonstrated significant inconsistency across circuits, which raises questions about the degree to which such variation can be justified. The most prominent example is that the D.C. Circuit forgoes using visiting judges altogether, while the other circuits all rely on visitors—some, like the Second Circuit, to a sizeable degree. If the practice of visiting judges were used only as it was initially intended—in times of judicial illness or caseload emergency—such inconsistencies would be not only *unsurprising* but also expected. (Under this formulation, it cannot be that every circuit is a “borrowing” circuit all of the time.) But given that several of the explanations for why the D.C. Circuit does not use visitors have nothing to do with lack of need, and given the clear benefits of visiting particularly for district judges,<sup>519</sup> this discrepancy seems might warrant further consideration.

One response is that having district judges visit the D.C. Circuit creates a uniquely difficult situation. Unlike every other regional circuit, D.C. has only one district. District judges sitting by designation would therefore necessarily have to serve on panels that would review cases decided initially by their colleagues<sup>520</sup>—a potentially concerning situation that at least one court tries to avoid altogether.<sup>521</sup> That said, there are several procedural ways to mitigate such substantive concerns. For example, it could simply become a practice among presiders that district judges sitting by designation not be assigned to author opinions reversing the court below (again, a practice followed by at least one other circuit<sup>522</sup>). Or, as one judge suggested, district judges could be assigned to agency cases (which are not decided in the first instance by the district court).<sup>523</sup> This move would solve the problem at hand, though it would presumably render the visit less instructive. The larger point is not that the D.C. Circuit should necessarily take on visitors. Rather, this seems a curious inconsistency—and one where the proffered explanation does not appear to hold. Given the stated benefits of having judges, particularly one’s own district judges, visit, the D.C. Circuit’s practices could be a promising site of limited reform.

---

519. See *supra* Subparts II.B & II.C.

520. See *supra* notes 392–395 and accompanying text.

521. See *supra* note 397 and accompanying text.

522. See *supra* notes 398–399 and accompanying text.

523. See *supra* note 395 and accompanying text.

Another surprising finding from this study is that the judges of the D.C. Circuit do not visit “out” much.<sup>524</sup> Several D.C. Circuit judges made it clear that they had no desire to leave their own court.<sup>525</sup> But precisely because the circuit has the lowest workload of all the regional circuit courts,<sup>526</sup> and frankly because the court is so well respected, its judges are well positioned to provide assistance to others. Presumably the benefits of such a regular practice would be felt not just by the borrowing courts, but by the lending court as well. Given that the D.C. Circuit hears cases from all over the country, its judges might benefit from more working experience with other courts and, by extension, other states. This argument seems all the more compelling given that a significant number of Supreme Court Justices come from the D.C. Circuit. (In recent memory, the list includes Chief Justice John Roberts,<sup>527</sup> Justice Ruth Bader Ginsburg,<sup>528</sup> Justice Brett Kavanaugh,<sup>529</sup> Justice Clarence Thomas,<sup>530</sup> and the late Justice Antonin Scalia.<sup>531</sup>) It therefore would be valuable for the Chief Judge or others on the court to work together towards creating a norm of visiting out to the rest of the judiciary.

One final point about consistency across circuits implicates the origin courts of the visiting judges. For example, the First Circuit had a significant number of visits from a retired Supreme Court Justice and a judge of the Federal Circuit; by contrast, the Second Circuit drew heavily from its own district courts and the U.S. Court of International Trade. Some differences can be chalked up to convenience—the Second Circuit draws on the Court of International Trade in part because both are based in New York. Some may come from happenstance—a former chief judge of the First Circuit develops a good working relationship with a judge of the Federal Circuit, say,<sup>532</sup> and a former Supreme Court Justice decides to hear cases in his native New England.<sup>533</sup> And some might be in reaction to the circumstances of the other

---

524. See *supra* note 337.

525. See *supra* notes 339–340 and accompanying text.

526. See *supra* note 317.

527. See *History of the Federal Judiciary, Biographical Directory of Federal Judges: John Glover Roberts, Jr.*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/roberts-john-glover-jr> [<https://perma.cc/79RQ-XQFV>].

528. See *History of the Federal Judiciary, Biographical Directory of Federal Judges: Ruth Bader Ginsburg*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/ginsburg-ruth-bader> [<https://perma.cc/9RE2-K5Z4>].

529. See *History of the Federal Judiciary, Biographical Directory of Federal Judges: Brett Kavanaugh*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/kavanaugh-brett-m> [<https://perma.cc/AM78-9GCV>].

530. See *History of the Federal Judiciary, Biographical Directory of Federal Judges: Clarence Thomas*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/thomas-clarence> [<https://perma.cc/Y946-XWJL>].

531. See *History of the Federal Judiciary, Biographical Directory of Federal Judges: Antonin Scalia*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/scalia-antonin> [<https://perma.cc/ZMG8-FJGD>].

532. See *supra* note 331.

533. See *supra* note 479 and accompanying text.

courts—as a former chief judge of the First Circuit said, his court moved away from relying on district judges as the district courts became overburdened themselves.<sup>534</sup>

That said, some number of these differences are the result of deliberate decisions on the part of the circuit judges. It is clear from the qualitative study that some judges strongly preferred one type of visitor over another—that district judges felt more “like colleagues” in one court or circuit judges were more “in the loop” to judges in another.<sup>535</sup> These preferences should be considered closely. Given that decisions about who will visit might have implications for not only the dissemination of norms but also the dissemination of law—for example, the development of a circuit’s intellectual property law might be affected by consistently bringing in a judge from the Federal Circuit—such differences across circuits deserve further attention and may well be another place for judges to reform current practices.

#### *B. Consistency Within Circuits*

Beyond inter-circuit disparities, the quantitative data reveal meaningful intra-circuit disparities. As noted in Part III, although several of the circuits appear to draw roughly evenly from their own districts, not all do. Specifically, there are key differences in how the Second Circuit draws visitors. On the high end, there were 199 visits and 87 visits from the Southern and Eastern Districts, respectively; on the low end, there were just 8 visits and 9 visits from the Northern and Western Districts, respectively.<sup>536</sup> Even when these figures are adjusted for the number of judgeships in each district, it is still plain that some districts are providing far more visitors than their sister districts.

To be sure, the rationale for relying on visiting judges is relevant to this discussion. If visiting is seen only as it was originally intended—to give assistance but to gain nothing in return—then the origins of the visitors are of little consequence. All else equal, it seems preferable for efficiency and cost-saving purposes to bring in judges from across the street over judges from across the state.

But if part of the rationale for having visiting judges centers on the benefit to the visitor—as it clearly does in the context of district judges—then attention should be paid to intra-circuit discrepancies. The qualitative data reveal the extent to which judges in most circuits thought it was vital for district judges to visit—to know how the appeals process works and to better know the judges.<sup>537</sup> Several circuit judges who had themselves been district judges noted how useful the visits had been.<sup>538</sup> Furthermore, new research by Professors Mark

---

534. *See supra* note 358.

535. *See supra* notes 359–365 and accompanying text.

536. *See supra* Subpart III.C.

537. *See supra* Subpart II.C.

538. *See supra* notes 382–384 and accompanying text.

Lemley and Shawn Miller documents additional benefits, at least for district judges who sat on the Federal Circuit.<sup>539</sup> Specifically, they found that judges who had visited, subsequently experienced a lower reversal rate when their cases went up on appeal to that court.<sup>540</sup> More research is needed in this area—to know if the findings can be replicated outside of the Federal Circuit and to know how the effect fares over time (for example, how much greater the benefit is to a judge who visit each year as compared to a judge who visits only once or twice).<sup>541</sup> But given all that appears to be at stake for district judges (and by extension, the parties who come before them), the circuits should examine, and particularly reconsider, existing disparities across districts.

To be clear, it does not follow from this analysis that there should necessarily be equality across all districts (even when taking the number of judgeships into account). As the interview data reveal, the process for determining whom to invite can be a complex one, involving myriad factors. Some districts might themselves be overworked and not in a position to constantly lend out judges. Some individual judges might not enjoy the experience of sitting by designation and might not wish to return. Some circuits might not enjoy the experience of sitting with a particular district judge and might not wish for her to return. And as noted above, there are additional considerations, such as the cost of having someone visit—both in terms of their time (if they must travel far) and the financial implications (if they must travel by airplane and be put up in a hotel, and if the same must be done for their law clerks). All of these are relevant factors to consider when determining who will be brought in to visit. The point is to recognize that the existing disparities across districts stand to have an impact on the judges themselves, and the relevant decision-makers should take this into consideration.

### C. Consistency Within the Judicial System as a Whole

Several scholars have recently proposed that members of the Supreme Court return to their historical roots and hear cases at the courts of appeals.<sup>542</sup> While there would be benefits to reinstating such a practice, it is hard to imagine these proposals getting political traction in the near future. Perhaps more importantly, by focusing on the Supreme Court, such proposals have missed a possibility that is feasible and that could improve judicial decision-making at the courts of appeals: increasing reverse designation.

The data reveal that when it comes to the use of visiting judges, the most significant disparity occurs between the judicial tiers. Despite the fact that

---

539. See Lemley & Miller, *supra* note 39.

540. *Id.* at 452.

541. Lemley and Miller test their data to see if the effect of sitting by designation once fades over time—and the authors conclude it may well. See *id.* at 476–77. But this leaves open the question of whether one’s reversal rate might continue to decline with subsequent visits to the court of appeals.

542. See *supra* note 247.



district judges routinely visit up, in none of the circuit courts do appellate judges consistently visit down.<sup>543</sup> This finding is all the more surprising given the significant workloads of the district courts, and given the benefits that the circuit judges acknowledged would come from sitting on the courts below. As several judges said, sitting by reverse designation—being “in the trenches”—would give them a better window into the pressures the district judges face and the challenges associated with trying cases.<sup>544</sup> Spending more time at the district court could also impact, and even improve, the appellate judges’ decision-making (to wit, the judge who forgoes crafting a multi-factored balancing test in a particular area of law after her visit).<sup>545</sup> Even appellate judges who at one time were district judges could stand to benefit from the visit, particularly if they were elevated some many years ago. In light of how much circuit judges—and circuit judge decision-making—could gain from reverse designation, the practice should be encouraged across all courts.

In terms of potential costs, as mentioned earlier, the visit need not be too cumbersome. The judge can be assigned a short trial, for example, to fit in between sitting weeks or possibly over the summer.<sup>546</sup> At the very least, it is hard to see why the practice would be more disruptive than a multi-day sitting at the court of appeals would be for a district judge.

The more substantial cost, as noted previously, is the one identified by several judges—that they could make an error during the trial.<sup>547</sup> There is the backstop of appellate review—in theory non-harmless errors should be caught—but it is not foolproof. That said, the fact that judges are concerned about making errors is arguably evidence of how important, and promising, increasing sitting by reverse designation is. For example, judges who think that they do not know enough to sentence a criminal defendant are perhaps most in need of gaining experience before they continue to hear such cases on appeal. If the concerns about error truly are substantial, then a more conservative approach could be taken—in the realm of sentencing, for example, judges could observe district court several times, either full stop or as preparation for holding a hearing on their own.

The greater point, though, is that as currently structured, the federal system encourages certain judges to visit other sites in the judicial hierarchy in order to improve their own decision-making. And while it may not be feasible to extend this practice to current Supreme Court Justices, it certainly is possible to extend it to circuit judges. The lack of reverse designation in the courts of

---

543. *See supra* Subpart II.C.

544. *See supra* notes 418–420 and accompanying text.

545. *Cf.* Daniel Epps & William Ortman, *The Lottery Docket*, 116 MICH. L. REV. 705 (2018) (arguing that exposing the Justices to a broader swath of appeals could lead to improved legal rules).

546. *See supra* notes 414–417.

547. *See supra* note 505 and accompanying text.

appeals today represents a missed opportunity for improving the quality of appellate decision-making, and therefore also poses an opportunity for reform.

\* \* \* \* \*

Ultimately, what began as a way to alleviate the burden of an overworked judge raises significant questions about the nature of judgeships and our judiciary as a whole.<sup>548</sup> Should there be a system of visiting judges and if so, to what extent? This Part has sought to offer a defense of current practice, but also to highlight places for further attention—from scholars and courts—to improve the use of visiting judges going forward.

### CONCLUSION

An attorney recently arguing before the First Circuit found herself in front of a panel of three judges—two of that court and retired Supreme Court Justice David Souter.<sup>549</sup> A party bringing an appeal to the Third Circuit had her case heard by two Third Circuit judges and a judge from the U.S. Court of International Trade.<sup>550</sup> And a panel of the Ninth Circuit was composed of two court of appeals judges . . . and a district judge from the Eastern District of Kentucky.<sup>551</sup> The practice of having outside judges come to hear and decide cases is a curious one indeed.

And yet the practice of visiting judges is more than an odd curiosity within the federal courts. As this Article has shown, the use of visiting judges has been integral to the federal system for more than two hundred years. Today the practice involves hundreds of jurists of different kinds,<sup>552</sup> helping to decide thousands of cases.<sup>553</sup>

Furthermore, the act of exchanging judges across courts has performed several crucial functions. It has helped in times of necessity and when workload demands have been extreme. And it has helped with the transmission of norms and institutional knowledge. In light of these valuable goals, it is vital to undertake additional scholarship and consider avenues for reform to further improve a critical court practice that is rightfully set to endure.

---

548. Some of the questions—such as to what extent a judge’s home state matters within the federal system—are explored in future work. *See generally* Marin K. Levy, *Are Federal Judges National Judges?* (in progress) (manuscript on file with author).

549. *See* *Goethel v. U.S. Department of Commerce*, 854 F.3d 106 (2017) (with Judges Kayatta and Stahl of the First Circuit Court of Appeals, and Associate Justice (Ret.) David Souter of the Supreme Court of the United States sitting by designation).

550. *See* *Munroe v. Central Bucks School Dist.*, 805 F.3d 454 (2015) (with Judges Ambro and Cowen of the Third Circuit Court of Appeals, and Judge Restani of the United States Court of International Trade sitting by designation).

551. *See* *Huppert v. City of Pittsburg*, 574 F.3d 696 (2009) (with Judges Tallman and Fletcher of the Ninth Circuit Court of Appeals, and Judge Bertelsman of the Eastern District of Kentucky sitting by designation).

552. *See supra* note 10.

553. *See supra* note 13.