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# PANEL ASSIGNMENT IN THE FEDERAL COURTS OF APPEALS

Marin K. Levy†

*It is common knowledge that the federal courts of appeals typically hear cases in panels of three judges and that the composition of the panel can have significant consequences for case outcomes and for legal doctrine more generally. Yet neither legal scholars nor social scientists have focused on the question of how judges are selected for their panels. Instead, a substantial body of scholarship simply assumes that panel assignment is random.*

*This Article provides what, up until this point, has been a missing account of panel assignment. Drawing on a multiyear qualitative study of five circuit courts, including in-depth interviews with thirty-five judges and senior administrators, I show that strictly random selection is a myth, and an improbable one at that—in many instances, it would have been impossible as a practical matter for the courts studied here to create their panels by random draw. Although the courts generally tried to “mix up” the judges, the chief judges and clerks responsible for setting the calendar also took into account various other factors, from collegiality to efficiency-based considerations. Notably, those factors differed from one court to the next; no two courts approached the challenge of panel assignment in precisely the same way.*

*These findings pose an important challenge to the widespread assumption of panel randomness and reveal key normative questions that have been largely ignored in the*

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*literature. Although randomness is regarded as the default selection method across much of judicial administration, there is little exposition of why it is valuable. What, exactly, is desirable about having judges brought together randomly in the first place? What, if anything, is problematic about non-random methods of selection? This Article sets out to clarify both the costs and benefits of randomness, arguing that there can be valid reasons to depart from it. As such, it provides a framework for assessing different panel assignment practices and the myriad other court practices that rely, to some extent, on randomness.*

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## INTRODUCTION

It is common knowledge that the federal courts of appeals typically decide cases in panels of three judges.<sup>1</sup> What is not commonly known is how the judges are assigned to panels. Rather, it has long been assumed that the panels are randomly

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<sup>1</sup> See, e.g., Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1897 (2009) (“Because we typically sit and hear cases in panels of three, appellate judges do not act alone in deciding cases . . . .”); Pauline T. Kim, *Deliberation and Strategy on the United States Courts of Appeals: An Empirical Exploration of Panel Effects*, 157 U. PA. L. REV. 1319, 1324 (2009) (“Clearly, then, the fact that federal appellate judges hear cases in panels of three makes a difference in their decision making.”); Marin K. Levy, *Judging Justice on Appeal*, 123 YALE L.J. 2386, 2396 (2014) (noting that appellate judges “hear cases in panels of three”).

formed.<sup>2</sup> That assumption has been foundational to a significant body of empirical scholarship about the federal courts.<sup>3</sup>

But there is reason to doubt that appellate panels are, or could be, “strictly random.” For courts that hear arguments throughout the year,<sup>4</sup> it would be practically impossible to place the names of each judge into a hat and simply draw three for each sitting. A given judge might fall ill; another might be scheduled to judge a moot court out of state; yet another might have a meeting of one of the committees of the United States Judicial Conference. That is, there are likely some factors that courts take into account when configuring panels to hear cases—a point supported by a recent quantitative study that I coauthored.<sup>5</sup>

If courts are not configuring their panels in a strictly random fashion, how are they creating them? Given the importance of the decision makers on any given panel, it is surprising that no scholarship has taken up this question before. This void is particularly striking in light of how many articles have noted that panels are randomly formed.<sup>6</sup> And it is more striking still given the significant number of articles that rely on the

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<sup>2</sup> See, e.g., Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 1009–10 (2005) (“In the Courts of Appeals, panels are the product of random draws of three among a larger set of members of the court.”); Lee Epstein, William M. Landes & Richard A. Posner, *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. LEGAL ANALYSIS 101, 110 (2011) (“We assume that members of a panel are chosen randomly from the judges of the court, which is the practice in all circuits.”); Cass R. Sunstein & Thomas J. Miles, *Depoliticizing Administrative Law*, 58 DUKE L.J. 2193, 2197 (2009) (noting that within the federal courts of appeals, “judges are randomly assigned to three-judge panels”); Emerson H. Tiller & Frank B. Cross, *A Modest Proposal for Improving American Justice*, 99 COLUM. L. REV. 215, 216 (1999) (“[T]he random assignment of federal appellate judges to panels has become a ‘hallmark’ of the system.”).

<sup>3</sup> See generally, e.g., Christina L. Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389 (2010); Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1 (2008); Adam B. Cox & Thomas J. Miles, *Judicial Ideology and the Transformation of Voting Rights Jurisprudence*, 75 U. CHI. L. REV. 1493 (2008); Jonathan P. Kastellec, *Racial Diversity and Judicial Influence on Appellate Courts*, 57 AM. J. POL. SCI. 167 (2012); Sunstein & Miles, *supra* note 2; Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301 (2004).

<sup>4</sup> Courts that hold what I call “rolling sittings” throughout the year stand in contrast to courts that have designated court weeks. For the latter category of courts, it is easier to approximate randomly configured panels. See *infra* subpart IV.A.

<sup>5</sup> See generally Adam S. Chilton & Marin K. Levy, *Challenging the Randomness of Panel Assignment in the Federal Courts of Appeals*, 101 CORNELL L. REV. 1 (2015) (providing empirical evidence of nonrandom panel assignment in several federal appellate courts).

<sup>6</sup> See *supra* note 2.

so-called randomness assumption when building models about the judiciary to address critical questions of judicial decision making.<sup>7</sup> In short, it is vital—both for our understanding of a key aspect of judicial administration and for our ability to study judges—to know how judicial assignment is made.

This Article takes up the task of exploring how argument panels are formed in the federal courts of appeals. As there is little publicly-available information on the topic,<sup>8</sup> doing so requires gathering data directly from the courts themselves. Specifically, this Article rests on a multi-year<sup>9</sup> qualitative project involving interviews with thirty-five judges and senior administrators of the D.C., First, Second, Third, and Fourth Circuits.<sup>10</sup> The data reveal that none of the courts configure their panels in a strictly random fashion, and that it would have been practically impossible for most to do so (although it should be noted that one Circuit, the Fourth, came closest to strictly random assignment).<sup>11</sup> The data further tell an important story about the challenges of judicial administration, the balancing of different values within our judiciary, and the variation—in values and practices—across the different circuit courts.

At the outset it is important to note that the absence of randomness does not mean the presence of any sort of ideological maneuvering. To be clear, there is no suggestion from this study that the relevant decision maker of the circuit—be it a chief judge or clerk of court or circuit executive—at any time attempted to set the calendar with an intent to affect, say, the number of majority liberal or conservative panels. The factors considered by the courts ranged from those related to logistics to those touching on collegiality, but none had an ideological bent.

To begin, as one might expect, most courts created their argument panels with some consideration for logistical or efficiency-based factors. For example, several courts took into account the personal schedules of the judges. The calendar preferences of senior judges were given particular weight—a senior judge's request to sit during a given week in a given month might be accommodated—to encourage those judges to

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<sup>7</sup> See *supra* note 3.

<sup>8</sup> For a detailed description of the publicly-available information on panel assignment, see *infra* subpart I.B.

<sup>9</sup> The majority of the interviews took place between 2012 and 2013, but follow-up interviews continued through 2015.

<sup>10</sup> For a description of how I selected the circuits and the methodology of the project more generally, see *infra* subpart II.A.

<sup>11</sup> See *infra* subpart II.B.

provide as many days of service as possible.<sup>12</sup> Still within the vein of efficiency, some courts formed particular panels for the purpose of hearing a case on remand—three judges that originally heard a matter would be deliberately brought back together to hear the case in its later iteration.<sup>13</sup>

Less expected, however, are the other factors that, on the judges' own accounts, do not touch on the efficient administration of justice. For example, one circuit had a long-standing tradition of ensuring that a judge within her first year have the experience of presiding; since the presiding judge must be the active judge with the most years on the court (apart from the chief judge),<sup>14</sup> this experience was ensured by arranging a panel with, for instance, a senior judge and a visiting judge.<sup>15</sup> Some circuits held special sessions of court at law schools located within the circuit and then drew the panel from the pool of judges in that geographic region.<sup>16</sup> As another example, though the practice had fallen out of favor by the time of the study, two circuits previously had allowed judges to identify other judges with whom they did not care to sit, and the preference was considered when forming the court's panels.<sup>17</sup>

These findings matter in several key respects. They are important for our own understanding of the federal courts and for scholarship about those courts—particularly empirical scholarship that rests on the assumption that panels are randomly configured. Furthermore, these findings are relevant for the courts themselves. What may be the most striking finding from this study is the extent to which the judges stated that they did not know how the panels were formed in their own courts, or said that they thought the panels were formed ran-

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<sup>12</sup> Senior judges elect how much to sit—they can choose to hear a caseload that is 25% of that of an active judge or, say, 75%. The more days that a senior judge chooses to hear cases, the fewer cases need then be distributed amongst the rest of the court. See Levy, *supra* note 1, at 2417 n.153 (noting that the ability of senior judges to set their workload seems to be a matter of custom and not explicitly authorized by statute); David R. Stras & Ryan W. Scott, *Are Senior Judges Unconstitutional?*, 92 CORNELL L. REV. 453, 461 (2007) (stating that “[e]lecting senior status allows a judge to take on a reduced workload” if he or she desires, “as little as one-quarter of the work of an active judge, while still receiving the salary of the office”). For further discussion of the sitting decisions of senior judges, see generally Albert Yoon, *As You Like It: Senior Federal Judges and the Political Economy of Judicial Tenure*, 2 J. EMPIRICAL LEGAL STUD. 495 (2005).

<sup>13</sup> See *infra* notes 110–13 and accompanying text.

<sup>14</sup> See 28 U.S.C. § 45(a) (2012). If the chief judge of the court is a member of the panel, then he or she automatically is the presiding judge. *Id.* at § 45(b)

<sup>15</sup> See *infra* notes 114–24 and accompanying text.

<sup>16</sup> See *infra* notes 141–46 and accompanying text.

<sup>17</sup> See *infra* notes 135–40 and accompanying text.

domly—say, by a computer program—when this ultimately turned out to not be the case.<sup>18</sup> Indeed, outside of the clerk's office and the chambers of the chief judge or former chief judges, there was little knowledge about the way that the argument panels were formed—much less how they might be formed in other circuits. Accordingly, these findings fill a gap in our collective knowledge of the federal courts.

That knowledge, in turn, leads to normative questions. How should we assess the varying panel assignment practices? Are there at least some factors that should not be taken into account when deciding which judges will sit together? As with many other issues of judicial administration, trade-offs are inevitable. Taking into account the particular scheduling preferences of senior judges, say, involves moving further away from a random configuration of panels but comes with a gain in judicial resources. Balancing these factors then requires a thicker account of the values of randomness in the first place.

This Article provides such an account and, drawing upon theories of randomness from other adjudicatory contexts, argues that randomness in panel configuration is not valuable in and of itself. Rather, as in other settings such as the assignment of cases to judges, randomness is favored because it ensures that the assignment process will not be manipulated to increase the chance of selecting judges likely to hold a particular point of view (and, perhaps just as importantly, that there will be no appearance of such manipulation). Keeping these values in mind, the Article sketches a framework for assessing different panel assignment practices. Some practices, such as taking into account certain logistical considerations, will provide important gains in efficiency without implicating concerns of predetermining or biasing case outcomes (or the appearance of doing so) and accordingly are perfectly appropriate. Other practices, such as selecting particular judges for special sittings, warrant greater consideration.

The final Part turns from individual practices to the system as a whole. Specifically, the findings reveal that no two circuits configure their panels in precisely the same way, prompting one to ask how such variation across the federal courts should be regarded. Drawing upon previous research in judicial administration,<sup>19</sup> the Article argues that perfect uniformity in panel assignment procedures will be practically impossible for the circuits to achieve. There are simply too many variations in

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<sup>18</sup> See *infra* notes 154–59 and accompanying text.

<sup>19</sup> See *infra* subpart IV.A.

circuit organization—from how often they hold argument to how many judges they have—that affect how the panels are formed. Furthermore, it is precisely these differences that impact the consideration of any individual practice in the different courts, necessarily creating variation. And yet, determining that there will be disuniformity in panel assignment does not mean that there is no space for improvement. The Article concludes by calling for greater transparency to encourage the necessary deliberation about assignment procedures and to improve the internal workings of the appellate courts.

## I

### BACKGROUND ON PANEL ASSIGNMENT

District judges tend to hear cases by themselves.<sup>20</sup> The Supreme Court Justices almost always hear cases as a full court of nine.<sup>21</sup> The court of appeals judges can be located, appropriately, in between—when not sitting en banc, they tend to hear cases in panels of three.<sup>22</sup> One consequence of this structure is that, unlike their lower and higher court counterparts, the circuit courts require a process for selecting which judges will sit together.<sup>23</sup> That is, even before cases are assigned to panels, the circuit courts need to determine which

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<sup>20</sup> It is important to note that district judges *tend to* decide cases alone, as there are some instances in which they hear cases in panels. For example, redistricting cases are heard by panels of three federal district judges—as required by statute. See 28 U.S.C. § 2284(a) (2012).

<sup>21</sup> It is worth noting that the Court *almost* always hears cases as a full complement of Justices, as there are times when one or more justices will recuse themselves, per 28 U.S.C. § 455 (2012). See, e.g., *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2215 (2016) (“Justice Kagan took no part in the consideration or decision of this case.”); *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2111 (2016) (“Justice Sotomayor took no part in the consideration or decision of this case.”); *Commil USA, LLC v. Cisco Sys., Inc.*, 135 S. Ct. 1920, 1931 (2015) (“Justice Breyer took no part in the consideration or decision of this case.”).

<sup>22</sup> See *supra* note 1.

<sup>23</sup> This is true for all of the regional circuit courts when configuring argument panels, and true of the Ninth Circuit as well when configuring en banc panels. Specifically, the Ninth Circuit holds a “limited” en banc with only a subset of its court members. See 9TH CIR. R. 35-3 (stating that an en banc court shall consist of the chief judge and ten additional judges); see also 28 U.S.C. § 46(c) (2012) (providing that en banc courts shall consist of all circuit judges in regular active service unless section 6 of Pub. L. No. 95-486, 92 Stat. 1633 provides otherwise); Act of Oct. 20, 1978, Pub. L. No. 95-486, § 6, 92 Stat. 1629, 1633 (creating an exception for courts with more than fifteen judges).

judges will make up the dozens (and sometimes hundreds) of panels<sup>24</sup> that will hear arguments in the coming term.<sup>25</sup>

For decades, legal scholars have assumed that the process by which judges are assigned to panels is a random one. Indeed, scores of law review articles have included this claim. Within this body of scholarship, a substantial number of empirical studies on judicial decision making have rested on this assumption to reach their results. It is only recently that a quantitative study that I coauthored with Adam Chilton, in examining data on oral argument panels in all twelve regional circuit courts, found evidence that at least some of the courts did not create panels randomly.<sup>26</sup>

That scholars have made assumptions about panel formation is perhaps a by-product of the fact that there is little publicly-available information on the subject. Specifically, there are very few statutory requirements regarding panel formation, and there is limited information from the courts themselves in local rules and operating procedures on how panels are formed.

This Part briefly discusses the long-standing assumption of random panel formation in the scholarly literature. It then turns to the rules of randomness—what statutory requirements exist regarding panel configuration and what practices courts note that they follow in their local rules and procedures.

#### A. Assumptions of Randomness

Numerous academic articles have stated that oral argument panels in the federal appellate courts are randomly formed.<sup>27</sup> This claim is present in scholarship on a variety of

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<sup>24</sup> See Chilton & Levy, *supra* note 5, at 25.

<sup>25</sup> The phrase “term” is something of a construct. Although some circuits, such as the D.C. Circuit, have formal terms, others do not. I use this phrase to refer to the year of sittings that takes place between September 1 and August 31 of the following year.

<sup>26</sup> See Chilton & Levy, *supra* note 5, at 37–45.

<sup>27</sup> See, e.g., Abramowicz & Stearns, *supra* note 2, at 1009–10; Epstein, Landes & Posner, *supra* note 2, at 110; Samuel P. Jordan, *Early Panel Announcement, Settlement, and Adjudication*, 2007 BYU L. REV. 55, 66–67 (noting criticism of “the current practice of randomly assigning judges to appellate panels”); Ronald J. Krotoszynski, Jr., *The Unitary Executive and the Plural Judiciary: On the Potential Virtues of Decentralized Judicial Power*, 89 NOTRE DAME L. REV. 1021, 1073 (2014) (“Random assignment of judges to panels means that subgroups of the entire court are constituted to hear and decide particular cases.”); Jud Mathews, *Deference Lotteries*, 91 TEX. L. REV. 1349, 1373 (2013) (noting that for the article’s model about how courts apply deference standards in different agency cases, “it is enough that the assignment of judges to panels be random” (emphasis omitted)); Sunstein & Miles, *supra* note 2, at 2197; Tiller & Cross, *supra* note 2, at 216.

topics—from federal courts to constitutional law to administrative law<sup>28</sup>—and has remained the dominant view of panel assignment. As Emerson Tiller and Frank Cross put it, random assignment of judges to panels has become viewed as a “hallmark” of the federal system.<sup>29</sup>

The claim that panel assignment is random has been made not only by scholars but also by judges. Specifically, Judge Richard Posner has written that “the panels that hear cases are randomly selected from the court’s judges.”<sup>30</sup> Similarly, Judge Robert Parker of the Fifth Circuit stated that in his court, “[t]he panels are selected at random.”<sup>31</sup> And Judge Alex Kozinski, former Chief Judge of the Ninth Circuit, likewise suggested that panels were drawn randomly—a result of “the luck of the draw.”<sup>32</sup>

To be sure, it is quite possible that not all of these authors meant to suggest that panels are formed in a strictly random fashion—that is, by placing the names of each judge into a hat and selecting three for each sitting. The authors might well have meant something less rigid than this standard. For example, they might well have considered panel assignment to still be random even if it took into account a given judge’s trip to judge moot court on a particular date or another judge’s vacation during a particular week, and so forth—what one might call “practical randomness.” Even acknowledging the potential for ambiguity, what is clear is that these various articles assumed that panels were formed without a deliberate intent and, if not in a strictly random manner, at least without the deliberate consideration of factors beyond, say, basic logistical matters.

This assumption has played a particularly relevant role in empirical research. A robust quantitative literature on judicial decision making at the court of appeals has justified its research design and identification strategy for making causal

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<sup>28</sup> See *supra* note 27.

<sup>29</sup> See Tiller & Cross, *supra* note 2, at 216 (first citing Joseph W. Bellacosa, *Judging Cases v. Courting Public Opinion*, 65 *FORDHAM L. REV.* 2381, 2390 (1997); and then citing Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 *J. LEGAL STUD.* 627, 630 (1994)).

<sup>30</sup> Richard A. Posner, *A Heartfelt, Albeit Largely Statistical, Salute to Judge Richard D. Cudahy*, 29 *YALE J. ON REG.* 355, 357 (2012).

<sup>31</sup> Robert M. Parker, *Foreword*, 26 *TEX. TECH L. REV.* 265, 266 (1995).

<sup>32</sup> Alex Kozinski & James Burnham, *I Say Dissental, You Say Concurral*, 121 *YALE L.J. ONLINE* 601, 607 (2012) (arguing that the practice of dissenting from, or concurring in, orders denying rehearings en banc can be beneficial to a judge who was not a member of the original three-judge panel simply because of “the luck of the draw”).

inferences on the randomness of panel assignment.<sup>33</sup> After assuming that judges are randomly assigned to panels (and that cases are then randomly assigned to those panels), the studies in this literature have gone on to test such hypotheses as whether judges vote differently when their panel members were appointed by a president from the same, or different, political party,<sup>34</sup> and even whether the gender<sup>35</sup> or race<sup>36</sup> of a judge affects the behavior of the rest of the panel. Without random panel assignment, the “reasoned basis for inference”<sup>37</sup>—ultimately the ability to make findings on these and other aspects of judicial behavior—is then called into question.

A recent quantitative study that I coauthored was the first to formally call this assumption into question.<sup>38</sup> The study examined an original dataset of oral argument panels for all twelve regional circuits over a five-year span.<sup>39</sup> Using a computer program that took into account the number of panels formed in each circuit in each term and the judges that sat in each circuit in each term, we were able to simulate the random configuration of panels.<sup>40</sup> Specifically, we ran the simulation

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<sup>33</sup> See Chilton & Levy, *supra* note 5, at 2–3.

<sup>34</sup> There have been a substantial number of such papers in the so-called “panel effects” literature. For prominent examples, see generally Sunstein & Miles, *supra* note 2; Sunstein, Schkade & Ellman, *supra* note 3.

<sup>35</sup> See, e.g., Boyd, Epstein & Martin, *supra* note 3, at 390 (finding sex-based panel effects in cases implicating sex discrimination).

<sup>36</sup> See Cox & Miles, *Judging the Voting Rights Act*, *supra* note 3, at 29–37 (finding strong race-based panel effects in voting rights cases).

<sup>37</sup> See Daniel E. Ho & Donald B. Rubin, *Credible Causal Inference for Empirical Legal Studies*, 7 ANN. REV. L. & SOC. SCI. 17, 18 (2011) (first citing R.A. FISHER, STATISTICAL METHODS FOR RESEARCH WORKERS (1925); and then citing R.A. FISHER, THE DESIGN OF EXPERIMENTS (1935)).

<sup>38</sup> See Chilton & Levy, *supra* note 5. Ours was not the first to note the possibility of nonrandom panel assignment, however. For example, a 2009 article by Matthew Hall noted that in the course of conducting research, he contacted the clerk’s office of different circuit courts and asked directly whether judicial assignment—the assignment of judges to panels and then panels to cases—was random in their court. See Matthew Hall, *Experimental Justice: Random Judicial Assignment and the Partisan Process of Supreme Court Review*, 37 AM. POL. RES. 195, 202–03 (2009). He reports that the clerks of some circuits told him that judicial assignment was not, in fact, random in their circuit. *Id.* But to my knowledge, there are no studies that directly tested whether panels were, in fact, randomly configured or that sought to understand how panel assignment is made.

<sup>39</sup> See Chilton & Levy, *supra* note 5, at 24.

<sup>40</sup> See *id.* at 31–33. Specifically, we determined how many panels were formed in each circuit in each year and how many times each judge sat on a panel. For example, we noted that there were 115 panels during the 2008 term of the D.C. Circuit and that Judge X had sat on 36 of them. We then wrote code that randomly configured the panels for that term. The code essentially treated each time a judge sat as a piece of paper with that judge’s name, put all of the pieces of paper into a virtual hat, and then randomly picked three names out of the hat for

100,000 times, generating over one billion panels.<sup>41</sup> To determine the likelihood that panel assignment in any given circuit was random, we compared the distribution of an observable characteristic—whether a judge was appointed by a Republican president—in the panels as they were formed by the courts and those that were formed by random configuration.<sup>42</sup> Ultimately, our methodology produced findings that suggested nonrandom panel assignment in several of the courts of appeals.<sup>43</sup> Specifically, four out of the twelve regional circuits had distributions of Republican-appointed judges across panels that suggested a nonrandom method had been used when configuring them.<sup>44</sup> The study concluded by noting that further research would be needed to understand how, exactly, panels were configured.<sup>45</sup>

In short, there has been a long-standing claim of random panel assignment in the literature. This claim has proved important for certain types of scholarship, particularly empirical studies of judicial decision making. Only recently has this assumption been challenged, further underscoring the question: how are the courts of appeals creating their argument panels?

## B. Rules of Randomness

One might think that the answer to how courts form their panels can be found in the statute books or the Federal Rules of Appellate Procedure. As it turns out, these sources have very few requirements when it comes to panel assignment—and randomness is not among them. The federal statute governing panel assignment states only that panels must consist of three judges and that those panels shall sit at the times and places “as the court directs.”<sup>46</sup> The federal rules are silent on the matter.<sup>47</sup>

Accordingly, it has fallen to the circuit courts themselves to decide how to create their panels. They have made their own determinations about who will assign judges to panels—in some circuits this task belongs to the chief judge, whereas in

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each panel in each term (with the caveat that the same judge could not be selected more than once for a given panel). *Id.*

<sup>41</sup> *Id.* at 34–35.

<sup>42</sup> *See id.* at 33–36.

<sup>43</sup> *See id.* at 37–45.

<sup>44</sup> Specifically, the D.C., Second, Eighth, and Ninth Circuits showed statistically significant results. *Id.* at 38.

<sup>45</sup> *Id.* at 51.

<sup>46</sup> 28 U.S.C. § 46 (2012) (Assignment of judges; panels; hearings; quorum).

<sup>47</sup> *See generally* FED. R. APP. P.; FED. R. CIV. P.

others it is the responsibility of the clerk of court or a member of the circuit executive's staff.<sup>48</sup> And they have made their own rules about how those panels are to be formed. Although the circuits do not provide full information about how they set their panels,<sup>49</sup> some information about the processes can be found in their local rules and operating procedures<sup>50</sup> as well as occasionally in reports.<sup>51</sup> Additionally, the Federal Judicial Center has published a monograph on case management that includes some information on panel formation.<sup>52</sup> Taken together, these sources provide a limited amount of information on the self-imposed rules that the courts follow when deciding which judges will sit together.

First, the Federal Judicial Center reports in its monograph on case management procedures that some of the courts use a random process to configure their oral argument panels. For example, the Center states that active judges in the Fourth Circuit "are randomly assigned [to argument panels] by a computer program."<sup>53</sup> The same report writes of the Eleventh Circuit that "[t]o ensure complete objectivity in assigning cases, the names of the active judges for the sessions of the court are drawn by lot for the entire court year."<sup>54</sup>

Second, a substantial number of courts report that their judges are assigned to panels in a way that comes close to randomness but nevertheless does include the deliberate consideration of various factors. Specifically, the Federal Judicial

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<sup>48</sup> See *infra* Part II.

<sup>49</sup> It is apparently likewise difficult to find information about the circuits' case assignment procedures. See Adam M. Samaha, *Randomization in Adjudication*, 51 WM. & MARY L. REV. 1, 48 (2009) (noting that when it comes to how the courts assign cases to panels, "it appears that no one source effectively aggregates this information for outsiders").

<sup>50</sup> See, e.g., U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT, LOCAL RULES AND OPERATING PROCEDURES OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT, Internal Operating Procedure 34(a)(1) (2016) [hereinafter 6TH CIR. I.O.P.] ("Judges are later assigned to panels during the sitting weeks using an automated routine which searches the court's database to determine which active judges have the longest intervals between sitting pairing."); U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT, LOCAL RULES AND INTERNAL OPERATING PROCEDURES OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT, Internal Operating Procedure 47.1(b)(3) (2016) [hereinafter 2D CIR. I.O.P.] ("The clerk assigns judges to death penalty case panels by random drawing from the death penalty case pool.")

<sup>51</sup> For example, a recent Ninth Circuit annual report notes that a particular panel of all Alaskan judges was formed by the "luck of the draw." JUDICIAL COUNCIL OF THE NINTH CIRCUIT, UNITED STATES COURTS FOR THE NINTH CIRCUIT 2013 ANNUAL REPORT 21 (2014).

<sup>52</sup> See LAURAL HOOPER, DEAN MILETICH & ANGELIA LEVY, FED. JUD. CTR., CASE MANAGEMENT PROCEDURES IN THE FEDERAL COURTS OF APPEALS (2d ed. 2011).

<sup>53</sup> *Id.* at 99.

<sup>54</sup> *Id.* at 208.

Center reports that the Fifth Circuit relies upon a computer program to “achieve random assignment of judges to panels,” but further notes that the program tries to ensure that no two judges sit together too frequently in a term.<sup>55</sup> The Sixth Circuit similarly states that it begins with a random process—it states in its Internal Operating Procedures that the court hears cases in two-week periods during which “[a]t least six active judges are assigned to one of the two sitting weeks at random” and the remainder of the active judges are assigned to the other week.<sup>56</sup> The court further notes that other factors are then taken into account when setting the panels: within each sitting week, judges are assigned to panels “using an automated routine which searches the court’s database to determine which active judges have the longest intervals between sitting pairing.”<sup>57</sup> The Seventh Circuit also reports that it begins with “random” assignment of judges to panels “except that the circuit executive uses a computer-generated table to ensure that over a two-year period a judge sits approximately the same number of times with every other judge of the court.”<sup>58</sup> The Federal Judicial Center reports that the Ninth Circuit likewise begins with a random assignment process but goes on to consider other factors for the calendar.<sup>59</sup> It notes that in the Ninth Circuit, there is “random assignment of judges by computer to particular days or weeks on the calendar” which is designed to “equalize the workload among the judges . . . [and] to enable each active judge to sit with every other active and senior judge approximately the same number of times over a two-year period[.]”<sup>60</sup> Differing from the other courts mentioned here, the Center reports that the panel assignment procedure of the Ninth Circuit is also meant to “assign active judges an equal number of times to each of the locations at which the court holds hearings.”<sup>61</sup> Finally within this category, the Federal Judicial Center reports that the Tenth Circuit “randomly” assigns its judges to panels using a software program, but goes on to note that the program

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<sup>55</sup> *Id.* at 115.

<sup>56</sup> 6TH CIR. I.O.P. 34(a)(1).

<sup>57</sup> *Id.*

<sup>58</sup> HOOPER, MILETICH & LEVY, *supra* note 52, at 140; *see also* U.S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT, PRACTITIONER’S HANDBOOK FOR APPEALS 11 (2017) (“Assignments of judges to panels are made about a month before the oral argument on a random basis . . . . Each judge is assigned to sit approximately the same number of times per term with each of his or her colleagues.”).

<sup>59</sup> HOOPER, MILETICH & LEVY, *supra* note 52, at 174.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

deliberately “equalizes the number of times judges sit with one another over a period of one year.”<sup>62</sup>

There is a final category of courts that state that they configure panels randomly for death penalty cases but do not provide information about panel assignment more generally. Specifically, the Second Circuit notes in its Internal Operating Procedures that “[t]he clerk assigns judges to death penalty case panels by random drawing from the death penalty case pool.”<sup>63</sup> And the Federal Judicial Center states that in the Third Circuit, “for each death penalty case, a special panel is constructed, and active judges are randomly assigned to the panel.”<sup>64</sup> There is no additional information about how panels are formed for the regular argument calendar in these courts.<sup>65</sup>

Stepping back, there is a striking interplay between the assumptions about panel assignment, and the rules regarding that assignment. Although there has been a long-standing assumption in the academic literature that panel configuration in the federal appellate courts is random, there are no rules—statutory or otherwise—that require randomness. At most, the available information suggests that a few courts create their panels randomly. Far more take into account at least some factors, thereby making their assignment process non-random—a point supported by recent empirical work.<sup>66</sup> What is clear among these conflicting accounts is that there is a need—for our collective understanding of how the federal courts operate and for scholarship about the courts—to better understand how panel assignment is made.

## II

### PANEL ASSIGNMENT PRACTICES

To learn how the federal courts of appeals create their panels requires conducting interviews with those closest to the process: judges and senior members of the clerk’s office from different circuits. Subpart A first sets out the methodology of the underlying qualitative study—how the thirty-five federal appellate judges and senior administrators from five different circuit courts were identified and interviewed. Subpart B turns

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<sup>62</sup> *Id.* at 194.

<sup>63</sup> 2D CIR. I.O.P. 47.1(b)(3).

<sup>64</sup> HOOPER, MILETICH & LEVY, *supra* note 52, at 87; see U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT, INTERNAL OPERATING PROCEDURES OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, Internal Operating Procedure 16.2 (2017) [hereinafter 3rd Cir. I.O.P.].

<sup>65</sup> See generally 2D CIR. I.O.P.; 3D CIR. I.O.P.

<sup>66</sup> See Chilton & Levy, *supra* note 5, at 36–48.

to the findings of the study, detailing the various factors that many of the courts took into account when creating their panels. Instead of providing a litany of these considerations, this subpart creates a typology, organizing factors around their stated rationales. In so doing, it seeks to both identify, and give structure to, the motivations behind the different assignment practices.

### A. Methodology

Qualitative methods, and in particular interviewing, have long been used within law to gain a better understanding of particular phenomena or practices.<sup>67</sup> Gathering data about court practices often requires interviewing judicial actors, including the judges themselves and court administrators.<sup>68</sup> This is particularly important where, as here, the practices in question are not already fully documented.<sup>69</sup> What follows is a description of the methodology that was employed to both select and interview subjects for this Article.

At the outset, I focused on a subset of the twelve regional circuit courts in the interest of performing an in-depth review. To facilitate in-person interviews in particular, and consistent with past research,<sup>70</sup> I selected the D.C., First, Second, Third, and Fourth Circuits. To be sure, this is not a random sample, and the circuits share some features that are not common across the courts—for example, they are all relatively compact geographically.<sup>71</sup> That said, ultimately providing information on nearly half of the circuit courts serves the study's purpose, even if those circuits are not representative of the others.

In selecting interview subjects, I conducted convenience sampling in some of the most heavily judge-populated areas within each circuit. That is, I contacted every judge in a given

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<sup>67</sup> See, e.g., ROBERT C. ELICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 289–92 (1991) (describing the use of in-person and telephone interviews); Stewart Macaulay, *Lawyers and Consumer Protection Laws*, 14 LAW & SOC'Y REV. 115, 118–20 (1979) (describing the use of in-person and telephone interviews). For a useful discussion of the benefits of qualitative methods, particularly in-depth interviewing, see Sara Sternberg Greene, *The Broken Safety Net: A Study of Earned Income Tax Credit Recipients and a Proposal for Repair*, 88 N.Y.U. L. REV. 515, 521 n.32, 529–30 (2013).

<sup>68</sup> See Marin K. Levy, *The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts*, 61 DUKE L.J. 315, 326–27 (2011).

<sup>69</sup> As noted already, while some courts and the Federal Judicial Center provide some information on panel formation, that information is not complete. Additionally, not all courts provide information. See *supra* notes 53–64 and accompanying text.

<sup>70</sup> See Levy, *supra* note 68, at 327.

<sup>71</sup> *Id.*

area by email and then met with those who were willing to do so.<sup>72</sup> For the D.C. Circuit, I contacted all active and senior judges<sup>73</sup> in Washington, D.C. as of April 2012.<sup>74</sup> Out of thirteen judges in this set,<sup>75</sup> I interviewed eight, as well as a senior member of the clerk's office. For the First Circuit, I contacted all of the judges in Boston as of April 2012.<sup>76</sup> Of the three judges in this set,<sup>77</sup> I interviewed one, as well as a senior member of the clerk's office. In the Second Circuit, I contacted all of the judges in Manhattan, Brooklyn, New Haven, and Hartford between the spring of 2012 and the summer of 2013. Out of the twenty judges in this set,<sup>78</sup> I interviewed thirteen and a senior member of the clerk's office. In the Third Circuit, I contacted all of the judges in Philadelphia between the spring of 2012 and the summer of 2013.<sup>79</sup> Out of the four judges in this set,<sup>80</sup> I interviewed three and a senior member of the clerk's office. Finally, in the Fourth Circuit, I contacted all of the judges in Baltimore, Alexandria, Raleigh, and Richmond as of June 2013. Out of the seven judges in this set,<sup>81</sup> I interviewed five and a senior member of the clerk's office. Including all judges and senior administrators contacted, I had a response rate of roughly sixty-seven percent.

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<sup>72</sup> I used a standard request letter that I tailored (for example, if I knew the judge personally).

<sup>73</sup> I omitted any inactive judges. In the D.C. Circuit, this meant refraining from contacting James L. Buckley.

<sup>74</sup> The study does not include those judges who were appointed to the court and sworn in after this time period, including Sri Srinivasan, Patricia Ann Millett, Nina Pillard, and Robert L. Wilkins.

<sup>75</sup> The entire set consisted of Judges Merrick B. Garland, Karen L. Henderson, Judith Ann Wilson Rogers, David S. Tatel, Janice Rogers Brown, Thomas B. Griffith, Brett M. Kavanaugh, Harry T. Edwards, Laurence H. Silberman, Stephen F. Williams, Douglas H. Ginsburg, David B. Sentelle, and A. Raymond Randolph.

<sup>76</sup> The study does not include David Jeremiah Barron, as he joined the First Circuit after this time period.

<sup>77</sup> The entire set consisted of Judges Sandra Lynch, Michael Boudin, and Norman H. Stahl.

<sup>78</sup> The entire set consisted of Judges Robert Katzmann, Dennis G. Jacobs, José A. Cabranes, Reena Raggi, Debra Ann Livingston, Gerard E. Lynch, Denny Chin, Raymond Lohier, Jr., Susan L. Carney, Christopher F. Droney, Jon O. Newman, Amalya L. Kearse, Ralph K. Winter, Jr., John M. Walker, Jr., Pierre N. Leval, Guido Calabresi, Chester J. Straub, Robert D. Sack, Barrington Daniels Parker, Jr., and Joseph M. McLaughlin.

<sup>79</sup> The study does not include Cheryl Ann Krause, as she joined the Third Circuit after this time period.

<sup>80</sup> The entire set consisted of Judges Theodore A. McKee, Marjorie O. Rendell, Anthony J. Scirica, and Dolores Korman Sloviter.

<sup>81</sup> The entire set consisted of Judges Paul V. Niemeyer, Diana Gribbon Motz, Roger Gregory, Allyson Kay Duncan, Andre M. Davis, Barbara Milano Keenan, and James A. Wynn, Jr.

Most interviews were conducted in person, although a few took place by telephone. Some interviews were as short as fifteen minutes but most lasted between a half hour and one hour. The interviews were all semi-structured—I asked each subject a set list of questions about how the panels were configured in his or her circuit, though we also discussed other topics that arose during the interview.<sup>82</sup> To help ensure that the discussion was as open and candid as possible, I did not record the interviews and I assured each person I interviewed that I would not quote him or her by name.<sup>83</sup> This is why, as with previous scholarship, I attribute my findings to “a judge” or “a senior member of the clerk’s office” within a given circuit.<sup>84</sup> To further protect the identities of the judges and senior court administrators, the findings here generally refrain from naming specific circuits unless it is necessary for the discussion.<sup>85</sup>

#### B. Findings: Considered Panel Assignment in Five Circuit Courts

What follows is a compilation of the findings from the interview-based study. These findings both show that the courts did not employ strictly random panel assignment during this time period and also detail the various factors they considered when creating panels (again, to stress a point from the introduction, none of these factors related to the ideology of panel members). This subpart constructs a typology that organizes

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<sup>82</sup> For a discussion of semi-structured interviews, see generally MARGARET C. HARRELL & MELISSA A. BRADLEY, *DATA COLLECTION METHODS: SEMI-STRUCTURED INTERVIEWS AND FOCUS GROUPS* (2009).

<sup>83</sup> Assurances of anonymity are not unusual in interview-based studies about the federal judiciary. See, e.g., Tracey E. George, Mitu Gulati & Ann C. McGinley, *The New Old Legal Realism*, 105 NW. U. L. REV. 689, 709 n.98 (2011) (providing information about the subject’s rights of confidentiality and anonymity for a study that included interviews with federal judges); Mitu Gulati & Richard A. Posner, *The Management of Staff by Federal Court of Appeals Judges*, 69 VAND. L. REV. 479, 480 (2016) (“The judges interviewed for this study were promised anonymity and that no identifying information would be disclosed.”); cf. David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information*, 127 HARV. L. REV. 512, 520 (2013) (describing the practice of granting subjects anonymity in studies drawing on interviews with U.S. government insiders).

<sup>84</sup> See Levy, *supra* note 68, at 327. For the present Article, I also use only male pronouns when referring to judges or senior administrators I interviewed to further protect their identities. I also omit the location of the interviews for the same reason.

<sup>85</sup> As close readers will notice, attributions nevertheless include circuit designations (i.e., “Interview with a Judge of the U.S. Court of Appeals for the X Circuit”) in order to maintain scholarly standards.

the factors that were considered into categories based on their stated purpose. Categories include: increasing efficiency, enhancing collegiality, and providing special training for new judges. This analytic structure provides a framework for understanding the descriptive findings, and further provides a way to ultimately address the normative questions raised by panel assignment.<sup>86</sup>

Before discussing the data, a few caveats are in order. First, the categories outlined below are not mutually exclusive. For example, it is entirely possible that a single practice can both enhance collegiality and also provide special training for new judges. That said, the subjects typically described the departures as being related to one purpose. Accordingly, I categorize the practice with the purpose so identified.<sup>87</sup>

Second, as the preceding paragraph suggests, these categories are based upon how the judges and senior court administrators described the purposes of the practices. For example, several judges described the practice of ensuring that each judge sit with every other judge at least some number of times per term as being motivated by a desire to enhance the court's collegiality; accordingly, this particular practice is described under the heading of collegiality. As with any study that relies on interviewing, this study is limited by the information provided by the subjects,<sup>88</sup> and it is possible that the motivations were not accurately, or at least fully, described. That said, one can look to external indications of the subjects' accuracy with many of the categories here. For instance, it is difficult to imagine a rationale for encouraging every judge to sit with every other judge that did not include, at least in part, an appeal to collegiality.

Third, the findings do not purport to capture all of the factors that were considered in creating panels. Again, as with any interview-based project, the data is dependent upon the responses of the interviewees.<sup>89</sup> It is possible that in any given circuit, there were other factors that went into panel assign-

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<sup>86</sup> See *infra* Part III.

<sup>87</sup> I do, however, note the rare instances in which a practice was identified with more than one purpose, see *infra* note 113 and accompanying text, and those in which a practice was not identified with a purpose, see *infra* notes 141-51 and accompanying text.

<sup>88</sup> See, e.g., George, Gulati & McGinley, *supra* note 83, at 709 (noting how, for a large-scale interview-based project, it was possible that some of the interviewees had not been "completely candid," but explaining that the subjects generally seemed "comfortable and forthcoming").

<sup>89</sup> See *id.*

ment that were not captured in interviews and thus are not presented here. The study was designed to mitigate this possibility—by interviewing multiple subjects from each circuit and asking a range of questions about how panels were formed—but it is a limitation that bears mentioning.

Finally, it is important to note that the practices listed here do not necessarily convey how the courts are creating their calendars today. Practices regarding panel formation, like court practices generally, may change as the relevant actors turn over.<sup>90</sup> Accordingly, these practices should be understood as current as of the dates of the interviews, unless otherwise noted.<sup>91</sup>

### *Accommodating Schedules / Managing Logistics*

The most common departure from randomness came from accommodating the scheduling needs and preferences of judges. In four of the five circuits surveyed here, the courts took these factors into account when creating oral argument panels. By and large, these departures were described as purely logistical.

In one circuit, the deputy chief executive began the process of creating argument panels by gathering information about each judge's upcoming availability.<sup>92</sup> He noted when some judges were planning to travel and other scheduling preferences they had about sitting dates, and then tried to accommodate them.<sup>93</sup> The process was similar in another circuit.<sup>94</sup> There, information was collected from judges about dates that

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<sup>90</sup> Indeed, the chief judges of the circuits studied here have all turned over since the focal period of this study. Specifically, Merrick Garland replaced David B. Sentelle as Chief Judge of the United States Court of Appeals for the D.C. Circuit on February 12, 2013; Jeffrey R. Howard replaced Sandra Lynch as Chief Judge of the United States Court of Appeals for the First Circuit on June 16, 2015; Robert Katzmann replaced Dennis J. Jacobs as Chief Judge of the United States Court of Appeals for the Second Circuit on September 1, 2013; D. Brooks Smith replaced Theodore A. McKee as Chief Judge of the United States Court of Appeals for the Third Circuit on October 1, 2016; and Roger Gregory replaced William Byrd Traxler, Jr. as Chief Judge of the United States Court of Appeals for the Fourth Circuit on July 8, 2016.

<sup>91</sup> There is one practice discussed here that I was told had previously been in place, but, I was told, was not still in place by the time of the study—a point that I note. See *infra* notes 135–40 and accompanying text.

<sup>92</sup> Interview with a Senior Member of the Clerk's Office, U.S. Court of Appeals for the First Circuit (June 18, 2012).

<sup>93</sup> Interview with a Judge of the U.S. Court of Appeals for the First Circuit (June 18, 2012); Interview with a Senior Member of the Clerk's Office, U.S. Court of Appeals for the First Circuit, *supra* note 92.

<sup>94</sup> Interview with a Senior Member of the Clerk's Office, U.S. Court of Appeals for the Third Circuit (Apr. 20, 2012).

should be blocked out—for a conference or vacation—and that information was inputted into a computer program that ultimately created a calendar to be approved by the chief judge.<sup>95</sup> In a third circuit, several judges mentioned that beyond accommodating such preferences as wanting to not sit on a particular date so as to attend a conference, their court might accommodate a judge's teaching schedule at a law school or even a judge's desire to maximize consecutive days in the sitting city.<sup>96</sup> Specifically, one judge noted that some members of the court taught and therefore wanted to sit more outside of the semester.<sup>97</sup> The same judge went on to note that while some out-of-town judges requested to have their sittings condensed to Monday through Friday, others wanted to spend the weekend in the sitting city and so preferred to have sittings that extended from, say, Thursday to Wednesday of the following week.<sup>98</sup> In short, these courts consistently departed from strict randomness to accommodate the various scheduling needs and preferences of the judges, though the extent of the accommodation varied among these circuits.

It may seem inevitable and unavoidable that courts accommodate the scheduling preferences of its judges, but it is important to note that not every circuit did so. In contrast to the other four circuits, the Fourth Circuit did not factor in availability when creating argument panels.<sup>99</sup> The court was able to do this because of another difference between it and the other circuits surveyed here—it held designated court weeks. Rather than have a rolling calendar whereby the court was often in session, the Fourth Circuit had specific weeks set aside each year for hearing cases. As such, the judges all knew well in advance that they were expected to be in Richmond, where sittings are typically held, during those times.<sup>100</sup> The judges then formed their schedules around these dates, and so no one mentioned a need to accommodate them.

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<sup>95</sup> *Id.*

<sup>96</sup> See Interview with a Judge of the U.S. Court of Appeals for the Second Circuit (Mar. 5, 2012); Interview with a Judge of the U.S. Court of Appeals for the Second Circuit (July 25, 2013).

<sup>97</sup> Interview with a Judge of the U.S. Court of Appeals for the Second Circuit (Mar. 5, 2012), *supra* note 96.

<sup>98</sup> *Id.*

<sup>99</sup> Interview with a Senior Member of the Clerk's Office, U.S. Court of Appeals for the Fourth Circuit (June 12, 2012).

<sup>100</sup> As I discuss at greater length in Part IV, it would be difficult for some of the other circuits to hold similarly structured court weeks, not least because most of those circuits hear argument in a higher percentage of cases. See *infra* subpart IV.A.

*Maximizing Judicial Resources*

Several of the circuit courts took particular care to honor the scheduling preferences of senior judges. The motivating rationale for this departure was quite different from balancing pure logistics, however. By accommodating the requests of the senior judges first, the court was ultimately more likely to maximize the number of days those judges would sit. Because senior judges decide what kind of workload they will take on,<sup>101</sup> failing to accommodate their scheduling preferences might mean that they decide to sit with the court for fewer days. Since any time a senior judge is willing to devote to hearing cases is a net gain for the court in judicial resources,<sup>102</sup> the purpose of the rule was to ensure the greatest number of sitting days from the senior judges, thereby maximizing judicial resources overall.

Apart from the Fourth Circuit, the courts of appeals were consistent in accommodating the scheduling preferences of senior judges. Tying back to the previous departure from strict randomness, I was told that in one circuit, although the deputy circuit executive tried to accommodate the scheduling preferences of all judges, this was especially true of the preferences of senior judges.<sup>103</sup> A senior member of the clerk's office in another circuit said that information was collected regarding when senior judges wanted to sit, and then that information was factored into the creation of panels.<sup>104</sup> A senior member of a clerk's office in another circuit stated that senior judges were allowed to inform the office of when they would like to sit—say, two times in September.<sup>105</sup> A senior judge in that circuit reported being able to request, and indeed insist upon, a certain

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<sup>101</sup> See *supra* note 12 and accompanying text.

<sup>102</sup> To be sure, if a court needed additional days of service beyond what its senior judges were willing to provide, it would likely call upon visiting judges to sit by designation. See Marin K. Levy, *Visiting Judges* (in progress). From this vantage point, one might say that accommodating the scheduling preferences of the senior judges ultimately reduces the reliance on visiting judges but does not necessarily provide a net gain in terms of judicial resources. While this may be true from a system-wide perspective, from the perspective of each individual court, accommodating the preferences of senior judges increases their own judicial resources. Moreover, many judges have noted the limitations of using visitors and have commented that having panels made up only of one's own court is easier and more efficient. See *id.*

<sup>103</sup> Interview with a Senior Member of the Clerk's Office, U.S. Court of Appeals for the First Circuit, *supra* note 92.

<sup>104</sup> Interview with a Senior Member of the Clerk's Office, U.S. Court of Appeals for the Third Circuit, *supra* note 94.

<sup>105</sup> Interview with a Senior Member of the Clerk's Office, U.S. Court of Appeals for the D.C. Circuit (Apr. 30, 2012).

sitting schedule.<sup>106</sup> A former chief judge of another circuit said that in his court, a senior judge might say that she would be willing to sit for fifteen days and would like eight of them to be in September and October and so forth.<sup>107</sup> In our interview, the judge acknowledged that this practice made an “inroad” into randomness.<sup>108</sup> Again, the rationale was clear—as one former chief judge of the same circuit put it, senior judges would be willing to give more days if they were accommodated.<sup>109</sup>

### *Increasing Efficiency*

Related to the general rationale of increasing judicial time, there was at least one departure from random panels based on the goal of efficiency. This departure stemmed from selecting panels to hear cases following a remand.<sup>110</sup> The thought was that if the original panel had put a considerable amount of time into the case during its first iteration at the court, it would save judicial time for those same panel members to decide the case during its second iteration.

Specifically, one judge stated that the panels were all randomly created in his circuit except if cases were coming back following a remand either to the district court or from the Supreme Court.<sup>111</sup> Another judge of the same circuit stated that if they had to handle a remand, the same panel (meaning the original panel) would hear it.<sup>112</sup> He went on to note that this was done for efficiency purposes but also mentioned that the rule is a prudent one in that the parties would not have to

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<sup>106</sup> Interview with a Judge of the U.S. Court of Appeals for the D.C. Circuit (Apr. 30, 2012).

<sup>107</sup> Interview with a Judge of the U.S. Court of Appeals for the Second Circuit (Feb. 29, 2012).

<sup>108</sup> *Id.*

<sup>109</sup> Interview with a Judge of the U.S. Court of Appeals for the Second Circuit (Mar. 6, 2012). It is worth noting that the gains in judicial resources could extend beyond additional sitting days. Having one’s specific scheduling preferences honored would provide the court with one more incentive for eligible judges to take senior status (thereby “freeing up” another seat on the court sooner rather than later).

<sup>110</sup> The most recent monograph on case management from the Federal Judicial Center also notes this practice in some circuits surveyed here. See HOOPER, MILETICH & LEVY, *supra* note 52, at 55, 67.

<sup>111</sup> Interview with a Judge of the U.S. Court of Appeals for the Fourth Circuit (June 14, 2013).

<sup>112</sup> Interview with a Judge of the U.S. Court of Appeals for the Fourth Circuit (June 14, 2013).

contend with the equivalent of umpires changing in the middle of the game.<sup>113</sup>

### *Providing Training*

Two of the circuit courts reported creating special panels for judges in their first year or two on the court, with the goal of providing new judges the experience of presiding. The rationale was that it was helpful for the junior judge to know what it is like to be the lead judge of a panel—to manage oral argument, to assign opinions, and, in some circuits, to file any non-published dispositions.<sup>114</sup> The difficulty in ensuring such an experience is that a judge presides only if she is the most senior member of the active judges on the panel.<sup>115</sup> It is therefore extremely unlikely that a newly appointed judge would be the senior most active judge on a panel early in her tenure if the panels were left to chance. Instead, the experience of presiding could only be guaranteed by putting the new judge on a panel either with two senior judges or with a senior judge and a judge from another court sitting by designation.<sup>116</sup>

In two circuits, there has been a tradition of deliberately creating just this type of panel, so as to ensure that each new judge preside within that judge's early time on the court. A senior member of the clerk's office in one circuit stated that the deputy circuit executive tried to give new judges the experience of presiding sometime in their first year.<sup>117</sup> A judge of this circuit suggested, however, that the number of judges on the court was sufficiently small so as to cause new judges to preside early on in any event (meaning that intentional departures

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<sup>113</sup> *Id.*

<sup>114</sup> In the Second Circuit, for example, the presiding judge is generally responsible for drafting in the first instance and then filing summary orders—the Circuit's form of unpublished dispositions. *See, e.g.,* HOOPER, MILETICH & LEVY, *supra* note 52, at 80 (noting that the presiding judge's law clerk typically will prepare a summary order when the judge expects that a given case will be decided without a published opinion).

<sup>115</sup> *See* 28 U.S.C. § 45(b) (2012) (“[C]ircuit judges of the court in regular active service shall have precedence and preside according to the seniority of their commissions.”). The only exception to this rule is that the chief judge of the circuit always presides. *See id.* (“The chief judge shall have precedence and preside at any session of the court which he attends.”).

<sup>116</sup> As one judge noted, there is an interesting relationship between caseload and days spent as a presider in his circuit. Because, he said, the caseload had fallen some in his court, there were fewer judges sitting by designation and, as a result, he was the presiding judge in fewer cases. *See* Interview with a Judge of the U.S. Court of Appeals for the Second Circuit, *supra* note 96.

<sup>117</sup> Interview with a Senior Member of the Clerk's Office, U.S. Court of Appeals for the First Circuit, *supra* note 92.

on this account would be rare).<sup>118</sup> A former chief judge of another circuit stated that he had created special panels for new judges to give those judges the experience of presiding.<sup>119</sup> A former chief judge of the same circuit stated that he had done the same, noting that a little orchestration was required to end up with a panel that allows a new judge to preside.<sup>120</sup>

Judges from one of the circuits that had this special practice all commented on how useful it had been for them to preside early in their tenure. One judge said that he thought the practice overall was a good idea, and specifically that it was good to have a new judge learn what the burdens are on a presiding judge, as well as what a presider can and cannot do.<sup>121</sup> Another judge stated that he thought it was important to break new judges in by giving them some limited opportunity to preside, sooner rather than later.<sup>122</sup> Finally, a third judge commented that the practice makes one really learn the different techniques and rules of a presider and the role of a presider.<sup>123</sup> The judge concluded that having the experience early on was very helpful, and made him a better judge even when he was not presiding.<sup>124</sup>

### *Enhancing Collegiality*

All of the circuit courts surveyed here stated that they tried—in varying degrees—to take into account the number of times each judge had sat with every other judge when creating panels. Some of the circuits had precise rules about “co-sits”—that every judge must sit with every other judge at least some number of times, but no more than some other number of times. Other circuits had no precise rule about co-sits and simply tried to ensure that the judges were “mixed up” every so often. The given rationale for attempting to equalize co-sits was consistent: doing so would enhance the court’s collegiality.

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<sup>118</sup> Interview with a Judge of the U.S. Court of Appeals for the First Circuit, *supra* note 93.

<sup>119</sup> Interview with a Judge of the U.S. Court of Appeals for the Second Circuit, *supra* note 109.

<sup>120</sup> Interview with a Judge of the U.S. Court of Appeals for the Second Circuit, *supra* note 106.

<sup>121</sup> Interview with a Judge of the U.S. Court of Appeals for the Second Circuit (Aug. 9, 2013).

<sup>122</sup> Interview with a Judge of the U.S. Court of Appeals for the Second Circuit, *supra* note 96. This Judge went on to say that the experience of presiding should not happen *too* soon, either. *Id.*

<sup>123</sup> Interview with a Judge of the U.S. Court of Appeals for the Second Circuit (July 25, 2013).

<sup>124</sup> *Id.*

Regarding the mechanics of co-sits, one judge stated that in his circuit, each judge sat with each other judge at least four times but no more than twelve times during a term.<sup>125</sup> He added that if a judge could not sit during one of his assigned days and tried to switch with another judge, the chief judge would not give his approval if the number of co-sittings went outside the accepted range.<sup>126</sup> On the other side of the spectrum, a senior member of the clerk's office in a different circuit stated that the deputy circuit executive of his court simply tried to mix the judges up as much as possible.<sup>127</sup>

Turning to the rationale behind the practice, one judge noted that the chief judges in his circuit had always tried to have everybody sit with everybody else over each term or two—the theory being that if you sat with someone and knew them better, you would tend to like them.<sup>128</sup> A judge of the same circuit stated that it was good for judges to work with all of their colleagues so that they were familiar with them and developed some collegiality.<sup>129</sup> A judge of another circuit said that in his court, no two judges were permitted to sit together more than twice in the same sitting period so that all the judges got to know one another.<sup>130</sup> A judge of still a different circuit stated that the computer program used to create panels was designed to take into account if judges had not sat together for a long period of time, and further stated that their system was great for collegiality.<sup>131</sup> Finally, a judge of the same circuit noted that the judges on his court all wanted to know and sit with each other.<sup>132</sup> He stated that he therefore saw the court's practice of equalizing co-sits as being consistent with the court's general ethos of civility.<sup>133</sup>

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<sup>125</sup> Interview with a Judge of the U.S. Court of Appeals for the D.C. Circuit (Apr. 26, 2012).

<sup>126</sup> *Id.*

<sup>127</sup> Interview with a Senior Member of the Clerk's Office, U.S. Court of Appeals for the First Circuit, *supra* note 92.

<sup>128</sup> Interview with a Judge of the U.S. Court of Appeals for the Second Circuit, *supra* note 121.

<sup>129</sup> Interview with a Judge of the U.S. Court of Appeals for the Second Circuit, *supra* note 123.

<sup>130</sup> Interview with a Judge of the U.S. Court of Appeals for the Third Circuit (Apr. 20, 2012).

<sup>131</sup> Interview with a Judge of the U.S. Court of Appeals for the Fourth Circuit (June 12, 2013).

<sup>132</sup> Interview with a Judge of the U.S. Court of Appeals for the Fourth Circuit (July 17, 2013).

<sup>133</sup> *Id.*

### *Avoiding Acrimony*

Related to enhancing collegiality, a few of the judges I interviewed mentioned a pair of rarely-used practices aimed at avoiding acrimony between members of the court: allowing individual judges to identify other judges with whom they were unwilling to sit and allowing the chief judge to keep two judges who were at odds with each other from being on the same panel for a limited time.<sup>134</sup> No judges suggested that either practice was in use during the time I interviewed them.

In one circuit, I was told of a particular judge who had sat on the court a few decades prior who preferred not to sit with certain other members of the court.<sup>135</sup> This judge made his preferences known to the chief judge, who tried to some extent to accommodate them in creating the argument panels.<sup>136</sup> Doing so, it seemed, would avoid acrimony between judges.<sup>137</sup> In another circuit I was informed that this practice had been in use in the past, depending upon the chief judge. Specifically, I was told that some chief judges would accommodate a judge who said he would not sit with another judge, whereas other chief judges would not.<sup>138</sup>

The practice of individual judges making panel requests was contrasted with a slightly different practice, in which a chief judge would separate two judges who had recently been at odds. The chief judge would, in effect, give the judges a cooling-off period, and thus would keep them from sitting on the

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<sup>134</sup> See, e.g., *infra* notes 135 and 138. It is worth noting that there is some tension between the theory behind this practice and the preceding one. That is, all of the courts here thought there was a value in having judges sit together so as to produce greater collegiality, but here the theory is that sometimes judges need to be kept apart for the sake of collegiality, or to avoid acrimony. Though one can see how the two theories can sit side by side—in extreme cases individuals may well need to be apart to, as the judges said, “cool off” and ultimately come back together—the tension bears mentioning as it highlights that not all of these various purposes and strategies are totally obvious and, indeed, they may occasionally be at odds with one another.

<sup>135</sup> Interview with a Judge of the U.S. Court of Appeals for the Second Circuit (Mar. 6, 2012). I learned in conversation that another circuit outside of the five surveyed here had a similar rule, whereby judges were allowed to note if they had a particularly bad experience with a colleague during a sitting so that they could “skip” their next sitting with the offending judge. Telephone conversation with a Judge of the U.S. Court of Appeals for the Seventh Circuit (Jan. 26, 2015).

<sup>136</sup> Interview with a Judge of the U.S. Court of Appeals for the Second Circuit, *supra* note 135.

<sup>137</sup> *Id.*

<sup>138</sup> Interview with a Senior Member of the Clerk’s Office, U.S. Court of Appeals for the Third Circuit, *supra* note 94.

same panel for a limited period of time.<sup>139</sup> One judge volunteered that he thought this practice was on surer footing than the previous one, on the grounds that chief judges have a role in creating a collegial court and avoiding unnecessary acrimony.<sup>140</sup>

### *Considering Unusual Events*

A final group of departures was not associated with any one rationale. Rather, several interview subjects described how particular panels were created for unusual events as if the events themselves necessitated the departure from randomness. These events included: first, holding special sessions of court outside the traditional locales, and second, hosting a retired Supreme Court Justice.

From time to time, some circuits hold special sessions of court—either at a district court in a city outside of the designated locations for oral argument or at a law school within the circuit.<sup>141</sup> Of the five circuits surveyed here, all but the D.C. Circuit reported having held special sittings in the recent past.<sup>142</sup> According to the interviews, the rules of panel configuration and even case assignment<sup>143</sup> were different for these special sessions of court.

As one former chief judge told me, there had been sittings in numerous locations in his circuit—in New Haven, Connecticut, as well as in Albany and on Long Island, New York.<sup>144</sup> The judge noted that for these sittings, judges who lived in that geographic area were often selected to be on the panel.<sup>145</sup> Although not every circuit that held special sittings followed this pattern—a senior member of a clerk's office in one circuit

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<sup>139</sup> Interview with a Judge of the U.S. Court of Appeals for the Second Circuit, *supra* note 107.

<sup>140</sup> Interview with a Judge of the U.S. Court of Appeals for the Second Circuit, *supra* note 121.

<sup>141</sup> See Marin K. Levy, *Where Judges Sit* (in progress 2018).

<sup>142</sup> Interview with a Senior Member of the Clerk's Office, U.S. Court of Appeals for the First Circuit, *supra* note 92; Interview with a Judge of the U.S. Court of Appeals for the Second Circuit, *supra* note 107; Interview with a Senior Member of the Clerk's Office, U.S. Court of Appeals for the Third Circuit, *supra* note 94; Interview with a Judge of the U.S. Court of Appeals for the Fourth Circuit, *supra* note 132.

<sup>143</sup> For example, a senior member of the clerk's office for the First Circuit stated that when the court sits in Maine, it tries to hear Maine cases. See Interview with a Senior Member of the Clerk's Office, U.S. Court of Appeals for the First Circuit, *supra* note 92.

<sup>144</sup> Interview with a Judge of the U.S. Court of Appeals for the Second Circuit, *supra* note 107.

<sup>145</sup> *Id.*

stated that judges were not picked specially for these panels<sup>146</sup>—this was certainly the practice of several of the circuits surveyed here.

Turning to a different kind of special session of court, Justice Sandra Day O'Connor had recently sat by designation with four of the five circuits surveyed here, and in many circuits the rules of panel formation were special for this event. For example, in one circuit a judge noted that during a visit from Justice O'Connor, the Justice ended up on a panel with the chief judge at that time and a former chief judge.<sup>147</sup> The judge I interviewed noted that this was a special panel and suggested that it was structured deliberately.<sup>148</sup> One judge in another circuit noted that the Justice's visit is one of the exceptions to the ostensible rule of random panel assignment.<sup>149</sup> He went on to say that during Justice O'Connor's more recent visit, she sat with the court for two days, and on each panel she was joined by two newly appointed judges to the circuit.<sup>150</sup> The judge of this circuit stated that he did not think this had happened by chance.<sup>151</sup>

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Beyond providing data on how these circuits created their argument panels, the study also provides data on how much the judges seemed to know about these processes. In particular, the findings revealed that at least some judges were not aware of how panels were formed—either because they said so directly or because they provided information that turned out to be inaccurate.

To begin, some judges exhibited a lack of knowledge about the panel assignment practices of other circuits. Specifically, a judge from the D.C. Circuit said that he liked the way his court configured panels and had assumed that every other court put together their panels in the same way.<sup>152</sup> When I told a judge of the Fourth Circuit that some of the other courts create a spe-

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<sup>146</sup> Interview with a Senior Member of the Clerk's Office, U.S. Court of Appeals for the Third Circuit, *supra* note 94.

<sup>147</sup> Interview with a Judge of the U.S. Court of Appeals for the Second Circuit, *supra* note 121.

<sup>148</sup> *Id.*

<sup>149</sup> Interview with a Judge of the U.S. Court of Appeals for the Fourth Circuit, *supra* note 132.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> Interview with a Judge of the U.S. Court of Appeals for the D.C. Circuit (July 25, 2013).

cial panel for new judges to gain the experience of presiding, he said he was surprised to hear this.<sup>153</sup>

More striking than the lack of inter-circuit knowledge was the apparent lack of *intra*-circuit knowledge among the judges interviewed here. When I asked judges about panel formation in the D.C. Circuit, one told me that an algorithm determined them,<sup>154</sup> and another described how a computer program had been used to create panels in the past.<sup>155</sup> At the time I conducted the interviews, the Circuit was not using, nor had ever used, a computer program to create oral argument panels.<sup>156</sup> One Third Circuit judge referred to the computer program that the court employed to help set panels but noted that he did not know precisely how the program worked.<sup>157</sup> A Fourth Circuit judge asked me whether his circuit attempted to equalize the number of co-sittings, as he did not know himself.<sup>158</sup> Another judge of the same circuit likewise said that he did not know that the court had taken co-sits into account when forming panels.<sup>159</sup>

In short, the results of the qualitative study provide an account of how five of the circuit courts created their argument panels. In particular, the findings reveal the challenges presented by creating each court's calendar and the extent to which the relevant decision makers were balancing various factors. They further show how these factors were not entirely appreciated by judicial actors from outside, or sometimes inside, the circuit.

### III

#### ASSESSING PANEL ASSIGNMENT PRACTICES

Contrary to the widespread assumption that panels are randomly formed in the federal appellate courts,<sup>160</sup> the findings

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<sup>153</sup> Interview with a Judge of the U.S. Court of Appeals for the Fourth Circuit, *supra* note 132.

<sup>154</sup> Interview with a Judge of the U.S. Court of Appeals for the D.C. Circuit, *supra* note 152.

<sup>155</sup> Interview with a Judge of the U.S. Court of Appeals for the D.C. Circuit, *supra* note 125.

<sup>156</sup> Interview with a Senior Member of the Clerk's Office, U.S. Court of Appeals for the D.C. Circuit, *supra* note 105.

<sup>157</sup> Interview with a Judge of the U.S. Court of Appeals for the Third Circuit (Apr. 20, 2012).

<sup>158</sup> Interview with a Judge of the U.S. Court of Appeals for the Fourth Circuit (July 31, 2013).

<sup>159</sup> Interview with a Judge of the U.S. Court of Appeals for the Fourth Circuit, *supra* note 111.

<sup>160</sup> See *supra* subpart I.A.

from the previous Part reveal the myriad factors those courts consider when deciding which judges will sit together. Normative questions follow from these descriptive findings. Is it problematic that panel assignment is not strictly random? Are there at least some factors that should not be taken into account when deciding which judges will sit together?

The first question can be dealt with handily enough. Although it might be tempting in theory to argue that courts should engage in strictly random assignment, such a demand is impossible to satisfy in practice. As the previous Part shows, most courts simply cannot perform the functional equivalent of pulling names out of a hat for each sitting. If a chief judge or clerk of court is creating a calendar for one year hence, there will be some limitations—a judge may be scheduled to undergo surgery during this week, or a judge may have a meeting of a particular rules committee that week—that, as a practical matter, must be taken into account when creating panels. This means that at the outset, one must accept that panel assignment cannot be left to chance alone.

The second question is much more complicated to answer. Outside of those instances in which the courts arguably *must* engage in deliberate panel assignment, there is inevitably a world of trade-offs. For example, taking into account the specific sitting requests of senior judges involves moving further away from a random configuration of panels but comes with a gain in judicial resources. How should the courts make sense of such options?

To even begin to balance the costs and benefits of these practices requires a thicker account of the values of randomness in the first place. Despite how much scholarship has assumed that panels are randomly formed as a positive matter, why randomness is desirable is severely undertheorized as a normative matter. Accordingly, this Part first identifies the values of randomness in configuring panels by drawing upon arguments for randomness in related adjudicatory contexts. It then turns back to developing a balancing framework and providing preliminary thoughts on specific court practices, which could ultimately have purchase on questions regarding other aspects of judicial administration more generally.<sup>161</sup>

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<sup>161</sup> Random selection methods are used, at least in part, in a wide range of other judicial administration processes, from circuit selection within multidistrict litigation, see 28 U.S.C. § 2112(a)(1) (2012), to case assignment to panels, see *infra* note 162.

### A. Values of Randomness

What is the value of having judges randomly selected to sit together? In few other contexts—legal or non-legal—would one tout the randomness of a body’s composition as a virtue when it is selected from a larger group of eligible participants. Coaches do not randomly choose who will play and who will sit on the bench in a given game; participants in academic panel discussions are not determined by lottery. Nor, to turn to other branches of government, are Congressional committees, agency leadership, or other governing groups assigned randomly. In all of these contexts, individuals are selected based on nonrandom characteristics such as their backgrounds and relative competencies. These observations then push the question to the forefront: why should we value utilizing a random process for panel assignment?

This is a topic that has been left without a theory: no prior scholarship has discussed the value of random panel assignment. That said, there has been a little more, from scholars and the courts themselves, on why randomness is important in related areas, such as the assignment of cases to judges. It is useful, as a starting point, to examine those arguments and ultimately consider their applicability to panel assignment.

It is generally thought that cases are randomly assigned to judges at the trial level<sup>162</sup>—and that randomness is important. Indeed, there have been a few high-profile cases in which the parties objected to the assigned judge precisely because the assignment was deliberate. In one prominent example from the Southern District of New York, a petitioner sought a writ of habeas corpus on the ground that the trial judge in state court had been assigned to the case because that judge had previ-

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<sup>162</sup> See, e.g., Edward K. Cheng, *The Myth of the Generalist Judge*, 61 STAN. L. REV. 519, 523 (2008) (“[W]ell-established rules and norms within the courts of general jurisdiction require the random assignment of cases to ensure that judges see all case types.”); Samaha, *supra* note 49, at 47 (“Lotteries are a key part of the case assignment procedure in many federal district courts, in the federal courts of appeals, in many state trial courts and appellate courts, in federal immigration courts, and elsewhere.”). However, there are some known exceptions. For example, in some districts, a judge may be assigned a case that is “related” to a case that is already on the judge’s docket. See S.D.N.Y. Rules for the Division of Business Among District Judges, Rule 13; see generally Katherine A. Macfarlane, *The Danger of Nonrandom Case Assignment: How the Southern District of New York’s “Related Cases” Rule Shaped Stop-and-Frisk Rulings*, 19 MICH. J. RACE & L. 199, 210–15 (2014) (discussing how the Southern District of New York’s case assignment rules appear to mandate random assignment but in fact allow for deliberate assignment methods, including the assignment of related cases to the same judge).

ously reviewed the wiretap and search warrant applications.<sup>163</sup> The problem, the petitioner argued, was that this earlier assignment had been based purely on which judge the district attorney had chosen to bring the applications to.<sup>164</sup> As such, the petitioner claimed, the prosecution was essentially permitted to select the judge who would supervise the trial—thereby resulting in a denial of the petitioner's due process rights.<sup>165</sup> Although the federal district court did not agree that the state assignment system created a *per se* constitutional violation, the court did note that there were significant concerns attendant with such a system.<sup>166</sup>

Specifically, the district court stated that while all judges on a given court are vetted by a selection and appointment process, this does not mean that those judges are interchangeable. Quoting an earlier Supreme Court opinion on the matter of recusal,<sup>167</sup> the district court wrote:

Judges are not fungible; they cover the constitutional spectrum; and a particular judge's emphasis may make a world of difference when it comes to rulings on evidence, the temper of the courtroom, the tolerance for a proffered defense, and the like. Lawyers recognize this when they talk about "shopping" for a judge; Senators recognize this when they are asked to give their "advice and consent" to judicial appointments; laymen recognize this when they appraise the quality and image of the judiciary in their own community.<sup>168</sup>

The implicit message from the district court was that having one judge and not another decide a case could impact the substantive outcome of that case. The concern, then, with an assignment process that essentially left the choice of the judge to a particular party was that the outcome of the case could be predetermined or biased before it even began. In the words of the court, "The concept of judge-shopping by a prosecutor for a

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<sup>163</sup> See *Francolino v. Kuhlman*, 224 F. Supp. 2d 615, 619 (S.D.N.Y. 2002), *aff'd*, 365 F.3d 137 (2d Cir. 2004). Thanks to Maggie Lemos and Josh Fischman for pointing me to this case. For a similar example in the Supreme Court of Louisiana, see *State v. Simpson*, 551 So. 2d 1303, 1304 (La. 1989) (*per curiam*) (holding that a process whereby the district attorney was effectively able to select the judge to preside over criminal cases violated due process).

<sup>164</sup> *Francolino*, 224 F. Supp. 2d at 619.

<sup>165</sup> *Id.*

<sup>166</sup> Specifically, the court concluded that while "[p]rosecutorial [j]udge-[s]hopping" may give rise to "serious concerns about the appearance of partiality," a showing of actual prejudice is required for habeas corpus relief. *Id.* at 630-38.

<sup>167</sup> See *Laird v. Tatum*, 409 U.S. 824 (1972) (Rehnquist, J.). Justice Rehnquist's opinion, in turn, drew upon a dissenting opinion by Justice Douglas in *Chandler v. Judicial Council*, 398 U.S. 74, 137 (1970). *Laird*, 409 U.S. at 834-35.

<sup>168</sup> *Francolino*, 224 F. Supp. 2d at 630 (quoting *Laird*, 409 U.S. at 834-35).

judge whom the prosecutor believes would be inclined or biased in his favor offends our basic notions of justice.”<sup>169</sup>

Beyond the concern that a nonrandom assignment process could bias the outcome of the case is the concern that the process could create an *appearance* of bias. Here, the District Court for the Southern District elaborated the specific dangers: “Any criminal justice system in which the prosecutor alone is able to select the judge of his choice, even in limited types of cases, raises serious concerns about the appearance of partiality, irrespective of the motives of the prosecutor in selecting a given judge.”<sup>170</sup> Other courts have similarly weighed in on the concern of perceived bias when a deliberate case assignment process is employed at the trial court. Writing for the Seventh Circuit, Judge Richard Posner has called the practice of allowing a prosecutor to select the judge “certainly unsightly.”<sup>171</sup> Although this concern might seem obvious in the case of a prosecutor essentially being able to pick the judge, other nonrandom processes—for example, having the chief judge assign cases to judges based on who she thinks should decide them—would nevertheless raise this same kind of worry. As the Ninth Circuit has stated, “[t]he suggestion that the case assignment process is being manipulated for motives other than the efficient administration of justice casts a very long shadow” and can affect the entire court system.<sup>172</sup> And as the U.S. District Court for the Eastern District of Michigan put it in the famous case of *Grutter v. Bollinger*,<sup>173</sup> “random assignment of cases . . . has the obvious, commonsensical and beneficial purpose of maintaining the public’s confidence in the integrity of the judiciary. This purpose is defeated when cases . . . are assigned, or reassigned, to judges who are handpicked to decide the particular case . . . in question.”<sup>174</sup> The court concluded: “A system of random assignment is purely objective and is not open to the criticism that business is being assigned to particular judges in accordance with any particular agenda.”<sup>175</sup>

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<sup>169</sup> *Francolino*, 224 F. Supp. 2d at 631.

<sup>170</sup> *Id.* at 630.

<sup>171</sup> *Tyson v. Trigg*, 50 F.3d 436, 442 (7th Cir. 1995).

<sup>172</sup> *Cruz v. Abbate*, 812 F.2d 571, 574 (9th Cir. 1987).

<sup>173</sup> 16 F. Supp. 2d 797 (E.D. Mich. 1998), *rev’d* 288 F.3d 732 (6th Cir. 2002) (en banc), *aff’d* 529 U.S. 306 (2003).

<sup>174</sup> *Id.* at 802.

<sup>175</sup> *Id.* Interestingly enough, the potential nonrandomness of case assignment was again an issue in *Grutter* at the court of appeals, *Grutter v. Bollinger*, 247 F.3d 631 (6th Cir. 2001), and at the en banc court of the Sixth Circuit, *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002) (en banc). See Tracey E. George & Albert

This consideration of case assignment at the trial court level reveals two clear reasons for valuing randomness. The intentional assignment of cases to judges is understood as deeply problematic for its potential to predetermine case outcomes and certainly for its appearance of predetermining case outcomes. The value of random case assignment then, at least largely, is that it ensures that the selection process is not slanted in a particular way so as to affect the results of cases and to assure the public that the institution is fair. It is therefore a prophylactic measure; randomness is not valuable in and of itself, but rather useful as a way to protect the process, thereby protecting the substantive outcomes of cases and the perceived legitimacy of the courts.<sup>176</sup>

It is readily apparent how these values are meaningful in the related context of assigning cases to oral argument panels at the courts of appeals.<sup>177</sup> The suggestion of deliberately assigning cases to certain panels brings concerns about predetermining the outcome of those cases and harming the perceived legitimacy of the courts. Indeed, this is presumably why courts state that the appeals before any given panel have been ran-

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H. Yoon, *Chief Judges: The Limits of Attitudinal Theory and Possible Paradox of Managerial Judging*, 61 VAND. L. REV. 1, 2-4 (2008).

<sup>176</sup> The values associated with random case assignment at the trial court level do not necessarily translate into other contexts, particularly contexts in which a substantive, rather than procedural, decision is being made. For example, judges who have flipped coins to make substantive decisions in cases have been reprimanded and even removed from office. See RICHARD A. POSNER, *OVERCOMING LAW* 491 n.28 (1995) (describing how a New York City judge was removed from office after admitting that he decided close cases by flipping a coin); see also Samaha, *supra* note 49, at 27 n.102 (first citing *In re Daniels*, 340 So. 2d 301, 302, 307 (La. 1976); and then citing *Judicial Inquiry & Review Comm'n of Va. v. Shull*, 651 S.E.2d 648, 650, 652, 658 (Va. 2007)). The concern is not simply that randomness in substantive decision making creates unsound adjudication, but also that it will cause the public to question legal institutions. See Judith Resnik, *Precluding Appeals*, 70 CORNELL L. REV. 603, 610-11 (1985) (describing how the public was "incensed" following the case of the judge in New York City who had used coin flips to decide cases, as the process "offended this society's commitment to rationality").

<sup>177</sup> As Professors George and Yoon have written, although there is no constitutional or statutory requirement of random assignment of cases to judges, "most courts have instituted procedures that result in roughly random assignment of judges to cases." George & Yoon, *supra* note 175, at 32. The authors do, however, note a few high-profile examples of alleged nonrandom case assignment. See *id.* at 2-4, 31.

domly drawn,<sup>178</sup> with little exception.<sup>179</sup> The one distinguishing feature between the two contexts concerns the number of decision makers that will impact a case's outcome (and thus the appearance of impropriety). With district courts, the concern about utilizing a nonrandom process for case selection is that a judge will be selected who is predisposed to be favorable to a particular side. With appellate courts, as there are three decision makers instead of one, the concern need not be that all of the judges hold a certain position but only that a majority does. Indeed, some of the most high-profile accusations of nonrandomness have been precisely of this sort.

Just after the Ninth Circuit struck down Nevada's ban on same-sex marriage in 2014, the Coalition for the Protection of Marriage filed a motion for rehearing en banc; part of the Coalition's argument was that two of the judges on the original panel were known to be in favor of same-sex marriage and had heard a disproportionately high number of such appeals.<sup>180</sup> Specifically, the Coalition argued that Judges Stephen Reinhardt and Marsha Berzon—who were “publicly perceived to be favorably disposed to arguments for expanding the rights of gay men and lesbians”—had been assigned to many of the same-sex marriage cases, in addition to the one at hand, and it was virtually impossible that this was the result of chance.<sup>181</sup> Accordingly, the Coalition argued that “[t]he appearance is strong and inescapable that the assignment of this case to this three-judge panel was not done through a neutral process but rather was done in order to influence the outcome in favor of the plaintiffs.”<sup>182</sup>

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<sup>178</sup> See J. Robert Brown, Jr. & Allison Herren Lee, *Neutral Assignment of Judges at the Court of Appeals*, 78 TEX. L. REV. 1037, 1041 (2000) (“To create neutrality, all federal circuits purport to rely on the random assignment of judges to panels.” (footnote omitted)). The authors go on, however, to call into question whether neutral assignment of cases to panels is actually taking place in the appellate courts. *Id.* at 1069–79.

<sup>179</sup> In interviewing judges and court administrators about panel configuration, the conversation sometimes touched upon case assignment. I was routinely told that cases are randomly assigned to panels, with the exception that some judges will be recused from hearing certain cases, and that cases following remand will often be sent back to at least some of the members of the original panel in some circuits. For more on this latter topic, see *supra* subpart II.B.

<sup>180</sup> *Petition of Appellee Coal. for the Prot. of Marriage for Rehearing En Banc* at 4, 11; *Latta v. Otter*, 779 F.3d 902 (9th Cir. 2015) (No. 12-17668), *denying rehearing en banc* to 771 F.3d 456 (9th Cir. 2014), *rev'd*, *Sevcik v. Sandoval*, 911 F. Supp. 2d 996 (D. Nev. 2012).

<sup>181</sup> *Id.* at 12. Specifically, the Coalition argued that the chances of this happening by random process were, by their calculations, 441-to-1. *Id.* at 14.

<sup>182</sup> *Id.* at 9.

This was not the first time that allegedly nonrandom assignment had been used to criticize or delegitimize substantive outcomes in contested areas of law. In the early 1960s, Judge Benjamin Cameron of the Fifth Circuit claimed that more than two-dozen civil rights cases had been assigned to panels with a “pro-civil rights” majority, all to influence the outcome of the cases.<sup>183</sup> Examining evidence that the cases in the Fifth Circuit were not, in fact, randomly assigned to panels, J. Robert Brown, Jr. and Allison Lee made a plea for truly “neutral” case assignment, drawing upon the values noted above.<sup>184</sup> A primary justification for this recommendation was “the awareness that, in the absence of a neutral assignment system, judges will sometimes gain access to a panel in order to affect the outcome of a case.”<sup>185</sup> The authors also noted that such a system would “preserve the appearance of judicial impartiality.”<sup>186</sup> Accordingly, they concluded that “[j]udges and cases are to be paired randomly, not deliberately.”<sup>187</sup> Again, in the realm of assigning cases to panels, randomness “matters” not because it is valuable in and of itself, but because it ensures that no process is employed that would bias the outcome of cases and assures the public that the process is fair.<sup>188</sup>

The reasons for favoring randomness in case assignment appear applicable to panel assignment as well. First and foremost, a primary concern with nonrandom panel configuration is that the selection of each trio of judges could be done in a way that ultimately affects case outcomes—most plausibly because it affects the ideological balance of those panels. To see how this is so, imagine that because of panel assignment practices in a given circuit, that circuit ended up with quite a few panels with two liberal judges and one conservative judge—and fewer panels with three liberal judges or one liberal judge and two conservative judges. To be sure, these practices might not go on to impact the majority of cases coming before the circuit. Some ideologically charged cases might come before a panel

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<sup>183</sup> See Brown & Lee, *supra* note 178, at 1049–50 (quoting *Armstrong v. Bd. of Educ. of Birmingham*, 323 F.2d 333, 352 (5th Cir. 1963) (Cameron, J., dissenting)).

<sup>184</sup> *Id.* at 1066–69.

<sup>185</sup> *Id.* at 1066.

<sup>186</sup> *Id.* at 1111.

<sup>187</sup> *Id.* at 1069.

<sup>188</sup> For another high-profile example of alleged nonrandomness at the court of appeals, one can look at the en banc decision of *Grutter* from the Sixth Circuit. *Grutter v. Bollinger*, 288 F.3d 732, 754–58 (6th Cir. 2002) (en banc) (Moore, J., concurring); *id.* at 810–14 (Boggs, J., dissenting). For a helpful discussion of the claims of nonrandomness in *Grutter*, see George & Yoon, *supra* note 175, at 2–4.

with two liberal judges that otherwise would have come to an all-liberal panel. And of course, a substantial number of cases have no clear ideological bent at all or have ideological implications but are “easy” cases that are plainly controlled by precedent or statute, and thus would not be affected by the change in panel composition. That said, it is still possible, if not likely, that at least some cases in this scenario would be decided differently because there were now more “majority” liberal panels.<sup>189</sup> Thus, there is a palpable concern that a nonrandom process in the panel configuration context could lead to biased or skewed results of cases.

Second, with respect to concerns about appearances, the judges interviewed for this Article were quite attuned to the public’s perception of the judiciary’s legitimacy. One judge commented that he thought his circuit’s system worked pretty well—that the public bought into it.<sup>190</sup> If the process were deliberate in some fashion, the judge asked, what would the public think—that the process had been rigged?<sup>191</sup> A judge of another circuit said that a computer program was used in his court to help create oral argument panels because the chief judge wanted to make sure that no one thought he was loading panels.<sup>192</sup>

What connects these two major factors in favor of randomness—the prevention of both the reality and the appearance of inappropriate influence—is the idea that randomness “matters” because it guarantees that no *other* process was used that could impact the outcome of cases. In the words of Adam Samaha, a primary justification for randomness as a decision rule

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<sup>189</sup> As noted earlier, there is a large body of empirical research that suggests that the ideological composition of three-judge panels has an effect on case outcomes (with ideology being defined by the party of the appointing president). See generally, e.g., CASS R. SUNSTEIN ET AL., *ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY* (2006); Jonathan P. Kastellec, *Panel Composition and Voting on the U.S. Courts of Appeals Over Time*, 64 POL. RES. Q. 377 (2011); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823 (2006); Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761 (2008); Sunstein & Miles, *supra* note 2; Sunstein, Schkade & Ellman, *supra* note 3.

Even acknowledging the limits of the so-called panel effects literature, see, e.g., Edwards & Livermore, *supra* note 1, it seems uncontroversial to suggest that over time, having more panels with two liberal judges (and fewer with three or one liberal judge) will have an impact on some of the cases in a given circuit.

<sup>190</sup> Interview with a Judge of the U.S. Court of Appeals for the Fourth Circuit, *supra* note 112.

<sup>191</sup> *Id.*

<sup>192</sup> Interview with a Judge of the U.S. Court of Appeals for the D.C. Circuit, *supra* note 125.

is that it is "the least-bad option when behavior might otherwise be socially destructive."<sup>193</sup> Or as Guido Calabresi and Philip Bobbitt have pointed out, randomness binds the hands of decision makers to keep them from doing something else.<sup>194</sup> The public is aware of this constraining function and thus randomness becomes a shorthand or proxy for a fair process, and a fair process in turn assures us that the institutions rendering decisions are legitimate.

Ultimately, randomness has little to commend itself in a "positive" way. True, some have suggested a few attendant benefits of randomness as a decision strategy, such as that it can be efficient.<sup>195</sup> But by and large, randomness is of value precisely because of what it is *not*. Utilizing a random process for creating panels becomes a way to ensure that the cases that come before those panels have not been biased. Whatever we may ultimately think of the outcomes in those cases, we can be satisfied that the results were not preordained and that the process to arrive at those results, at least with respect to the selection of the decision makers, was fair. The widespread assumption that panels are randomly drawn and that this is a good thing is therefore best understood as manifesting a shared and deeply held belief that legitimacy in judicial decision making results from a dispassionate, "neutral" process.<sup>196</sup> Although this conclusion is important in and of itself, it also suggests that while randomization is a useful starting point or default for panel assignment, it need not be the only method.

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<sup>193</sup> See Samaha, *supra* note 49, at 18. As Professor Samaha elaborates, "A guarantee of equal probabilities ties the hands of error-prone decision makers while apparently cutting incentives of potential beneficiaries to curry favor with them . . . ." *Id.* at 21.

<sup>194</sup> GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES 44 (1978). Neil Duxbury makes the same point. See NEIL DUXBURY, RANDOM JUSTICE: ON LOTTERIES AND LEGAL DECISION-MAKING 51-53 (1999). In a not unrelated vein, philosopher Joseph Raz has noted that in games of "mere chance[,] there is no question of choosing moves in order to win." JOSEPH RAZ, PRACTICAL REASON AND NORMS 120 (1990).

<sup>195</sup> See DUXBURY, *supra* note 194, at 54. Furthermore, Adam Samaha has argued that one positive aspect of randomness is that it allows for experimentation. Specifically, because many empirical studies rely on random assignment in their research design, the utilization of a random process can enable information collection. See Samaha, *supra* note 49, at 23-24; cf. Michael Abramowicz, Ian Ayres & Yair Listokin, *Randomizing Law*, 159 U. PA. L. REV. 929, 934-38 (2011) (describing the importance of randomized controls as part of a larger argument that governments should use randomized trials to test the efficacy of different laws and regulations).

<sup>196</sup> See, e.g., DUXBURY, *supra* note 194, at 13 (noting how "[a] fundamental feature of decisions reached by lot is that they are stripped of human agency" and how this feature has been "highlighted as a primary virtue of the lottery decision"); BARBARA GOODWIN, JUSTICE BY LOTTERY 74 (1992) ("The impartiality at the heart of the lottery mechanism is also its major justification.").

## B. A Balancing Approach

Identifying the values behind random panel assignment is a necessary first step in evaluating the normative desirability of any assignment practice. One can now see, at least in general terms, what trade-offs must be made when assessing departures from randomness. Depending on the particular practice, the potential benefit—such as a gain in efficiency or collegiality<sup>197</sup>—should be balanced against the potential for bias and the appearance of bias.

And yet, determining why randomness is valuable does not as a matter of course resolve the question of trade-offs. First, as with assessing any trade-off, one needs a sense of how to weigh the various values at stake. Does a significant gain in judicial resources outweigh a slight concern about bias? What if the gain instead is in providing training for new judges or enhancing collegiality? Although there may be shared intuitions about at least some of these matters, by and large these are policy choices about which reasonable minds will disagree.

Second, even if there were a shared sense of the relative value of the values (so to speak), there is still the problem of particularities. That is, suppose there was agreement that a sizable gain in judicial resources *could* outweigh a slight concern about bias (and the appearance of bias). Presumably a final assessment would depend on the context. If a circuit had an enormous caseload—say, 400 or 500 cases per judge—one might feel differently about the trade-off than if the judges were not experiencing any caseload pressure. Possible alternatives would also be part of the context. Suppose a circuit had an enormous caseload but could easily recruit additional judges to sit by designation and help ease the burden.<sup>198</sup> Any assessment would have to consider the full context of the circuit, including possible alternative strategies for creating some of the same benefits (including, of course, the trade-offs associated with those strategies). This is all to say that even making strides in identifying the reasons why randomness matters in panel assignment still leaves complicated judgments of value and fact to be addressed when assessing court practices.

Despite the complexities of these policy choices, there are still some gains to be made at a general level. It is plain that there are some court practices that do not, in fact, implicate the neutrality values of randomness. From a normative perspec-

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<sup>197</sup> See *supra* subpart II.B.

<sup>198</sup> See generally Levy, *supra* note 102.

tive, those practices are presumptively legitimate. On the other end of the spectrum, there are some practices that clearly raise concerns about bias and the appearance of bias. Of those, we should be particularly wary. This next section addresses each in turn.

To begin, if a court engages in deliberate panel assignment but does so in ways that do not raise questions about biasing the outcome of cases, the costs of such practices can easily be outweighed by an attendant benefit. Accommodating the scheduling needs and preferences of judges should be able to satisfy this standard, at least in most instances. To return to an earlier example, if a judge is scheduled to undergo surgery several months hence, it is hard to imagine anyone objecting to removing her name from the pool of judges when selecting the panel for that timeframe. Even assuming that she would be physically capable of serving on a panel at that time, the neutrality value of randomness is not threatened by the accommodation of such personal needs, as presumably they are distributed relatively randomly among judges. Similarly, if a judge is planning to visit a law school to judge a moot court or give a talk to the local bar on a set date, a slight deviation from randomness is unlikely to bias panels, in fact or in appearance.

All else equal, a practice that attempts to equalize co-sits—ensuring that every judge sits with every other judge at least some number of times—likewise seems unobjectionable. This practice is the functional equivalent of taking a coin and placing it on heads once, then placing it on tails once, and so on, instead of actually tossing it. That is, the practice uses a non-random process to create results that are meant to be consistent with randomness. It is hard to see how this kind of panel assignment would bias, or be perceived as biasing, the results of cases. Moreover, it comes with several benefits. As the subjects of the interviews described it, “mixing up” judges leads to a more collegial court.<sup>199</sup> Beyond enhancing collegiality, this practice can be understood as a prophylactic measure—like randomness itself—to limit the extent to which panels might become skewed through other practices. For example, one can imagine a circuit that accommodates the scheduling preferences of its judges and ultimately ends up with panels that have a significantly different composition of liberals and conservatives than would have occurred following a strictly random process. If that same circuit now tries to ensure that each

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<sup>199</sup> See *supra* notes 128–32 and accompanying text.

judge sit at least a few times with every other judge, the system may prevent the skew before it occurs.

These two examples of nonrandom panel assignment practices (common ones, at that) suggest that although balancing the values at stake in panel assignment practices might sometimes be challenging, some practices involve a substantial benefit and virtually no relevant cost. At the other extreme, there are some practices that are straightforward to assess because the costs to the values behind random assignment are so substantial as to be extremely difficult, if not impossible, to overcome.

The clearest example of such a practice is a chief judge or clerk of court forming panels with the intention of achieving their own preferred case outcomes. To be sure, there was no evidence that the most troubling version of this practice—panel “gerrymandering” to bring about more liberal or more conservative case outcomes overall—occurred in any of the circuit courts. But even if a chief judge only wanted to “moderate” the law and avoid case outcomes that were particularly liberal or conservative, the departure would still be deeply troubling. Such a chief judge would be perhaps neutral with regard to liberal and conservative outcomes generally, but *not* neutral with regard to case outcomes overall—indeed, the departure from nonrandomness in this scenario is motivated by an assumption about what kinds of outcomes are desirable. As discussed earlier, the legitimacy of the courts and the appearance of legitimacy both depend on panels not being formed (and not being seen to be formed) with the intent to bias the results of the cases before them.<sup>200</sup> Again, as one judge said, if the panels were formed with the intent to affect case outcomes, what would the public think?<sup>201</sup> Accordingly, it is difficult to see how such a departure from random assignment could ever be justified.

As the preceding analysis makes clear, certain practices will be problematic on their face because their purpose—say, affecting case outcomes—is at odds with the neutrality values behind randomness. Still, there are other practices that can threaten these values in less obvious ways. Here, there are two categories worth noting. The first speaks to the degree of nonrandomness of any resulting panel, and the second speaks to the effect on the composition of panels overall.

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<sup>200</sup> See *supra* subpart III.A.

<sup>201</sup> Interview with a Judge of the U.S. Court of Appeals for the Fourth Circuit, *supra* note 112.

On the matter of degrees, one can see from Part II that some departures from random assignment only entail ensuring that a single judge does not sit on a single, specific day (say, because of an upcoming meeting or moot court). This is the functional equivalent of omitting one judge's name from a hat and then pulling out three names at random from, say, the other fifteen judges remaining when creating a given panel. The incursion on randomness here is slight. Given the neutrality value underlying randomness, it is extremely unlikely that the resulting panels will be, or appear to be, biased.

Such practices are in direct contrast to those that require putting a specific judge on a specific panel or drawing a panel from a very limited number of judges. Examples here include deliberately selecting the two newest members of the court to sit on a panel with a retired Supreme Court Justice,<sup>202</sup> or orchestrating a panel with a visiting judge and a senior judge for a new judge to preside.<sup>203</sup> Though not quite as stark, the practice of drawing judges from a particular geographic region for a special sitting of court<sup>204</sup>—especially if this means choosing, say, three names out of a hat when only four names are put in—falls into this category as well. Although there may be legitimate values behind all of these practices, the method for effectuating them is one that results in either a deliberately selected panel or one that comes close. A panel whose members are handpicked raises significant concerns. As one judge said, parties are not entitled to a panel that was chosen by chance, but they are entitled to one that was not chosen deliberately.<sup>205</sup> He went on to say that it would be quite dreadful, and even corruptive, if panels were deliberately formed.<sup>206</sup> Again, even though not created for this purpose, such panels would seem to predetermine case outcomes (simply imagine if the two newest members of court in the scenario described above happened to also be the most conservative members of that court because of the appointing president) and certainly could have that appearance. As such, even if infrequent, these sorts of panel assignment practices carry a burden of justification.

Finally, just as it is important to consider the purpose and degree of any given departure from random panel assignment,

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<sup>202</sup> See *supra* notes 148–51 and accompanying text.

<sup>203</sup> See *supra* notes 114–24 and accompanying text.

<sup>204</sup> See *supra* notes 141–46 and accompanying text.

<sup>205</sup> Interview with a Judge of the U.S. Court of Appeals for the Second Circuit (Mar. 5, 2012).

<sup>206</sup> *Id.*

courts should also consider its effect on panel composition overall. As noted earlier, it is possible that a court's practice of taking into account otherwise unobjectionable factors when creating panels—say, the scheduling requests of its judges—could lead to unintended, and indeed problematic, consequences. Imagine a circuit in which quite a few conservative judges requested to take vacation in June, as they were timing their leave around a Federalist Society Conference. And imagine, too, that many of the liberal judges on the court requested to be gone in July, as this time coincided with an American Constitution Society event. As a result, there would now be a considerably higher number of all or at least majority liberal panels (from June) and all or at least majority conservative panels (from July) than would otherwise sit. Although this hypothetical might seem far-fetched, my co-author and I found these kinds of distributions in some of the circuit courts in our quantitative assessment of panel assignment.<sup>207</sup>

As the vast literature on panel effects suggests, this shift in the ideological balance of panels would likely impact case outcomes.<sup>208</sup> Moreover, if litigants began to notice that there were a significant number of all-liberal panels one month and a significant number of all-conservative panels the next, they might raise concerns—not unlike those raised by the litigants in the Ninth Circuit appeal involving the ban on same-sex marriage.<sup>209</sup> Accordingly, concerns about the values associated with randomness could arise no matter the purity of the motivation for the departure or the slightness of the degree of the departure.

How would a court know if the effects of a given practice had raised this issue? Determining the relevant threshold is no easy task. One possibility is to follow the lead of the quantitative work and compare a set of randomly distributed panels to those actually created.<sup>210</sup> If there were a statistically significant ideological shift of the panels, then the courts would do well to reexamine their practices.

In sum, there are trade-offs with all of the practices identified here. The challenge is to determine a framework within which to make assessments about those practices. This Part has set out a balancing framework and identified the values at stake in random panel assignment. In particular, concerns

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<sup>207</sup> See Chilton & Levy, *supra* note 5, at 32–37.

<sup>208</sup> See *supra* note 189.

<sup>209</sup> See *supra* notes 180–82.

<sup>210</sup> See Chilton & Levy, *supra* note 5, at 27–31.

about bias and the perception of bias seem to drive an interest in randomness—in this context and others in judicial administration. With these values in mind, one can examine panel assignment practices and make some headway in assessing their normative desirability. Specifically, some practices—such as accommodating the scheduling preferences of judges—will be unobjectionable in many instances. Other practices, however, such as selecting judges for certain panels, may raise concerns. Still others will fall somewhere in the middle and are the sort about which reasonable minds may well disagree. The final question is whether there are any overarching guidelines or best practices that courts may want to consider applying to the panel formation process.

#### IV

#### PRESCRIPTIVE MEASURES FOR COURTS

Just as descriptive findings lead to normative questions, normative conclusions lead to prescriptive questions. In light of the assessments of different court measures in Part III, are there any broader process-based rules that courts should consider going forward?

This question dovetails with another that is raised by the particular findings of this study. One of the most notable discoveries is that no two courts created their panels in precisely the same way. Although there was some overlap in the factors they considered, each court had a unique way overall of deciding which judges would sit together. As with other aspects of judicial administration,<sup>211</sup> one may well wonder if one approach is preferable to another, and ultimately if there should be greater uniformity among the federal courts of appeals.

A single way to address the concerns underlying both points would be to propose a set of best practices for the courts. Drawing on the discussion of Parts II and III, one could imagine calling for courts to follow a particular circuit's way of configuring panels or, more generally, for the consideration of certain factors over others when constructing calendars.

And yet, the main problem with a one-size-fits-all approach for the circuit courts is that the courts are dramatically different sizes in the relevant senses. They have different needs and features, making the replication of one circuit's process or the scaling up of any one individual panel assignment practice

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<sup>211</sup> See Levy, *supra* note 68, at 377–83 (discussing the lack of uniformity among the case management practices of the federal courts of appeals).

potentially impracticable. Moreover, as the analysis of Part III makes clear, assessments of any given departure from randomness will turn on the particularities of the courts—given that those particularities differ greatly, so too must the assessments of the practices. In short, it is difficult to see how there could even be a set of best practices that could apply to all of the circuits; there will inevitably be some disuniformity across court practices.

Determining that there are no substantive guidelines for all courts to follow does not close the door on prescriptive measures, however. There is still one process-based guideline that could prove useful. In light of how little previously was known about panel assignment—by the public, by scholars, and even by judges—this Part concludes by calling for greater transparency of such practices in the future.

#### A. Accepting Disuniformity

Given the normative questions surrounding some of the panel assignment practices uncovered by the qualitative study, it would be tempting to consider measures that should guide the panel assignment process. Doing so would also help to limit the variation in practices across circuits. Drawing upon past research in judicial administration,<sup>212</sup> however, this subpart shows that this type of guide would quickly prove unworkable.

One particularly useful illustration in this regard is the “court week” model of the Fourth Circuit, discussed in Part II.<sup>213</sup> Rather than having rolling sittings throughout the year, the Fourth Circuit had six designated sitting weeks during which all judges were expected to come to Richmond to hear cases.<sup>214</sup> Because the Fourth Circuit had these six weeks set aside each term, it bypassed some of the logistical problems that other circuits faced (for example, the judges all knew in advance not to schedule a vacation or agree to judge a moot court during this time). More broadly, employing a court week model meant that the Fourth Circuit could configure its panels

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<sup>212</sup> See generally *id.*

<sup>213</sup> See *supra* notes 99–100 and accompanying text.

<sup>214</sup> See Interview with a Senior Member of the Clerk’s Office, U.S. Court of Appeals for the Fourth Circuit, *supra* note 99; see also U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT, APPELLATE PROCEDURE GUIDE, DECEMBER 2016, [https://www.ca4.uscourts.gov/AppellateProcedureGuide/Calendaring\\_\\_Argument/APG-oralargument.html](https://www.ca4.uscourts.gov/AppellateProcedureGuide/Calendaring__Argument/APG-oralargument.html) [<https://perma.cc/9H9T-ZCX6>] (“The court sits in Richmond, Virginia from Tuesday-Friday during six separate ‘court weeks’ scheduled between September and June.”).

using a process that came closest to random assignment, as the court's members were generally present at the same time.<sup>215</sup> Given these apparent benefits, it would be tempting to argue that all circuits should follow the court week model when creating their calendars.

Unfortunately, such an argument quickly runs aground given the significant differences between the circuits. To begin, the courts receive dramatically different quantities of filings per year. According to the Administrative Office of the U.S. Courts, in 2016 there were 1,156 cases commenced in the D.C. Circuit, as compared to 4,460—nearly four times as many—in the Second Circuit.<sup>216</sup> The number of judgeships allocated to each circuit is meant to loosely track the workload, but the number of cases per judgeship still varies considerably. During this same time period, there were approximately 105 cases per judgeship in the D.C. Circuit and 343 in the Second Circuit.<sup>217</sup> In addition to the number of cases, circuits also vary significantly when it comes to the type of cases they receive. The D.C. Circuit famously receives a sizeable number of complex agency cases as compared to the other circuits, which can have oral arguments that last for two hours; the Second Circuit has had a high number of immigration appeals in recent years, few of which receive oral argument.<sup>218</sup> The fact that the dockets differ so much from circuit to circuit ultimately has an effect on how many oral arguments the court will hear each year, and therefore on the composition of panels.

A less well understood, but still important, factor in determining how many cases go to argument is the pre-existing norm around oral argument in each circuit. As I have written about elsewhere, judges and court administrators have expressed that their court has a particular tradition when it comes to oral argument.<sup>219</sup> Specifically, judges of the Second

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<sup>215</sup> A court week model still cannot solve the problem of a judge unexpectedly falling ill or other similar events occurring that make strictly random assignment impossible.

<sup>216</sup> See ADMIN. OFFICE OF THE U.S. COURTS, TABLE B: U.S. COURTS OF APPEALS—CASES COMMENCED, TERMINATED, AND PENDING DURING THE 12-MONTH PERIODS ENDING DECEMBER 31, 2015 AND 2016, [http://www.uscourts.gov/sites/default/files/data\\_tables/stfj\\_b\\_1231.2016.pdf](http://www.uscourts.gov/sites/default/files/data_tables/stfj_b_1231.2016.pdf) [<https://perma.cc/UV2E-VQQM>]. If one looks outside of the five circuits surveyed here, the difference in caseload is even more dramatic. The Ninth Circuit, for example, had 11,291 cases commenced during this same time period. *Id.*

<sup>217</sup> To arrive at these figures, I took the number of appeals commenced in each circuit and divided it by the number of judges in that circuit. For a list of the number of judges per circuit, see 28 U.S.C. § 44 (2012).

<sup>218</sup> See Levy, *supra* note 68, at 356, 366–68.

<sup>219</sup> See *id.* at 368–73.

Circuit have reported that the court has long valued holding oral argument whenever possible.<sup>220</sup> By contrast, a judge and court administrator of the Fourth Circuit reported holding oral argument less frequently, out of a desire to spare parties the expense of traveling to Richmond if it seemed highly unlikely that a hearing would affect the outcome of the case.<sup>221</sup>

All of these factors—size of the docket, composition of the docket, and norms surrounding oral argument—affect how many cases go to oral argument in each court. If one looks to cases terminated on the merits after argument in 2016, there were 257 or approximately 23 per judgeship that occurred in the D.C. Circuit, 792 or approximately 61 per judgeship in the Second Circuit, and 300 or 20 per judgeship that occurred in the Fourth Circuit.<sup>222</sup> And if one focuses on administrative agency appeals, which can have particularly long arguments, there were 90 that went to oral argument in the D.C. Circuit, 31 in the Second Circuit, and 26 in the Fourth Circuit. Now, these numbers do not fully convey how many weeks of oral argument each judge sat, as circuits have senior judges who hear cases and some import judges to sit by designation to hear cases as well.<sup>223</sup> But they do help show that although the Fourth Circuit may be able to have six weeks of court each year, other circuits may need to have many more—because they have significantly more cases and/or because they have a higher percentage of cases that demand long arguments. And while it may be possible to have judges set aside six set weeks out of the year during which time they do not make any other commitments, this practice becomes far more challenging to put in place if judges have to agree to do the same with one or two weeks out of every month (particularly when those sittings take them far from home). This is all to say that while the court week model might seem, at first blush, like a model that other courts should be encouraged to adopt, not all circuits would be able to do so in light of their docket demands and pre-existing norms around oral argument.

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<sup>220</sup> *Id.* at 369.

<sup>221</sup> *Id.* at 369–70.

<sup>222</sup> See ADMIN. OFFICE OF THE U.S. COURTS, TABLE B-1: U.S. COURTS OF APPEALS—CASES COMMENCED, TERMINATED, AND PENDING, BY CIRCUIT AND NATURE OF PROCEEDING DURING THE 12-MONTH PERIOD ENDING DECEMBER 31, 2016, [http://www.uscourts.gov/sites/default/files/data\\_tables/stf\\_b1\\_1231.2016.pdf](http://www.uscourts.gov/sites/default/files/data_tables/stf_b1_1231.2016.pdf) [<https://perma.cc/FB6Q-QGXU>]. To calculate cases per judgeship, see *supra* note 217.

<sup>223</sup> For more on the extent to which the different circuits rely on visiting judges, see generally Levy, *supra* note 102.

Given the difficulties of imposing any one court's process on another, one could imagine proposing a "next best" step—encouraging the consideration of certain factors over others when configuring panels. Returning to the findings of Parts II and III, one clear candidate would be the consideration of how many times each judge had previously sat with every other member of court. Taking this factor into account not only seems unobjectionable given the values behind random panel assignment, but also comes with significant benefits, including the ability to prevent (or at least mitigate) ideological skews across panels.<sup>224</sup> While all of the circuits surveyed here took past co-sits into account to some extent when creating panels, for some this meant only ensuring that the judges were "mixed up" every so often.<sup>225</sup> In theory a useful guideline would take the current approach one step further and encourage all courts to equalize co-sittings; this essentially amounts to asking courts to deliberately place a coin on "heads" and then "tails" repeatedly, since true coin-flipping is not possible under the circumstances.

Although promising at first glance, perfect equalization or even near perfect equalization is ultimately bound to run into the same difficulties that replicating the court week model faces based on the differences among circuits. Ensuring that judges sit together roughly an equal number of times is feasible if it is simple enough to bring judges together in the first place. During court week, for example, it is easy to constantly mix judges because all of the judges are in the same place at the same time. Accordingly, if most judges have sat together several times in a given term but Judges A and B have only sat together once, it is easy enough to put that pair together when creating the next panel.

The ability to bring everyone together an equal number of times becomes constrained in circuits in which the judges are coming together from numerous cities across different states. Once judges are traveling a fair distance to hear oral argument, courts generally have those judges sit for several days in a row<sup>226</sup> and then provide them some time—at least a few

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<sup>224</sup> See *supra* subpart III.B.

<sup>225</sup> See *supra* notes 125–33 and accompanying text.

<sup>226</sup> As one judge said, if a judge is coming from Vermont to New York, you want to make it worth his while, and so geography becomes a factor. Interview with a Judge of the U.S. Court of Appeals for the Second Circuit (July 25, 2013), *supra* note 96.

weeks—before the next sitting.<sup>227</sup> As a logistical matter, then, it simply becomes more challenging to bring everyone together; the costs become too great. In speaking to one judge from the Second Circuit about the possibility of equalizing co-sits, I was told that in theory the goal was a good one but probably not feasible given the realities of the court.<sup>228</sup>

In short, following on the normative discussion of panel assignment practices, it may be tempting to call for courts to adhere to certain prescriptive measures. In particular, one could imagine suggesting that the circuits adopt a court week approach to panel formation or, at least, suggesting that they equalize co-sittings so as to guard against unintended consequences of nonrandom assignment. Such proposals quickly prove unworkable in practice, however, in view of the considerable differences across circuits. Accordingly, some disuniformity across the courts is inevitable and must be accepted.

And yet, concluding that a best practices approach to panel formation will ultimately run aground does not mean that there are no prescriptive measures worth adopting. Specifically, this last subpart considers one process-based guideline: increasing the transparency of panel assignment practices.

## B. Increasing Transparency

This Article began by documenting an assumption and a lack of public information about panel assignment.<sup>229</sup> Up until this point, the dominant view in the literature has been that panels are randomly formed in the circuit courts. No doubt part of the reason for this mistaken claim is that there is little information to be found on this topic. Indeed, the only way to acquire a fuller account of the courts' processes for creating panels was to conduct a multiyear in-depth interview study. It should be emphasized that this project was only possible be-

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<sup>227</sup> As a former chief judge said, if judges like to sit four or five days in a row, as some judges do, then you are going to give them three weeks off before their next sitting. Interview with a Judge of the U.S. Court of Appeals for the Second Circuit, *supra* note 107.

<sup>228</sup> Interview with a Judge of the U.S. Court of Appeals for the Second Circuit (July 25, 2013), *supra* note 96. Another judge of the same circuit likewise said he thought trying to equalize judges was expressly a good policy but quite difficult for the chief judge to effectuate given the different times that judges want to sit and given that the court is constantly in session. See Interview with a Judge of the U.S. Court of Appeals for the Second Circuit, *supra* note 121.

<sup>229</sup> See *supra* subpart I.A.

cause of the open and candid responses of numerous judges and senior court administrators. But for the benefit of the judiciary as a whole, scholars, and the public more generally, the courts should provide greater information on how they form their panels in their local rules or through the Federal Judicial Center.

First and foremost, this information is critical for the court administrators and the appellate judges themselves. As noted earlier, one of the most surprising findings of this study was the extent to which the judges were unaware that their own practices varied from those of other courts and were even unaware of what their own practices were.<sup>230</sup>

On the matter of *inter*-circuit knowledge, providing more information in the local rules or through the Federal Judicial Center would inform judges of practices that they would not otherwise be aware of—such as the practice in some courts of creating special panels for new judges to preside.<sup>231</sup> (Indeed, when I informed one judge of this practice during our interview, he responded that he was “surprised” to hear of such a thing.<sup>232</sup>) This, in turn, would allow courts to decide if there were any practices that they should adopt for their own court. Conversely, judges might learn that a particular practice employed in their court was an outlier, and this might lead them to reconsider it. To be clear, given the differences among the circuits, the hope would not be to generate a list of best practices for every circuit to follow. Rather, the goal would be to enable the courts to learn about new, and reexamine old, policies to carry out important deliberations about panel practices.

On the matter of *intra*-circuit knowledge, several judges in this study demonstrated a lack of awareness of the panel configuration process in their own court—either by saying so directly or by providing information that turned out to be inaccurate.<sup>233</sup> The lack of knowledge on the part of judges about their own circuit practices is surprising and also far from ideal. Given that the choices surrounding panel assignment are policy choices, it is important for all of the members of the court to be informed of the tradeoffs and to be able to weigh in on, and even object to, certain decisions.

Second, greater transparency of panel assignment practices is important for the public. As litigants, as potential liti-

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230 See *supra* notes 152–59 and accompanying text.

231 See *supra* notes 114–24 and accompanying text.

232 See *supra* note 153 and accompanying text.

233 See *supra* notes 154–59 and accompanying text.

gants, and as citizens affected by decisions, we are entitled to know how the courts form the panels that decide thousands of appeals per year. Moreover, as noted above, it is critical to have a check on the process given all that is at stake in these administrative practices. The judges themselves can serve as one important check; the public should serve as the other.

The final consideration in calling for greater transparency concerns a particular subset of the public: scholars. As this Article has detailed, numerous empirical studies have assumed that panels are randomly configured.<sup>234</sup> The fact that they ultimately are not may affect the findings of those studies.<sup>235</sup> The implications are significant. If scholars do not have complete information about how courts function, their ability to study those courts and measure various factors—such as the impact of a judge's ideology or race or sex on panel outcomes—will be seriously undermined. Returning to the notion of checks, scholars play a critical role in informing the courts and the public about the effects of given court practices. It is important that they, in turn, have the necessary information to carry out their work. Studies such as the one underlying this Article can make significant gains, but they are no substitute for greater information flowing directly from the courts themselves.

In short, the panel configuration process is a near-endlessly complicated one. It requires juggling different interests and balancing different values. And courts are simply, and fundamentally, too different for one model or even practice to necessarily be followed by all. But again, this conclusion does not mean there is no room for change. In fact, panel assignment practices would benefit substantially from greater sunshine measures. This Article has done much to provide an account of how the courts create their panels with the help of members of the judiciary. But more information should be made available—for the public, for scholars, and for the courts themselves.

#### CONCLUSION

Any litigant will tell you that the composition of a panel matters for the outcome of an appeal. And any scholar of judicial decision making will tell them that they are right. How

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<sup>234</sup> See *supra* note 3; see also *supra* subpart I.A.

<sup>235</sup> See Chilton & Levy, *supra* note 5, at 50–51 (discussing how a finding of nonrandom panel assignment affects researchers who use empirical methods to study judicial behavior).

appellate courts decide to configure their three-judge panels can have wide-ranging consequences. This is true for case outcomes, but also for legal doctrines more generally, and for scholarship about the judiciary.

This Article has questioned the traditional story of panel assignment and undertaken significant work to provide an account of how the courts of appeals in fact assign judges to panels. In so doing, it has detailed the various factors that courts consider when setting their calendar, moving away, sometimes necessarily, from strictly random panel assignment. Beyond challenging the positive story, this Article has also challenged the normative story—that panels should be randomly drawn. It has clarified both the costs and benefits of randomness, arguing that there can be valid reasons to depart from it. And as such, it has provided a framework for addressing different assignment practices and other matters of judicial administration.

Ultimately, it falls—and indeed *must* fall—to the courts to decide how to configure their panels. And it falls to scholars, and to the public, to understand, evaluate, and suggest improvements to the inner workings of the federal court system.