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DILUTING JUSTICE ON APPEAL?: AN EXAMINATION OF THE USE OF DISTRICT COURT JUDGES SITTING BY DESIGNATION ON THE UNITED STATES COURTS OF APPEALS

Richard B. Saphire*
Michael E. Solimine**

According to a number of studies and commentators, a serious case-load crisis faces the federal courts. With respect to the federal courts of appeals, some have called for drastic remedial measures. Until Congress responds, the courts of appeals have been forced to adopt a range of coping measures. In this article, Professors Saphire and Solimine examine one of these measures, the utilization of designated district court judges on appellate panels. After discussing the origins and extent of this practice, they identify a number of problems it raises. They argue that extensive and routine utilization of district judges on appellate panels has the potential to adversely affect important goals of judicial administration, including the maintenance of collegiality and the consistency of precedent. They also argue that, by treating district and circuit judges as fungible, current designation practice calls into question the rationality of the federal judicial appointment process and threatens to undermine the quality of appellate justice.

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We are extremely grateful to Judith A. McKenna of the Research Division of the Federal Judicial Center (FJC) and her associates there for compiling the subset of data on district judges for us. While much of this database is generally accessible to any researcher, the public database does not include the identity of judges associated with the cases, so additional work at the FJC was necessary to classify the cases according to the composition of the panels, i.e., whether the panel included one or more visiting circuit or district judges. Ms. McKenna’s work, and her comments on other aspects of this article, were invaluable. Of course, neither Ms. McKenna nor the FJC necessarily endorse any of the conclusions we draw from this data.
[W]e subtly undermine the constitutional system when we treat federal judges as fungible.¹

INTRODUCTION

In recent years, more and more people have questioned the capacity of the federal court system to do the work Congress has assigned to it. In his yearly reports to Congress, the current Chief Justice of the United States has expressed concern that the federal courts are approaching the point at which they will not be able to process the cases stacking up on their burgeoning dockets fairly and efficiently.² Similarly, a recent study of the federal court system concluded that the federal appellate courts are in a “crisis of volume” with “swollen caseloads” which, if left unattended, threaten to undermine the “hallmarks of our judiciary.”³

A number of remedies have been proposed to alleviate this problem. These proposals include changes to the en banc procedures of the federal courts of appeals, development of new case management techniques, and a range of fundamental “structural alternatives.”⁴ Also prominent have been proposals for the expansion of the number of authorized district and circuit court judgeships.⁵

⁴. 1990 STUDY COMMITTEE REPORT, supra note 3, at 114–31; see also J. Clifford Wallace, Tackling the Caseload Crisis, 80 A.B.A. J. 88 (June 1994) (calling for a careful examination of “new federal law and its impact on the federal court system”).
⁵. 1990 STUDY COMMITTEE REPORT, supra note 3, at 111–12 (calling upon the Judicial Conference of the United States to “develop and adopt a weighted caseload formula for determining needed appellate judgeships” and urging that Congress “quickly provide the additional appellate judgeships that the Judicial Conference has requested”). For a recent, extensive study of remedies that have been proposed to deal with the caseload crisis, see Baker, supra note 3. For a discussion of the federal court caseload crunch and a critical view of the notion that it should be addressed by expanding the number of courts, see Erwin Chemerinsky & Larry Kramer, Defining
The questions of whether a caseload crisis exists, what the extent of this supposed caseload crisis is, and how many, if any, new judgeships would alleviate it have sparked a lively and public debate among a number of prominent judges of the federal courts of appeals. For example, in a recent article published in the American Bar Association Journal, Judge Stephen Reinhardt of the United States Court of Appeals for the Ninth Circuit asserted that "our federal court system is too small for the job."6 Focusing specifically on the courts of appeals, Judge Reinhardt observed that "[t]hose who believe we are doing the same quality work that we did in the past are simply fooling themselves. We adopt more and more procedures for 'expediting' cases, procedures that ensure that individual cases will get less attention."7 Judge Reinhardt described these procedures, including dispensing with oral argument, as ensuring that "many cases do not get the full attention they deserve" and argued that the procedures undercut the goal of providing for a "first-class federal court system."8 His proposed solution to the problem was "simply that Congress double the size of the courts of appeals."9

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7. Id.
8. Id.
9. Id. at 53. Judge Reinhardt noted that, even if Congress were to adopt his proposal,

our present stream of cases would be more than enough to keep us busy with a full workload. The only difference would be that far more of the cases we are now handling would receive the full attention they deserve, and the quality of justice in our courts would be substantially improved.

Id. It should be noted that Judge Reinhardt's proposal was, according to a judicial colleague, "precipitated in part by the request of the [Ninth] Circuit ... for an additional 10 judges, and by pending legislation that will substantially increase the federal caseload." Dolores K. Sloviter, The Judiciary Needs Judicious Growth, NAT'L L.J., June 28, 1993, at 17.

In response to the attention drawn to the growing volume of cases in the federal circuit courts, some commentators have suggested the possibility of making structural modifications to the federal court system, including the consolidation of circuits, the creation of circuit courts whose jurisdiction is defined by subject matter, and the establishment of a national court of appeals. See, e.g., Randall Samborn, Big Change in Judiciary Rejected, NAT'L L.J., Mar. 7, 1994, at 3 (discussing a study conducted by
Judge Reinhardt's proposal sparked a number of spirited responses from within the federal judiciary. For example, Chief Judge Dolores Sloviter of the United States Court of Appeals for the Third Circuit agreed that "[s]ome growth of the federal courts is both necessary and inevitable." She expressed concern, however, that a rapid expansion of the size of the federal circuit courts might adversely affect the collegiality essential to the harmonious and effective operation of the appellate process and instead proposed incremental increases in the number of circuit judges, "limited to 15 percent to 20 percent every three years."

Judge Jon O. Newman, now Chief Judge of the United States Court of Appeals for the Second Circuit, also joined the debate about the severity of the caseload glut facing the federal courts. Judge Newman agreed that the federal courts were facing a serious problem in terms of their capacity to manage adequately their growing dockets. However, like Judge Sloviter, he cautioned against a precipitous and massive increase in the size of the federal courts of appeals, arguing that an enlarged federal judiciary would lead to a range of serious problems.

More specifically, Judge Newman conceded that the continued growth of federal caseloads would result in "an inevitable decline in the quality of decision-making" in the courts of appeals. Yet he was skeptical that a significant increase in the number of federal judges would improve the situation.

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the Federal Judicial Center that examines proposals and analyzes problems facing the circuit courts). Judge Reinhardt finds such suggestions superfluous: "We don't need more studies about structure. What we need are more judges to handle the cases." Id. at 40.

10. Sloviter, supra note 9, at 18.

11. Id.


13. See id. at 188.

14. Id. at 187–94. Among the problems identified by Judge Newman were a reduction in the quality of judicial nominees, the impairment of the ability of each court of appeals to function, a fragmentation of the circuits, the "inevitable decline in the coherence of a body of federal law," and "an impairment in the quality of decision making." Id. at 188.

15. Id. at 194.

16. Id. Similar concerns were expressed by Judge Gerald Tjoflat, Chief Judge of the United States Court of Appeals for the Fifth Circuit. See Gerald B. Tjoflat, More Judges, Less Justice, 79 A.B.A. J. 70, 70 (July 1993) (arguing in response to Judge Reinhardt's comments that "the problem for most circuits is not that they have too few judges, but that they have too many"); see also COMM. ON LONG RANGE PLANNING,
Consequently, he advocated that a more effective solution would be to curtail the jurisdiction of federal courts in areas where cases could sensibly be diverted to the state courts.17 If the number of federal judges were to be increased, Judge Newman proposed an overall limit of 1000 judges.18

While not every commentator accepts the assertion that the federal courts are faced with a serious caseload crisis,19 no one has suggested that the current state of the federal judiciary is ideal. For a long time, the federal court system has been asked to do more than many judges and scholars believe it is able to do. Typically, when Congress has enacted new systems of regulation broadening the jurisdiction or otherwise expanding the workload of the federal courts, it has failed to expand concomitantly the resources available to the courts to meet these new responsibilities.20

US. JUDICIAL CONFERENCE, PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS 42, 123 (2d prtg. 1995) [hereinafter PROPOSED LONG RANGE PLAN] (cautioning that growth of the size of the current federal courts may undermine collegiality among the judges and lead to inconsistency and incoherence in circuit law).


18. Id. Currently, there are 167 authorized federal appellate judgeships, excluding the Federal Circuit. PROPOSED LONG RANGE PLAN, supra note 16, at 15. See generally 28 U.S.C. § 44(a) (Supp. V 1993) (congressional authorization of circuit court judgeships). For an argument that an expanded federal judiciary could give rise to adverse consequences, see Jon O. Newman, Are 1,000 Federal Judges Enough?: Yes. More Would Dilute the Quality, N.Y. TIMES, May 17, 1993, at A17. Judge Reinhardt responded to Judge Newman’s plea for a 1000-judge cap by arguing that “[t]hose who would freeze the number of Federal judgeships at 1,000 have their priorities backward. Only after we decide on the proper role of the courts can we determine their proper size.” Stephen Reinhardt, Are 1,000 Federal Judges Enough?: No. More Cases Should Be Heard, N.Y. TIMES, May 17, 1993, at A17. Several others also have argued against significantly increasing the number of Article III judges. See 1990 STUDY COMMITTEE REPORT, supra note 3, at 7–8; Richard A. Posner, Coping with the Caseload: A Comment on Magistrates and Masters, 137 U. PA. L. REV. 2215, 2216 (1989).

19. At the close of his article calling for a significant expansion of the federal courts, Judge Reinhardt acknowledged that “[t]here are members of my own court who would disagree strongly with everything I have said.” Reinhardt, supra note 6, at 54.

One recent study, while noting that there had been “a tremendous growth in filings in the past 50 years,” found that a majority of federal appellate judges responding to a questionnaire did not believe that they were overwhelmed by their workload. Michael C. Gizzi, Examining the Crisis of Volume in the U.S. Courts of Appeals, 77 JUDICATURE 96, 96 (1993). The author of the study concluded that “little empirical evidence supports the claim that the courts of appeals are in a crisis of volume.” Id. at 103.

20. See BAKER, supra note 3, at 224–27 (describing demands that Congress better define legislation in order to aid adjudication).
This is not to say that Congress has completely ignored the need for additional adjudicatory mechanisms to enforce federal rights or the promotion of other federal interests. For example, the creation of the federal magistrate system and the expansion of the magistrates' responsibilities were intended in part to provide a measure of relief to federal district judges. 21 Similarly, the expansion of adjudicatory mechanisms outside of Article III of the Constitution—in the form of adjudicatory systems within federal agencies and so-called "Article I" courts 22—has allowed Congress to divert cases away from the federal court system, or at least to adjust the timing and scope of any necessary action by the regular federal courts. 23 Nevertheless, if the ongoing expression of criticism and concern is any indication, none of these efforts has been fully successful in ameliorating the problem of an overextended federal judiciary.

Most contemporary criticism of the federal court system, especially as it relates to conditions in the federal courts of appeals, has ignored an important fact: the ability of circuit court judges to process their cases in an expeditious and efficient manner is actually much worse than is generally realized. This becomes clear once one realizes that federal circuit judges—those men and women nominated by the President and confirmed by the Senate for vacancies on the twelve regional courts of appeals, the District of Columbia Circuit, and the Federal Circuit—are not the only persons who decide cases filed in the circuit courts. Indeed, each year a significant number of federal appellate cases are decided by three-judge panels consisting of one or more judges who were neither appointed by the President nor confirmed by the Senate to perform the federal appellate function. 24

Who are these persons who help the existing federal appellate system to do its work? Who are these persons who function as federal appellate judges, who exercise many of the constitutional and statutory functions of circuit judges, but who have

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23. See generally id. (analyzing Supreme Court attempts to find boundaries to Congress's power to create non-Article III courts and proposing a framework with which to assess such courts).
24. See infra Part II.A.
not been purposefully selected or formally approved to do the work assigned them? Are they interlopers whose presence on federal appellate panels presents a threat to the integrity of the federal judicial system as established and understood by the Constitution? Does the presence of these persons on federal appellate panels allow Congress to avoid what many see as its neglected duty to address in a more coherent, systematic, and rational way the crisis in administration that faces the federal courts?

Identifying these surrogate circuit judges is the easy part of this riddle. During the last decade, the federal circuit courts have, with increasing frequency, come to rely upon federal district judges to sit "by designation" on appellate panels. Responding to the other parts of the riddle, however, is more difficult. The utilization of district court judges in the circuit courts has received little study or analysis, either by those charged with the responsibility of administering the federal court system or by the scholarly community.

26. See BAKER, supra note 3, at 228 (summarizing the extramural reforms in the courts of appeals that Congress has used in the past but which are no longer sufficient).
27. In reported decisions of the federal circuit courts, opinions frequently refer to district court judges, and, for that matter, visiting circuit court judges, as sitting "by designation." See, e.g., United States v. Roberts, 986 F.2d 1026, 1028 (6th Cir.), cert. denied, 114 S. Ct. 271 (1993). The person who "designates" the visiting judge to sit is usually the Chief Judge or, by proxy, the clerk or executive officer of the circuit. See 28 U.S.C. § 292 (1988); infra Part I.B.
28. The federal circuits have also made extensive use of visiting judges, both active and senior, from other circuits. See MCKENNA, supra note 3, at 38–39. Since these judges were nominated and confirmed as circuit judges, however, they present different and, in our view, less serious concerns than those presented by the use of district court judges. Accordingly, our discussion will focus almost exclusively on the utilization of federal district judges on appellate panels.
29. For example, the Report of the Federal Courts Study Committee failed to mention the utilization of district judges in its chapter entitled "Dealing with the Appellate Caseload Crisis." 1990 STUDY COMMITTEE REPORT, supra note 3, at 109–31. On the other hand, the United States Judicial Conference's proposed long-range plan for the federal courts notes that there will be a "growing need for visiting circuit, district, magistrate, and bankruptcy judges to provide temporary assistance" in handling the ever-increasing workload of the federal courts. PROPOSED LONG RANGE PLAN, supra note 16, at 95. In a section containing recommendations for "restructuring appellate review," however, the plan makes no explicit mention of the practice of utilizing designated district judges in the circuit courts. Id. at 123–24. Instead, the report considers, somewhat unfavorably, "expanding the role of adjunct judicial officers, such as appellate commissioners," and suggests the creation of an "appellate division" at the district level. Id. at 123. Similarly, in identifying recent methods adopted by the federal circuits to deal with their caseload crisis, Chief Judge J. Clifford Wallace of the United States Court of Appeals for the Ninth Circuit mentioned
This article analyzes the effects of and problems associated with district judges sitting by designation. Part I provides some background for analyzing the current utilization of district judges in the circuit courts. After briefly describing the statutory and historical context for the practice, we discuss the diverse designation policies of the federal circuits and the rationales that are cited most frequently for those policies. Part II presents and analyzes available data concerning the extent to which district judges have been utilized on appellate panels in recent years. This Part also discusses the available data on the appellate voting behavior of district judges in order to determine whether the participation of district judges on appellate panels measurably affects the disposition of cases decided by the circuit courts. Part III begins to address a set of potential problems caused by the circuit courts' extensive utilization of district judges sitting by designation. These problems include the enhanced prospect for inconsistency in precedent and legal doctrine; the potential upheaval that frequent utilization of district judges can present to the collegiality within a circuit; the possibility that district judges may feel more constrained in exercising independent judgment than their circuit judge counterparts; and the potential for district judge participation to lead to greater pressure on the circuits to grant en banc review of panel decisions.

Finally, Part IV addresses a significant conceptual problem presented by what is now a relatively common practice of the circuit courts' reliance on district judges in order to manage their overburdened dockets. To the extent that the current practice treats all federal judges as fungible, it ignores what we suggest are important distinctions between the trial and appellate functions and between the kinds of persons who are likely to be best suited to perform these functions. We argue that the rationality of the process of staffing the federal courts must be measured by its effectiveness in scrutinizing the qualifications of personnel to perform the particular tasks they are assigned. When district judges are asked routinely to exercise

only that the circuit courts "hear fewer oral arguments, publish fewer opinions and rely more heavily on law clerks and staff attorneys." Wallace, supra note 4, at 88.

The utilization of district court judges by the federal courts of appeals has not completely escaped scholarly analysis. See, e.g., BAKER, supra note 3, at 172 n.84, 199 (studying the problems facing the circuit courts and making passing references to the utilization of district judges). Most of these discussions are focused on specific issues raised by the practice and tend to be quite dated. See discussion infra Part II.
the power of reviewing the decisions of other district judges, they exercise a function that they presumably were not nominated, confirmed, or appointed to perform. Although reliance on district judges may provide a short-term solution to the docket congestion now facing the circuit courts, we argue that this reliance has hidden costs that policymakers have not considered. Not the least significant of these costs is the possible dilution of justice on appeal.

I. UTILIZING DISTRICT JUDGES ON FEDERAL APPELLATE COURTS: AUTHORITY AND RATIONALE

A. Statutory Authority

The story of district judges sitting by designation on the courts of appeals begins with the history of appellate courts. Because the history of the present courts of appeals and their predecessor courts are treated in detail elsewhere, only a broad outline of this history will be sketched here.

Intermediate federal appellate courts have existed in pure form for only a little over a century. Prior to that, the Judiciary Act of 1789 created "circuit courts" in addition to the "district" or trial courts. The circuit courts exercised jurisdiction resembling that of the present courts of appeals. A principal difference was the composition of the circuit courts, which were composed of judges who sat permanently on other courts. These courts met intermittently and usually consisted of two Supreme Court justices ("riding circuit") and a district judge. This institutional arrangement led to dissatisfaction for a number of reasons, including the great time and travel burden it imposed on judges. There was apparently little or no concern about the problematic arrangement of appellate

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32. Id. § 11, 1 Stat. 78–79.
33. See Bator et al., supra note 30, at 35.
34. See id.
35. Id.
36. Id.
justice meted by judges on assignment from elsewhere, including some who were hearing appeals from their own decisions. 37

These logistical difficulties, coupled with the increased caseloads of the circuit courts, grew worse in the decades after the Civil War and provided the impetus for the passage of the Evarts Act in 1891, 38 which established the present courts of appeals, staffed by permanent judges. 39 From the earliest date, however, district judges were authorized to sit by designation as visiting judges on the new courts of appeals. 40 This authorization is now codified in section 292 of the Judicial Code, which permits the Chief Justice of the United States or the chief judge of a circuit to “designate and assign temporarily” a district judge to a circuit. 41 Section 292 is silent about the procedures that these individuals should employ in designating district judges as visitors, leaving it largely to individual circuit practice. 42

37. District judges apparently were allowed to hear appeals from their own decisions until 1891. See Evarts Act, ch. 517, 26 Stat. 826, 827 (1891) (codified as amended at 28 U.S.C. § 47 (1988)) (prohibiting the practice); see also Del Vecchio v. Illinois Dept of Corrections, 31 F.3d 1363, 1390 (7th Cir. 1994) (en banc) (Easterbrook, J., concurring) (noting that the practice of judges hearing appeals from their own decisions was not thought to be constitutionally suspect before the practice was abolished). See generally 13A WRIGHT ET AL., supra note 30, at § 3545 (describing § 47 as a “much-needed reform”).

38. See BATOR ET AL., supra note 30, at 38.


42. Section 292 has been amended a number of times since 1948, but in no substantive way affecting the issues addressed in this Article. In the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25, however, Congress did amend § 46 of the Judicial Code, and the amendment has the potential to impact § 292. The amendment to § 46(b) requires that separate panels of circuit courts consist “of three judges, at least a majority of whom shall be judges of that court, unless . . . the chief judge of that court certifies that there is an emergency.” 28 U.S.C. § 46(b)
In 1993, in an effort to document how the circuits employ the assignment authorized by section 292, we sent questionnaire letters to the chief judges and circuit executives of all the courts of appeals. Among the questions asked by the letters were whether there was any formal policy regarding the use of district judges by designation, the extent to which each circuit utilized district judges, and the rationale for such use. The chief judge, the circuit executive, or both responded from each of the courts of appeals.

Every circuit indicated that it had no formal policy regarding district judges sitting by designation. In other words, no circuit had implemented any policy in its local rules, internal operating procedures, or other widely disseminated document. Instead, each circuit asked district judges to serve through its office of the chief judge or circuit executive. If the district judges agreed, the circuits assigned the judges on an informal basis.

The responses to our correspondence described the functions thought to be served by district judges sitting by designation. One goal was to orient and educate newly appointed district judges; the belief was that district judges would familiarize themselves with federal judicial practice and judicial personnel on the appellate level by sitting with appellate judges.

(1988). The amendment expressed congressional concern over the "instability and unpredictability in the law of a circuit" that might result if many panels included judges from outside the circuit. In re Bongiorno, 694 F.2d 917, 918-19 n.1 (2d Cir. 1982). The language of the amendment might be read to prevent district judges from sitting if such judges were not considered "judges of that [circuit] court" and depending on whether one of the other judges was from outside the circuit. 28 U.S.C. § 46(b). Apparently, this precise issue has not been addressed in a published opinion. Courts have held that senior circuit judges fall within "judges of that court." Cone Corp. v. Hillsborough County, 995 F.2d 185, 186 (11th Cir. 1993) (en banc) (per curiam); Bongiorno, 694 F.2d at 918 n.1. These holdings suggest that district judges also may be considered "judges of that court" within the meaning of 28 U.S.C. § 46(b). Thus, the use of district judges sitting by designation may not violate the statute. Even if this practice does violate the statute, that violation may be overcome by the declaration of a judicial emergency.

43. The letters also asked for statistical information and about the use, if any, of district judges in the en banc process. Those matters are addressed in this Article in Parts II.A and III.A, respectively.

44. The responses are on file with the authors and with the University of Michigan Journal of Law Reform.

45. See letter from Cathy A. Catterson, Clerk of Court, United States Court of Appeals for the Ninth Circuit, to Richard B. Saphire (July 19, 1993) [hereinafter
This would presumably result in more collegiality among trial and appellate judges and would teach both sides the realities of decision-making in their respective courts, which, in theory, would lead to more informed decision-making.\(^46\)

Another reason for utilizing district judges is to aid in dealing with the heavy workload of the appellate court.\(^47\) Increasing the number of judicial personnel available increases the number of three-judge panels able to hear cases. Section 292(d) authorizes the Chief Justice of the United States to assign district judges from one circuit to serve temporarily on the appellate panels of another circuit "upon presentation of a certificate of necessity,"\(^48\) and our correspondents have related their experiences with such declarations of necessity.\(^49\)

Virtually all of the circuits, however, stated or implied that district judges were being used routinely to deal with heavy appellate work caused by numerous appeals or by unfilled

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\(^46\) Past authors have also noted that seating district judges by designation serves an educational or orientational function, but that the primary emphasis remains on educating the district judges, not the appellate judges. See, e.g., Stephen L. Wasby, "Extra" Judges in a Federal Appellate Court: The Ninth Circuit, 15 Law & Soc'y Rev. 369, 378–80 (1980–1981) (examining Ninth Circuit appellate judges' views of district judges sitting by designation).

\(^47\) See, e.g., id. at 378 (finding that Ninth Circuit judges considered workload reduction to be a benefit of district judges sitting by designation).


\(^49\) E.g., Fifth Circuit letter, supra note 45. As of July 22, 1993, the Fifth Circuit had been in a judicial emergency for two years. Id.
vacancies.\textsuperscript{50} Thus it seems that, in many circuits, district judges have become an institutional response to appellate workload concerns.

\textbf{II. UTILIZING DISTRICT JUDGES ON FEDERAL APPELLATE COURTS: EMPIRICAL PERSPECTIVES}

In this section, we discuss empirical evidence pertaining to the current practice of utilizing district judges on courts of appeals. First, we address how widespread this practice has become. Second, we consider how the appellate voting behavior of district judges, considered in the aggregate, compares to that of permanent appellate judges.

\textit{A. Frequency of Use of District Judges Sitting by Designation}

In recent years, the use of district judges sitting by designation has become frequent in some circuits;\textsuperscript{51} just how frequent, however, is somewhat difficult to determine. Past studies, surveying published cases, reported that up to thirty or forty percent of appellate panels have at least one visiting judge, either district or appellate or both.\textsuperscript{52} The danger with this methodology is that officially published opinions may not be a fair sample of the actual work being conducted by panels in the

\begin{footnotesize}
\textsuperscript{50} See \textit{id.} (describing the shortage in judges and the increasing number of appeals); letter from James A. Higgins, Circuit Executive, United States Court of Appeals for the Sixth Circuit, to Richard B. Saphire 1 (July 1, 1993) (same); memorandum from the United States Court of Appeals for the Tenth Circuit to Visiting Judges 1 (July 15, 1993) (thanking visiting judges for "help[ing] us in our work load") (on file with the \textit{University of Michigan Journal of Law Reform}); Eleventh Circuit Letter, supra note 45, at 1 (referring to reason of "heavy caseload").

\textsuperscript{51} See tbl. 1, infra p. 365.

\end{footnotesize}
A better source of data is one that captures all panel decisions by a circuit in a given period of time.

A more comprehensive source of data on this matter is found in the various issues of the Annual Report of the Director of the Administrative Office of the United States Courts. The Report contains information on the courts of appeals' utilization of senior and active district judges by designation, and some of those data are found in Table 1 on the following page. Table 1 includes all of the courts of appeals—except for the Federal Circuit—from 1984 through 1992.

Table 1 verifies the conventional wisdom suggesting the increased use of district judges sitting by designation and the increased number of appeals on the merits in which they participate. Though there were dips in 1992 and 1993, in the last ten years the share of appellate dispositions in which a district judge participated was around eighteen to twenty percent. From this we can infer that, in the past ten years, about one-fifth of the panel decisions in the courts of appeals, taken as a whole, have utilized at least one district judge.


55. We can make this inference because almost all appellate terminations on the merits are by three-judge panels, see infra text accompanying notes 74–75; furthermore, almost all panels with a designated judge contain only one district judge, see infra text accompanying notes 133–35.

There is another source of data on the use of district judges on the courts of appeals. The Annual Report supplies information on case participations by “visiting judges” each year. See, e.g., 1990–1992 ADMIN. OFFICE ANN. REP., supra note 54, at tbl. S-2. In 1992, visiting judges took part in 7.2% of all case participations, 1992 ADMIN. OFFICE ANN. REP., supra note 54, tbl. S-2, and prior years yield a similar percentage, see, e.g., 1990 ADMIN. OFFICE ANN. REP., supra note 54, at tbl. S-2 (6.9% of all case participations). For two reasons, we feel the data that we supply in Tables
### TABLE 1

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<td>230</td>
<td>102</td>
<td>21,006</td>
<td>1,532</td>
<td>17.6%</td>
</tr>
<tr>
<td>1991</td>
<td>230</td>
<td>102</td>
<td>21,006</td>
<td>1,532</td>
<td>17%</td>
</tr>
<tr>
<td>1992</td>
<td>230</td>
<td>102</td>
<td>22,707</td>
<td>1,573</td>
<td>16%</td>
</tr>
<tr>
<td>1993</td>
<td>205</td>
<td>128</td>
<td>23,597</td>
<td>1,604</td>
<td>14.6%</td>
</tr>
</tbody>
</table>

Sources: First three columns are taken from "Service Provided to Courts of Appeals" in Table V-2 of the Annual Report of the Administrative Office of the U.S. Courts. The fourth column is derived from Table V-2 (or other tables) from the Annual Report.
The circuits, however, vary considerably in their use of district judges. Table 2, on the following page, supplies a snapshot of the circuits for 1992. There we find that the use of district judges ranges from zero in the D.C. Circuit to over thirty-five percent in the Sixth Circuit. Other circuits with relatively high use of district judges are the Fourth (twenty-nine percent) and Tenth (thirty-one percent) Circuits. Not coincidentally, the Fourth and Sixth Circuits have comparatively high caseloads. Nonetheless, the circuits with the highest caseloads—the Fifth and the Ninth—report less dramatic use of district judges.

B. The Appellate Behavior of District Court Judges

The amount of district judge participation in appellate decision-making raises significant policy problems, which we explore at greater length in the next section. Of equal significance is the quality of that participation: how do district judges act while they serve temporarily on a higher court? A comparison of voting behavior of district judges and voting behavior of their circuit colleagues would begin to answer that question.

To date, the only empirical study on this issue was conducted by political scientists Justin J. Green and Burton M. Atkins. Their database consisted of all published opinions from 1965 to 1969 in the federal courts of appeals. The study found that district judges participated in a broad spectrum of cases rather than being concentrated in particular subject areas. There was little difference between appellate and district court judges with regard to voting behavior: the study found that panels with

1 and 2 give a better picture of the use of district judges. First, we understand "visiting judges," as used in the Annual Report, to mean any judge not appointed to serve on that circuit, which would include appellate judges from other circuits as well as all district judges. Second, we understand "all case participations" to include all merits and non-merits terminations. For a discussion of "visiting judge" data, see McKENNA, supra note 3, at 38-39.

56. Green & Atkins, supra note 52.
57. Id. at 363. This amounted to 19,183 cases, excluding en banc cases, which, by definition, do not include district judges. Id. at 370.
58. Id. at 365.
### TABLE 2


<table>
<thead>
<tr>
<th>Circuit</th>
<th>Active DJ</th>
<th>Senior DJ</th>
<th>Total Participations in Merits Appeals</th>
<th>All Merits Appeals</th>
<th>Percent of DJ Participation</th>
</tr>
</thead>
<tbody>
<tr>
<td>DC</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>723</td>
<td>0%</td>
</tr>
<tr>
<td>1</td>
<td>15</td>
<td>3</td>
<td>139</td>
<td>767</td>
<td>20.34%</td>
</tr>
<tr>
<td>2</td>
<td>22</td>
<td>11</td>
<td>262</td>
<td>1500</td>
<td>18.27%</td>
</tr>
<tr>
<td>3</td>
<td>6</td>
<td>12</td>
<td>190</td>
<td>1671</td>
<td>8.86%</td>
</tr>
<tr>
<td>4</td>
<td>30</td>
<td>22</td>
<td>626</td>
<td>2140</td>
<td>24.77%</td>
</tr>
<tr>
<td>5</td>
<td>23</td>
<td>4</td>
<td>220</td>
<td>3020</td>
<td>7.42%</td>
</tr>
<tr>
<td>6</td>
<td>34</td>
<td>10</td>
<td>770</td>
<td>2139</td>
<td>36.00%</td>
</tr>
<tr>
<td>7</td>
<td>9</td>
<td>6</td>
<td>206</td>
<td>1604</td>
<td>14.71%</td>
</tr>
<tr>
<td>8</td>
<td>15</td>
<td>14</td>
<td>346</td>
<td>1971</td>
<td>15.73%</td>
</tr>
<tr>
<td>9</td>
<td>44</td>
<td>21</td>
<td>504</td>
<td>4061</td>
<td>11.62%</td>
</tr>
<tr>
<td>10</td>
<td>21</td>
<td>11</td>
<td>503</td>
<td>1608</td>
<td>35.07%</td>
</tr>
<tr>
<td>11</td>
<td>1</td>
<td>8</td>
<td>110</td>
<td>2393</td>
<td>8.02%</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>220</strong></td>
<td><strong>122</strong></td>
<td><strong>3876</strong></td>
<td><strong>23597</strong></td>
<td><strong>16.43%</strong></td>
</tr>
</tbody>
</table>

Sources: First three columns are taken from "Service Provided to Courts of Appeals" in Table V-2 of the Annual Report. The fourth column is derived from Table S-1 of the Annual Report.
district court judges had only a slightly lower reversal rate (23.7%) than the average reversal rate of all appellate panels (25.1%). Likewise, Green and Atkins found that district judges wrote about one-third of the opinions in cases where the decision was unanimous, about the same as one would expect if the opinions were distributed randomly to the members of a three-judge panel. On the other hand, district judges wrote fewer concurring or dissenting opinions than did circuit judges. Nonetheless, the authors concluded that, overall, district judges were treated like and voted like permanent appellate judges.

The Green and Atkins study is rightly regarded as the leading empirical source on the quality of decision-making by designated judges. The study is now subject to several caveats, however, that limit its effectiveness as a modern resource upon which to measure designated judging. Their database, almost a decade old when they published their study, is now almost thirty years old. Moreover, because it was based only on published opinions, the results may not apply to voting behavior in all cases.

For these reasons, access to more recent and complete data would supplement the Green and Atkins study and enhance the accuracy of conclusions drawn from it. We were able to access such a database, extracted from a larger computer database on the federal trial and appellate courts compiled by the Federal Judicial Center (FJC). This database included information about all appeals terminated in the federal courts of appeals between 1987 and 1992 by panels with designated judges, including information about case outcomes and the presence of dissents or concurrences.

59. Id. at 366.
60. Id. at 367.
61. Id. at 368-69.
62. Id. at 370 ("the effect [on the court of appeals' quality of production] is minimal").
63. See, e.g., POSNER, supra note 52, at 101 (drawing favorable conclusions on use of district judges based in part on the Green and Atkins study).
64. See supra text accompanying note 53.
65. Our database is based in part on the Federal Court Cases: Integrated Data Base, which is derived from reports filled out for each appellate termination and submitted by the courts to the Administrative Office of the United States Courts (AO). The information supplied to the AO is compiled by the FJC and made available to researchers through the Inter-University Consortium for Political and Social Science Research. See facsimile document from Judith A. McKenna, Research Division, Federal Judicial Center, to Michael E. Solimine 1 (Feb. 8, 1994) [hereinafter FJC Data] (on file with the University of Michigan Journal of Law Reform).
66. Id.
Several pieces of information from the FJC data are of interest when compared to the Green and Atkins study. First, as summarized below in Table 3, the FJC data indicated an overall reversal rate of 17.92% of merits terminations,\(^67\) compared with a reversal rate of 18.30% for panels including at least one district judge.\(^68\) Unlike Green and Atkins, the FJC data also separate appeals from district courts from other appeals, such as those from federal administrative agencies. The reversal rate with respect to the latter is almost identical, regardless of the composition of the panel.

| TABLE 3 |
|-------------------|-------------------|
| **FJC DATA ON VOTING BEHAVIOR OF APPELLATE PANELS**  |
| **ON WHICH DISTRICT JUDGES SAT BY DESIGNATION**  |
| **REVERSAL RATE** | **REVERSAL RATE**|
| **OVERALL** | **FROM DISTRICT COURT** |
| ALL PANELS | 17.92% | 18.57% |
| PANELS WITH AT LEAST ONE DJ | 18.30% | 18.54% |

Source: FJC Data, supra note 65, at 1,3. Note that "reversals" include cases in which the outcome was recorded as "reversed-vacated" or "affirmed in part and reversed in part" or "remanded."

Also of interest were data on the voting behavior of district judges. Of cases in which a signed or separate opinion was

\(^67\) _Id._

\(^68\) _Id._ at 3. These data are not analyzed for statistical significance because such analysis is inappropriate when the data set contains the entire universe of cases being investigated. See HUBERT M. BLALOCK, JR., _SOCIAL STATISTICS_ 238–39 (2d ed. 1972). A significance test between sub-populations would not rule out alternative explanations. _Id._ at 239. Because Green and Atkins only looked at published opinions—which have a higher reversal rate—it is not surprising that the FJC reversal rates are lower than the rate found by Green & Atkins, supra note 52, at 366 (finding a reversal rate of 23.7% for appellate panels with one district judge). See Jon O. Newman, _A Study of Appellate Reversals_, 58 BROOK. L. REV. 629, 632 (1992); see also Theodore Eisenberg & Stewart J. Schwab, _What Shapes Perceptions of the Federal Court System?_, 56 U. CHI. L. REV. 501, 517, 535 (1989) (discussing some of the reasons why published opinions have a higher reversal rate).
issued, about eighteen percent were prepared by the visiting district judge on the panel. 69 This is greater than the comparable figure found by Green and Atkins. 70 Like the Green and Atkins study, however, the FJC data showed low rates (one or two percent) of dissenting or concurring opinions by district judges. 71 In contrast, circuit judges dissented or concurred in over three percent of the cases. 72

III. ASSESSING THE USE OF DISTRICT JUDGES SITTING BY DESIGNATION ON APPEAL: ADMINISTRATIVE ISSUES

As the foregoing discussion suggests, under present circumstances a litigant who appeals a case from a federal district court or a federal agency to a federal circuit court of appeals can have no assurance that the case will be reviewed or decided by a panel consisting exclusively of judges who were nominated by the President and confirmed by the Senate for the position of appellate judge. Indeed, although the practice has not yet become common, the litigant may find that the panel assigned to decide her case may consist of a majority of judges who have

69. Derived from FJC Data, supra note 65, at 4.
70. See Green and Atkins, supra note 52, at 367 (finding that district judges issued signed or separate opinions in roughly 12% of the sample).
71. District judges authored dissents in 1.6% of dispositions by panels containing a visiting judge, and authored concurring opinions in 2.0% of panel dispositions. FJC Data, supra note 65, at 4. For largely similar results obtained from a survey of the Ninth Circuit, see Stephen L. Wasby, Of Judges, Hobgoblins, and Small Minds: Dimensions of Disagreement in the Ninth Circuit, in JUDICIAL CONFLICT AND CONSENSUS: BEHAVIORAL STUDIES OF AMERICAN APPELLATE COURTS 154, 159 (Sheldon Goldman & Charles M. Lamb eds., 1986).
72. See facsimile document from Judith A. McKenna, Research Division, Federal Judicial Center, to Michael E. Solimine (May 12, 1994) (on file with the University of Michigan Journal of Law Reform). Unfortunately, the Green and Atkins study is not clear on the overall dissent or concurrence rate of district judges, or that of circuit judges alone. See Green & Atkins, supra note 52, at 368–69 (providing data showing the distribution of percentages of the total number of dissenting and concurring opinions written by various types of judges). Other works reveal results similar to the figure derived from the FJC database. See, e.g., J. WOODFORD HOWARD, JR., COURTS OF APPEAL IN THE FEDERAL JUDICIAL SYSTEM: A STUDY OF THE SECOND, FIFTH, AND DISTRICT OF COLUMBIA CIRCUITS 42, 193–96 (1981) (discussing dissent rates); Burton M. Atkins & Justin J. Green, Consensus on the United States Courts of Appeals: Illusion or Reality?, 20 AM. J. POL. SCI. 735, 742 (1976) (finding that dissenting votes were cast in 6.2% of all courts of appeals decisions); Donald R. Songer, The Circuit Courts of Appeals, in THE AMERICAN COURTS: A CRITICAL ASSESSMENT 35, 42 (John B. Gates & Charles A. Johnson eds., 1991) (finding only a 3.6% rate of non-unanimous decisions in 1986).
not been nominated or confirmed for that position. As a practical matter, should this fact make any difference to the parties?

The data presented in the previous Part suggest that, at least when measured against a standard that looks at the actual outcomes of cases, the performance of circuit courts does not differ markedly on the basis of whether or not a district judge has participated on a particular panel. But this does not necessarily suggest that the participation of a district judge is a neutral phenomenon, either with respect to the decision-making dynamics—the quality and character of deliberation—of appellate panels or with respect to the overall administration of the circuit courts. Indeed, as we suggest in this Part, the participation of district judges raises a number of interesting and largely unexplored questions.

In this Part, we consider the implications of district judges sitting by designation from the perspectives of the parties who litigate in the federal courts of appeals and those concerned with the efficient and effective operation of the federal judicial system. Later we will consider the implications of current practice for those who ultimately are responsible for the staffing of the federal judicial system: the President and the Senate.

A. Consistency in Judgment

Ideally, all decisions handed down by a multi-member court should be consistent. That is, such decisions should follow and conform to each other, to the extent that it is possible in any body of legal doctrine. Perhaps toward this end, the federal courts of appeals render the vast majority of their decisions in three-judge panels. The en banc procedure, although rarely used, is also intended to promote uniformity among decisions within a circuit.


74. For a description of the en banc procedure, see 28 U.S.C. § 46(c) (1988); FED. R. APP. P. 35.

There are, however, a number of factors that can conspire to undermine this ideal. Panels whose membership periodically rotate can lead to doctrinal inconsistency. Judges of a geographically far-flung circuit may only meet for several weeks out of a year, disrupting the sort of close consultation and collegiality that may underlie better-written and more consistent decisions. The temporary use of judicial personnel who do not work full-time on the circuit is another potentially disruptive force. This, of course, is the problem posed by district judges sitting by designation on the courts of appeals.

Several empirical studies suggest that the latter concern should not be taken lightly. In one such study, political scientist Stephen Wasby interviewed judges on the Ninth Circuit, which utilizes the greatest number of district judges. He found that, although

76. Cf. Lewis A. Kornhauser & Lawrence G. Sager, Unpacking the Court, 96 YALE L.J. 82, 102-15 (1986) (arguing that consistency and coherence are not necessarily impaired in panel decision-making).

In its discussion of concerns related to circuit size and workload, the March 1995 report of the United States Judicial Conference’s Committee on Long Range Planning defines a court as a "cohesive group of individuals who are familiar with one another’s ways of thinking, reacting, persuading, and being persuaded." PROPOSED LONG RANGE PLAN, supra note 16, at 42. As such, the report warns that an appellate court should not consist of "a large group of strangers—like a jury venire—who are essentially unknown to one another." Id. In addressing issues related to expanding the size of the circuit courts as a way to keep up with burgeoning caseload growth, the report cautions against steps that might be inconsistent with the notion of an appellate court as "an incorporeal body of precedent and tradition, of shared experiences and collegial feelings, whose members possess a common devotion to mastering circuit law, maintaining its coherence and consistency (thus assuring its predictability), and adjudicating cases in like manner." Id. Although the report does not explicitly relate these concerns to the use of designated district judges in the circuit courts, they would seem to be relevant in that context.

77. Of course, geographic proximity does not guarantee collegiality. Consider the "acerbic battles" between Warren Burger and David Bazelon while both were on the D.C. Circuit in the 1960s. HOWARD, supra note 72, at 204, 206 n.i. Likewise, distance alone does not necessarily lead to poor communication. See generally Stephen L. Wasby, Communication in the Ninth Circuit: A Concern for Collegiality, 11 U. PUGET SOUND L. REV. 73 (1987) (examining how judges on the Ninth Circuit communicate with each other). We acknowledge that many of the concerns we advance in this section of the Article with respect to district judges also apply to circuit judges visiting from another circuit. However, the concerns with respect to independence of judgment, which will be discussed in the next section, presumably are fewer with respect to a visiting appellate judge from a court of equal stature than with a visiting trial judge.

78. Wasby, supra note 46, at 370 n.2; see also Stephen L. Wasby, Inconsistency in the United States Courts of Appeals: Dimensions and Mechanisms for Resolution, 32 VAND. L. REV. 1343, 1345 (1979) (expanding interviews and study to the Eighth Circuit).

79. See tbl. 2, supra p. 367. This may be due, in part, to the fact that the Ninth Circuit is the largest circuit. See Wasby, supra note 77, at 77 (identifying the Ninth Circuit as the largest geographically and in number of judges as of 1987).
the use of extra judges in the Ninth Circuit was necessary to meet the circuit's caseload,\textsuperscript{80} several Ninth Circuit judges felt that the use of district judges led to intracircuit inconsistency in doctrine and difficulties in communication.\textsuperscript{81}

It is difficult to verify statistically the existence or extent of these phenomena. Washy concluded that problems did exist\textsuperscript{82} but that perhaps they were not serious.\textsuperscript{83} Other evidence, however, suggests that the Ninth Circuit judges were accurate in their perception of intracircuit conflict. Arthur Hellman has documented the doctrinal inconsistencies within the Ninth Circuit,\textsuperscript{84} though he has not laid blame at the feet of designated district judges. Nevertheless, it is not unreasonable to suppose that the large numbers of district judges used in the Ninth Circuit has played a part in lack of uniformity.

In this regard, we note that Justin Green compiled evidence that, at least indirectly, supports such a supposition.\textsuperscript{85} Green found 297 decisions wherein the designated judge\textsuperscript{86} wrote the majority opinion on a panel and a circuit judge dissented.\textsuperscript{87} Green then traced the subsequent treatment of these decisions in Shepards Federal Citations and compared his findings to a similar analysis of a random sample of unanimous decisions by panels made up of circuit judges.\textsuperscript{88} Green found that the 297

\textsuperscript{80.} Washy, \textit{supra} note 46, at 373–74.
\textsuperscript{81.} \textit{Id.} at 374; \textit{cf.} Washy, \textit{supra} note 78, at 1362 (finding that judges felt that the large number of judges participating in the court's work did magnify the problem of inconsistency—and certainly the 'extra' "judges increased the number of participants").
\textsuperscript{82.} See Washy, \textit{supra} note 46, at 373–76.
\textsuperscript{83.} See Washy, \textit{supra} note 78, at 1362 (deriving his conclusions from the Ninth Circuit judges' comments).
\textsuperscript{85.} See Justin J. Green, \textit{The Influence on Circuit Law of Judges Sitting "By Designation"} 5–6 (paper delivered at the Annual Meeting of the American Political Science Association, Sept. 2, 1979) (unpublished manuscript, on file with the University of Michigan Journal of Law Reform).
\textsuperscript{86.} Green defines "designated judge" as either a senior—or retired—judge, a visiting circuit judge, or a district court judge. \textit{Id.} at 1. \textit{See also} Green & Atkins, \textit{supra} note 52, at 359–60 n.4 (defining "designated judges" in a similar way).
\textsuperscript{87.} Green, \textit{supra} note 85, at 5.
\textsuperscript{88.} \textit{Id.} It would seem that the more appropriate comparison would be to non-unanimous decisions of panels made up of three circuit judges. The comparison made by Green could only tell us that any differences observed regarding cases taken en banc or granted certiorari might be premised on the existence of disagreement on the panel, not on the presence of a district judge. Both factors, of course, might explain the differences Green found, but that is difficult to conclude given the comparison he made. Green did not address this point in his paper.
cases had higher rates of en banc review, higher rates of certiorari being sought, and higher rates of certiorari being granted in cases where the designated judge cast the deciding vote.\textsuperscript{89} Likewise, Green found some evidence that the 297 cases had more negative citations than the other group, though the differences were not robust.\textsuperscript{90} Thus, to the extent that lack of consistency in the circuit is problematic, district judge participation on panels may contribute to the problem.

It has been suggested that district judge participation may also lead to more en banc review.\textsuperscript{91} This might be expected for two reasons. First, the regular judges of a circuit might be more willing to grant en banc review in cases where district judges sit by designation, especially in non-unanimous decisions where a visiting district judge's vote is necessary for a court majority and a circuit judge has dissented. In the eyes of some circuit judges, the fact that the district judge's vote was necessary for the judgment might diminish the status of the decision and thus make it more appropriate for review by the full court. The inclination of the full court to grant en banc review might be even greater in cases where two district judges sat on the original panel. The notion of two district judges establishing the law of the circuit—especially in cases involving controversial or high-profile issues—might be unsettling to some judges of the circuit.

Second, district judges, perhaps less familiar with appellate practice, may help formulate decisions that are inconsistent with circuit precedent. Green's data supports this charge,\textsuperscript{92} as does more recent data collected by one of the present authors, whose study considered 224 en banc decisions published in 1985, 1986, and 1987.\textsuperscript{93} Professor Solimine, author of the study, reexamined the 224 cases\textsuperscript{94} giving rise to en banc review; his reanalysis

\begin{itemize}
  \item \textsuperscript{89} Id. at 5–6 (certiorari sought in 31\% of the 297 cases, as compared to 22\% of all circuit judge decisions; certiorari granted in 14\% of former cases (13 of 93) as compared to 2\% in latter; en banc review of eight of the 297 cases, as compared to one in the latter).
  \item \textsuperscript{90} Id. at 6–11 (finding that the mean numbers of negative citations within the circuit for the 297 cases and for the sample of all circuit-judge decisions was .17 and .07, respectively). Green, however, characterized the numbers as “too small” to conclude that “the use of designated judges [has] an untoward disruptive effect on the making of circuit law.” Id. at 9.
  \item \textsuperscript{91} Howard, supra note 72, at 190; Green & Atkins, supra note 52, at 361.
  \item \textsuperscript{92} Green, supra note 85, at 7–9.
  \item \textsuperscript{93} See Michael E. Solimine, Ideology and En Banc Review, 67 N.C. L. Rev. 29, 61 (1988).
  \item \textsuperscript{94} In only 160 of the 224 cases could the membership of the initial three-judge panel be determined. Id. at 35 n.27.
\end{itemize}
indicated that about twenty-nine percent were the product of panel decisions in which a district judge participated,95 which is higher than the rate of such participation in panels as a whole.96

We find the sum of this evidence to be equivocal on the existence and amount of intracircuit inconsistency. Perhaps the problem itself has been exaggerated,97 but, given the mounting pressures for the appointment of more federal judges and the increasing number of written decisions, it is difficult to believe that any inconsistency that does exist will soon go away.98 District judges have played a role, though perhaps a small one, in contributing to such inconsistency.

B. Independence of Judgment

Conventional wisdom holds that multi-member appellate courts must operate in an atmosphere of collegiality in order to perform properly.99 Only in such an atmosphere can appellate judges and

95. Support for this reanalysis and the newly examined cases is on file with the authors.

96. For the rate of district judge participation on panels as a whole, see tbl. 1, supra p. 365. It is also worth noting that the Solimine study examined 58 cases during the time period in question where en banc review was sought and denied but where at least one circuit judge issued a published decision dissenting from the denial. Solimine, supra note 93, at 65 tbl. 5. Thirteen of those (22%) involved panels including a district judge. Support for this figure is on file with the authors.

Several factors might ameliorate the potential for district judge contribution to intracircuit inconsistency. Most if not all district judges have access to computerized case law databases, which can make it easier to keep up with the law of the circuit. Likewise, district judges who sit repeatedly on the circuit might eventually develop some of the broader perspective of circuit law which circuit judges will normally possess. See infra Part IV.C. Finally, inconsistency from whatever source can be reduced by emphasizing the practice of circulating drafts of opinions, prior to release, to all members of the circuit. See, e.g., UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, INTERNAL OPERATING PROCEDURES § 14.3 (1985)(providing that "[a]ll judges receive copies of any proposed opinions"); see also Solimine, supra note 93, at 36 n.38.

97. See McKenna, supra note 3, at 2 n.4, 93 (reporting the results of a survey of 80% of all circuit and district judges and finding that most judges who responded indicated that intracircuit inconsistency was a small problem or none at all).

98. We note that the Federal Judicial Conference’s recent proposed long range plan for the federal courts, in a section entitled “Restructuring Appellate Review,” acknowledges that proposals to deal with the caseload crisis that focus on adding more circuit judges or expanding the role of “adjunct judicial officers” may “lead to inconsistency and incoherence in circuit law.” PROPOSED LONG RANGE PLAN, supra note 16, at 123.

99. See Meador, supra note 73, at 281; Collins J. Seitz, Collegiality and the Court of Appeals, 75 JUDICATURE 26, 26 (1991).
their clerks communicate with each other effectively and render reasonably correct judgments in written decisions. As the Federal Judicial Conference's noted in its recent proposed long-range plan for the federal courts:

The effectiveness, credibility, and efficiency of a court of appeals is intricately linked to its ability to function as a unified body. A judge's sense that he or she speaks for the whole court and not merely as an individual is critical to an appellate court's ability to shape and maintain a coherent body of law, and it contributes to the satisfaction of appellate judges. 100

Simply put, collegiality on an appellate court increases job satisfaction and improves communication, without undermining respect for the differing views that may be embodied in concurring or dissenting opinions. One predicate for collegiality, it would seem, is the presence of judges who are on relatively equal social and professional footing and who interact regularly and for relatively long periods of time. 101

This comfortable model is subject to disruption by the use of district judges sitting by designation. District judges who serve for only short periods may view themselves and may be viewed as subordinate to their appellate counterparts. It may be difficult to set aside, even temporarily, the necessarily hierarchical nature of the relationship between the permanent and temporary judge. 102 If so, the district judge may be deferential to his circuit counterparts and reluctant to vote differently in the form of concurring or dissenting opinions. 103 Perhaps mindful that his own decisions are reviewed periodically, the district judge may be hesitant to depart from the vote of the two permanent circuit panel members. Such strategic voting behavior by the district judge may undermine the independent thought that seems to

100. PROPOSED LONG RANGE PLAN, supra note 16, at 42. The plan associates the potential decline in collegiality with the growth of the courts of appeals, noting that "as a court grows it may become more difficult for its judges to become familiar with their colleagues' views." Id. The plan notes that this may be a "particular problem when new judges are added to courts in large groups." Id.

101. Cf. Meador, supra note 73, at 284 (noting that the members' fixed panels may reach decisions more readily because each becomes familiar with the others' ideas).

102. See Newman, supra note 68, at 629 (noting that an appellate judge's jurisdiction to reverse the decision of a district judge creates an "undeniable basis for some tension" between them).

103. See Green & Atkins, supra note 52, at 368-69 (finding "strong pressures against [issuing] a solitary opinion").
underlie true collegiality and the sort of decision-making contemplated by Article III.\textsuperscript{104} Alternatively, the problem may be one of vertical deference. District judges may be reluctant to overrule a fellow district judge, even when the law and facts seem to call for that result.\textsuperscript{105} This may be, in part, because district judges are used to making decisions on their own and may be uncomfortable with group decision-making.\textsuperscript{106}

On the positive side, temporary judges from a lower court may improve appellate decision-making. District judges may lend a different and beneficial perspective to the panel, especially if the judgment under review is from a district court. For instance, the district judge might be able to educate the circuit judge on the realities of trial court decision-making, thereby informing the review of such decisions.\textsuperscript{107} On the other hand, as discussed in the previous section, this different perspective may detract from intracircuit consistency.\textsuperscript{108}

In addition to these possible effects within the court system, there also may be external effects. Participation by district judges might make the panel decision carry less authority in the eyes of litigants, their attorneys, and affected members of the public.\textsuperscript{109} Disappointed litigants may tend to press more often for en banc or Supreme Court review if the original panel consisted of a designated district judge.\textsuperscript{110}

\textsuperscript{104} See Lewis A. Kornhauser & Lawrence G. Sager, The One and the Many: Adjudication in Collegial Courts, 81 CAL. L. REV. 1, 51–56 (1993) (discussing strategic behavior by judges in a collegial setting). Such strategic behavior might be expected less from senior district judges sitting by designation. Presumably because of their lighter caseload, senior judges render fewer trial decisions, or perhaps none, subject to appeal, ameliorating the problem suggested here. As Tables 1 and 2, supra pp. 365, 367, indicate, senior district judges have recently constituted about a third of all district judges sitting by designation. The FJC Data, supra note 65, that we used do not distinguish between active and senior judges, so we have not been able to examine the implications of this difference in status.

\textsuperscript{105} Wasby, supra note 46, at 379.

\textsuperscript{106} See Howard, supra note 72, at 135 n.d (commenting on the “autocratic position” of the trial judge in the decision-making process).


\textsuperscript{108} See supra notes 92–96 and accompanying text.

\textsuperscript{109} See Wasby, supra note 46, at 374–75.

\textsuperscript{110} See Green & Atkins, supra note 52, at 361 (finding some evidence that en banc decisions are more likely to overrule a panel decision if the panel included a district judge (citing A. Lamar Alexander, En Banc Hearings in the Federal Court of Appeals: Accommodating Institutional Responsibilities, 46 N.Y.U. L. REV. 583, 586 (1965))). In
Empirical evidence can be brought to bear on some of these issues. Taking the extrajudicial effects first, we observed in the previous section that, at least to some degree, district judge participation weakens the authoritative status of panel decisions. Such decisions are more likely to be the subject of en banc review and of Supreme Court certiorari petitions. Likewise, there is some evidence to support the fear that district judges may not act as full-fledged members of the appellate court. Although previously we observed that district judges appear to vote to reverse their fellow district judges at about the same rate as do circuit judges, district judges write dissenting or concurring opinions less often than do circuit judges and appear to write the panel opinion less often as well. This latter conclusion suggests that, on the whole, district judges are deferring more to their circuit counterparts than appellate judges defer to each other.

This conclusion is supported by two articles written by political scientist Thomas Walker. In one, Walker examined 370 opinions issued by the Washington Supreme Court in 1965 and 1966 in which a lower court judge had participated. Based in part on low dissent rates by, and more opinion assignments to, the temporary judges, Walker concluded that the permanent members of the court viewed the temporary designatees primarily as vehicles for workload reduction. Relatedly, the temporary judges seemed to behave in a compliant manner toward the permanent judges.

addition, the consumers—other judges and litigants—of panel opinions authored by district judges, viewing such decisions as less authoritative, might be less likely to rely on such opinions in assessing the state of the law. This assumption would presumably lead to less inconsistency and confusion. The assumption could be subject to empirical investigation, but it is beyond the scope of this Article.

111. See supra notes 85–96 and accompanying text.
112. See supra note 89 and accompanying text.
113. See tbl. 3, supra p. 369. We make this statement with some equivocation, since the FJC Data, supra note 65, does not directly measure the voting behavior of individual district judges. Because the same database tells us that district judges dissent relatively rarely, however, we can reasonably infer their voting behavior by knowing how the panels on which they sit decide.
116. Id. at 145–46.
117. Id. at 146.
In the second study, Walker examined interaction between district and circuit judges in the now repealed three-judge district courts. Typically, these three-judge courts consisted of a circuit judge, a district judge, and the district judge before whom the case was originally filed. Walker studied fifty-six published opinions issued by such courts between 1963 and 1968. His study revealed that the circuit judge issued the majority of written opinions and that the district judges usually voted with the circuit judge. Walker concluded that the "appeals court judge appears to be the most influential member of such courts." Temporary members of small groups, or junior members of temporary groups, typically have less influence in the group than permanent members. The difference is exacerbated if the temporary members have a lower status or possess less expertise than the permanent members. The use of district judges on the courts of appeals fits neatly into this model. District judges are perceived by some to have lower status or prestige than circuit judges and typically will have less acumen regarding appellate practice. These factors suggest that district judges sitting by designation will have less influence and less independence of judgment.


119. Walker, supra note 118, at 407 n.4.

120. Id. at 411.

121. Id.

122. Id. at 412-13.

123. Id. at 413.


125. See Walker, supra note 118, at 408-09.


127. Cf. HOWARD, supra note 72, at 113 (referring to the "promotion" of district judges to the circuit level).

128. In 1983, one of the present authors, Richard B. Saphire, and his then-colleague, Professor Pamela J. Stephens (currently of Vermont Law School), sought to explore some of these questions through a survey of federal district judges. Richard B. Saphire, Study of the Practice of Assigning Federal District Court Judges to Sit by Designation on Court of Appeals (undated study) (on file with the University of Michigan Journal...
Some of the interplay between circuit and district judges can be illustrated by a glance at the appellate opinions themselves. For example, one sometimes finds deferential language in a district judge’s dissent, perhaps more so than the ritual language of collegiality one finds in circuit judge dissents. One district judge, dissenting from a Sixth Circuit panel decision, spoke of the “temerity required of a district judge in dissenting from the opinion of an appellate panel on which he sits by designation.”

On the more positive side, one also finds majority, concurring, and dissenting opinions in which district judges seem to take pains to describe and discuss trial issues with which they may have more familiarity.

of Law Reform). Some 309 of 329 district judges responded. Id. at 1. Of these respondents, 219 (71%) had served at least once by designation, id., and 98 (32%) had declined invitations to serve by designation, id. at 2, usually due to their own workload, id. The vast majority who had served by designation (over 90%) stated that they had not felt inhibited at all in discussing the case with their appellate counterparts or in dissenting. Id. at 3. These results suggest that district judges do have an independence of judgment on the courts of appeals. The results should be tempered, however, by the knowledge that respondents in self-reported surveys like this one may consciously answer in ways that make them look good, or in ways that they think the researchers desire. See Robert Rosenthal & Ralph L. Rosnow, Essentials of Behavioral Research: Methods and Data Analysis 135 (1984)(noting that, when responses on a questionnaire correlate to the socially desirable responses, it is usually interpreted to mean that the respondents were motivated to present themselves in a favorable light).

129. See, e.g., Shaw v. Dow Brands, Inc., 994 F.2d 364, 372 (7th Cir. 1993) (Shadur, J., dissenting) ("[T]he majority opinion in this case has done violence (not purposefully, of course) to one or more of the most fundamental principles of federal jurisdiction."); United States v. Tolson, 988 F.2d 1494, 1505 (7th Cir. 1993) (Shadur, J., concurring) ("I am constrained to express my respectful disagreement with one aspect of the opinion . . . ."); United States v. Roberts, 986 F.2d 1026, 1034 (6th Cir.) (Potter, J., dissenting) ("It is not an easy task to dissent from an opinion by the respected majority . . . ."); cert. denied, 114 S. Ct. 271 (1993).


131. See, e.g., United States v. Uwaezhoke, 995 F.2d 388, 396 (3d Cir. 1993) (Pollak, J., dissenting) (arguing for a remand to allow the district court to amplify its findings); cert. denied, 114 S. Ct. 920 (1994); Alexander v. City of Chicago, 994 F.2d 333, 340 (7th Cir. 1993) (Crabb, J., concurring) (explaining the use and application of Federal Rule of Civil Procedure 12(c)); Dickerson v. Department of Justice, 992 F.2d 1426, 1434 (6th Cir. 1993) (Beckwith, J., concurring) (suggesting stronger grounds for the result reached by the district court and affirmed in the instant case); cert. denied, 114 S. Ct. 1049 (1994); Guarino v. Brookfield Township Trustees, 980 F.2d 399, 404–07 (6th Cir. 1992) (majority opinion by Cleland, J., giving a careful explanation of how a district court must examine an unopposed summary judgment motion); Wheeler v. McKinley Enter., 937 F.2d 1158, 1167 (6th Cir. 1991) (Joner, J., concurring) (explaining the proper use of jury interrogatories by a district judge); Street v. J.C. Bradford & Co., 886 F.2d 1472, 1476–81 (6th Cir. 1989) (majority opinion by Bertelsman, J., offering a scholarly review of the shift in the Supreme Court’s views on summary judgment); Sakamoto v. N.A.B. Trucking Co., 717 F.2d 1000, 1004–07 (6th Cir. 1983) (majority
In the end we are faced with mixed evidence regarding the independence of judgment by district judges on the courts of appeals. Like the issue of consistency of decisions, perhaps the asserted lack of independence is exaggerated. After all, district judges possess lifetime tenure under Article III of the Constitution and enjoy significant prestige of their own. Given their status, they may be unlikely candidates to defer to anyone, including their circuit court colleagues. Moreover, even if one concludes that the district judge does not perfectly replicate the ideal circuit judge, this judge constitutes only one-third of a panel. Two-thirds are still made up of "real" appellate judges.

The problematic aspects of district judge participation on appellate panels are exacerbated when district judges make up opinion by Bertelsman, J., giving a careful analysis of the interplay between rules 49 and 51 of the Federal Rules of Civil Procedure).


Somewhat analogous questions of independence have arisen in examinations of the utilization of United States Magistrate Judges in the district courts. For example, it has been suggested that Article III-judge control over magistrates, in the form of reappointment power and power to determine the nature and scope of authority, makes magistrates "beholden" to federal judges in a way that compromises the independence that is the hallmark of the federal judiciary. Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037, 1053 (7th Cir. 1984) (Posner, J., dissenting). See generally Reinier H. Kraakman, Note, Article III Constraints and the Expanding Civil Jurisdiction of Federal Magistrates: A Dissenting View, 88 YALE L.J. 1023, 1055–57 (1979) (discussing the "role problems arising from the magistrate's dual position as judicial subordinate and independent adjudicator"). Of course, district judges sitting in their own courts are also subject to constant review by circuit judges in the normal course of appeals, and this sort of "control" has not been thought to threaten their independence in the constitutional sense. As Judge Richard A. Posner has noted, "[a]ppellate judges . . . cannot fire district judges, cow them, or silence them—cannot prevent them from making independent judgments and expressing independent views." Geras, 742 F.2d at 1053 (Posner, J., dissenting). Judge Posner's observation, of course, also holds true when a district judge sits by designation on a circuit court: if a district judge alienates or disappoints a circuit judge colleague during service on the court, the judge risks little more than not being asked to serve again, though that risk might not be insignificant for at least some district judges. But it is also true that a district judge, recognizing that his circuit co-panelists will be reviewing his decisions for years to come, might be less inclined to challenge his co-panelists' judgement than would a regular circuit judge.

It is important to note that we have no direct evidence that district judges have felt cowed or otherwise intimidated or constrained during circuit court service. Indeed, our conversations and correspondence with district and circuit judges have never suggested that they possess any lack of confidence in, or commitment to, their ability to be fully independent actors while sitting on the circuit courts. Our suggestion is only that the possibility for the existence of independence-compromising constraints is greater for district judges than it is for circuit judges in the appellate context.
two of the three-judge panel. Although the presence of such panels until now has been rare,\(^\text{133}\) they seem to occur with some frequency on the Fourth Circuit.\(^\text{134}\) Were this practice to become more widespread, it would raise serious policy questions, similar to those already suggested above, with regard to the now defunct three-judge district courts. The inevitable next step would be the regular use of three district judges to compose panels, a prospect already under discussion.\(^\text{135}\) While such panels would do away

\(^{133}\) See FJC Data, supra note 65, at 2 (reporting that, of 30,482 cases with one or more visiting judges, 188 had panels with two judges sitting by designation). Apparently, no one has questioned whether the use of such panels violates 28 U.S.C. § 46(b) (1988). See supra note 42.


We make no claim that these cases are a scientific sample of all Fourth Circuit panel decisions with two district judges; we merely surveyed published opinions. Even so, it is interesting to note that of these 15 cases, 13 involved appeals from district courts, and six of those reversed, in whole or in part, or vacated the district court decision. This reversal rate is higher than usual. See tbl. 3, supra p. 369. Moreover, in no case did the circuit judge dissent, and in only one did a district judge write an additional opinion. All this may suggest that even when district judges make up a majority of a panel, they still may defer to circuit judges.

\(^{135}\) See McKENNA, supra note 3, at 136–39 (discussing the use of review panels comprised of district judges who screen appeals from district courts).

A similar model is permitted in appeals from bankruptcy court decisions whereby the circuit has the discretion to establish three-judge panels made up of bankruptcy judges to decide appeals. 28 U.S.C. § 158(b)(1) (1988). The litigants can opt out of this procedure and pursue an appeal to the usual panels of Article III judges. Id. § 158(a); see also 16 WRIGHT ET AL., supra note 30, § 3926.1 (Supp. 1995) (discussing the legislation creating the current structure for bankruptcy appeals). Only the Ninth Circuit has exercised the option to establish such panels. McKENNA, supra note 3, at 7 n.18. A somewhat dated study of those panels found that the panels reversed more often than their district court counterparts—where an initial appeal would otherwise be taken—and that attorneys expressed little dissatisfaction with the arrangement. Gordon Bermant & Judy B. Sloan, Bankruptcy Appellate Panels: The Ninth Circuit's Experience, 21 ARIZ. ST. L.J. 181, 201, 215 (1989). Recent legislation provides that each circuit will establish a bankruptcy appeal panel made up of three bankruptcy judges unless the circuit's judicial council finds that certain special circumstances exist. Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 104(c)–(d), 108 Stat. 4106 (to be codified at 28 U.S.C. § 158(b)).
with any judgment independence concerns, they would nevertheless heighten the concern about the lack of doctrinal consistency and render problematic the notion of a separate tier of appellate courts.

IV. ASSESSING THE USE OF DISTRICT JUDGES SITTING BY DESIGNATION ON APPEAL: SELECTION OF JUDGES

We have suggested that the problems raised by the utilization of district judges on appellate panels are not trivial. From the perspective of parties who litigate in the federal courts of appeals, the presence of district judges on appellate panels may lead to a decision-making process in which the independence of judgment supposedly ensured by Article III's salary and life tenure protections is compromised. We also outlined a set of operational and administrative issues associated with the current practice of utilizing district judges on appellate panels.

We now turn to an important conceptual problem that the utilization of district judges in the courts of appeals presents, a problem that assumes greater significance as the appellate deployment of district judges becomes increasingly routine. In particular, we consider whether the utilization of district judges threatens to undermine the integrity and rationality of the method by which these judges are selected.

Before we begin, we need to sketch at least the basic elements of what we believe to be a rational selection process for federal judges. Any such effort must, of course, account for the political dimensions of such a process.

A. The Political Dimensions of the Judicial Selection Process

Although the Constitution confers on the President the power to appoint federal judges along with "all other Officers of the United States" with "the Advice and Consent of the Senate,"\(^\text{136}\) it fails to offer guidelines for determining when or whether a person proposed by the President or considered by the Senate

\(^{136}\) U.S. Const. art. II, § 2, cl. 2.
is eligible to serve as a federal judge. Although it has been said that the goal of Article II's advice and consent provision "was clearly to help secure meritorious appointees," the precise nature, contents, and role of merit considerations have been the subject of much debate. What has not been the subject of debate, however, is that political considerations were expected to be, and indeed have been, important factors in the process of selecting federal judges.

Political considerations have played a role in nominations to all levels of the federal judiciary. For example, there has been a long tradition of taking political factors into account in the nomination and confirmation of Supreme Court justices. As Professor Freund has noted, the first century of the appointing process saw "parochialism combined with partisanship to shape appointments to the Court." In his 1985 analysis of how Supreme Court Justices are chosen, Professor Tribe traced the failure of the nomination of John Rutledge in 1795 to inquiry by

137. The Constitution requires at least some minimum qualifications for the Senate, the House of Representatives, and the Presidency. U.S. CONST. art. I, §§ 2-3 (establishing age, citizenship, and residency requirements for Representatives and Senators); id. art. II, § 1, cl. 5 (establishing age, citizenship and residency requirements for the President). It requires no analogous requirements for federal judges.


139. See infra Part IV.B.

140. See, e.g., Lloyd N. Cutler, The Limits of Advice and Consent, 84 NW. U. L. REV. 876, 876 (1990) ("T[he] judgments that the President and the Senate are supposed to reach in the nomination and confirmation processes are essentially political judgments—in both the highest and lowest senses of that term.").

141. By "political factors," we mean a range of factors not necessarily related to assessments of professional competence. These include: partisan considerations related to political party membership and involvement; considerations related to obtaining geographical or racial representation or balance on a particular court; presidential deference to other political actors such as United States senators; and ideological considerations related to a potential nominee's likely voting patterns and their relation to issues or constituencies viewed as particularly important to a given President. As Professor Freund has noted in discussing the "history of unsuccessful nominations" to the Supreme Court, "although politics in the partisan sense has never ceased to be a factor, it has been increasingly outweighed by politics in the larger, Aristotelian sense—a perception that an individual's identity is conditioned by his or her associations, inclinations, and sympathies." Paul A. Freund, Appointment of Justices: Some Historical Perspectives, 101 HARV. L. REV. 1146, 1157 (1988); see also Monaghan, supra note 138, at 1204 (describing the confirmation process as political because the president "has selected an appointee satisfactory to him—a judgment that may include the nominee's philosophy, as well as a wide range of factors not associated with merit in a narrow sense, such as the appointee's contribution to the diversity of the Court").

142. See Monaghan, supra note 138, at 1207 (characterizing the appointment process as involving "mainly questions of prudence, judgment, and politics").

143. Freund, supra note 141, at 1148.
the Senate into his political views. While modern attention to the political implications and motivations for Supreme Court nominations may have reached its peak in the 1987 struggle over the nomination of Judge Robert Bork, subsequent Supreme Court vacancies have continued to be major political events.

Politics also plays an important role in the selection of judges for the lower federal courts. In his influential study of the federal judge appointment process, Harold Chase traced much of the criticism of the process to its political nature. While observing that "our political leaders have been apologetic in defending the consideration given to party affiliation," Chase also noted that "the importance of party in judicial selection is writ large on the record provided by American history." He reviewed the appointments records of the Truman, Eisenhower, and Kennedy administrations and found that the overwhelming majority of appointments to the lower federal courts went to individuals from each President's political party. Analyses of the Carter administration appointments to the federal bench reveal a similar connection between the political affiliation of nominees and the President who nominated them.

144. LAURENCE H. TRIBE, GOD SAVE THIS HONORABLE COURT: HOW THE CHOICE OF JUSTICES CAN CHANGE OUR LIVES 86 (1985).
146. See, e.g., Anthony Lewis, The Blackmun Legacy, N.Y. TIMES, Apr. 8, 1994, at A27 (noting that President Bill Clinton was advised not to appoint Judge Richard Arnold to fill Justice Harry A. Blackmun's seat on the Supreme Court "because [Arnold] is from Arkansas and Arkansas is in bad odor right now").
148. Id. at 71. Chase quoted President John F. Kennedy as stating, in response to an American Bar Association's proposal to divide judgeships between the political parties, "I would hope that the paramount consideration in the appointment of a judge would not be his political party but his qualifications ..." (emphasis supplied). Id.
149. Id. at 72; see also JOSEPH C. GOULDEN, THE BENCHWARMERS: THE PRIVATE WORLD OF THE POWERFUL FEDERAL JUDGES 24 (1974) ("Lacking constitutional guidelines, the appointive system has evolved through custom. And an essential element of our custom is that political connections are as important to a prospective judge as is his legal ability.").
150. CHASE, supra note 147, at 112.
151. Under the Carter administration, both district and circuit judge nominating commissions were established. See ALAN NEFF, THE UNITED STATES DISTRICT JUDGE NOMINATING COMMISSIONS: THEIR MEMBERS, PROCEDURES AND CANDIDATES 31 (1981) [hereinafter DISTRICT JUDGE NOMINATING COMMISSIONS]. One of the principal purposes of these commissions was to effectuate President Jimmy Carter's campaign promise to select federal judges on the basis of professional competence instead of party or personal loyalty. Id. Although most persons recommended by the district court nominating commissions were "relatively inactive politically ... [t]he majority of the relatively small group that was active participated in Democratic party matters." Id.
continued, and indeed became even more accentuated, during the Reagan and Bush administrations. 152

It should not be surprising that political considerations have influenced the selection of federal judges. After all, the appointment of life-tenured judges provides a President with an opportunity—perhaps the most significant opportunity—to have a long-term influence on the direction of the country and its legal system. Moreover, the high professional status historically associated with a federal judgeship provides a President with a vehicle to reward important political supporters. But no one has seriously suggested that the exclusive criterion for selection to the federal bench should be the political credentials and affiliations of a potential candidate. 153 No one claims that the federal judiciary should be staffed by politically well-connected or ideologically congenial people who do not have the intellectual or character-related resources to do the work the nation has entrusted to its courts. 154 To say that the President has the unfettered prerogative to nominate a person for federal judicial office, or that the Senate can grant or deny confirmation on any basis it deems appropriate, 155 is not to suggest that either should be oblivious to the professional qualifications of federal judge candidates. At the very least, it is "perfectly sensible for the Senate to review a candidate's professional experience to determine whether she meets some baseline standard of legal and intellectual competence." 156

at 121. With respect to the circuit court selection process, 79% of those persons recommended by the commissions to President Carter for nomination were Democrats. LARRY C. BERKSON & SUSAN B. CARBON, THE UNITED STATES COURT JUDGE NOMINATING COMMISSION: ITS MEMBERS, PROCEDURES AND CANDIDATES 138 (1980) [hereinafter CIRCUIT JUDGE NOMINATING COMMISSION].


153. Indeed, the American Bar Association has committed itself to the proposition that "[t]he selection of judges should be non-political." JUDICIAL ADMIN. DIVISION, AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO COURT ORGANIZATION 51 (1990) [hereinafter ABA STANDARDS].

154. Cf. HOWARD, supra note 72, at 93 (arguing that "professional competence" is a prerequisite to being a circuit judge because, [o]f all the filters through which potential judges must pass, the one with the most far-reaching implications is the dictate of custom and the bar that circuit judges must be qualified lawyers.

155. See Monaghan, supra note 138, at 1207 ("We are better off recognizing a virtually unlimited political license in the Senate not to confirm nominees.

156. Stephen L. Carter, The Confirmation Mess, 101 HARV. L. REV. 1185, 1186 (1988). Professor Carter's comments on the Senate's interest in scrutinizing the competence and qualifications of federal judges applies even more forcefully to the
B. Merit-Based Qualifications

To say that the President and Senate have an interest, if not a duty, to construct and apply some "baseline standard" of competence to judicial candidates is not to suggest that the establishment or application of such a standard is easy or uncontroversial. Although "appointment-makers should, in the public interest, set as their goal the naming of 'the very best' persons available," there exists little consensus concerning the qualities that would satisfy such a goal. To appreciate how problematic qualitative, or at least comparative, judgments can be in this context, one need only recall the highly critical, even incredulous, reaction to President Bush's reference to then-Judge Clarence Thomas as the best qualified person available for appointment to the Supreme Court.

But what of the more modest notion that we can articulate basic standards with which to evaluate the competence and forecast the accomplishment of potential federal judges? While even the possibility of establishing such basic standards has been questioned, scholars and persons who have been involved

President's interest in nominating and having confirmed people who are not simply perceived as otherwise incompetent political hacks or cronies. To the extent that the President's legacy is likely to be evaluated by the long-term influence and contributions to the law of his appointments to the federal courts, it is in his interest to appoint people who are highly qualified.

157. Professor Carter recently suggested that "[w]e as a nation, like the Senate as a body, share no consensus on what qualifications a nominee ought to have, for the Supreme Court or for anything else." STEPHEN L. CARTER, THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS 162 (1994). Carter characterized past efforts "to set forth the basic qualifications that federal judges should have" as having "foundered on the rocks of consensus building." Id. at 164.

158. CHASE, supra note 147, at 66.

159. Id. (claiming that former Attorney General Nichols deB. Katzenbach used to ask, "How do you determine who is 'the very best?'" and referring to such a standard as "will-o'-the-wisp"); see also Robert P. Davidow, Judicial Selection: The Search for Quality and Representativeness, 31 CASE W. RES. L. REV. 409, 417 (1981) (noting that "no consensus exists as to which qualities make an individual 'the best' candidate for a judgeship").

160. The fact that standards for determining the best candidates for the federal bench are so illusive does not stop commentators from concluding that the selection system often fails to produce such candidates. See, e.g., HOWARD, supra note 72, at 101 ("The defect of the system is that circuit judgeships do not necessarily go to the most qualified persons.").


162. See, e.g., CARTER, supra note 157, at 165 (discussing "our inability to find a public language in which to discuss the qualifications of potential judges for public office"); Carl Tobias, Rethinking Federal Judicial Selection, 1993 B.Y.U. L. REV. 1257,
in the judicial selection process have proposed criteria for the evaluation of potential and actual nominees. Some of these efforts have resulted in quite general and abstract standards. For example, in its 1990 Standards Relating to Court Organization, the American Bar Association (ABA) advanced the following criteria for evaluating judicial qualifications:

Judges should have superior self-discipline, moral courage, and sound judgment. They should be able to listen readily to others and to be detached, even-handed, and decisive. They should have a breadth of education sufficient to understand the variety of problems that come before the courts. They should be professionally qualified as lawyers so that they can interpret and apply the law competently. They should have had experience in making practical and critical judgments concerning human relations.163

Elsewhere, the ABA, with specific reference to the federal judiciary, has defined professional competence as encompassing "such qualities as intellectual capacity, judgment, writing and analytical ability, industry, diligence, knowledge of the law and professional experience."164

Other efforts to prescribe standards of judicial quality have been similarly vague. During the Kennedy administration, criteria were established for determining what constituted a “good” appointment to the federal bench165 qualities including: “unquestioned ability,” “incorruptible character,” “firm judicial temperament,” and “the rare inner quality to know when to temper justice with mercy.”166 During the Eisenhower administration,
officially promulgated criteria included the need to be an "outstanding lawyer and leader in the community from which he comes" as well as a person whose "personal and professional reputation" was "beyond reproach."  

The Carter administration, which committed itself to making special efforts to seek qualified judicial nominees and established district and circuit court nominating committees toward that end, was only slightly more successful in establishing concrete standards for evaluation. An Executive Order issued by President Jimmy Carter called for the selection of persons with the following: "a reputation for, integrity, good character, and common sense"; "a reputation for being, fair, experienced, even-tempered and free of biases"; "sound physical and mental health"; and "outstanding legal ability and competence, as evidenced by substantial legal experience, ability to deal with complex legal problems, aptitude for legal scholarship and writing, and familiarity with courts and their processes." Scholarly efforts to establish standards have been similarly general and vague. For example, Professor Tobias recently argued that only "those attorneys who will be excellent judges" should be appointed to the federal bench. The qualities he listed as constituting excellence include the following: involvement "in extremely rigorous legal activity"; high intelligence, industriousness, and a balanced disposition; "broad intellect, willingness to labor vigorously, and appropriately measured judicial temperament"; and "impeccable integrity and substantial independence." Professor Davidow, after noting the lack of consensus on "which qualities make an individual 'the best' candidate for a judgeship," concluded that "[t]he conventional

167. Id. at 67–68 (quoting William P. Rogers, Judicial Appointments in the Eisenhower Administration, 41 J. AM. JUDICATURE SOC'Y 39–40 (1957)).
168. See Circuit Judge Nominating Commission, supra note 151, at 23–29; District Judge Nominating Commissions, supra note 151, at 53–112.
169. For general discussions of the Carter administration's approach to judicial selection, see District Judge Nominating Commissions, supra note 151, at 27–86; Griffin B. Bell, Federal Judicial Selection: The Carter Years, in Judicial Selection, supra note 164, at 25.
171. Tobias, supra note 162, at 1274.
172. Id. at 1274–75.
wisdom deems important the personal attributes of honesty, moral courage, diligence, courtesy, patience, decisiveness, independence, impartiality, open-mindedness, knowledge of the law, and experience." 173

A number of characteristics recur regularly in the various efforts to construct a list of non-political qualifications. In no special order, such a list would probably include integrity, judgment, decisiveness, intellectual openness, even temperament, technical competence, independence, and impartiality. 176

173. Davidow, supra note 159, at 417. Over 25 years ago, Professor Rosenberg noted that the "judicial office today demands the best possible men, not those of merely average ability who were gray and undistinguished as lawyers and who will be just as drab as judges." Maurice Rosenberg, The Qualities of Justices—Are They Strainable?, 44 TEX. L. REV. 1063, 1064 (1966). Rosenberg went on to list 23 attributes that would best equip a lawyer to become a trial judge. Id. at 1066–67.

174. According to the American Bar Association’s Standing Committee on Federal Judiciary, "[i]ntegrity is self-defining." ABA STANDING COMMITTEE, supra note 164, at 3. Although this is something of an overstatement, the ABA’s accompanying reference to "character and general reputation in the legal community," along with one’s "industry and diligence," represents a fairly uncontroversial list of at least some of the qualities encompassed by integrity. Id. See generally Anthony T. Kronman, Living in the Law, 54 U. CHI. L. REV. 835, 855 (1987) (defining integrity in Aristotelian terms of "[a] person whose soul has . . . ‘friendly feelings’ toward itself," as well as in terms of "steadiness of action and purpose, the reliability of character, the dignity of self-respect that a person shows in relations with others and in his or her conduct generally").

175. By “technical competence” we mean understanding and familiarity with the legal concepts and doctrines, as well as methodologies and modes of argument, of which the law consists. Of course, no person will have a complete mastery of all of the legal materials that are likely to be implicated in every case over which he or she is likely to preside during a judicial career. Technical competence thus includes the ability to master, or at least gain a reasonable understanding of, the legal materials relevant to the resolution of any given case. Cf. MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.1 (1983) (“Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”). Interestingly, the American Bar Association Code of Judicial Conduct has no provision dealing specifically with judicial competence. See SPECIAL COMM. ON STANDARDS OF JUDICIAL CONDUCT, AMERICAN BAR ASSOCIATION, CODE OF JUDICIAL CONDUCT (1972) [hereinafter CODE OF JUDICIAL CONDUCT].

176. Independence, of course, is widely viewed as a hallmark of the American judiciary. See CODE OF JUDICIAL CONDUCT, supra note 175, Canon 1 (entitled: “A Judge Should Uphold the Integrity and Independence of the Judiciary”; providing that “an independent and honorable judiciary is indispensable to justice in our society”). Independence is embodied in Article III’s tenure and salary protections for federal judges. See U.S. CONST. art. III, § 1. Impartiality is also a central feature of the judicial process, a fact embodied in our constitutional notions of due process as well as in the ethical rules that apply to the judiciary. CODE OF JUDICIAL CONDUCT, supra note 175, Canon 3 (“A Judge Should Perform the Duties of His Office Impartially and Diligently.”).

Some would, no doubt, include empathy and compassion in a list of characteristics essential to judging. For example, the ABA Standing Committee on Federal Judiciary, when evaluating judicial temperament, considers the “compassion” and “sensitivity"
Although these qualities may be difficult to define with precision, and although they may be even more difficult to apply to the evaluation of any given judicial candidate, they should be part of a baseline set of qualifications for any judicial office.

C. Distinguishing Between Trial and Appellate Judges

The aforementioned characteristics would represent the minimum requirements in a merit-based standard used in assessing the suitability of potential candidates for the federal bench. In our view, any potential nominee, whether for the federal district, federal circuit, or other Article III court, should possess as many of these characteristics as possible; persons without these characteristics should not be nominated to a federal judgeship and, if nominated, should not be confirmed.

of a prospective nominee to the federal bench. ABA STANDING COMMITTEE, supra note 164, at 4. In addition, some judges and scholars maintain that compassion is a central component of the judicial process. See, e.g., DeShaney v. Winnebago County Dep't of Social Serv., 489 U.S. 189, 213 (1989) (Blackmun, J., dissenting) (remarking that “compassion need not be exiled from the province of judging”); William J. Brennan, Jr., Reason, Passion, and the “Progress of Law,” 42 REC. OF THE ASS’N OF THE BAR OF THE CITY OF NEW YORK 948, 959 (Dec. 1987) (“Sensitivity to one’s intuitive and passionate responses, and awareness of the range of human experience, is therefore not only an inevitable but a desirable part of the judicial process, an aspect more to be nurtured than feared.”); Judith Resnik, Changing Criteria for Judging Judges, 84 NW. U. L. REV. 889, 893 (1990) (remarking that a new requirement for Supreme Court justices is to have “compassion and concern” for those who appear before them); Richard C. Reuben, Justice Defined, 80 A.B.A. J. 46, 47 (July 1994) (discussing Justice Harry A. Blackmun’s career and emphasizing the role of compassion in his judging). Some might believe that compassion and empathy do not easily coexist with impartiality, detachment, and disinterestedness, standard qualifications for judges. While we are quite comfortable with the notion that an element of compassion or empathy is desirable in the judicial process, we omit it from our list of baseline criteria.

177. Indeed, one commentator has suggested that “it is virtually impossible to assess accurately the integrity, intelligence, independence, and judicial temperament that specific judges have.” Tobias, supra note 162, at 1262.

178. We believe the characteristics discussed in the text provide a standard against which any potential federal judge should be assessed. This would be true with respect to nominees to the Supreme Court, circuit courts, district courts, or other specialized Article III courts, although the standard should be applied more rigorously to nominees to the Supreme Court. In our view, at least as an ideal matter, it would also be appropriate to evaluate potential candidates for Article I courts against the same general standard.

179. Any attempt to establish a formulaic approach to assessing how a nominee measures up to the characteristics we have described, or others we can imagine, probably would be unwise. While one could well imagine that a candidate’s failure to meet any of these criteria would result in disqualification, in most cases the obvious disqualifying factor would have been identified in the vetting process that typically
Assuming that all individuals considered for federal judicial appointments should, at a minimum, satisfy these criteria, are there sensible grounds to distinguish between individuals depending upon the particular judicial position for which they are being considered? In particular, are there grounds to distinguish between those persons who are likely to be reasonably good or competent trial judges from those persons who are likely to be reasonably good or competent appellate judges? If there are, presumably a rational selection process should reflect such a distinction. In other words, once a person satisfies the baseline standard we have suggested, is it reasonable to assume that we can expect any person to function as well as any other person in either trial or appellate capacity?

According to many observers, trial and appellate judging are distinguishable in significant ways, which suggests that trial and appellate judges are not interchangeable. For example, the ABA Standing Committee on the Federal Judiciary has established evaluation criteria that acknowledge differences between trial and appellate judges. Regarding standards for appellate judges, the Committee concludes:

Recognizing that an appellate judge deals primarily with records, briefs, appellate advocates and colleagues (in contrast to witnesses, parties, jurors, live testimony and the theater of the courtroom), the Committee may place somewhat less emphasis on the importance of trial experience as a qualification for the appellate courts.

1. Distinctions in Intellectual Ability—The ABA Committee’s analysis suggests two primary, functional distinctions between trial and appellate judges. First, nominees for the appellate courts are expected to have “an especially high degree of

precedes the decision to nominate. Consequently, there almost always will be room for legitimate (i.e. not politically driven) debate and disagreement as to whether any candidate measures up to any merit-based standard.

180. See Paul D. Carrington, Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law, 82 HARV. L. REV. 542, 565 (1969) (asserting that “[t]he use of district judges [on appellate courts] does present a special problem with respect to its impact on the quality of review, since the qualities that make a good trial judge are somewhat different from those which make a good appellate judge”).

181. However, the Committee states that “[s]ubstantial trial experience (as a lawyer or a trial judge) is important for prospective nominees to both the appellate and the trial courts.” ABA STANDING COMMITTEE, supra note 164, at 3.

182. Id.
scholarship and academic talent." This expectation is most likely based on the notion that appellate judges have broader responsibilities than do their trial court colleagues. While it is the primary duty of trial judges to decide the case sub judice, the ABA Committee endorses the view that appellate judges have the additional responsibilities of harmonizing the law and integrating it into a coherent whole. Arguably, these additional responsibilities entail certain qualities and skills that trial judges may not be expected to possess, such as the ability to take a long view of the applicable legal principles and the additional capacity for reflection that will take into account the "sober second thought" of the community.

The survey data reflect that sitting judges have internalized this distinction between the trial and appellate function. For example, in his study of the Second, Fifth, and District of Columbia Circuits, Professor Howard asked circuit judges to compare their jobs with those of federal district judges. Respondents reported that a primary functional distinction was that trial judges generally are called upon to make "instant" judgments while circuit judges were called upon to make "reflective" judgments. As one circuit judge reported, "our work is far more deliberate and supported by reason. The district judge must decide on the spur of the moment most of the time."

The notion that trial and appellate functions differ in the respect that appellate judges should have a greater aptitude and disposition for scholarly analysis finds some support in Professor Slotnick's investigation of the judicial nominees presented by President Carter to the Senate Judiciary Committee during the

183. Id. at 2.
184. Id. At least in common law contexts, appellate courts are more likely to be viewed as responsible for the law's evolution, its reform, and its progress.
185. See Harlan F. Stone, The Common Law in the United States, 50 Harv. L. Rev. 4, 25 (1936). See generally Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 23-28 (1962) (arguing that a government should serve enduring values and that the judiciary is best situated to protect such values).
186. Howard, supra note 72, at 134. Almost half (46%) of the circuit judges polled had previously served as trial judges. Id.
187. Id.
188. Id. at 134-35. Howard expected his survey to show, among other things, that "district judges have greater responsibility to ensure justice in individual cases while circuit judges grapple more with legal doctrine." Id. at 134. Yet only three of the surveyed judges reported this distinction, and Howard concluded that his survey "cracked orthodox molds," because the survey responses stressed operational discrepancies. Id. The general responses, however, do seem subject to an interpretation supporting the "orthodox" understanding that Howard expected.
96th Congress. Among other things, Professor Slotnick discovered that circuit court nominees were more likely to have served in "prestigious law clerkships" earlier in their careers, that they were "more likely to have obtained law school honors than their district judge counterparts," and that they had "considerably more prolific scholarly publication records" than the district court nominees. These findings led him to conclude that, once political considerations were put aside, the Carter Administration in fact made distinctions between "the credentials and backgrounds" of its nominees for the district and circuit courts. For Slotnick, these findings lent support to the "conventional wisdom" that "suggests that the more prestigious U.S. Courts of Appeals will be staffed by judges who are 'better' trained and more 'qualified' in several respects than their counterparts on the U.S. District Courts."

These analyses reflect a widespread view that circuit judges should have a greater demonstrated capacity for exceptional

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190. Id. at 577-78.
191. Id. at 578.
192. Id. at 570. Professor Slotnick's analysis is consistent with the individual case versus "long view" distinction between district court and circuit court functions we have previously suggested:

The nature of the aggregate backgrounds and experiences of federal trial judges suggest an adjudication process attuned directly to the specific problems of the litigants involved[,] decided by judges closely tied to the districts in which they work. The experiences and backgrounds of appellate judges, however, appear to result in a circuit bench which is more nationally oriented and which will be more prone to take a broader view of cases before it—perhaps with a greater eye towards their public policy significance.

Id. at 578.

We tend to agree with Professor Slotnick's suggestion that the customary mode of thought includes the notion that appellate judges should be more capable of engaging in high-level intellectual analysis and reflection about the law than their trial judge counterparts. Nevertheless, we note concern with some of the factors he uses to support the correlation between a candidate's background and the likelihood that she will possess the requisite intellectual qualities. For example, Professor Slotnick concluded that district nominees "were nearly three and a half times less likely than the circuit nominees to have attended Ivy league law schools." Id. at 573. Then he equated the "prestige" of the candidates' law school with the quality of their training. Id. In our view, the notion that there is a direct correlation between the intellectual capacity of a lawyer and the "eliteness" of her law school is quite problematic. That Professor Slotnick himself is troubled by such a correlation is suggested by his description of an "elite" law school training as "possibly[] 'better.'" Id. at 574. Other factors he examines, including honors earned while in law school and scholarly publication record, id., are more reliable though still imperfect indicators of intellectual prowess.
intellectual acumen than persons who would qualify for service on the district court. All judges should possess a capacity for sophisticated and high-level thinking about legal concepts and doctrines; it would be difficult to argue against the notion that we should strive for a system where all of our judges, whether trial or appellate, are the brightest and wisest people available. Although all judges should be capable, a rational federal judicial selection process should be especially rigorous when evaluating the intellectual capability and potential of candidates for the circuit courts.

2. Distinctions in Temperament—Trial and appellate judges may also be distinguished based on characteristics other than intellectual ability. Principal among these is judicial temperament. In the present context, temperament might be understood as a general feature of one's personality or character that affects one's ability to adapt to the demands and expectations of the professional environment. The ABA Standing Committee on Federal Judiciary lists judicial temperament as one of three general categories of professional qualifications that it considers in evaluating federal judicial nominees. In assessing temperament, the Committee "considers . . . the prospective nominee's compassion, decisiveness, open-mindedness, sensitivity, courtesy, patience, freedom from bias and commitment to equal justice."

Although there has been little systematic effort to study the suitability of different types of persons for trial, as opposed to appellate, positions, there is reason to believe that the sort of person who might be well-disposed temperamentally to function

193. *But cf.* Carrington, *supra* note 180, at 565–66 (arguing that, although the qualities of a good trial judge may vary from those of a good appellate judge, the differences are not very significant and the qualities required of an appellate judge may be more common than those required of a trial judge). In this regard, it is worth noting that, in a relatively small number of cases, district judges review in the first instance decisions of federal administrative agencies, an appellate duty different from the usual case before the trial judge. *See, e.g.*, 28 U.S.C. § 158(a) (1988) (certain bankruptcy court decisions); 42 U.S.C. § 405(g) (1988) (social security disability benefit decisions).

194. Those who suggest otherwise may be subjected to ridicule as was Senator Roman Hruska when, in arguing for the confirmation of G. Harrold Carswell to the Supreme Court, he maintained that mediocre people are entitled to representation on the Court. *See* HENRY J. ABRAHAM, THE JUDICIAL PROCESS 79 (6th ed. 1993).

195. The United States Circuit Court Nominating Committee, established during the Carter administration, evaluated prospective circuit court nominees on their "demeanor, character and personality indicative of judicial temperament." CIRCUIT JUDGE NOMINATING COMMISSION, *supra* note 151, at 105.


197. *Id.*
comfortably and effectively as a trial judge might not be as well disposed to function as an appellate judge. In one of the leading efforts to study the attitudes of circuit judges toward their jobs and their district court colleagues, Professor Howard reported that seven of the thirty-five Fifth Circuit judges interviewed differentiated sharply between the appellate and trial functions, "even distinguishing the talents required according to personal 'temperament.' " Several judges "opposed using visiting district judges to help meet their caseload on grounds that trial judges often found it difficult 'to think like appellate judges.' " Elsewhere, Howard reported that one-fifth of the judges he interviewed "invoked personality to differentiate suitability for trial and appellate work." These findings suggest that the normal tasks of trial and district judges may differ in ways significant enough to raise doubts concerning whether the same person can perform each set of tasks with equal ease or effectiveness.

This point was evidenced further in an investigation by William Kitchin of the attitudes of district judges towards their jobs. Kitchin inquired into the judges' impressions of how their roles differed from the roles of circuit judges and discovered that the district judges did perceive differences between trial and appellate styles. First, the district judges deal with litigants, witnesses, and the whole range of actors who populate the trial process, while the circuit judge is rarely required to relate, on a personal level, with these actors. Second, "district judges are individual decision makers whereas circuit judges are collegial

198. See Howard, supra note 72, at 125-57.
199. See id. at 304-05 (describing interview and methods).
200. Id. at 137.
201. Id. at 137 n.g. One circuit judge expressed the following sense of the differentiation between circuit and district judging: "I was never interested in becoming a district judge. I would be bored to death listening to witnesses. I am interested in broad questions, in principles." Id. Another observation offered by a circuit judge was: "I couldn't be a district judge. I don't have confidence in myself to make quick decisions daily or to have to listen all day to inept lawyers." Id.
202. Id. at 97.
204. Id. at 57.
205. See id. at 57-58. One Southern district judge thought it an important distinction that district judges are exposed to the outward behavior of witnesses, while "appellate judges read a record like reading a newspaper: they get the impressions of another human being, of what he saw and heard. They see only what the reporter got." Id. at 58.
decision makers."\textsuperscript{206} District judges reported a preference for "their solitary style of decision making."\textsuperscript{207} As one judge noted:

On the district level, you are your own boss. Up there, there are at least two others you have to compromise your views with. That brings about giving and swapping back and forth. The district judge has more independence than this.\textsuperscript{208}

3. Evaluation—These studies suggest that the functional differences between trial and appellate courts frequently demand quite different sorts of skills, dispositions, and temperaments. They indicate that the work of processing trials and appeals is sufficiently different that persons who can effectively and comfortably perform the tasks demanded by the former may not be as adept at the latter. The studies show that judges themselves distinguish between the talents required to perform well at the trial and appellate levels, relating the differences to differences in personal "temperament."\textsuperscript{209}

We are not aware of any reports that a person who has been offered a position as a federal circuit judge has rejected the offer because of a view that her talent and temperament were better suited for a district court position, or vice versa.\textsuperscript{210} We suspect, however, that such a decision has been reached more than once in the past. We further suspect that a candid self-assessment by many persons who now sit on the federal circuit and district courts would lead to a conclusion analogous to the federal circuit judge who was reported to have said: "I wouldn’t care to be a trial judge and don’t now. It’s a good thing, too. I don’t have the temperament."\textsuperscript{211}

We do not mean to suggest that the skills, dispositions, and temperaments necessary to be effective trial and appellate judges

\begin{footnotes}
\item[206] Id. at 59.
\item[207] Id.
\item[208] Id. Similarly, Howard found that circuit judges differentiated the functions and operations of trial and intermediate appellate courts in part on the basis of "solo versus collective responsibility." Howard, supra note 72, at 135. As one judge put it, at the district court level, "your calendar is your own . . . and yourself is the only person you have to convince." Id.
\item[209] See supra Part IV.C.2.
\item[210] In his study of circuit judges, Professor Howard noted that one interviewee, deciding whether he would prefer an appointment to the district or circuit court, observed several trials and reported: "It was so boring! All that time spent on the calendar, getting the case to trial. The pace was so slow . . . . How they have the patience to listen! Some enjoy it, however, God bless ‘em." Howard, supra note 72, at 135.
\item[211] Id. at 97.
\end{footnotes}
are inherently incompatible or mutually exclusive. There are certainly many persons who can function effectively in each position, and many distinguished judges have done so. Many federal district judges have served with distinction as state appellate judges before their appointment to the federal bench, and many federal circuit judges have served effectively as state or federal trial judges before their "elevation" to the court of appeals.\(^{212}\) The point worth noting is that the personal and professional qualities required for effective and satisfying service at both the appellate and trial levels are not necessarily transferrable.

D. Implications for Evaluating the Practice of District Judges Sitting by Designation

Given our evaluation of the elements of a rational process for selecting federal judges and our assessment of the distinctions between the temperament, intellectual ability, and functions of trial and appellate judges, several concerns arise with respect to the current practice of utilizing district judges on circuit court panels.

The treatment of all trial and appellate judges as interchangeable raises troublesome questions of constitutional policy. These questions were addressed in the United States Supreme Court's decision in *Glidden Co. v. Zdanok.*\(^{213}\) In *Glidden*, the Court was faced with constitutional challenges to the composition of two appellate panels, one from the United States Courts of Appeals for the Second Circuit and one from the Court of Appeals for the District of Columbia Circuit.\(^{214}\) In each case, one criminal and the other civil, the panel in question consisted of two judges who were from the respective circuit and a third judge who was not: one judge participating on the Second Circuit panel was an active

\(^{212}\) Sheldon Goldman, *Federal Judicial Recruitment*, in *The American Courts: A Critical Assessment* 189, 198 (John B. Gates & Charles A. Johnson eds., 1991); see also Howard, *supra* note 72, at 113 (finding in a study of three circuits that 40% of judges were promoted from the district court); Susan Haire et al., *An Intercircuit Profile of Judges on the U.S. Courts of Appeals*, 78 *Judicature* 101, 102 (1994) (reporting that, of judges on the courts of appeals between 1891 and 1992, those who had previously served on the district courts ranged from 59.6% in the Sixth Circuit to 16.7% in the D.C. Circuit; overall figure for all circuits not given but appears to be about 40%).

\(^{213}\) 370 U.S. 530 (1962).

\(^{214}\) *Id.* at 532–33.
judge from the United States Court of Claims sitting by designation; one judge participating on the D.C. Circuit panel was a retired judge sitting by designation from the United States Court of Customs and Patent Appeals.\textsuperscript{215} The Supreme Court granted review in the cases "[b]ecause of the significance of the 'designation' issue for the federal judicial system."\textsuperscript{216}

The principal basis for the challenge to the participation of the designated judges in \textit{Glidden} was not just that they were not regular judges of the circuit courts in question. Instead, the appellants based their challenge on the claim that the Court of Claims and the Court of Customs and Patent Appeals were not courts established pursuant to Article III of the Constitution.\textsuperscript{217} They argued that litigants before Article III courts had a right to have their case adjudicated only by judges who enjoyed the life tenure and salary protections embodied in Article III.\textsuperscript{218} The Court, in large part overruling its prior decisions holding that the two courts in question were constituted pursuant to Article I, held that both were Article III courts whose judges did enjoy the relevant Article III protections.\textsuperscript{219} The Court therefore rejected the appellants' constitutional challenge.\textsuperscript{220}

Of particular interest for present purposes is Justice Douglas's dissent. In concluding that the participation of the two designated judges violated Article III,\textsuperscript{221} Justice Douglas emphasized two points. The first concerned the principle of judicial independence. Justice Douglas noted that, as Article I judges,\textsuperscript{222} they were not beneficiaries of Article III's tenure and salary protections, protections whose importance to "the independence of the judiciary needs no argument."\textsuperscript{223}

\textsuperscript{215.} \textit{Id.} at 532.  
\textsuperscript{216.} \textit{Id.} at 533.  
\textsuperscript{217.} \textit{Id.} The Supreme Court had held earlier that both courts were legislative courts established pursuant to Article I of the Constitution. \textit{Williams v. United States}, 289 U.S. 553 (1933) (Court of Claims); \textit{Ex parte Bakelite Corp.}, 279 U.S. 438 (1929) (Court of Customs Appeals).  
\textsuperscript{218.} \textit{Glidden}, 370 U.S. at 533.  
\textsuperscript{219.} \textit{Id.} at 584.  
\textsuperscript{220.} \textit{Id.} at 584–85. The concurring Justice concluded that the Court of Claims and the Court of Customs and Patent Appeals had been transformed into Article III courts by Congress after the Supreme Court had found them to be Article I courts. \textit{Id.} at 585 (Clark, J., concurring).  
\textsuperscript{221.} See \textit{id.} at 606 (Douglas, J., dissenting).  
\textsuperscript{222.} In Justice Douglas's view, the Court of Claims and the Court of Customs and Patent Appeals were Article I courts. \textit{Id.} at 592.  
\textsuperscript{223.} \textit{Id.} at 594.
The second point emphasized by Justice Douglas related to the general issue of the judges’ function and qualifications. Justice Douglas expressed concern that Article I courts, unlike their Article III counterparts, were not bound by such constitutional limitations as those found in the Seventh Amendment’s guarantee of a jury trial. Justice Douglas was also concerned that the designated judges were people whose general background and qualifications might not be well-suited for the business of Article III courts. Justice Douglas noted that “[a]n appointment is made by the President and confirmed by the Senate in light of the duties of the particular office.” A President “might never dream” of entrusting the powers of an Article III judge to a nominee of an Article I court or an administrative agency: “The tasks are so different, the responsibilities and the qualifications are so diverse that it is difficult for one who knows the federal system to see how in the world of practical affairs these offices are interchangeable.” To treat Article I and Article III judges as interchangeable, Douglas argued, would be to risk thwarting or perverting the judicial selection process ordained by the Constitution: “Federal judges named to Article III courts are picked in light of the functions entrusted to them. No one knows whether a President would have appointed to an Article III court a man he named to an Article I court.”

Perhaps the central concern expressed in the Glidden dissent was captured in the statement with which we began this article: that “we subtly undermine the constitutional system when we treat federal judges as fungible.” We believe this concern is also relevant when federal district judges, assigned to sit by designation on appellate panels, are treated as fungible with federal circuit judges. To be sure, Justice Douglas’s admonition was expressed in the context of the admixing of functions of judges whose constitutional pedigrees were quite different; unlike Article I judges, federal district judges enjoy the same salary and tenure protections enjoyed by their circuit court

224. Justice Douglas conceded that the personal ability, character, and qualifications of the two designated judges were not challenged by the appellants. Id. at 589–90.
225. Id. at 600–02; see U.S. CONST. amend. VII.
226. Glidden, 370 U.S. at 603.
227. Id.
228. Id.
229. Id. at 604.
230. Id.
colleagues. Nevertheless, many of the functional distinctions between Article I and Article III judges mentioned by Douglas are also applicable to district and circuit judges.

As we have argued earlier, a merit-based process for selecting judges should take seriously the qualifications of all potential candidates, including their temperament and experience. In evaluating a person’s suitability for a judicial position, such a process should take into account the differences between the functions of courts that conduct trials and those that decide appeals. Such a process should recognize that a person might be well suited and qualified to serve in a trial, but not in an appellate, capacity. In Glidden, Justice Douglas noted that people “of highest quality chosen as Article I judges might never pass muster for Article III courts.” In our view, the same could be said when comparing potential district and circuit court nominees. To ignore this reality would represent an example of what Douglas referred to as a “light-hearted treatment of Article III functions.”

Justice Douglas’s concerns reveal an appropriate understanding of Article III and its design for the federal judicial system. These concerns led him to conclude that treating Article I and Article III judges as fungible would compromise impermissibly the independence of the federal judiciary and its capacity to safeguard constitutional rights. We do not maintain that the pervasive and routine utilization of district judges on appellate panels raises precisely the same concerns as those to which Douglas alluded; neither do we argue that the participation of a district judge in any given case ought to be found constitutionally impermissible. That the judges of all of the inferior

231. Even so, the dynamics of collegial decision-making may impose inhibitions even among Article III judges. See supra notes 102–05 and accompanying text.

232. Glidden, 370 U.S. at 605 (Douglas, J., dissenting). Justice Douglas’s observation was made in the context of evaluating the relative qualifications of Article I and Article III judges “when tested by their record of tolerance for minorities and for their respect of the Bill of Rights.” Id. at 605–06. Presumably, candidates for positions on all of the Article III courts should be tested for these qualities. But as we have noted earlier, there are differences between the ideal profiles of candidates for trial and appellate courts, aspects that a sensitive selection process should take into account.

233. Id. at 605.

234. Originalist interpretational theory has dominated much of the Supreme Court’s decisions applying Article III. See Saphire & Solimine, supra note 22, at 86–87 n.8. Thus a constitutional attack on the use of district judges sitting on appellate panels would be unlikely to succeed, given that the lower federal courts were created by Congress and that trial and appellate judges were originally treated as fungible. See supra notes 31–42 and accompanying text; see also Akhil R. Amar, The Two-Tiered Structure of the Judiciary Act of 1789, 138 U. Pa. L. Rev. 1499, 1510
federal courts enjoy the independence contemplated by Article III should ensure their capacity to protect the individual and minority rights that were central to Justice Douglas's analysis. Nonetheless, we believe that litigants who appear before the federal courts of appeals have a legitimate expectation that the judges before whom they appear will have been selected and found qualified by reference to standards evaluating their ability to exercise the appellate function. The pervasive use of district judges on the circuit courts results in appellate decision-making undertaken by persons who have not been found qualified or suited to perform the appellate function and therefore threatens to dilute the quality of justice on appeal.

Even if the concerns we have identified as associated with the participation of district judges on appellate panels do not amount to constitutional defects, they surely raise serious questions about the general integrity of current designation practices. To a significant extent, the assignment of district court judges to appellate panels is driven by one simple fact: under current circumstances, there simply are not enough circuit judges available to fill the number of panels necessary to process expeditiously the cases being filed in the circuit courts.235 Faced with this reality and with the failure of Congress to provide substantial relief,236 the federal circuits have had little choice but to utilize all of the resources available, including district judges.

As we have suggested in this Article, however, using district judges raises serious concerns. First, it threatens to undermine the rationality and integrity of the process of staffing the federal courts. If the rationality of the selection process is measured by the extent to which it is tailored to fill available positions on the federal circuit courts with persons who have

(1990) (arguing that the framers considered all federal judges, supreme and inferior, to be in "structural parity" with each other).

235. See supra notes 2–19 and accompanying text. As we noted earlier, see supra notes 45–46 and accompanying text, a second reason offered to explain the designation of district judges to sit on the circuit courts is to provide orientation and understanding concerning those courts' operations. But that justification cannot explain or justify the pervasiveness of the current practice.

236. See supra notes 20–23 and accompanying text. Numerous proposals have been made to stem the tide of cases filed in the lower federal courts. These have included significant increases in the number of federal judgeships authorized by Congress, see, e.g., Reinhardt, supra note 6, at 53; expediting the process of filling current vacancies on the courts, see, e.g., Henry J. Reske, Keeping Pace With Judicial Vacancies, 80 A.B.A. J. 34 (July 1994); and curtailing federal jurisdiction, see, e.g., Baker, supra note 3, at 187, 190.
been found qualified to be appellate judges, then the current system must be found wanting. Nationally, nearly twenty percent of circuit court panels consist of at least one district judge, and in some circuits the percentage is higher. Particularly troublesome is the fact that in some cases a majority of an appellate panel consists of district judges. Even assuming that the current selection process screens all potential and actual nominees for Article III judgeships on the basis of a set of merit-based qualifications, there is no evidence to suggest that current screening practices account for the characteristics that distinguish between potentially good trial and appellate judges.

We have already acknowledged that the case for distinguishing competence in potential trial and appellate judges can be overstated. There are certainly many individuals who possess the temperament, intellect, and experience to qualify for either trial or appellate positions. But it is just as likely that many of those district judges now asked to serve on the federal courts of appeals are not particularly qualified for or interested in the position. To the extent they are not, the quality of appellate justice—something to which we assume that every nominating President and confirming Senate would express a commitment—is destined to suffer.

237. See tbl. 1, supra p. 365.
238. See tbl. 2, supra p. 367.
239. See supra notes 133-34 and accompanying text.
240. A large percentage of nominees to the federal circuit courts have had prior experience as trial judges. See, e.g., CIRCUIT COURT NOMINATING COMMISSION, supra note 151, at 134, 143–44 (reporting that 26% of the first and second round candidates recommended for nomination to the circuit courts by the United States Circuit Court Nominating Commission during the Carter administration had been federal district judges and that, by May 1979, 12 of the 28 persons nominated had been district judges). In addition, many observers and judges believe that experience as a trial judge is an especially useful, if not indispensable, qualification for the appellate bench. See, e.g., HOWARD, supra note 72, at 107–08 ("In theory, the best training for appellate courts is practical experience in advocacy and on a trial bench."). Presumably, however, many persons who might not have the interest in or the qualifications for a position on the circuit court will acquire both during their tenure on the district court. More importantly, both the President and the Senate will have a second chance to evaluate the qualifications of sitting district judges considered for elevation to the circuit court in light of the specific and even distinctive requirements for the latter position. Neither the President nor the Senate, of course, has the opportunity to evaluate the appellate judging credentials of a district judge designated by a circuit for work on a circuit court panel.
CONCLUSION

From the perspective of the circuit courts in need of a stop-gap measure in the face of congressional default, reliance on district judges is certainly rational, but such reliance cannot be viewed as an optimal response to a difficult problem. Frequent utilization of district judges can be a disruptive influence on the work of a circuit: it can lead to inconsistency in circuit precedents and doctrine, reduced collegiality within panels, restraint on the candid and robust exchange of views between all members of a panel, and greater pressure for en banc review. It can also create logistical problems and other inefficiencies, complicating the circuit's ability to decide and process the cases on its docket.

241. As we noted earlier, most of the circuits invite newly appointed district judges to sit as part of a larger effort towards orientation and socialization. See supra notes 44–46 and accompanying text. While, at least in theory, many of the criticisms of the general practice of circuit court reliance upon district judges would also apply here, we find them less troubling than where even experienced district judges are called upon solely for the purpose of helping the circuit manage its docket. Presumably, fewer cases overall would be affected if the designation process were used solely, or primarily, for an orientation purpose.

242. See supra Parts II.B–III.

243. Several judges have suggested to us in informal conversations that district judges may be less efficient in reaching decisions and writing opinions in their appellate cases than their circuit court colleagues. Some inefficiency may be unavoidable. For example, to the extent that trial and appellate decision-making involve different mental processes and skills, a district judge may need more time to process a case than an experienced circuit judge would need. Moreover, when a district judge visits the court of appeals, he retains responsibility for managing his own docket. Many district judges will continue to work on their own files even while preparing for appellate arguments and reaching decisions in their appellate cases. And once their visit to the circuit court concludes, the district judge must return to his court and assume the often very hectic and demanding schedule he left behind. In this context, it would not be surprising if some district judges would, at least temporarily, postpone processing of some of their appellate cases. This, in turn, would create an additional set of obstacles to the circuit’s ability to terminate the relevant cases expeditiously.

These observations suggest another, perhaps less visible cost associated with district judges sitting on appellate panels. Not only does the practice entail a potential cost in terms of the circuit court's ability to process those cases in which district judges participate, it also entails a cost to the processing of cases pending in the district courts. While the district judge sits on the court of appeals, his ability to devote attention to the processing of his own docket will, at the very least, be reduced. And when his visit to the court of appeals concludes, the time necessary to complete the process of writing and circulating opinions will continue to detract from his ability to handle his responsibilities in the district court. Thus even if the overall benefits to the circuit court of utilizing the district judge outweigh the costs, the costs to the efficient operation of the district courts remain.
From the perspective of those who are constitutionally responsible for the selection of the men and women who preside over the district courts, the rationality of continued reliance upon federal district judges—at least the sort of extensive reliance that we have described in this Article—is a much more serious question. Both the President and the Senate have a significant interest in ensuring that all of those who are entrusted with the power of the federal government have been selected on the basis of their qualifications for the precise functions that they will be called upon to exercise. This would seem especially true in the case of federal judges who alone among the officers of government are authorized to exercise power for life.

What might be done to remedy or ameliorate the concerns we have raised with respect to the current practice of designation? First and most obviously would be the complete discontinuation of the practice of designating district judges to sit on appellate panels. We believe the problems set out earlier in this Article are significant enough to warrant the abandonment of the *routine* reliance upon district judges to manage the circuit courts' dockets.

Given the almost complete failure of the chroniclers of the federal appellate caseload crisis to acknowledge the contribution that district judges now make to the processing of federal appeals, one might think that stopping the flow of district judges would have no discernible adverse effect on the circuit courts. But as we have noted, district judges do provide a major source of the personnel resources upon which the circuit courts rely. Cutting off those resources is certain to exacerbate the problems facing the circuit courts, and thus the chief judges of the circuits and others involved in policy-making in this area would probably not view this with favor.244

Nonetheless, if and to the extent that district judges are to be used in the future for the sole purpose of processing the circuit courts' caseload, we believe that those charged with circuit

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244. As suggested earlier, although we believe that the routine utilization of district judges by the circuit courts raises important questions of constitutional policy, it is not our position that the practice is constitutionally invalid. As a general matter, all Article III requires is that those who exercise the federal judicial power enjoy life tenure and salary protections. See U.S. CONST. art. III, § 1; see also MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 53 (2d ed. 1990) (outlining job attributes of federal judges such as life tenure and salary); Saphire & Solimine, *supra* note 22, at 85 (listing same benefits of federal judgships).
court administration should make a concerted effort to utilize only those district judges who express a particular interest in serving. In the case of judges who already have served by designation, only those judges who have demonstrated a particular interest and aptitude for working effectively on the circuit court should be called upon to serve again.\footnote{245}

We recognize that deciding who among the pool of available district judges is most qualified for service on circuit court panels will almost always involve a degree of speculation and subjectivity. Even though sitting circuit judges may find it as difficult to articulate and apply a set of performance-based standards as those who have been in charge of nominating and confirming federal judges in the first instance,\footnote{246} circuit judges' assessment of particular district judges' ability to function on their panels is likely to be at least equally, and probably more, well-informed and reliable. In any event, we believe that the designating authorities have an obligation to be deliberative and selective in their choices.\footnote{247}

\footnote{245. The chief judge of the circuit has responsibility for designating district judges for appellate assignment. 28 U.S.C. § 292(a)(1988). In practice, the chief judge may delegate, either formally or informally, some or all of that authority to the circuit executive or other administrative personnel. See, e.g., Eleventh Circuit letter, supra note 45, at 2 (showing that responsibility for selecting members of panels is delegated to circuit executive). When such delegation takes place, the designation process can become largely a clerical function. Whether or not such delegation takes place, it is our sense that little systematic attention is given to the factors we consider important in making informed assignments of district judges to appellate duties.

In any event, we suspect that considerable discretion is now used in the determination of which judges will be called upon repeatedly to sit by designation on the circuit courts. Our correspondence and conversations with circuit court administrators has suggested that not all judges who serve by designation are invited back for subsequent duty on the circuit courts. But it is not clear to us that these decisions are always made on the basis of a careful consideration of which district judges are best suited to perform the appellate function.

\footnote{246. See supra Part IV.B for a discussion of judges' descriptions of the different characteristics needed to perform the trial or appellate function.

\footnote{247. Indeed, it is difficult to see how our suggestion that district judges be carefully evaluated before they are repeatedly invited back for circuit court duty could be regarded as controversial. To the extent that the circuit courts rely on district judges to manage their caseload, it is clearly in their interest to place the principal burden on district judges who have demonstrated particular aptitude and interest in performing an appellate function. Our impression, however, is that the decision of whom should be invited back, and how often, is frequently made on a relatively informal or ad hoc basis. To that extent, we would argue that selection of designated district judges should be made in a more systematic and purposeful manner.

As we have noted, the justification for assigning district judges to sit on appellate panels is not limited to stemming the caseload crisis. Many circuits routinely}
In addition, if the current practice is to continue, it should be acknowledged explicitly. The President and the Senate should take the designation process into account in the selection and confirmation of federal district judges. From a practical and managerial standpoint, each has an important interest in staffing all levels of the federal judiciary with personnel who have been judged competent to perform the particular tasks that they will be expected to perform. Just as important, we believe that those parties who bring their disputes to the federal courts of appeals have a legitimate expectation that the judges before whom they appear will have been chosen based upon their qualifications and capacity to dispense appellate justice. As long as district judges are to be assigned appellate responsibilities, it is incumbent upon the appointing authorities to assess each nominee's qualifications to perform the appellate function in addition to the trial function. Reliance upon district judges to meet the perceived caseload crisis in the circuit courts represents a form of appellate justice on the cheap. It would certainly be more costly, at least in terms of dollars and cents, for Congress to authorize an expansion of the number of circuit court positions to be filled by persons purposefully chosen to exercise the federal appellate jurisdiction. But as we have argued, continuation of the current practice, even if only by default, entails costs of its own. Up until now, we have seen no evidence that those ultimately responsible for setting policy for the administration of the federal courts have directly confronted those costs. It is time that they did.

assign recently appointed district judges to appellate panels as part of their orientation to the federal courts. See supra notes 44-46 and accompanying text. In our view, a view apparently shared by many district judges with whom we have communicated, this one-time assignment can be quite a valuable educational experience, and its benefits outweigh the attendant administrative and related costs.

248. To the extent that district judges may be less efficient or less qualified in performing the appellate function, litigants whose cases are decided by panels composed of one or more district judges may be both absolutely and relatively disadvantaged. See supra note 243 and accompanying text for a discussion of problems with district court judge's efficiency while sitting by designation.

249. According to figures reported by Professor Baker, it costs approximately $630,000 to create a new circuit judgeship and over $800,000 per year to maintain each position. BAKER, supra note 3, at 203. Baker concludes that "[e]ven on the national order of magnitude, delivering a large litter of new circuit judgeships is an expensive proposition over time." Id.