

THE MECHANICS OF FEDERAL APPEALS: UNIFORMITY AND CASE MANAGEMENT IN THE CIRCUIT COURTS

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ABSTRACT

Case-management practices of appellate courts define the judicial review of appeals. The circuit courts constantly make decisions about which cases will receive oral argument, which will have dispositions written by staff attorneys in lieu of judges, and which will result in unpublished opinions—decisions that exert a powerful influence on the quality of justice that can be obtained from the federal appellate courts. Despite their importance, there has been no in-depth review of the case-management practices of the different circuit courts in the academic literature.

This Article begins to fill that void. It first documents and analyzes the practices of five circuit courts using qualitative research from a series of interviews of appellate judges, clerks of court, court mediators, and staff attorneys. This thorough account of case management reveals the great extent to which these practices vary across circuits. The Article considers reasons for the variation and asks whether such a lack of uniformity is problematic in a federal system. The Article concludes that disuniformity in case management is more defensible than in substantive and procedural law, but that current practices can and should be improved through increased transparency and information sharing between the circuits.

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INTRODUCTION

Twenty-five years ago, then-Chief Judge Wilfred Feinberg of the Court of Appeals for the Second Circuit wrote: “[J]udicial administration continues to be the stepchild of the law. This comparative inattention is odd, since the way that courts operate has a significant, possibly even dominant, influence on the quality of justice that can be obtained from them.”¹ Both of these observations—that judicial administration is a critical component of the American justice system and that it is often overlooked—remain just as true, and just as troubling, today.

1. Wilfred Feinberg, *Unique Customs and Practices of the Second Circuit*, 14 HOFSTRA L. REV. 297, 298 (1986) (footnote omitted) (quoting Note, *The Second Circuit: Federal Judicial Administration in Microcosm*, 63 COLUM. L. REV. 874, 874 (1963)) (internal quotation marks omitted).

First, the decisions that appellate courts make about how to review their vast caseloads shape the consideration that appeals receive and may even affect their outcomes. Determinations about case management—including whether a case will receive oral argument or will be decided solely on the briefs, whether its disposition will be drafted by judges and their law clerks or by staff attorneys, and whether it will be resolved by a published opinion or by an unpublished, nonbinding order—are therefore an essential part not just of judicial administration, but of justice itself.²

Second, despite its critical importance, case management has often been overlooked by the academy. Most scholars are unaware of how cases move from filing to disposition in the individual courts of appeals.³ Of the few scholars who have written in this area, most have focused on specific case-management practices—for example, on the benefits or drawbacks of holding fewer oral arguments or publishing fewer opinions.⁴ No one outside of the judiciary has undertaken the essential task of examining how these practices fit together within each circuit and how the circuits' practices compare.⁵

2. See Robert A. Katzmann & Michael Tonry, *The Crisis of Volume and Judicial Administration*, in *MANAGING APPEALS IN FEDERAL COURTS* 1, 4 (Robert A. Katzmann & Michael Tonry eds., 1988) (“The discipline recognizes that organizational structure and process may affect outcomes, that it is important to understand the internal and external forces that bear upon the workings of the judicial system. Arrangements have much to do with determining how and by whom policy is made, with significant ramifications for litigants, the public, and the judicial system itself.”).

3. Indeed, two scholars of appellate courts describe the process by which the majority of appeals are handled as a “black box.” David C. Vladeck & Mitu Gulati, *Judicial Triage: Reflections on the Debate over Unpublished Opinions*, 62 *WASH. & LEE L. REV.* 1667, 1674 (2005).

4. Some individual case-management practices have been examined extensively. On the use of screening mechanisms, see, for example, Charles R. Haworth, *Screening and Summary Procedures in the United States Courts of Appeals*, 1973 *WASH. U. L.Q.* 257. On the matter of forgoing oral argument, see, for example, Robert J. Martineau, *The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom*, 72 *IOWA L. REV.* 1 (1986). And on the use of unpublished opinions, see, for example, Vladeck & Gulati, *supra* note 3; and Johanna S. Schiavoni, Comment, *Who's Afraid of Precedent? The Debate over the Precedential Value of Unpublished Opinions*, 49 *UCLA L. REV.* 1859 (2002).

5. Some scholars have studied the practices and case statistics of individual circuits. See, e.g., David R. Stras & Shaun M. Pettigrew, *The Rising Caseload in the Fourth Circuit: A Statistical and Institutional Analysis*, 61 *S.C. L. REV.* 421 (2010) (analyzing the practices and case statistics of the Fourth Circuit); Stephen L. Wasby, *A Look at the Smallest Circuit*, 43 *SUFFOLK U. L. REV.* 417 (2010) (describing various practices of the First Circuit). Furthermore, some scholarship has examined case-management practices generally, but none of it has examined the specific practices of the different circuits. See, e.g., Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 *BROOK. L. REV.* 685 (2001) (examining the management of caseloads in the federal appellate courts generally);

Even within the judiciary, a void in knowledge exists. Judges themselves acknowledge that they are unacquainted with the case-management practices of courts outside their own.⁶ The Federal Judicial Center—the research agency created by Congress to promote improvements in judicial administration in the federal courts—has attempted to fill this void by periodically issuing extensive monographs on the case-management practices of the federal appellate courts.⁷ At the time of this Article’s writing, however, the last such effort was more than a decade ago;⁸ the practices have changed considerably in the interim.⁹ Moreover, a thorough discussion of case management requires not only a descriptive account, but also an analytical account of why courts operate the way they do and a normative account of whether these differences in operation can be justified.

This Article, therefore, begins a long-overdue descriptive, analytical, and normative discussion about circuit case-management practices. To fill the void created by the absence of a current compendium of court practices, I provide a general account of the practices of five circuits. As these practices are rarely written down or publicly available,¹⁰ this Article reports and explores a new dataset

William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273 (1996) (considering the impact of increased caseloads on the practices of the federal appellate courts). Finally, case-management practices have also been examined at the district court level. *See, e.g.*, Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 378 (1982) (exploring the extent to which district judges have become “managers” of their dockets).

6. As one judge said, when it comes to case management, the courts of appeals are “very balkanized”; judges often “don’t know what is going on in other circuits.” Interview with a Judge on the U.S. Court of Appeals for the 4th Circuit (Oct. 18, 2010); *see also* Interviews with a Judge on the U.S. Court of Appeals for the 2d Circuit (June 7, 2010 & Jan. 4, 2011) [hereinafter Interviews with a Judge on the U.S. Court of Appeals for the 2d Circuit (June 7, 2010 & Jan. 4, 2011)]; Interviews with a Judge on the U.S. Court of Appeals for the 2d Circuit (Mar. 26, 2010 & Apr. 1, 2011) [hereinafter Interviews with a Judge on the U.S. Court of Appeals for the 2d Circuit (Mar. 26, 2010 & Apr. 1, 2011)].

7. *See* JUDITH A. MCKENNA, LAURAL L. HOOPER & MARY CLARK, FED. JUDICIAL CTR., CASE MANAGEMENT PROCEDURES IN THE FEDERAL COURTS OF APPEALS, at xi–xii (2000) (describing the information on court practices gathered by the Federal Judicial Center for the 2000 monograph and earlier reports).

8. *Id.*

9. For example, in 2000, the Second Circuit had not yet created the Non-Argument Calendar—a submission-only track it now uses in approximately 45 percent of the cases that are decided on the merits. *See infra* note 216 and accompanying text.

10. The federal courts of appeals provide some information about their case-management procedures in their local rules and operating procedures, but these documents rarely give a detailed account of how appeals are treated. For example, the Fourth Circuit notes in its Local

that has been culled from in-person interviews with federal appellate judges, clerks of court, chief circuit mediators, and senior staff attorneys.

A thorough account of case management, bolstered by statistical evidence from the Administrative Office of the United States Courts, reveals the great extent to which these practices vary across circuits. When it comes to deciding whether a case will be placed on the oral-argument calendar or will be decided solely on the briefs, some circuits rely on staff attorneys to make the decision, whereas others reserve it for judges.¹¹ When it comes to determining how many cases will actually receive oral argument, one circuit holds hearings in as many as 44.4 percent of their cases, whereas another holds hearings in as few as 13.1 percent.¹² Finally, when it comes to choosing between disposing of cases through published or unpublished opinions, some circuits use unpublished dispositions in as many as 93.0 percent of their appeals, whereas other circuits opt for this approach in as few as 62.3 percent.¹³

In light of such variation, I analyze the potential causes of the discrepancies—including the size and makeup of the caseload and the various priorities of the circuits. Then I begin a normative discussion of whether we should be concerned that the mechanics of the federal courts of appeals—and perhaps the quality of justice they provide as a result—vary so greatly.

The Article proceeds as follows: Part I begins with a background on case-management practices and discusses how dramatic changes in appellate caseloads created a need to “manage” the circuit dockets.¹⁴ Part II gives an in-depth descriptive account of the case-management

Rule 34(a) that “[i]n the interest of docket control and to expedite the final disposition of pending cases, the chief judge may designate a panel or panels to review any pending case at any time before argument for disposition under this rule.” 4TH CIR. R. 34(a). Yet this discussion does not convey that the vast majority of cases decided on the merits are decided solely on the briefs. See ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: ANNUAL REPORT OF THE DIRECTOR 44 tbl.S-1 (2010) (noting that 86.9 percent of cases decided on the merits were submitted on the briefs during the twelve-month period ending on September 30, 2010). Likewise, this rule does not convey that many nonargument cases will be decided in oral presentations, see *infra* note 249 and accompanying text, or that certain cases are more likely than others to be decided solely on the briefs, see *infra* text accompanying note 139.

11. See *infra* Part II.B.

12. See *infra* Part II.E.

13. See *infra* Part II.F.

14. When it comes to the management practices of the courts, I use the terms “case management” and “docket management” interchangeably.

practices of the D.C., First, Second, Third, and Fourth Circuits. This Part demonstrates that the practices of the different courts—from screening to mediation to oral argument to disposition—vary enormously. Part III attempts to explain why the circuits have such divergent practices, examining both differences in their dockets and in their priorities. Part IV then considers the central normative question stemming from the differences in case-management practices: whether this lack of uniformity can be justified. Counter to the common claim in substantive law¹⁵ and procedure,¹⁶ this Part argues that at least some disuniformity can be defended, and even understood as necessary, given the differences in the volume and kinds of cases each circuit receives. Finally, Part V argues that even if the circuits are justified in having different practices, there should still be further inquiry into whether those practices can be improved. To this end, I call for greater transparency and increased information sharing between the circuits.

I. A BACKGROUND ON CIRCUIT CASE MANAGEMENT

Writing in 2005, Judge J. Clifford Wallace of the U.S. Court of Appeals for the Ninth Circuit stated: “[I]t goes without saying that an appellate court must begin managing the life of a case the moment it arrives at the courthouse.”¹⁷ This was not always so. For much of the past century, federal appellate judges did not need case management as it is conceived of today—that is, judges did not need to make decisions about the amount and kind of judicial attention to give each case based on concerns about the size of their docket. They were able to hear oral argument in nearly all cases, draft dispositions in chambers, and publish those dispositions in the form of full-length opinions. Judges and scholars alike have spoken with nostalgia about this era—one defined by what has been called the “traditional model”¹⁸ of appellate decisionmaking.¹⁹

15. See *infra* note 384 and accompanying text.

16. See *infra* note 385 and accompanying text.

17. J. Clifford Wallace, *Improving the Appellate Process Worldwide Through Maximizing Judicial Resources*, 38 VAND. J. TRANSNAT'L L. 187, 192 (2005).

18. William H. Rehnquist, *Seen in a Glass Darkly: The Future of the Federal Courts*, 1993 WISC. L. REV. 1, 4 (“Appellate courts will necessarily have largely discarded the traditional model of oral argument and detailed consideration of individual cases reflected by reasoned opinions and collegial decision making.”).

19. See Richman & Reynolds, *supra* note 5, at 278 (advocating for a return to the “traditional appellate process in the circuit courts”).

But that era came to an end as the number of appeals began to rise. Between 1950 and 1978, the annual filings per judge in the federal courts of appeals nearly doubled—from 73 to 137.²⁰ By the 1970s, the phrase “crisis in volume” was coined to describe the workload of the courts of appeals.²¹ This dramatic increase in filings has been attributed to a flurry of legislative activity in Congress starting in the 1960s, which resulted in new causes of action²² and ultimately made federal law more complex.²³ Without the ability to increase their ranks or limit their jurisdiction,²⁴ appellate judges had only one way to respond to their burgeoning caseload: adopt practices

20. COMM’N ON STRUCTURAL ALTS. FOR THE FED. COURTS OF APPEALS, FINAL REPORT 14 tbl.2-3 (1998).

21. See DANIEL J. MEADOR, *APPELLATE COURTS: STAFF AND PROCESS IN THE CRISIS OF VOLUME* (1974). As Professors Jeffrey Cooper and Douglas Berman note, however, academics have written about a caseload “crisis” since at least the late 1960s. Cooper & Berman, *supra* note 5, at 689 n.8 (citing Paul D. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542 (1969)). Not everyone, however, has endorsed the notion that the appellate courts have experienced a caseload “crisis.” For example, in 1990, the Federal Courts Study Committee issued a report on the functioning of the courts, and four members—Judge José Cabranes, J. Vincent Aprile II, Senator Charles Grassley, and Diana Motz (now Judge Motz)—stated that “the alleged ‘caseload crisis’ that is said to afflict the courts of appeals has not been adequately demonstrated.” FED. COURTS STUDY COMM., JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 113, 123 (1990). Still, the term “crisis” has been ubiquitously used in the literature on case management, including by appellate judges themselves. See, e.g., Henry J. Friendly, *Averting the Flood by Lessening the Flow*, 59 CORNELL L. REV. 634, 634 (1974); Diarmuid F. O’Scannlain, *Striking a Devil’s Bargain: The Federal Courts and Expanding Caseloads in the Twenty-First Century*, 13 LEWIS & CLARK L. REV. 473, 473 (2009).

22. See Carolyn Dineen King, *A Matter of Conscience*, 28 HOUS. L. REV. 955, 956–57 (1991) (“What are the reasons for this increase in the caseload and what are its results? . . . The legislation in the 1960s which increased rights and created mechanisms for obtaining them has resulted in an explosion of litigation, particularly in the federal courts.”).

23. In the words of Chief Justice Rehnquist, the growth in filings, although “impressive,” does not convey the “increas[ed] complexity of the issues” before the courts. Rehnquist, *supra* note 18, at 3.

24. Congress, which of course does have these capabilities, was not insensitive to the “crisis.” In addition to more than doubling the authorized circuit court judgeships from 75 in 1950 to 168 in 1984, see COMM’N ON STRUCTURAL ALTS. FOR THE FED. COURTS OF APPEALS, *supra* note 20, at 13, Congress also created several commissions to study the structure of the courts. Most notably, in 1972, Congress created the Commission on Revision of the Federal Court Appellate System, headed by Senator Roman Hruska. Act of Oct. 13, 1972, Pub. L. No. 92-489, 86 Stat. 807. Additionally, in 1988, Congress created the Federal Courts Study Committee to look into the functioning of the courts. Federal Courts Study Act, Pub. L. No. 100-702, § 102, 102 Stat. 4642, 4644 (1988).

designed to increase judicial efficiency.²⁵ Thus, modern case management was born.

Judges first focused on alleviating the stress caused by publishing opinions in most cases. In 1964, the Judicial Conference of the United States decided that only opinions of “general precedential value” needed to be published.²⁶ Within ten years, each circuit had developed a plan regarding the use of unpublished opinions.²⁷ This change in policy enabled judges to write shorter dispositions for cases in which they believed publication was not warranted²⁸ and to spend less time per page on those dispositions, as they were nonbinding and not destined for the federal reporter.²⁹

Second, judges focused on decreasing the amount of time spent preparing for and hearing cases. Starting with the Fifth Circuit in 1968, courts of appeals began to develop screening processes, whereby either staff or the judges themselves reviewed cases to determine whether they could be disposed of without oral argument.³⁰ By 1979, Federal Rule of Appellate Procedure 34³¹ was officially amended to authorize the resolution of an appeal without oral argument when the panel agreed that argument was unnecessary because (1) the appeal was “frivolous,” (2) the dispositive issue in the

25. See Joe S. Cecil & Donna Stienstra, *Deciding Cases Without Argument: An Examination of Four Courts of Appeals*, in *MANAGING APPEALS IN FEDERAL COURTS*, *supra* note 2, at 397, 398–99 (“As the number of cases filed has increased, without an equivalent increase in the number of judgeships, the courts have looked for procedures that would enable the judges to dispose of their caseloads more efficiently.”).

26. ADMIN. OFFICE OF THE U.S. COURTS, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, MARCH 16–17, 1964, at 11 (1964); *cf.* THOMAS E. BAKER, *RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS* 127 (1994) (“[I]n 1972 the Federal Judicial Center and the Judicial Conference requested each Court of Appeals to develop a limited publication/noncitation plan.”).

27. William L. Reynolds & William M. Richman, *Limited Publication in the Fourth and Sixth Circuits*, 1979 DUKE L.J. 807, 808 (citing ADMIN. OFFICE OF THE U.S. COURTS, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, MARCH 7–8, 1974, at 12–13 (1974)).

28. See Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177, 190 (1999) (“[U]npublished decisions are, as a rule, shorter than published decisions.”).

29. See COMM’N ON THE REVISION OF THE FED. COURT APPELLATE SYS., STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE 72 (1975) (describing how unpublished opinions save time because “judges no longer sense quite the same need to polish the prose and to monitor each phrase as they do with opinions which are intended for general distribution”).

30. JOE S. CECIL & DONNA STIENSTRA, *DECIDING CASES WITHOUT ARGUMENT: A DESCRIPTION OF PROCEDURES IN THE COURTS OF APPEALS* 2 (1985).

31. FED. R. APP. P. 34.

case had already been “authoritatively decided,” or (3) the legal arguments and relevant facts were “adequately presented” in the submitted materials and “the decisional process would not be significantly aided by oral argument.”³² Although the rule reads as though oral argument is a default procedure, many think the stated exceptions—particularly the broadly defined third exception—actually allow courts increasingly to do away with oral argument.³³

Third, judges increased their reliance on staff. Starting with the Fifth Circuit in 1973, courts of appeals began to receive funding for staff clerks, as distinct from law clerks, or “elbow” clerks, to review certain classes of cases.³⁴ In 1982, Congress officially authorized the creation of staff attorney offices,³⁵ which were designed to review pro se prisoner cases.³⁶ As appellate filings continued to grow, the number and role of staff attorneys expanded.³⁷

Finally, courts began to adopt mediation or conference programs to help parties either settle their cases or narrow the range of issues

32. *Id.*; see also *id.* advisory committee’s note, reprinted in 28 U.S.C. app. at 1227 (Supp. III 1980) (“The . . . amendment . . . sets forth general principles and minimum standards to be observed in formulating any local rule.”).

33. See, e.g., BAKER, *supra* note 26, at 116 (“The promise in Federal Rule of Appellate Procedure 34, echoed in the local rules of the Courts of Appeals, has been rendered rather Orwellian by the circuit judges’ collective response to the caseload crisis, which in effect has reversed the presumption in favor of oral argument in every appeal to what amounts to a *de facto* presumption that most appeals can be decided without oral argument.”); see also Richman & Reynolds, *supra* note 5, at 281 (“Unfortunately, the apparently strong *de jure* presumption in favor of argument amounts in fact to a *de facto* presumption against argument.”).

34. *Staff Attorney Offices Help Manage Rising Caseloads*, FED. CT. MGMT. REP. (Admin. Office of the U.S. Courts, Wash., D.C.), Feb. 2004, at 1, 3. The key difference between law clerks and staff attorneys is one articulated by Professor Owen Fiss nearly thirty years ago: “[E]lbow clerks’ . . . are chosen by and work under the direct supervision of a particular judge, and ‘staff attorneys’ . . . are not assigned to any particular judge but belong to what has become known as the ‘central legal staff.’” Owen Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442, 1446 (1983). Other distinctions include the kind of work that each performs—law clerks tend to work on argued cases, whereas staff attorneys typically prepare nonargument cases, see *infra* Part II.D—and the length of term for which each serves—law clerks typically serve one-year terms, whereas some staff attorneys serve multiple-year terms, see *infra* Part II.A.

35. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, sec. 120(c)(1), § 715, 96 Stat. 25, 34 (codified at 28 U.S.C. § 715 (2006)).

36. *Staff Attorney Offices*, *supra* note 34, at 1, 3.

37. See *Staff Attorney Offices*, *supra* note 34, at 3 (noting that the number of staff attorneys working for the appellate courts grew from 117 in 1980 to more than 380 in 2004 and that “[o]ver time, the scope of the office’s substantive legal work expanded, involving staff attorneys in a larger percentage of the 60,000 federal appeals filed each year”).

on appeal.³⁸ In 1974, the Second Circuit became the first federal court of appeals to adopt a conference program.³⁹ By 1996, all eleven of the other regional circuits had followed suit.⁴⁰ As Second Circuit Judge Irving Kaufman—the architect of the first mediation program—explained, the goal of this effort was clear: “to encourage the resolution of appeals without participation by judges,” thus “preserving their scarcest and most precious asset, time” and “expedit[ing] the consideration” of all other appeals.⁴¹

Despite these innovations, the regional courts of appeals continue to operate under stress because filings have, for the most part, continued to rise. Filings per year per judge—which had jumped from 73 in 1950 to 137 in 1978⁴²—only continued to increase—to 194 in 1984 and 300 in 1997.⁴³ Although filings are down from their peak in 2006, they still remain quite high—at 335 filings per judge.⁴⁴ Numerous judges have commented on the difficulties associated with such a voluminous caseload. Justice Alito, a former judge of the U.S. Court of Appeals for the Third Circuit, described the workload of the appellate courts as “crushing.”⁴⁵ And as Judge Robert Parker and Leslie Hagin wrote in a 1994 article:

It is beyond reasonable doubt that our federal courts, especially the courts of appeal, are in serious trouble. Caseloads are at levels that fundamentally undermine the ability of these courts to administer justice, given the courts’ current procedures and

38. See ROBERT J. NIEMIC, FED. JUDICIAL CTR., *MEDIATION & CONFERENCE PROGRAMS IN THE FEDERAL COURTS OF APPEALS: A SOURCEBOOK FOR JUDGES AND LAWYERS* 5–6 (2d ed. 2006) (describing the genesis and the objectives of mediation and conference programs).

39. *Id.* at 4; see also Irving R. Kaufman, *Must Every Appeal Run the Gamut? The Civil Appeals Management Plan*, 95 *YALE L.J.* 755, 756 (1986) (describing the “major aims” of the program).

40. NIEMIC, *supra* note 38, at 4.

41. Kaufman, *supra* note 39, at 756.

42. COMM’N ON STRUCTURAL ALTS. FOR THE FED. COURTS OF APPEALS, *supra* note 20, at 14 tbl.2-3.

43. *Id.*

44. See ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 10, at 16 tbl.1. It is important to note that these figures, unlike the previous figures from the Commission on Structural Alternatives for the Federal Courts of Appeals, exclude data for the U.S. Court of Appeals for the Federal Circuit. Strikingly, per-judge filings have more than quadrupled even as the number of regional courts of appeals judges has more than doubled—from 75 in 1950, COMM’N ON STRUCTURAL ALTS. FOR THE FED. COURTS OF APPEALS, *supra* note 20, at 14 tbl.2-3, to 167 in 2010, ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 10, at 16 tbl.1.

45. Interview by David F. Levi with Samuel A. Alito, Assoc. Justice, Supreme Court of the U.S., in Durham, N.C. (Sept. 15, 2010).

structural configuration; the courts of appeal, especially, are suffering from case overload—with nothing but worse times ahead if present courses are continued.⁴⁶

Given the current caseload and its implications for the functioning of the federal courts of appeals, it is critical to understand and assess the courts' case-management techniques. The following Part gives a descriptive and analytical account of the case-management practices of five circuit courts.

II. THE CASE-MANAGEMENT PRACTICES OF FIVE CIRCUITS

As the preceding Part makes plain, the twelve regional circuit courts of appeals⁴⁷ have adopted a multitude of case-management practices over the past several decades.⁴⁸ Even though these practices are meant to address the same problem—increasingly heavier caseloads—and even though the circuits are all acting under the same general rubric—the Federal Rules of Appellate Procedure—these practices vary greatly from circuit to circuit. In the words of the Federal Judicial Center: “While the Federal Rules of Appellate Procedure impose a generally uniform scheme of appellate practice and procedure, the U.S. courts of appeals, each with unique traditions and circumstances, have developed different ways of managing their dockets.”⁴⁹

Recognizing “the potential of circuit-based experimentation with case management as a fertile source of ideas for improving the

46. Robert M. Parker & Leslie J. Hagin, *Federal Courts at the Crossroads: Adapt or Lose!*, 14 *MISS. C. L. REV.* 211, 211 (1994) (footnote omitted); see also Stephen Reinhardt, *A Plea To Save the Federal Courts: Too Few Judges, Too Many Cases*, 79 *A.B.A. J.* 52, 52 (1993) (“We seem to assume that judges can perform the same quality of work regardless of the number of cases they are assigned. That simply is not correct. Most of us are now working to maximum capacity. As a result, when our caseload increases, we inevitably pay less attention to the individual cases. . . . Those who believe we are doing the same quality work that we did in the past are simply fooling themselves.”); Wallace, *supra* note 17, at 189 (“A shrinking proportion of litigants is afforded the opportunity to present cases orally before the tribunal; fewer parties still are fortunate enough to have their disputes resolved in a published, fully reasoned decision.”).

47. Although I recognize that the original “circuit courts” were abolished by the Act of March 3, 1911, Pub. L. No. 61-475, 36 Stat. 1087, I use that term interchangeably with the term “courts of appeals,” which were created by the Act of March 3, 1891 (Evarts Act), ch. 517, 26 Stat. 826.

48. I hold aside the Federal Circuit because its caseload is substantially different from the other circuits.

49. MCKENNA ET AL., *supra* note 7, at xi.

practices and procedures of the courts,”⁵⁰ the Judicial Conference of the United States has recommended that the circuits share information about their various docket-management practices.⁵¹ Accordingly, the Federal Judicial Center has periodically collected data and published reports on these practices.⁵² As I noted, however, the last such effort was in 2000, and many of the practices of the circuits have changed dramatically in the interim.⁵³ Although local rules can provide some information about how courts operate,⁵⁴ the majority of these practices are known only to the judges and administrators of the courts in which they operate.

My information on these practices has come from qualitative research—primarily from a series of interviews with judges, clerks of court, chief circuit mediators, directors of staff attorney offices, and supervisory staff attorneys that were conducted between March 2010 and June 2011.⁵⁵ Although I tailored my questions to each interviewee, my general approach in each interview was the same: I first asked a set of questions about the specific practices of the interviewee’s circuit and then asked a set of questions about the interviewee’s views on these practices—specifically, regarding which practices worked particularly well and which could be improved. With

50. *Id.*

51. JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS 67 (1995).

52. *See* CECIL & STIENSTRA, *supra* note 30 (“This report [of the Federal Judicial Center] describes the procedures and standards adopted by the federal courts of appeals for deciding cases without oral argument.”); Katzmann & Tonry, *supra* note 2, at 7, 11–12 (describing the Federal Judicial Center’s research into appellate workload and listing some of the reports published by the center).

53. *See supra* notes 7, 9.

54. *See supra* note 10 and accompanying text.

55. The goal of speaking to members of the clerk’s office and the staff attorney office was to gather information about the various docket-management practices. I selected the people I interviewed by first contacting the clerk of court and, if possible, speaking to the clerk, and then speaking to whomever the clerk recommended, such as the director of the staff attorney office or supervisory staff attorneys. The goal of speaking to one or two judges from each circuit was to learn what individual judges thought of the case-management practices of their circuits generally. For this portion of the project, I simply contacted several judges in each circuit and met with those who had availability, although I did try to balance meeting with active and senior judges, judges who had been appointed by Democratic and Republican presidents, and at least one female judge. I fully recognize, however, as Judge Harvie Wilkinson explains, that “[n]o one judge can truly hope to speak for the court” and that each “may have a slightly different view about the circuit.” J. Harvie Wilkinson III, *The Fourth Circuit and Its Future*, 61 S.C. L. REV. 415, 416 (2010).

rare exception,⁵⁶ all of the initial interviews were conducted in person and lasted between thirty minutes and two hours. I later conducted follow-up interviews—often as many as three or four—by telephone, by email, and in person to verify the information that I had collected. I assured each person I interviewed that I would not quote him or her by name without explicit permission—this is why, with few exceptions, I attribute my findings to “a judge,” “a senior member of the clerk’s office,” or “a senior staff attorney” from a specific circuit.⁵⁷

In the interest of performing an in-depth review of docket-management practices, I found it necessary to focus on a sample of the twelve regional circuits. For ease of research purposes, I selected the D.C., First, Second, Third, and Fourth Circuits. Although I recognize that this sample is not random and that these circuits share several key characteristics—they are all on the East Coast, they are all relatively small geographically, and most contain large urban centers—this lack of randomness should not pose a problem for this study. To the extent that I can show that there is disuniformity among the five seemingly similar courts studied here, I will have demonstrated that disuniformity exists in the whole set.⁵⁸

What follows is a compilation and analysis of my findings, in conjunction with statistical data from the Administrative Office of the United States Courts. After first noting basic information about each circuit’s docket and complement of judges, this Part presents information about the courts’ practices, including tables where helpful. I begin with the initial screening of appeals, and then move on to mediation, followed by nonargument cases and argument cases, and, finally, disposition procedures—describing and analyzing each practice. My discussion does not purport to capture every aspect of docket management in these five circuits,⁵⁹ but it is meant to convey a picture of the significant case-management practices in these courts.

56. I conducted two initial interviews by telephone and one by email.

57. All interview notes are on file with the *Duke Law Journal*.

58. Furthermore, from what I have learned through interviews and from the Federal Judicial Center’s 2000 Report, *MCKENNA ET AL.*, *supra* note 7, a review of all the regional circuits would have shown only more variation among practices. I plan to examine the practices of all twelve regional circuit courts of appeals in future projects.

59. In some instances, it proved necessary to give a slightly simplified account of a particular practice—a point I note in such instances.

A. General Figures and Statistics

In light of the fact that many case-management practices are driven by the demands of each circuit's docket, it is important to note the size of each court's caseload and bench—both of which vary dramatically from circuit to circuit. Furthermore, because many of the docket-management practices involve the use of staff attorneys, it is also important to note the structure of each circuit's staff attorney office, which also varies from circuit to circuit. In particular, there is variation when it comes to how many staff attorneys work for each circuit, whether they hold permanent or temporary positions, and whether they are trained to work on general matters or have particular expertise. Unlike the number of judges on the various courts, the number of staff attorneys is constantly changing.⁶⁰ Thus, what is provided here is a snapshot, meant only to provide a general sense of how the offices are organized. Unless otherwise noted, all information is current as of September 30, 2010, the end of "FY 2010."

At the end of FY 2010, the D.C. Circuit had nine active judges, two vacancies, and five senior judges.⁶¹ In FY 2010, 1,178 appeals were filed in the circuit⁶²—approximately 131 appeals per active judge.⁶³ As of fall 2010, the court's legal division was composed of fourteen attorneys: one director; one assistant director; and twelve staff attorneys, ten of whom were full time and two of whom were

60. This is due largely to changes in the budget but also to decisions on the part of individual staff attorneys (if some decide to leave a term early, for example). The figures for some of the offices changed even during the time I was conducting interviews.

61. *U.S. Court of Appeals for the DC Circuit*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetCourt?cid=14&order=c&ctype=ac&instate=dc> (last visited Oct. 7, 2011); *see also U.S. Court of Appeals for the District of Columbia: Legislative History*, FED. JUDICIAL CTR., http://www.fjc.gov/history/home.nsf/page/courts_coa_circuit_dc.html (last visited Oct. 7, 2011).

62. ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 10, at 83 tbl.B.

63. I arrived at this figure by dividing the number of appeals filed in FY 2010 by the number of active judges as of the end of FY 2010 and rounding to the closest whole number. This measure is admittedly both underinclusive and overinclusive—judges who were active in FY 2010 but who took senior status at some point in the year are not counted, and judges who received their appellate judgeships at some point in the year are counted, even, for example, those judges who received their commissions in August. As this number is simply meant to convey a general sense of how many cases each judge has, this "back of the envelope" calculation should be sufficient.

As a broader point, though, the measure of filings per active judge is an imperfect measure of workload as it does not include the contributions of senior or visiting judges. Yet again, because this measure is only meant to provide an approximate sense of relative workloads, it should be adequate.

part time.⁶⁴ Of the twelve staff attorneys, five were career attorneys and the rest had two-year terms that could be extended.⁶⁵ In the D.C. Circuit, staff attorneys generally perform the same functions—that is, the attorneys do not specialize.⁶⁶

At the end of FY 2010, the First Circuit had six active judges and two senior judges.⁶⁷ In FY 2010, 1,530 appeals were filed in the circuit⁶⁸—approximately 255 appeals per active judge. As of fall 2010, the staff attorney office for the First Circuit had twenty attorneys: one senior staff attorney and nineteen line staff attorneys, fourteen of whom were full time and five of whom were part time.⁶⁹ The staff attorneys tend to stay for long terms in the First Circuit,⁷⁰ and all of them perform generally the same kind of work.⁷¹ As a senior member of the clerk’s office put it, the staff attorney office “is simply too small” for specialization.⁷²

At the end of FY 2010, the Second Circuit had ten active judges, three vacancies, and twelve senior judges.⁷³ In FY 2010, 5,371 appeals were filed in the circuit⁷⁴—approximately 537 appeals per active

64. Interviews with a Senior Member of the Legal Div., U.S. Court of Appeals for the D.C. Circuit (Jan. 10, 2011 & Jan. 14, 2011); Interview with Two Senior Members of the Legal Div., U.S. Court of Appeals for the D.C. Circuit (May 7, 2010).

65. Interviews with a Senior Member of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64; Interview with Two Senior Members of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64.

66. Interviews with a Senior Member of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64; Interview with Two Senior Members of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64.

67. *U.S. Court of Appeals for the First Circuit*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetCourt?cid=19&order=c&ctype=ac&instate=01> (last visited Oct. 7, 2011); *see also U.S. Court of Appeals for the First Circuit: Legislative History*, FED. JUDICIAL CTR., http://www.fjc.gov/history/home.nsf/page/courts_coa_circuit_01.html (last visited Oct. 7, 2011).

68. ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 10, at 83 tbl.B.

69. Interviews with a Senior Member of the Clerk’s Office, U.S. Court of Appeals for the 1st Circuit (Dec. 15, 2010, Jan. 7, 2011 & June 8, 2011).

70. *Id.*

71. *Id.*

72. *Id.*

73. *U.S. Court of Appeals for the Second Circuit*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetCourt?cid=22&order=c&ctype=ac&instate=02> (last visited Oct. 7, 2011); *see also U.S. Court of Appeals for the Second Circuit: Legislative History*, FED. JUDICIAL CTR., http://www.fjc.gov/history/home.nsf/page/courts_coa_circuit_02.html (last visited Oct. 7, 2011). As of July 2011, two new judges had joined the U.S. Court of Appeals for the Second Circuit: Raymond Lohier, Jr., and Susan Carney. *See U.S. Court of Appeals for the Second Circuit, supra*. This brought the active number of judges to twelve, the number of vacancies to one, and the number of senior judges to twelve. *See id.*

74. ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 10, at 83 tbl.B.

judge. As of fall 2010, the staff attorney office for the Second Circuit was composed of forty attorneys: one director, five supervisors, one acting supervisory attorney, twenty-two regular staff attorneys, and eleven staff attorneys who worked only on immigration appeals.⁷⁵ In the Second Circuit, the staff attorneys who work on immigration appeals are generally hired for one-year terms, with the possibility of renewal based on need and performance.⁷⁶ All of the regular staff attorneys are hired for a minimum of two years, with the possibility of renewal.⁷⁷ For both the immigration and regular staff attorneys, renewal can be for up to five years.⁷⁸ Unlike the staff attorneys in many of the other circuits, the staff attorneys in the Second Circuit specialize.⁷⁹ As noted previously, there is a team of staff attorneys that works only on immigration appeals. The regular staff attorneys are split into three teams—one that works on pro se appeals, one that works on counseled motions, and one that works on pro se motions. The regular staff attorneys rotate through all three teams during their terms.⁸⁰

At the end of FY 2010, the Third Circuit had fourteen active judges and nine senior judges.⁸¹ In FY 2010, 3,951 appeals were filed in the circuit⁸²—approximately 282 per active judge. As of fall 2010, the staff attorney office for the Third Circuit was composed of thirty staff attorneys: one senior staff attorney, four supervising attorneys, and twenty-five line attorneys.⁸³ Approximately half of the staff attorneys were serving temporary terms of one to two years, with the possibility of extension; the other half held permanent or long-term positions.⁸⁴ Generally, the staff attorneys of the Third Circuit do not

75. Interviews with a Senior Member of the Staff Attorney Office, U.S. Court of Appeals for the 2d Circuit (May 17, 2010, Nov. 22, 2010 & Nov. 23, 2010).

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *U.S. Court of Appeals for the Third Circuit*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetCourt?cid=26&order=c&ctype=ac&instate=03> (last visited Oct. 7, 2011); *see also U.S. Court of Appeals for the Third Circuit: Legislative History*, FED. JUDICIAL CTR., http://www.fjc.gov/history/home.nsf/page/courts_coa_circuit_03.html (last visited Oct. 7, 2011).

82. *See* ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 10, at 83 tbl.B.

83. Interviews with a Senior Member of the Staff Attorney Office, U.S. Court of Appeals for the 3d Circuit (Apr. 30, 2010 & Dec. 6, 2010).

84. *Id.*

specialize.⁸⁵ “[E]verybody works on everything,” with one primary exception: only the most experienced staff attorneys work on death penalty cases.⁸⁶

At the end of FY 2010, the Fourth Circuit had thirteen active judges, two vacancies, and two senior judges.⁸⁷ In FY 2010, 4,854 appeals were filed in the circuit⁸⁸—approximately 373 filings per active judge. As of fall 2010, the staff attorney office of the Fourth Circuit was composed of thirty-eight attorneys: one senior staff attorney, one deputy senior staff attorney, four supervising attorneys and thirty-two line attorneys.⁸⁹ Of the thirty-two line attorneys, fifteen were permanent, and seventeen were term.⁹⁰ Generally, in the Fourth Circuit, term attorneys are hired for two years, but those who do well may stay for three or four years,⁹¹ and occasionally, term staff attorneys are offered the opportunity to become permanent staff attorneys.⁹² All staff attorneys work on criminal appeals and appeals involving postconviction relief. But when cases involving complicated statutory schemes are directed to the office—for example, tax, bankruptcy, immigration, or Social Security appeals—they go to specific staff attorneys.⁹³ Accordingly, a handful of staff attorneys may handle almost all of the immigration appeals.⁹⁴ Thus, there is a degree

85. *Id.*

86. *Id.*

87. *U.S. Court of Appeals for the Fourth Circuit*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetCourt?cid=20&order=c&ctype=ac&instate=04> (last visited Oct. 7, 2011); *see also U.S. Court of Appeals for the Fourth Circuit: Legislative History*, FED. JUDICIAL CTR., http://www.fjc.gov/history/home.nsf/page/courts_coa_circuit_04.html (last visited Oct. 7, 2011). As of July 2011, one new judge, Albert Diaz, had joined the U.S. Court of Appeals for the Fourth Circuit. *U.S. Court of Appeals for the Fourth Circuit, supra*. Additionally, one senior judge, Robert Chapman, had retired, and one active judge, Blane Michael, had passed away. *See id.* This brought the active number of judges to thirteen, the number of vacancies to two, and the number of senior judges to one. *See id.*

88. *See* ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 10, at 83 tbl.B.

89. Interviews with a Senior Member of the Staff Attorney Office, U.S. Court of Appeals for the 4th Circuit (Oct. 1, 2010 & Nov. 22, 2010). The staff attorney I interviewed noted, however, that these figures fluctuate—in 2009, there were eighteen permanent staff attorneys and only thirteen term staff attorneys. *Id.* He noted that the fluctuation mainly occurs in the number of temporary staff attorneys. *Id.*

90. *Id.*

91. In some instances, term staff attorneys who do well can stay even beyond four years. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

of de facto specialization that takes place among the staff attorneys in the Fourth Circuit.⁹⁵

* * *

Circuit	Number of Active Judges at the End of FY 2010	Filings in FY 2010	Filings per Active Judge	Number of Staff Attorneys in Fall 2010
D.C. Circuit	9	1,178	131	14
First Circuit	6	1,530	255	20
Second Circuit	10	5,371	537	40
Third Circuit	14	3,951	282	30
Fourth Circuit	13	4,854	373	38

Two critical points emerge from this collection of data and statistics. First, circuits vary widely in the number of cases filed per active judge. Although this figure does not fully capture how busy the judges are on each circuit—as it does not take into account the work of senior or visiting judges and cannot account for the kinds of cases that each court hears—it is still useful in conveying some sense of a court’s workload.⁹⁶ Specifically, it is striking that the Second Circuit had approximately 537 appeals per active judge in FY 2010, whereas the D.C. Circuit had only 131 appeals per active judge in the same time period. Moreover, these figures are relevant when assessing each circuit’s case-management practices; how a court should handle its appeals is informed, at least in part, by the level of stress its caseload causes.

Second, circuits vary widely in the number and kinds of staff attorneys they hire. The staff attorney office of the Second Circuit, composed of forty attorneys in the fall of 2010, was nearly three times the size of the D.C. Circuit’s office. Although the differences in office size may be a function of docket size, docket size alone cannot explain the variation in how the offices are staffed. As one senior staff attorney observed, the composition of the staff attorney offices in the Third and Fourth Circuits is fairly similar, whereas the First Circuit is more “top heavy” in permanent staff attorneys, and the Second

95. *Id.*

96. *See supra* note 63.

Circuit contains more temporary staff attorneys.⁹⁷ These differences are meaningful because the kinds of staff attorneys each circuit employs affects what the circuit can ask of them.⁹⁸ A circuit might be comfortable asking its staff attorneys to screen cases for oral argument, for example, if its office is composed of mostly permanent attorneys with many years of experience, rather than attorneys who have held the position for only one or two years. In short, significant differences exist with respect to the demands on the circuits and the number and kinds of people who meet those demands. These differences, in turn, shape the specific practices of the appellate courts.

B. Initial Screening

It would be easy to think that once a case is filed at the court of appeals, the case is set for argument—or “calendared”—and then sent off to a panel of judges. In reality, a great amount of activity takes place before calendaring even occurs. The cases are reviewed not only to identify technical defects but also to appraise their difficulty⁹⁹ and even to decide whether oral argument is warranted.¹⁰⁰ Depending on the circuit, this screening is performed by counsel in the clerk’s office, by staff attorneys, or by judges. The appeal is then routed to a particular destination—to a settlement program, a merits panel, or onto a “nonargument track.”¹⁰¹ This initial screening is only

97. Interviews with a Senior Member of the Staff Attorney Office, U.S. Court of Appeals for the 4th Circuit, *supra* note 89.

98. The logic here is somewhat chicken-and-egg-like: Just as the kinds of staff attorneys each circuit has affect what the circuit can ask of them, what each circuit intends to ask of its staff attorneys affects the kind of staff attorneys the circuit hires.

99. See Wallace, *supra* note 17, at 196 (“Many appellate courts in the United States utilize an ‘inventory’ process whereby non-judge personnel are trained to review the case to identify the basic legal issues it raises and assess its overall degree of difficulty. . . . Using an imperfect yet reasonable method to weigh cases enhances the court’s ability to apportion its workload more equally among judges; the court does not schedule a judge or panel to hear a certain number of cases, but rather a certain number of ‘points.’”).

100. See Cecil & Stienstra, *supra* note 25, at 397 (“The practice of selecting cases for different kinds of decision-making procedures—often referred to as screening—is probably familiar in concept, if not detail, to most judges, attorneys, and court scholars. Generally, cases are sorted into two categories: (1) those to be disposed of using the briefs as the primary source of information for deciding the merits of a case and (2) those to be disposed of with the additional source of an oral argument from the attorneys for both parties.”).

101. I use the term “nonargument track” to refer generally to the processing route for cases that are not, at least initially, designated for oral argument. That is, when a court of appeals decides that a certain case or class of cases will not be going to oral argument—and instead will

the beginning of a multilayered review process—all of these cases will be screened and sorted again, either by judges once they are calendared or by staff attorneys and then by judges if they are set on the nonargument track. How these cases are handled during this initial review stage and who handles them differ from circuit to circuit.

When an appeal is docketed in the D.C. Circuit, it is first screened within the clerk's office for jurisdictional defects.¹⁰² Once any potential defects are resolved and any motions are addressed, a staff attorney reviews the case and recommends that it either go to oral argument or be decided on the briefs—a recommendation that is then considered by a supervisor.¹⁰³ In making such a recommendation, the staff attorney considers several factors, including the novelty of the issues presented in the appeal, the number of issues raised, the number of parties, and the size of the record.¹⁰⁴ A significant factor in the staff attorney's determination is whether the appellant is represented by counsel; if the appellant is pro se and not an attorney, the case will rarely proceed to argument.¹⁰⁵ If the staff attorney determines that oral argument is likely unnecessary, the clerk's office sets forth the briefing schedule without an argument date.¹⁰⁶

Once all of the briefs have been filed, the staff attorney reviews them for a second time and makes a final recommendation about whether argument would be beneficial.¹⁰⁷ If the staff attorney decides that argument would be beneficial in a pro se appeal, she can

be sent to a special panel or sent to a “nonargument calendar”—I say that the case or class of cases has been placed on a nonargument track. *See infra* Part II.D.

102. Interviews with a Senior Member of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64; Interview with Two Senior Members of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64.

103. Interviews with a Senior Member of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64; Interview with Two Senior Members of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64.

104. Interviews with a Senior Member of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64; Interview with Two Senior Members of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64.

105. Interviews with a Senior Member of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64; Interview with Two Senior Members of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64.

106. Interviews with a Senior Member of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64; Interview with Two Senior Members of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64.

107. Interviews with a Senior Member of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64; Interview with Two Senior Members of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64.

recommend that the court appoint counsel or an amicus curiae and hear argument.¹⁰⁸ Cases that are recommended for argument are given a rating based upon their perceived level of difficulty, with “complex” being the most difficult, “regular” being the least difficult, and “regular/plus” being somewhere in between.¹⁰⁹ These ratings are based on many of the same factors that determine whether or not the staff attorney recommends argument, including whether novel issues of law are presented, the number of issues raised, the number of parties, and the size of the record.¹¹⁰ These ratings become important when the cases are calendared—complex cases are always heard alone on a particular sitting day.¹¹¹ Also, for the purposes of case distribution, cases that raise similar or complementary issues are “batched,” or grouped together,¹¹² so that they come before the same panel on the same day.¹¹³

In the First Circuit, the clerk’s office screens appeals for jurisdictional defects.¹¹⁴ Cases that are free from such defects are set for briefing and, once fully briefed, are screened for oral argument.¹¹⁵

108. Interviews with a Senior Member of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64; Interview with Two Senior Members of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64.

109. Interviews with a Senior Member of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64; Interview with Two Senior Members of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64.

110. Interviews with a Senior Member of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64; Interview with Two Senior Members of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64.

111. Interviews with a Senior Member of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64; Interview with Two Senior Members of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64.

112. Wallace, *supra* note 17, at 197; *see also id.* at 196 (“[T]he court can ‘group’ together cases posing similar issues and assign all the cases in the group to one panel for hearing and decision Thus, in deciding one case, the court can quickly dispose of the others without duplication of effort.”).

113. In the D.C. Circuit, this practice is called giving cases the “same day, same panel” designation. Interviews with a Senior Member of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64; Interview with Two Senior Members of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64.

114. Interviews with a Senior Member of the Clerk’s Office, U.S. Court of Appeals for the 1st Circuit, *supra* note 69. Specifically, I was told that if any jurisdictional problems are found, the clerk’s office will issue a show-cause order. If there is no response to the show-cause order, the clerk’s office will dismiss the appeal for lack of prosecution. If a response is received, the appeal will be sent to the staff attorney office. If the staff attorney office determines that the appeal should be dismissed, an individual staff attorney will prepare a recommendation, which will then be circulated to a three-judge panel for review.

115. *Id.*

Unlike in the D.C. Circuit, only the senior staff attorney makes recommendations about whether appeals should be calendared for argument.¹¹⁶ She reviews the briefs with an eye toward the number of issues presented in the appeal, the complexity of the issues, and so forth.¹¹⁷ Certain kinds of cases tend not to receive oral argument, including pro se cases, bail appeals, Social Security appeals, *Anders* brief cases,¹¹⁸ and cases from the Board of Immigration Appeals.¹¹⁹ The senior staff attorney gives each case a difficulty rating based on an informal scale for case-distribution purposes—cases are judged as being of “average difficulty,” “more/less than average difficulty,” or “far more/far less than average difficulty.”¹²⁰ As in the D.C. Circuit, cases that raise the same or similar issues can be batched and distributed to the same panel for consideration—this practice, however, occurs only occasionally in the First Circuit.¹²¹

The Second Circuit’s method of screening differs greatly from that of the D.C. and First Circuits. Although cases are screened by staff attorneys for jurisdictional or other technical defects, they are not formally screened for oral argument.¹²² Nearly every kind of case is sent to the regular argument calendar, including pro se cases.¹²³ The only exception to this rule is that most immigration appeals are sent to the Non-Argument Calendar (NAC),¹²⁴ which is discussed in

116. *Id.*

117. *Id.*

118. Following the Supreme Court case *Anders v. California*, 386 U.S. 738 (1967), if appointed counsel requests to withdraw after trial on the ground that an appeal would be frivolous, he or she must also file a brief “referring to anything in the record that might arguably support the appeal.” *Id.* at 744.

119. Interviews with a Senior Member of the Clerk’s Office, U.S. Court of Appeals for the 1st Circuit, *supra* note 69.

120. *Id.*

121. *Id.*

122. Interviews with a Senior Member of the Staff Attorney Office, U.S. Court of Appeals for the 2d Circuit, *supra* note 75.

123. *Id.*

124. Specifically, Second Circuit Local Rule 34.2 on the Non-Argument Calendar states, in part, that:

The court maintains a Non-Argument Calendar (NAC) for the following classes of cases:

- (1) Immigration. An appeal or petition for review, and any related motion, in which a party seeks review of the denial of:
 - (A) a claim for asylum under the Immigration and Nationality Act (INA);
 - (B) a claim for withholding of removal under the INA;
 - (C) a claim for withholding or deferral of removal under the Convention Against Torture; or

greater detail in Part II.D. Staff attorneys give cases a general difficulty rating of “easy,” “medium,” or “difficult,” as well as a case-type designation.¹²⁵ As in other circuits, this practice is used to try to ensure that all of the merits panels receive roughly equal workloads.¹²⁶ Unlike the other circuits surveyed here, the Second Circuit tends not to batch cases.¹²⁷ One Second Circuit judge said that, if anything, the court tries to be sure that no panel receives too many of a particular kind of case¹²⁸—an opposite approach to batching.

In the Third Circuit, staff attorneys do not screen cases for oral argument or for complexity.¹²⁹ All cases are initially screened either by the clerk’s office or by the staff attorney office to ensure that no jurisdictional defects are present, that all necessary fees have been paid, that a certificate of appealability has been granted if one is needed,¹³⁰ and that no other procedural problems exist.¹³¹ Cases with no procedural defects proceed to briefing unless they are selected for mediation.¹³² Whether a case will be orally argued is decided by the judges after briefing.¹³³ As in the Second Circuit, however, the Third Circuit has created special tracks for certain classes of cases. Most immigration cases are sent to standing immigration panels,¹³⁴ and pro se cases that do not involve direct criminal appeals are sent to

(D) a motion to reopen or reconsider an order involving one of the claims listed above.

2D CIR. R. 34.2(a).

125. Interviews with a Senior Member of the Staff Attorney Office, U.S. Court of Appeals for the 2d Circuit, *supra* note 75.

126. Interviews with a Senior Member of the Clerk’s Office, U.S. Court of Appeals for the 2d Circuit (Sept. 23, 2010, Dec. 10, 2010 & Jan. 5, 2011).

127. *Id.*

128. Interviews with a Judge on the U.S. Court of Appeals for the 2d Circuit (June 7, 2010 & Jan. 4, 2011), *supra* note 6.

129. Interviews with a Senior Member of the Clerk’s Office, U.S. Court of Appeals for the 3d Circuit (Sept. 20, 2010, Nov. 23, 2010 & Jan. 5, 2011).

130. *See, e.g.*, FED. R. APP. P. 22(b)(1) (“In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c).”).

131. Interviews with a Senior Member of the Clerk’s Office, U.S. Court of Appeals for the 3d Circuit, *supra* note 129.

132. *Id.* Additionally, cases with jurisdictional defects, cases that need a certificate of appealability, and cases subject to dismissal under 28 U.S.C. § 1915(e) (2006) are sent to motions panels. *Id.*

133. *Id.*

134. *Id.*

standing pro se panels.¹³⁵ Additionally, each capital appeal goes to a special panel constituted to hear that particular death penalty case.¹³⁶ Only after cases are scheduled for a sitting do the judges determine whether any of the cases should be decided solely on the briefs, a practice discussed in further detail in Part II.E.¹³⁷

In the Fourth Circuit, counsel in the clerk's office conducts an initial screening for oral argument.¹³⁸ As a default rule, pro se cases are directed to be resolved without argument; if, however, a pro se case raises issues that warrant oral argument, a judge or panel may authorize appointment of counsel.¹³⁹ Additionally, cases that raise certain kinds of issues—including Social Security appeals, immigration appeals, and *Anders* brief appeals—almost always are slated for decision without argument.¹⁴⁰ If the need for argument in a given case is apparent upon initial review of the briefs, counsel in the clerk's office directs the case to the argument calendar.¹⁴¹ If closer review of the case is needed, counsel in the clerk's office directs the case to the Office of Staff Counsel.¹⁴² If the need for argument is not apparent, the case is assigned to a panel for resolution without argument.¹⁴³ Those cases that are placed on the argument calendar are reviewed for difficulty and are rated difficult, average, or below average, in an effort to equalize the difficulty of case assignments across the calendar.¹⁴⁴ Cases raising the same or closely related issues may be batched and scheduled to be argued in seriatim.¹⁴⁵

135. *Id.*

136. Interviews with a Senior Member of the Staff Attorney Office, U.S. Court of Appeals for the 3d Circuit, *supra* note 83.

137. Interviews with a Senior Member of the Clerk's Office, U.S. Court of Appeals for the 3d Circuit, *supra* note 129.

138. Interviews with a Senior Member of the Staff Attorney Office, U.S. Court of Appeals for the 4th Circuit, *supra* note 89.

139. 4TH CIR. R. 34(b); Interviews with a Senior Member of the Clerk's Office, U.S. Court of Appeals for the 4th Circuit (Oct. 1, 2010, Dec. 6, 2010 & Jan. 21, 2011).

140. Interviews with a Senior Member of the Staff Attorney Office, U.S. Court of Appeals for the 4th Circuit, *supra* note 89.

141. Interviews with a Senior Member of the Clerk's Office, U.S. Court of Appeals for the 4th Circuit, *supra* note 139.

142. *Id.*

143. *Id.*; see also 4TH CIR. R. 34(a) (providing for the resolution of cases without oral argument when argument is deemed unnecessary).

144. Interviews with a Senior Member of the Clerk's Office, U.S. Court of Appeals for the 4th Circuit, *supra* note 139.

145. *Id.* Additionally, as in other circuits, in the Fourth Circuit, a case may be held in abeyance pending the determination of the issue it raises in another case. *Id.*

* * *

This brief account of screening procedures demonstrates the complexity, variation, and importance of case-management practices. First, all of the circuit courts discussed here engage in screening of some kind. Each circuit routes some of its appeals to an NAC or panel for disposition before the judges have even received the briefs. It is worth noting, however, that in every circuit, when judges review nonargument cases, they always have the option to route cases back to the regular calendar.

Second, these practices vary tremendously, even in a sample composed of just under half of the circuit courts. In the D.C., First, and Fourth Circuits, staff attorneys are heavily involved in the screening process, determining which cases will go on to oral argument and which cases will not. By contrast, in the Second and Third Circuits, staff attorneys play almost no role in screening, apart from reviewing matters for technical defects. All cases that are taken off of the argument track go to special calendars or panels based upon subject-matter criteria that the judges have previously established.

Third, an ancillary issue is whether courts decide to batch appeals. Although one court scholar describes this practice as a way to “enhance productivity” at “no cost,”¹⁴⁶ other observers might wonder whether batching results in the entrenchment of a particular panel’s views. The Fourth Circuit uses the practice frequently, the First Circuit uses it sparingly, and the Second Circuit tends to avoid batching appeals altogether.

On a more general level, this review of screening practices reveals that courts make different determinations about appropriate trade-offs. The Third Circuit has decided that judges, not staff attorneys, should decide whether a case will go to oral argument.¹⁴⁷ Other circuits have concluded that screening is a key way to save judicial time and is an appropriate task for trained staff, with the understanding that judges can always decide later to route a case from the nonargument track to the regular calendar.¹⁴⁸ How the

146. Carl Tobias, *Fourth Circuit Publication Practices*, 62 WASH. & LEE L. REV. 1733, 1754 (2005).

147. Interviews with a Senior Member of the Clerk’s Office, U.S. Court of Appeals for the 3d Circuit, *supra* note 129.

148. Interviews with a Senior Member of the Clerk’s Office, U.S. Court of Appeals for the 1st Circuit, *supra* note 69; Interviews with a Senior Member of the Clerk’s Office, U.S. Court of

courts perceive certain functions—as necessarily performed by judges or not—and certain timesaving measures—as necessary or not—directly impacts which practices they adopt.

C. Mediation

Much like appellate screening, appellate mediation has attracted surprisingly little scholarly attention. Although trial-led mediation has been the subject of a large and sustained literature—much of it focusing on how mediation detracts from the public role of adjudication¹⁴⁹—one could survey the literature on “mediation” and “settlement” and still be unaware that mediation programs exist at the appellate level.¹⁵⁰ Yet all of the regional circuit courts rely on some sort of mediation or settlement program for civil appeals, and most of the circuits have done so for several decades.¹⁵¹

The primary objective of the mediation programs tends to be the same throughout the courts of appeals: by meeting with a mediator, the parties may be able to resolve some of their issues or even their entire case, thereby saving judicial time.¹⁵² Moreover, the timing of these programs tends to be the same throughout the circuit courts; eligible appeals are routed to these programs after docketing but before the parties file their briefs.¹⁵³

Yet despite these commonalities, critical differences exist among the settlement programs. First, some circuits route nearly all of their

Appeals for the 4th Circuit, *supra* note 139; Interview with Two Senior Members of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64.

149. See, e.g., Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984) (arguing that settlement falls short of adjudication, which “uses public resources and employs not strangers chosen by the parties but public officials chosen by a process in which the public participates”); Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 265 (1995) (suggesting that the rise in mediation has resulted in the eclipsing of the “accessible, multi-doored courthouse—with one door wide open for adjudication”).

150. Although some articles note the existence of settlement programs in the courts of appeals, see, e.g., Samuel P. Jordan, *Early Panel Announcement, Settlement, and Adjudication*, 2007 BYU L. REV. 55, 56 (discussing how “most appellate courts have instituted or enhanced their mediation and settlement programs in an effort to remove cases from the docket”), few such articles exist. By way of comparison, a search conducted on Westlaw in October 2011 for “federal district court” and either “settlement program” or “mediation program” yielded nearly 900 articles, whereas a search for “federal court of appeal” and either “appellate mediation program” or “civil appeals management plan” yielded just under 80 articles.

151. See *supra* notes 38–40 and accompanying text.

152. See NIEMIC, *supra* note 38, at 6.

153. *Id.* at 9.

civil appeals to their program, whereas others direct only a subset of specifically selected appeals. Relatedly, in some circuits, judges have established general rules about which cases will go on to mediation, whereas in others, staff attorneys and court administrators exercise discretion in selecting appeals for the program. Finally, differences exist in the number and kinds of mediators who staff the programs.

In the D.C. Circuit, civil appeals are selected for mediation by the director of the Appellate Mediation Program following a preliminary screening by the legal division of the clerk's office.¹⁵⁴ Parties may request to participate in the mediation program, and these requests are given special consideration in deciding which cases will be selected.¹⁵⁵ Once a case is selected and mediation begins, participation is mandatory—that is, the parties are then required to confer with a mediator.¹⁵⁶ Mediation is conducted by some forty volunteer attorneys from the Washington, D.C., area.¹⁵⁷ While mediation takes place, the appeal will continue in the normal course unless the parties file a motion to ask that the case be held in abeyance.¹⁵⁸ Ultimately, roughly 30 percent of the cases that are part of the Appellate Mediation Program settle.¹⁵⁹ If a case does not settle and was previously removed from the calendar following a request by the parties, it will be placed back on the calendar and will proceed in the normal course.¹⁶⁰

154. Interviews with a Senior Member of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64; Interview with Two Senior Members of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64.

155. Interviews with a Senior Member of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64; Interview with Two Senior Members of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64.

156. Interviews with a Senior Member of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64; Interview with Two Senior Members of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64.

157. Interviews with a Senior Member of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64; Interview with Two Senior Members of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64.

158. Interviews with a Senior Member of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64; Interview with Two Senior Members of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64.

159. Interviews with a Senior Member of the Appellate Mediation Program, U.S. Court of Appeals for the D.C. Circuit (Jan. 27, 2011 & Feb. 3, 2011).

160. Interviews with a Senior Member of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64; Interview with Two Senior Members of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64.

In the First Circuit, nearly all counseled¹⁶¹ civil appeals are sent automatically to the Civil Appeals Management Program (CAMP).¹⁶² Only a few classes of civil appeals, including habeas appeals, are not sent to the management program.¹⁶³ Despite the fact that CAMP is mandatory in most cases, parties can request, and are sometimes granted, a waiver.¹⁶⁴ The First Circuit's CAMP is staffed by two retired state court judges—one in Boston and one in Puerto Rico—who serve part time as settlement counsel.¹⁶⁵ In FY 2010, close to 400 cases were referred to CAMP, of which slightly over 55 percent were ultimately conferenced;¹⁶⁶ approximately 40 percent of the conferenced cases settled.¹⁶⁷ Cases that do not settle continue to proceed in the ordinary course in the clerk's office and are no more or less likely to receive oral argument than cases that do not go through CAMP.¹⁶⁸

Like the First Circuit, the Second Circuit directs almost all counseled civil appeals to CAMP—about one thousand cases per year.¹⁶⁹ Participation is mandatory.¹⁷⁰ The Second Circuit's CAMP is staffed by three lawyers, one screener, and one or two staff persons.¹⁷¹ The settlement rate appears to be approximately 30 percent.¹⁷² Cases

161. Pro se cases are excluded by local rule. 1ST CIR. R. 33.0(f).

162. Interviews with a Senior Member of the Clerk's Office, U.S. Court of Appeals for the 1st Circuit, *supra* note 69.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* Cases referred to CAMP may not ultimately be conferenced for a number of reasons. These include, but are not limited to, a determination by the settlement counsel that the case is not amenable to potential settlement; a change in the status of the case, such as the withdrawal of counsel; or a procedural event that makes the case no longer eligible for the program, such as an order of remand, withdrawal of appeal, and so on. *Id.*

167. *Id.*

168. *Id.*

169. Interviews with a Senior Member of the Staff Attorney Office, U.S. Court of Appeals for the 2d Circuit, *supra* note 75.

170. Interviews with a Senior Member of the Clerk's Office, U.S. Court of Appeals for the 2d Circuit, *supra* note 126.

171. *Id.* But a senior member of the staff attorney office explained that “the settlement rate is higher if you take into account [Rule] 42.1 stip[ulation]s without prejudice because a significant number of those are not reinstated and become final.” Interviews with a Senior Member of the Staff Attorney Office, U.S. Court of Appeals for the 2d Circuit, *supra* note 75.

172. Interviews with a Senior Member of the Clerk's Office, U.S. Court of Appeals for the 2d Circuit, *supra* note 126. This figure was arrived at by measuring the number of Federal Rule of Appellate Procedure 42 stipulations—or voluntary dismissals—filed in the 2009 term, indicating the cases that settled after CAMP.

that do not settle continue to proceed in the normal course and often will ultimately be placed on the regular argument calendar.¹⁷³

In line with the D.C. Circuit, the Third Circuit directs only a subset of civil appeals to its Appellate Mediation Program.¹⁷⁴ Specifically, the “mediation office selects from the pool of eligible cases those that seem most amenable to mediation and settlement.”¹⁷⁵ Additionally, the Third Circuit has the unique practice of mediating pro se appeals.¹⁷⁶ If a staff attorney recommends a pro se case for mediation, the mediator will have an attorney represent the pro se litigant.¹⁷⁷ Representation is limited to mediation only; the attorney need not stay on as counsel if mediation fails.¹⁷⁸ The program is staffed by a director and a staff mediation attorney, who oversee mediation in approximately 90 percent of the cases, and by senior circuit and district judges, who oversee mediation in the remaining 10 percent of cases.¹⁷⁹ In the 2009 calendar year, 378 cases were mediated and 143 settled—approximately 37 percent.¹⁸⁰ If a case does not settle, either because the mediator rejects the case or because mediation fails, the case will return to the clerk’s office, a briefing schedule will be issued, and, after briefing, the case will be sent to a regular merits panel.¹⁸¹

In the Fourth Circuit, all civil and most agency appeals in which both parties are represented by counsel are directed to the Mediation Program.¹⁸² Mediation is mandatory in eligible cases, although cases that lack settlement potential move through the program quickly.¹⁸³ The settlement rate of cases referred to the program is 34 percent.¹⁸⁴

173. *Id.*

174. Interviews with a Senior Member of the Clerk’s Office, U.S. Court of Appeals for the 3d Circuit, *supra* note 129.

175. NIEMIC, *supra* note 38, at 31.

176. Interviews with a Senior Member of the Clerk’s Office, U.S. Court of Appeals for the 3d Circuit, *supra* note 129.

177. *Id.*

178. *Id.*

179. NIEMIC, *supra* note 38, at 31.

180. Interviews with a Senior Member of the Clerk’s Office, U.S. Court of Appeals for the 3d Circuit, *supra* note 129.

181. *Id.*

182. Interviews with a Senior Member of the Clerk’s Office, U.S. Court of Appeals for the 4th Circuit, *supra* note 139. Immigration appeals and appeals from the National Labor Review Board are not directed to the mediation program. *Id.*

183. *Id.*

184. *Id.*

Cases not settled through mediation are decided by the court after oral argument or submission on the briefs.¹⁸⁵

* * *

As this brief description demonstrates, many parties participate in a mediation or settlement program even before they have submitted briefs or appeared in court. Although the settlement rates of these programs are roughly comparable, the programs diverge on several key points: whether all civil cases are part of the program, whether certain parties are excluded from participating, and who serves as a mediator. The First, Second, and Fourth Circuits automatically send almost all of their civil appeals to mediation; in contrast, the D.C. and Third Circuits select only a subset of civil appeals for their mediation programs. Additionally, most courts do not permit *pro se* appellants to participate in their mediation programs—the Third Circuit is the only exception among the circuits surveyed here. Finally, in two circuits—the First and Third—parties may have judges acting as mediators, whereas in the others—the D.C., Second, and Fourth—parties have lawyers overseeing mediation. Although none of these individual differences may seem significant, when assessed cumulatively, it is evident that parties in civil appeals are facing quite different settlement programs across the different circuit courts.

D. Nonargument-Track Cases and the Role of Staff Attorneys

Of the cases that survive an initial screening and do not settle, many go on to be decided on the merits—either after oral argument or solely on the briefs.¹⁸⁶ In the interest of judicial economy, courts

185. *Id.*

186. There may be an interim step between the screening of a case and consideration of that case's merits—sometimes a panel of judges will need to consider a motion made by one of the parties. What has not been widely discussed in the literature is the fact that in deciding particular motions, many courts will seize the opportunity to also decide the merits of the case. For example, if a *pro se* litigant makes a motion to have counsel appointed or if a litigant requests a free transcript of the trial below, a motions panel may review the merits of the case, decide that the appeal is frivolous, and dismiss the appeal before a formal adjudication has taken place. Jon O. Newman, *The Second Circuit's Expedited Adjudication of Asylum Cases*, 74 BROOK. L. REV. 429, 433 (2009). How often courts terminate cases on the merits following a motion is again something that varies from circuit to circuit. Although this practice is significant, exploring the full range of motions practice—procedural, substantive, and emergency—is beyond the scope of this Article and is something I plan to explore in future work.

have been holding fewer and fewer oral arguments relative to the caseload as a whole.¹⁸⁷

Although nonargument tracks have become one of the most widely used case-management tools, they have also been one of the most controversial. The use of these tracks has been defended on the grounds that, by holding fewer oral arguments, judges have more time to spend on other matters—particularly the difficult and complex cases—and the cost to the parties is minimized. In the words of Judge Wallace:

The amount of time saved by foregoing oral argument is significant, and it affords the court that much more time to allocate to more difficult cases. Dispensing with unnecessary oral argument also enables the parties to avoid the substantial costs associated with having their attorneys prepare presentations and attend the hearing. Incurring these expenses is a waste if further efforts to persuade the court would be futile.¹⁸⁸

The critical clause of this statement is “if further efforts to persuade the court would be futile.” The declining use of oral argument has been controversial precisely because there are those who believe that some cases that warrant oral argument are not being heard. Minnesota Supreme Court Justice David Stras and Shaun Pettigrew argue that “the curtailment of oral arguments in the courts of appeals has gone so far that even cases that would benefit from oral argument are decided solely on the briefs with the assistance of staff attorneys and law clerks.”¹⁸⁹

This critique raises another controversial aspect of the move away from oral argument: courts’ increased dependence on staff.¹⁹⁰ In many of the cases that are not tracked for argument, staff attorneys “work up” the case, meaning that they prepare a memorandum and

187. See Ruggero J. Aldisert, *Perspective from the Bench on the Value of Clinical Appellate Training of Law Students*, 75 MISS. L.J. 645, 648 (2006) (“Crushing caseloads have imposed severe restrictions on the time available for oral argument.”). Judge Aldisert conducted a survey of the percentage of cases argued in the twelve regional circuits in 1990 and 2004, concluding that “[t]here has been a decline in oral argument in every circuit.” *Id.* at 649.

188. Wallace, *supra* note 17, at 200.

189. Stras & Pettigrew, *supra* note 5, at 433.

190. See generally Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 ARIZ. ST. L.J. 1 (2007) (arguing that increased reliance on staff attorneys has impoverished the federal appellate system).

draft a disposition.¹⁹¹ Yet the extent to which oral argument has been curtailed, the degree to which staff attorneys prepare cases, and the manner in which judges ultimately review the staff attorneys' work differs greatly from circuit to circuit.

In the D.C. Circuit during the 2009–2010 term, over 50 percent of the cases that were decided on the merits were not placed on the argument calendar.¹⁹² This set of cases, which is composed of pro se appeals and those appeals that are perceived to be straightforward, is worked up by staff attorneys.¹⁹³ In many of these cases, the assigned staff attorney drafts a proposed disposition—almost always an order that will not be officially published—and submits the proposed decision, along with an explanatory memorandum, to a panel of three judges.¹⁹⁴ The cases are then discussed at a conference.¹⁹⁵ According to one D.C. Circuit judge, roughly half-a-dozen to two-dozen cases are decided during this kind of conference, and these conferences are held approximately twice a month.¹⁹⁶ If the judges have case-related questions, they can address them to the authoring staff attorney who is present,¹⁹⁷ along with the staff attorney's supervisor.¹⁹⁸ The judges then decide whether they agree with the staff attorney's

191. See Vladeck & Gulati, *supra* note 3, at 1669 (explaining that many cases not tracked for oral argument “are processed by staff attorneys or court-employed legal assistants,” on whom judges rely “to provide them with both an even-handed, balanced appraisal of the case and a proposed disposition”).

192. Specifically, I was informed that, during the 2009–2010 term, there were 271 lead case dispositions by merits panels and 293 dispositions by the legal division or staff attorney office. Interviews with a Senior Member of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64.

193. *Id.*

194. *Id.* The staff attorney also submits a proposed order to the panel, which notifies the parties that the case is going to be decided without argument. *Id.*

195. In addition to deciding nonargument cases at these conferences, judges also rule on motions. Interviews with a Senior Member of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64; Interview with Two Senior Members of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64.

196. Interviews with a Judge on the U.S. Court of Appeals for the D.C. Circuit (May 10, 2010 & June 6, 2011).

197. *Id.*

198. Interviews with a Senior Member of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64; Interview with Two Senior Members of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64.

recommendation to dispense with oral argument, and if so, whether to adopt or alter the proposed disposition.¹⁹⁹

The remainder of the nonargument cases—those deemed to be truly frivolous—are handled by the court’s rapid response program.²⁰⁰ For these cases, a staff attorney prepares a memorandum that gives a brief abstract and a proposed order or judgment for each case.²⁰¹ Ten to twenty cases at a time can be decided using this form of review.²⁰² The materials are then sent to the chief judge of the circuit; if he agrees with the proposed dispositions, then two members of the motions panel will be presented with the same memorandum.²⁰³ As with the other nonargument cases, the judges can decide that a case should be placed on the argument calendar.²⁰⁴ If the court decides that argument will not be held, however, the parties are notified.²⁰⁵ Pursuant to D.C. Circuit Rule 34(j),²⁰⁶ a party may file a motion for reconsideration of the decision within ten days, but, according to the circuit rule, “[s]uch motions are disfavored.”²⁰⁷ If the party does not

199. Interviews with a Senior Member of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64; Interview with Two Senior Members of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64.

200. Interviews with a Senior Member of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64; Interview with Two Senior Members of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64. Motions can also be decided through the rapid response program. Interviews with a Senior Member of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64; Interview with Two Senior Members of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64. Those matters may be non-frivolous. Interviews with a Senior Member of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64; Interview with Two Senior Members of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64.

201. Interviews with a Senior Member of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64; Interview with Two Senior Members of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64.

202. Interviews with a Senior Member of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64; Interview with Two Senior Members of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64.

203. Interviews with a Senior Member of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64; Interview with Two Senior Members of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64.

204. Interviews with a Senior Member of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64; Interview with Two Senior Members of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64.

205. Interviews with a Senior Member of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64; Interview with Two Senior Members of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64.

206. D.C. CIR. R. 34(j).

207. *Id.*

object or if the motion for reconsideration is denied, the court enters the judgment.²⁰⁸

In the First Circuit in FY 2010, approximately 71 percent of the cases decided on the merits were not placed on the argument calendar.²⁰⁹ Cases may be tracked for nonargument in one of two ways: screening by staff attorneys or waiver by the parties before the case has been calendared.²¹⁰ In these matters, a staff attorney prepares a memorandum and drafts a short opinion for consideration by a panel of three judges.²¹¹ The panel members then review the materials on their own and—without formal, in-person conferencing—vote in a serial or round-robin fashion.²¹² If any judge believes that the case should be argued, the appeal will be sent to the argument calendar automatically.²¹³ Otherwise, the judges vote on whether to accept the drafted disposition.²¹⁴ It is not unusual for the judges to rewrite or revise the draft substantially or even to decide on a different result, redrafting the proposed opinion or asking the staff attorney to do so.²¹⁵

208. Interviews with a Senior Member of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64; Interview with Two Senior Members of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64.

209. I was informed that the First Circuit does not have precise statistics on the number of argument and nonargument cases that are decided on the merits. Interviews with a Senior Member of the Clerk's Office, U.S. Court of Appeals for the 1st Circuit, *supra* note 69. But the Administrative Office of the Federal Courts reports that during FY 2010, 28.9 percent of the cases terminated on the merits were decided after an oral hearing. *See* ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 10, at 44 tbl.S-1. This figure suggests that 71.1 percent of cases terminated on the merits were decided without argument. This figure alone, however, does not capture cases not originally calendared because it is possible for cases to be calendared but not ultimately argued. I was informed by a senior member of the clerk's office that very few cases that are calendared in the First Circuit do not ultimately go to argument. Interviews with a Senior Member of the Clerk's Office, U.S. Court of Appeals for the 1st Circuit, *supra* note 69. Accordingly, one can estimate that approximately 71 percent of the cases that are ultimately decided on the merits are not placed on the argument calendar. *Id.*

210. Interviews with a Senior Member of the Clerk's Office, U.S. Court of Appeals for the 1st Circuit, *supra* note 69. Pursuant to First Circuit Rule 34.0(a), parties have the opportunity during briefing to set forth reasons why oral argument should or should not be heard in their case. 1ST CIR. R. 34.0(a).

211. Interviews with a Senior Member of the Clerk's Office, U.S. Court of Appeals for the 1st Circuit, *supra* note 69.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

In the Second Circuit, roughly 45 percent of the cases decided on the merits were placed on the NAC in recent terms.²¹⁶ This figure marks a sea change in the circuit, which until less than a decade ago boasted a tradition of hearing oral argument in nearly every case.²¹⁷ After the court became overwhelmed by immigration appeals in the early part of the decade,²¹⁸ however, the judges decided that most asylum-related appeals would be decided on the briefs unless at least one judge on the panel thought the case warranted argument.²¹⁹ The circuit simultaneously decided that nonargument cases would be worked up by staff attorneys, who would prepare a bench memorandum and draft a summary order for each case.²²⁰ This continues to be the practice of the NAC. Until recently, sentencing-only appeals—that is, criminal appeals that raise issues only about a defendant’s sentence—were also sent to the NAC.²²¹ Because the Second Circuit has experienced a drop in the number of filings per judge,²²² though, sentencing-only cases are again being routed to the

216. Interviews with a Senior Member of the Staff Attorney Office, U.S. Court of Appeals for the 2d Circuit, *supra* note 75. Pursuant to Second Circuit Local Rule 34.1(a), parties are to file an oral-argument statement form to set forth reasons why oral argument should or should not be heard in their case. 2D CIR. R. 34.1(a).

217. See MCKENNA ET AL., *supra* note 7, at 70 (“Except for the examination of pro se in forma pauperis cases, there is no decisional screening to track cases; all cases, including pro se cases that survive initial review . . . , are placed on an argument panel calendar.”). The main exception to this rule at the time was that litigants who were incarcerated prisoners did not receive oral argument. *Id.*

218. See Newman, *supra* note 186, at 431 (“On September 30, 2002, there were 691 agency cases pending in the Second Circuit; on the same date in 2003, 2004, and 2005, the total increased to 2493, 4647, and 5299, respectively.”).

219. *Id.* at 433–34.

220. *Id.* at 434.

221. Interviews with a Senior Member of the Clerk’s Office, U.S. Court of Appeals for the 2d Circuit, *supra* note 126.

222. When I was a law clerk during the 2008–2009 term, a weeklong sitting would consist of, on average, thirty-six cases. This figure has now dropped to between twenty-five and twenty-seven cases per week. Interviews with a Senior Member of the Clerk’s Office, U.S. Court of Appeals for the 2d Circuit, *supra* note 126. This drop in cases heard per week appears to be due to several factors, including: (1) the fact that filings have been down generally in the courts of appeals (specifically, filings were down 6 percent in the regional appellate courts in 2009, see ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: ANNUAL REPORT OF THE DIRECTOR 13 (2009), and 3 percent in 2010, see ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 10, at 15); (2) the fact that four of the active judges took senior status in the summer and fall of 2009, thereby freeing up several more active seats (two of which have been filled); and (3) the fact that the Second Circuit increased its number of sitting days and the cases per sitting over the past few years in an effort to reduce its backlog, thereby reducing the workload, Interviews with a Senior Member of the Clerk’s Office, U.S. Court of Appeals for the 2d Circuit, *supra* note 126.

regular argument calendar.²²³ Accordingly, staff attorneys who work on NAC cases work only on immigration cases.²²⁴ They submit their proposed summary orders and bench memoranda to an NAC panel composed of three judges.²²⁵ The judges do not meet to talk with each other or with the staff attorneys; rather, they indicate their views on a voting sheet, submitted in a serial fashion. As described by Judge Jon Newman of the Second Circuit:

A voting sheet accompanying the submission identifies each of the three panel members as either Judge No. 1, Judge No. 2, or Judge No. 3. Each of the judges on the panel is Judge No. 1 for one third of the week's cases, is Judge No. 2 for another third of the cases, and is Judge No. 3 for the final third.

The judges vote in sequence on the voting sheet. Each Judge No. 1 votes first on the three or four cases for which that judge is Judge No. 1, and sends the voting sheet to Judge No. 2, who votes and sends it on to Judge No. 3. The voting options are: refer the petition to the [regular argument calendar], deny, grant, remand, or other. The voting sheet provides blanks to be checked to indicate whether the proposed order from the [staff attorney office] is acceptable (either as submitted or as edited by the judges) or whether Judge No. 1 (or occasionally Judge No. 2 or No. 3) has proposed a substitute order.²²⁶

This process is meant to ensure that voting concludes in a timely manner. As Judge Newman notes, “In the absence of exceptional circumstances, each judge is required to vote and send the voting sheet on in one week,” which means that “voting is normally concluded within three weeks of submission.”²²⁷

In the Third Circuit in FY 2009, 17 to 27 percent of the cases decided on the merits were sent to nonargument panels.²²⁸ This is

223. Interviews with a Senior Member of the Clerk's Office, U.S. Court of Appeals for the 2d Circuit, *supra* note 126.

224. Staff attorneys also work on pro se cases. Because pro se cases are placed on the regular calendar, however, I discuss them in the Section pertaining to sittings. See *infra* Part II.E.

225. Newman, *supra* note 186, at 434.

226. *Id.*

227. *Id.*

228. I was informed that in FY 2009, 2,333 cases were decided on the merits in the Third Circuit. Of that number, approximately 220 were sent to a standing pro se panel, and 300 were sent to a standing immigration panel. Thus, to formulate an estimate of the number of cases that were sent to nonargument panels, I simply divided 520 by 2,333, which comes to 22 percent. To

because, like the Second Circuit, the Third Circuit does not have its staff attorneys screen cases for oral argument. Rather, only particular kinds of cases—pro se cases that do not involve direct criminal appeals and most immigration cases—are sent to panels that do not hear argument.²²⁹ Cases that are sent to nonargument panels are worked up by staff attorneys, who write both a memorandum and a draft order, or possibly a draft per curiam opinion, for each case.²³⁰ Those materials are then sent to an appropriate standing panel, such as a pro se panel.²³¹ As is the case in the First and Second Circuits, the nonargument panels of the Third Circuit do not actually meet; the judges receive the materials and then vote without formal discussion, although it is possible for the judges to exchange comments about cases prior to voting.²³² Unlike in the First and Second Circuits, however, voting in the Third Circuit is not sequential.²³³ Rather, the panel members generally transmit their votes to the “administrative” judge for the panel and send a copy to the other panel members in no set order.²³⁴ According to one judge of the Third Circuit, the decision not to employ serial voting was a deliberate one, geared toward minimizing the extent to which judges would be influenced by each other when casting their votes.²³⁵

In the Fourth Circuit, it appears that close to 88 percent of the cases decided on the merits are not placed on the argument calendar—the highest percentage of the circuits surveyed here.²³⁶

account for the fact that this figure is only an estimate, I gave a range of 17 to 27 percent. The raw data comes from interviews with a senior member of the clerk’s office for the Third Circuit. Interviews with a Senior Member of the Clerk’s Office, U.S. Court of Appeals for the 3d Circuit, *supra* note 129.

229. *Id.* According to Third Circuit Local Appellate Rule 34.1, parties may file a statement with the court during briefing to request argument. 3D CIR. R. 34.1(b).

230. Interviews with a Senior Member of the Staff Attorney Office, U.S. Court of Appeals for the 3d Circuit, *supra* note 83. Specifically, I was told that staff attorneys prepare a memorandum and proposed order, or, if appropriate, a per curiam opinion, in any habeas case requiring a certificate of appealability, any immigration case in which a party has filed a motion, and any other civil matter in which one of the parties is proceeding pro se. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. Interviews with a Judge on the U.S. Court of Appeals for the 3d Circuit (Sept. 20, 2010 & Jan. 11, 2011).

236. Specifically, I was told that the Fourth Circuit hears argument in roughly 450 cases each year and, recently, has decided approximately 3,800 cases on the merits. Interviews with a Senior Member of the Staff Attorney Office, U.S. Court of Appeals for the 4th Circuit, *supra* note 89. Of course, some cases that are initially slated for resolution without argument are

These cases all go to the Office of the Staff Counsel.²³⁷ There, staff attorneys review each case and, if they believe argument is warranted, place the case on the calendar.²³⁸ Cases that are set for submission without oral argument are first worked up by staff attorneys.²³⁹ For approximately 60 percent of these cases, the staff attorneys prepare a memorandum and draft a disposition for submission to a panel of three judges.²⁴⁰

As in the First, Second, and Third Circuits, the panel does not actually confer in person; each judge reviews the materials and decides the case on her own.²⁴¹ The Fourth Circuit then employs a modified, loose form of serial voting.²⁴² Each panel has a “lead” judge—a position that is randomly assigned.²⁴³ The lead judge is in charge of eventually submitting the disposition for each case to the clerk’s office and is usually, but not necessarily, the first to vote.²⁴⁴ The other two judges then submit their votes to their fellow panel members in no set order.²⁴⁵ Again, as in all of the other circuits, if any

ultimately put on the argument calendar, meaning that the 450 figure overcounts and the 3,800 figure undercounts. *Id.* The concerns about over- and undercounting are at least partially canceled out, however, because some cases that are put on the argument calendar are not actually argued, meaning that the 450 figure undercounts and the 3,800 figure overcounts. *Id.* I therefore treated the over- and undercounting effects as net neutral and simply divided the number of cases decided on the briefs by the total number of cases decided on the merits to obtain a rough estimate of the percentage of cases that are initially set for resolution without argument.

Like many of the other circuits surveyed here, the Fourth Circuit gives parties the opportunity to explain why argument is warranted in their case. Specifically, parties are permitted to include in their briefs “a statement setting forth the reasons why, in their opinion, oral argument should be heard.” 4TH CIR. R. 34(a).

237. Interviews with a Senior Member of the Staff Attorney Office, U.S. Court of Appeals for the 4th Circuit, *supra* note 89.

238. *Id.* Staff attorneys have the authority to place a case on the calendar without judicial approval so long as one of the supervisory staff attorneys agrees and both parties in the case have counsel. *Id.* If a staff attorney believes that a pro se case should be calendared, he or she must first write a calendaring memorandum, setting out why the case should be argued and requesting appointment of counsel. *Id.* This process is carried out because pro se litigants are not permitted oral argument in the Fourth Circuit. *Id.* If the panel agrees, the case is approved for appointment of counsel, and most of the time, the request for argument is approved, although, occasionally, that decision is made only after formal briefs are filed and reviewed by the judges. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

one member of the panel determines that argument would be useful, the panel notifies the responsible staff attorney, who then communicates the panel's determination to the clerk's office, which places the case on the oral-argument calendar.²⁴⁶ If the judges all agree that a particular case should be decided on the briefs alone, the judges vote whether to accept the disposition proposed by the staff attorneys and then decide on any changes to the proposed disposition.²⁴⁷

In the remaining 40 percent of the nonargument cases in the Fourth Circuit, the staff attorneys make oral presentations.²⁴⁸ Staff attorneys select the most straightforward appeals for this kind of decision.²⁴⁹ In oral-presentation cases, staff attorneys draft proposed dispositions but not memoranda.²⁵⁰ A randomly selected three-judge panel then receives the draft dispositions, along with the rest of the file for each case.²⁵¹ The panel convenes via telephone conference, and the staff attorneys discuss each case.²⁵² These meetings are held twice a month, and anywhere from forty-five to seventy-five appeals are decided at each meeting.²⁵³ In addition to deciding whether to accept the staff attorneys' proposed disposition, the judges may also decide to request that the case be written up more fully with a memorandum, or even calendared, though the latter is rarely done.²⁵⁴

* * *

There are several important observations to make about the treatment of cases not set for oral argument. First, there is a striking difference in the percentage of cases set for submission at the outset. In the Third Circuit in FY 2009, only 17 to 27 percent of cases decided

246. Interviews with a Senior Member of the Clerk's Office, U.S. Court of Appeals for the 4th Circuit, *supra* note 139.

247. Interviews with a Senior Member of the Staff Attorney Office, U.S. Court of Appeals for the 4th Circuit, *supra* note 89.

248. *Id.*

249. *Id.* Specifically, for a term staff attorney to slate an appeal for decision by oral presentation, the staff attorney would also need a supervisor to agree. Permanent staff attorneys, however, have the authority on their own to submit cases for decision by oral presentation. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

on the merits were decided by panels without argument.²⁵⁵ In contrast, the comparable figure in the Fourth Circuit was nearly 88 percent.²⁵⁶ Although these figures do not convey how many cases ultimately were argued—some circuits, including the Third, decide to set a high percentage of cases on submission after they have been calendared—they do convey how many cases were prepared by staff attorneys. Cases that are placed on a nonargument track tend to have their decisions drafted by staff attorneys, whereas cases that are calendared, even if they are ultimately decided on the briefs, tend to be worked up in chambers. Thus, this striking difference in the percentage of cases set for submission actually translates into a striking difference in the ways cases are prepared—and in particular, the way dispositions are drafted—in the circuits.

Second, key differences exist in the staff attorneys' work product and the way their work is reviewed. On one end of the spectrum are the oral presentations in the Fourth Circuit—in which staff attorneys draft proposed decisions for each case and the judges consider as many as seventy-five cases at a time. On the other end of the spectrum are the conferences in the D.C. Circuit—in which judges have not only been given explanatory memoranda and proposed decisions in each case but also have the opportunity to question the staff attorney who submitted the proposal at length in conferences during which only half-a-dozen to two-dozen matters are considered. Quite plainly, the treatment of nonargument cases ranges significantly among these circuits.

Finally, critical differences exist among the circuits in their voting procedures for noncalendared cases. Several of the circuits rely on serial voting, which necessarily means that one-third of the time, a judge will know how one other panel member has voted before casting her vote; another third of the time, a judge will know how two other panel members have voted before casting her vote. In contrast, the Third Circuit has judges submit their votes to the administrative judge of the panel, thereby allowing the other panel members to vote blindly.²⁵⁷ This is yet another example of a key practice with significant variation across the circuits.

255. See *supra* note 228 and accompanying text.

256. See *supra* note 236 and accompanying text.

257. Of course, both of these practices differ from what happens during oral presentations—or, for that matter, in conferences after an oral argument—when judges necessarily learn how the other panel members intend to vote.

E. Sittings and Argument

Cases that survive initial screening and that are not designated for a nonargument track are scheduled for a particular sitting. Most of those cases then follow the traditional model of appellate decisionmaking—that is, they will be heard before a panel of three judges, and those judges will then conference about, and ultimately resolve, the cases.²⁵⁸ There are, however, a few caveats worth mentioning about cases that are set for sittings.

First, being set for a particular sitting does not necessarily mean that a case will be argued. Even after a case is scheduled on the calendar, judges can decide that the issues do not warrant oral argument.²⁵⁹ The frequency of this practice varies greatly from circuit to circuit. If a panel decides that a case will go on submission, the case technically remains on the calendar, but, like a nonargument case, it will be decided solely on the submitted materials.²⁶⁰ Importantly, unlike other nonargument cases, cases that remain on the calendar are almost always worked up within chambers.²⁶¹

Second, the percentage of cases that are actually decided after an oral argument varies considerably—from 44.4 percent²⁶² in one court to 13.1 percent²⁶³ in another. Because docket size also varies considerably from circuit to circuit, these percentages represent a sizeable difference in the raw number of cases that are decided after oral argument.

Third, even if a case receives argument, the structure of that argument varies from circuit to circuit. The Administrative Office of the United States Courts has described oral argument in the federal courts of appeals as “a structured discussion between the appellate lawyers and the panel of judges,” with each side “given a short time—

258. See *supra* notes 18–19 and accompanying text.

259. Of the circuits surveyed here, the Third Circuit is a prime example of a court that directs appeals to go on submission, even after argument is scheduled. See *infra* note 286 and accompanying text; see also MCKENNA ET AL., *supra* note 7, at 86 (explaining how judges on regular panels “receive the cases six to eight weeks before the argument date and decide at least ten days in advance of the argument week which cases referred for that week will be argued”).

260. See *infra* notes 268, 272, 279, 286–288, 294 and accompanying text.

261. See *infra* notes 271, 276, 283, 292, 300 and accompanying text.

262. See *infra* note 269 and accompanying text.

263. See *infra* note 296 and accompanying text.

usually about 15 minutes—to present arguments to the court.”²⁶⁴ In some circuits, oral argument typically lasts a total of forty minutes,²⁶⁵ and in others, argument may conclude in as few as ten minutes.²⁶⁶ Again, just as with the other major docket-management practices, there is great variation among how regular calendar cases are treated.

In the D.C. Circuit, cases that are recommended for oral argument go on the court’s calendar and are argued in due course, unless the panel members unanimously decide that a case should go on submission.²⁶⁷ The practice of directing a case to go on submission at that point—known in the circuit as “34(j)-ing a case,” after the circuit rule that controls disposition without oral argument—occurs approximately 11 percent of the time.²⁶⁸ According to the Administrative Office of the United States Courts, in FY 2010, 231—or 44.4 percent—of the D.C. Circuit cases terminated on the merits were decided after oral argument.²⁶⁹ Argument time in the D.C. Circuit is, on average, about fifteen minutes per side, but argument for complex cases can last up to two hours total.²⁷⁰ Once a case is set on the court’s calendar, the disposition will be drafted within the chambers of one of the members of the panel that heard the case.²⁷¹

264. *The Appeals Process*, U.S. COURTS, <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/HowCourtsWork/TheAppealsProcess.aspx> (last visited Oct. 7, 2011).

265. *See infra* note 298 and accompanying text.

266. *See infra* note 282 and accompanying text.

267. Interviews with a Senior Member of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64; Interview with Two Senior Members of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64.

268. Interviews with a Senior Member of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64; Interview with Two Senior Members of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64. Specifically, over the last three court terms, the percentage of cases that have been “34(j)ed” after being scheduled for argument has been as follows: September 2007–2008 term: 11.2 percent; September 2008–2009 term: 12.3 percent; September 2009–2010 term: 10.2 percent. The three-term average is 11.3 percent. Interviews with a Senior Member of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64; Interview with Two Senior Members of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64.

269. ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 10, at 44 tbl.S-1.

270. Interviews with a Senior Member of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64; Interview with Two Senior Members of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64.

271. Interviews with a Senior Member of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64; Interview with Two Senior Members of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64. In complex cases, a panel may decide to divide a single opinion among various panel members. Interviews with a Senior Member of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64.

In the First Circuit, cases that are put on the regular calendar are generally argued—judges place cases on submission without oral argument “fairly rarely.”²⁷² In FY 2010, 28.9 percent of the cases terminated on the merits were decided after an oral hearing.²⁷³ This figure corresponds to 279 cases.²⁷⁴ Allotted time typically ranges between ten and twenty minutes per side.²⁷⁵ As in the D.C. Circuit, once a case is on the argument calendar, the decision will be drafted in judges’ chambers, regardless of whether or not it actually is argued.²⁷⁶

In the Second Circuit, cases that are not placed on the NAC or otherwise disposed of go to the regular argument calendar.²⁷⁷ Once on the calendar, the majority of cases receive argument, unless the panel unanimously decides to direct a case to go on submission.²⁷⁸ Such a decision, however, does not occur often, if at all, in a given sitting.²⁷⁹ Roughly 90 percent of cases on the regular argument calendar actually receive argument; the remainder are decided solely on the briefs.²⁸⁰ Overall, during FY 2010, 37.7 percent of the cases terminated on the merits in the Second Circuit were decided after oral argument.²⁸¹ This figure corresponds to 1,246 cases—well above the number of cases that were orally argued in the remaining circuits I surveyed. Oral argument in the Second Circuit tends to be shorter than argument in the other circuits surveyed: cases typically are assigned anywhere from five to fifteen minutes per side, although the panels can—and often do—decide to extend this limit.²⁸² Cases that are on the regular argument calendar are generally worked up within the judges’ chambers, meaning that judges are responsible for

272. Interviews with a Judge on the U.S. Court of Appeals for the 1st Circuit (June 8, 2010 & Jan. 4, 2011).

273. ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 10, at 44 tbl.S-1.

274. *Id.*

275. Interviews with a Senior Member of the Clerk’s Office, U.S. Court of Appeals for the 1st Circuit, *supra* note 69.

276. *Id.*

277. Interviews with a Senior Member of the Clerk’s Office, U.S. Court of Appeals for the 2d Circuit, *supra* note 126.

278. *Id.*

279. *Id.*

280. *Id.*

281. ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 10, at 44 tbl.S-1.

282. Interviews with a Senior Member of the Clerk’s Office, U.S. Court of Appeals for the 2d Circuit, *supra* note 126.

drafting the dispositions.²⁸³ The only exception to this rule is that, beginning in the 2008–2009 term, the staff attorney office began submitting a draft summary order and memorandum for all pro se appeals.²⁸⁴

In the Third Circuit, cases that are not sent to particular panels—such as a standing immigration or pro se panel—will go to a regular merits panel.²⁸⁵ The judges on each merits panel then decide which cases will receive oral argument.²⁸⁶ Because these cases have not previously been screened for oral argument, judges on the Third Circuit tend to direct a higher percentage of cases to go on submission.²⁸⁷ Specifically, over 50 percent of the cases that are set for any given sitting are ultimately decided on the briefs without argument.²⁸⁸ Compared to the other circuits, the Third Circuit holds oral argument in a small percentage of cases—during FY 2010, only 13.9 percent of the cases decided on the merits were decided after oral argument.²⁸⁹ Yet the raw number of cases decided following oral argument—344²⁹⁰—is in the middle of the circuits surveyed here. During oral argument, cases in this circuit typically receive fifteen minutes per side, with a grant of less than fifteen minutes being a rarity.²⁹¹ In general, cases that go on the argument calendar are decided in dispositions drafted in chambers.²⁹²

In the Fourth Circuit, only cases that have been specifically selected for oral argument—either by counsel to the clerk, staff attorneys, or the judges when they are reviewing cases originally selected for decision solely on the briefs—are placed on the calendar.²⁹³ As in the other circuits, judges have the discretion to forgo oral argument in any case, even after the case is set for oral

283. *Id.*

284. *Id.*

285. Interviews with a Senior Member of the Staff Attorney Office, U.S. Court of Appeals for the 3d Circuit, *supra* note 83.

286. *Id.*

287. *Id.*

288. Interviews with a Judge on the U.S. Court of Appeals for the 3d Circuit, *supra* note 235.

289. ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 10, at 44 tbl.S-1.

290. *Id.*

291. Interviews with a Senior Member of the Staff Attorney Office, U.S. Court of Appeals for the 3d Circuit, *supra* note 83.

292. *Id.*

293. Interviews with a Senior Member of the Staff Attorney Office, U.S. Court of Appeals for the 4th Circuit, *supra* note 89.

argument, so long as the decision is unanimous.²⁹⁴ These decisions happen infrequently—in about 5 percent of the cases calendared for argument.²⁹⁵ The Fourth Circuit has the lowest percentage of argued cases out of the circuits surveyed here—during FY 2010, 13.1 percent of the cases terminated on the merits were decided after oral argument.²⁹⁶ Yet the total number of orally argued cases was the second highest of the circuits surveyed here: 379.²⁹⁷ Generally, the Fourth Circuit gives the longest argument time of the considered circuits. The allotted time per side is twenty minutes in most cases; some cases, however, including agency substantial evidence cases and criminal cases involving the application of the sentencing guidelines, are set for fifteen minutes per side.²⁹⁸ Argument time is never set below fifteen minutes per side for any case.²⁹⁹ As with the other circuits, cases that are on the regular calendar are decided in dispositions drafted in chambers.³⁰⁰

* * *

Circuit	Percentage of Cases Decided After an Oral Hearing of Those Decided on the Merits in FY 2010	Number of Cases Decided After an Oral Hearing of Those Decided on the Merits in FY 2010
D.C. Circuit	44.4	231
First Circuit	28.9	279
Second Circuit	37.7	1,246
Third Circuit	13.9	344
Fourth Circuit	13.1	379

Overall, the variation among the circuits with respect to the prevalence of oral argument is striking. In the Fourth Circuit, only 13.1 percent of cases terminated on the merits have oral argument,

294. Interviews with a Senior Member of the Clerk's Office, U.S. Court of Appeals for the 4th Circuit, *supra* note 139.

295. *Id.*

296. ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 10, at 44 tbl.S-1.

297. *Id.*

298. 4TH CIR. R. 34(d); Interviews with a Senior Member of the Clerk's Office, U.S. Court of Appeals for the 4th Circuit, *supra* note 139.

299. Interviews with a Senior Member of the Clerk's Office, U.S. Court of Appeals for the 4th Circuit, *supra* note 139.

300. *Id.*

whereas close to half of all such cases in the D.C. Circuit receive hearings. Perhaps more surprising are the raw numbers. The Second Circuit hears a staggering 1,246 cases in oral argument, while the Fourth Circuit—which hears the second-highest number of cases of the circuits studied here—holds oral argument in fewer than one-third as many. These numbers, in turn, may be better understood by simultaneously considering differences in oral argument time—it is no coincidence that the Second Circuit holds the most, and also the shortest, oral arguments.

Furthermore, understanding how these numbers come about is important. In the Third Circuit, judges direct more than 50 percent of calendared cases to be decided on the briefs,³⁰¹ whereas in the First Circuit, judges cut very few cases from argument.³⁰² Of course, these variations are due in part to the fact that, as described in Part II.B, initial screening processes vary so greatly. Circuits that screen out a relatively large number of cases initially—such as the First—are bound to have fewer cases directed to go on submission once they have been calendared. This is the mechanics of federal appeals at work—how cases are managed in one stage of review directly affects how they are managed in another stage of review.

F. *Publication of Dispositions*

After oral argument, or after reviewing the submitted materials in nonargument cases, judges must decide how to dispose of each appeal—not just whether they will affirm or deny the decision below, but whether they will decide the case by a signed, published opinion; by a per curiam opinion; or by a short, unpublished, and nonprecedential opinion or order.³⁰³ It is the increased use of this last category of dispositions that has received the most attention—and criticism—in the academic literature on case management.³⁰⁴ Critics

301. See *supra* note 288 and accompanying text.

302. See *supra* note 272 and accompanying text.

303. As has been noted elsewhere, the term “unpublished opinion” has become something of a term of art. *E.g.*, Martin, *supra* note 28, at 185. Despite the fact that these opinions are not published in the Federal Reporter, they are almost always published on the Westlaw and Lexis databases. *Id.*

304. Much of the initial criticism of unpublished opinions focused on the fact that they were not citable, see William L. Reynolds & William M. Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167, 1179–80 (1978) (“The Circuit court rules forbidding citation of unpublished opinions have caused more controversy than any other facet of the limited publication debate.”), which has now been remedied, see *infra* note 305 and accompanying text.

have argued that the use of these short, unpublished opinions—which may now be cited but which still are not precedential³⁰⁵—has led to a decline in judicial accountability and responsibility³⁰⁶ and has undermined the common-law tradition by creating judgments that are not precedential.³⁰⁷ Defenders of unpublished opinions respond that courts would not be able to work through their dockets if they did not have these shorter, less formal forms of disposition, and that the publication of only a select set of cases results in clearer precedent.³⁰⁸ In the midst of this controversy, there has been virtually no commentary on the degree to which the use of unpublished opinions varies among the circuits—in as few as 62.3 percent³⁰⁹ of cases terminated on the merits in one court to as many as 93.0 percent³¹⁰ in another. Thus, a key variation in court practice has been overlooked until this point.

In the D.C. Circuit, of the cases decided on the merits during FY 2010, 62.3 percent were disposed of using unpublished opinions or orders.³¹¹ Virtually all nonargument-track cases are disposed of using

305. See FED. R. APP. P. 32.1(a) (prohibiting courts from restricting the citation of unpublished opinions issued on or after January 1, 2007).

306. See Richman & Reynolds, *supra* note 5, at 282–83 (arguing that compared to the “traditional, fully reasoned written opinion,” unpublished opinions diminish judicial accountability—“[w]hen a judge makes no attempt to provide a satisfactory explanation of the result, neither the actual litigants nor subsequent readers of an opinion can know whether the judge paid careful attention to the case”—and responsibility—“[j]udges who cannot be held individually responsible either for the reasoning or the result have far less incentive to insure that they ‘get it right’”).

It is important to note that the publication of a lengthy opinion was not always the standard treatment for all dispositions—the use of oral dispositions used to be popular among some of the courts. For example, the Second Circuit decided 34 percent of its cases by oral disposition in 1977. Feinberg, *supra* note 1, at 317 n.62.

307. See Richard B. Cappalli, *The Common Law’s Case Against Non-Precedential Opinions*, 76 S. CAL. L. REV. 755, 759 (2003) (“The body of law is also victimized by the loss of valuable precedent.”).

308. See Martin, *supra* note 28, at 189 (“I believe that practicality and policy are strong arguments in support of the use of unpublished opinions. On the practical side, we use unpublished opinions in order to get through our docket. Policy-wise, we need to be able to distinguish those opinions worthy of publication, and of making a meaningful contribution to our body of precedent, from those that merely apply settled law to decide a dispute between parties.”).

309. See *infra* note 311 and accompanying text.

310. See *infra* note 324 and accompanying text.

311. ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 10, at 46 tbl.S-3.

unpublished orders or judgments.³¹² Thus, published opinions—both signed and per curiam—come almost exclusively from argued cases. There were 187 signed opinions in cases terminated on the merits in FY 2010.³¹³

In the First Circuit, of the cases terminated on the merits during FY 2010, 65.1 percent were disposed of through unpublished opinions.³¹⁴ As in the D.C. Circuit, most First Circuit cases that have not been calendared are disposed of by unpublished opinions. Unlike the other circuits surveyed here, however, most of the calendared cases result in full-length, published opinions, including those cases that are ultimately decided only on the briefs.³¹⁵ The First Circuit issued 318 signed opinions in cases terminated on the merits in FY 2010.³¹⁶

In the Second Circuit, 88.3 percent of cases decided on the merits during FY 2010 resulted in unpublished orders.³¹⁷ As in the D.C. and First Circuits, virtually all NAC cases are disposed of through unpublished summary orders.³¹⁸ Of the cases that are on the regular argument calendar, roughly three-fourths are disposed of through summary orders—the rest are disposed of by signed or per curiam opinions.³¹⁹ The Second Circuit issued 324 signed opinions in cases terminated on the merits in FY 2010.³²⁰

The Third Circuit's rate of unpublished opinions is close to that of the Second Circuit—89.8 percent of cases terminated on the merits during FY 2010 were decided by a nonprecedential opinion (NPO), the equivalent of an unpublished opinion.³²¹ Almost all of the cases that are submitted to a panel other than a regular merits panel are

312. Interviews with a Senior Member of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64; Interview with Two Senior Members of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64.

313. ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 10, at 46 tbl.S-3.

314. *Id.*

315. Interviews with a Senior Member of the Clerk's Office, U.S. Court of Appeals for the 1st Circuit, *supra* note 69.

316. ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 10, at 46 tbl.S-3.

317. *Id.*

318. Interviews with a Senior Member of the Clerk's Office, U.S. Court of Appeals for the 2d Circuit, *supra* note 126.

319. *Id.*

320. ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 10, at 46 tbl.S-3.

321. *Id.*

decided by an NPO.³²² Accordingly, most of the court's published opinions come from argued cases. The Third Circuit issued 246 signed opinions in cases terminated on the merits in FY 2010.³²³

The Fourth Circuit has the highest rate of unpublished opinions. Of the cases decided on the merits during FY 2010, 93.0 percent were disposed of by unpublished order.³²⁴ As a rule, the Fourth Circuit does not publish opinions in cases that have not been argued.³²⁵ Accordingly, all of its published opinions come from argued cases—specifically, from about 55 percent of those cases.³²⁶ The Fourth Circuit issued 193 signed opinions in cases terminated on the merits in FY 2010.³²⁷

* * *

Circuit	Percentage of Cases Decided by Unpublished Order of Those Decided on the Merits in FY 2010	Number of Cases Decided by Published, Signed Opinion of Those Decided on the Merits in FY 2010
D.C. Circuit	62.3	187
First Circuit	65.1	318
Second Circuit	88.3	324
Third Circuit	89.8	246
Fourth Circuit	93.0	193

Without these figures, it would be all too easy to say that the use of unpublished opinions is uniformly widespread. As these figures make clear, however, there are significant disparities in the nonpublication rates of the circuits: compare the D.C. Circuit's use of unpublished opinions in 62.3 percent of cases decided on the merits with the Fourth Circuit's use of such opinions in 93 percent of its cases terminated on the merits.

Beyond appreciating these differences in publication rates, it is also important to understand where these figures come from. Almost

322. Interviews with a Senior Member of the Staff Attorney Office, U.S. Court of Appeals for the 3d Circuit, *supra* note 83.

323. ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 10, at 46 tbl.S-3.

324. *Id.*

325. 4TH CIR. R. 36(a).

326. Interviews with a Senior Member of the Clerk's Office, U.S. Court of Appeals for the 4th Circuit, *supra* note 139.

327. ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 10, at 46 tbl.S-3.

all of the published opinions in all of the circuits come from cases that are calendared for oral argument. From here, however, differences arise. The First Circuit publishes full-length opinions in nearly all of its cases that are calendared—even ones that ultimately are decided solely on the briefs. In the other circuits, making it onto the calendar does not guarantee that a case will result in a published opinion. Yet for most of these circuits, published opinions tend to come from a subset of cases that actually receive oral argument.

Finally, it is important to recognize the variation in the number of cases that actually result in signed, published opinions. For example, even though the D.C. Circuit had the highest percentage of cases decided by published opinions, it ultimately decided only 187 cases by signed, published orders—just over half of the number of cases decided by the Second Circuit. Although these figures can only convey so much—for example, they cannot account for opinion length or for how much judicial time each case took—they serve to underscore once again that the story of case management in each circuit is a complex one, and that case-management practices diverge at every step of the appellate process.

G. *Additional Practices*

This Part has described the most significant docket-management practices in the appellate courts, but these courts, of course, have other practices beyond the ones mentioned here. For example, the courts have specific practices governing how often they hold sittings³²⁸ and where those sittings are held.³²⁹ The judges have different rules about sharing opinions—whether they circulate them to the entire

328. For example, in the August 2011 term, the Fourth Circuit has scheduled oral argument for six weeks and two individual days, *Oral Argument Calendar*, U.S. COURT OF APPEALS FOR THE 4TH CIRCUIT, <http://www.ca4.uscourts.gov/argcal.htm> (last visited Oct. 7, 2011), whereas for the first half of the same term, the Second Circuit is scheduled to hold oral argument nearly every week, *Court Calendar*, U.S. COURT OF APPEALS FOR THE 2D CIRCUIT, <http://www.ca2.uscourts.gov/calendars.htm> (last visited Oct. 7, 2011).

329. The courts of appeals all make their own decisions about where in their circuits to hold argument. For example, the Second Circuit typically hears cases in Manhattan but has recently also held oral argument in Albany and Buffalo, New York, and in New Haven, Connecticut. Interviews with a Senior Member of the Clerk's Office, U.S. Court of Appeals for the 2d Circuit, *supra* note 126. The Third Circuit hears most of its cases in Philadelphia, Pennsylvania, but twice a year sits in Newark, New Jersey. Interviews with a Senior Member of the Clerk's Office, U.S. Court of Appeals for the 3d Circuit, *supra* note 129. Additionally, although most of the circuits hear cases only in courthouses, some have used law schools; for example, the Second Circuit held oral argument at Yale Law School in 2008. Interviews with a Senior Member of the Clerk's Office, U.S. Court of Appeals for the 2d Circuit, *supra* note 126.

court or only to the original panel before publication.³³⁰ There are even different practices concerning en banc³³¹ and “mini en banc” procedures.³³² In short, courts diverge significantly at numerous points from filing to disposition in their handling of appeals.

* * *

Ultimately, this review of the docket-management practices of five circuits makes two points plain: First, the case-management practices of any given circuit are deeply interconnected. The practices that a court adopts at one point in the review process affect what it can or even what it will need to do at other points in the review process. For example, circuits that do not have staff attorneys perform screening functions at the outset of review either need to have oral argument in a higher percentage of cases or need judges to devote time to deciding, once cases are calendared, which cases will actually receive argument. No single decision about case management occurs in isolation.

Second, the federal courts of appeals have widely varied practices, from intake and screening to disposition. It may be tempting to speak in general terms about the practices of the courts—for example, that the use of oral arguments is on the decline but the use of staff attorneys is on the rise. When one more closely examines how each circuit functions, however, it becomes clear that each court has adopted its own approach to managing appeals. Having documented the extensive differences among the circuits’ case-management practices, I now turn to how such differences arose.

330. For example, some circuits, such as the Third Circuit, precirculate every opinion that is intended for publication to the entire circuit for comment. Interviews with a Judge on the U.S. Court of Appeals for the 3d Circuit, *supra* note 235. In contrast, the Second Circuit almost never precirculates opinions beyond the original panel. Interviews with a Senior Member of the Clerk’s Office, U.S. Court of Appeals for the 2d Circuit, *supra* note 126.

331. The Second Circuit, for example, has historically avoided holding en banc hearings. Feinberg, *supra* note 1, at 311.

332. Some courts hold “mini en bancs,” in which a panel circulates an opinion that changes circuit law to the active members of the court, and if no one objects, the change in law goes forward. *See, e.g.*, *Shipping Corp. of India Ltd. v. Jaldhi Overseas Pte Ltd.*, 585 F.3d 58, 67 (2d Cir. 2009) (noting that “it would ordinarily be neither appropriate nor possible for [the court] to reverse an existing Circuit precedent” without a formal en banc, but that in this case the panel had been able to alter precedent because it circulated the opinion “to all active members of [the Second Circuit] prior to filing and . . . [had] received no objection”).

III. EXPLAINING THE VARIATION

Why do the courts of appeals vary so much in their management of cases? The answer to that question is crucial for assessing the key positive and normative question about case management: To what extent can and should the circuits change their current practices?

In this Part, I argue that the differences between the circuits' practices can be explained in part by differences in dockets, and in part by differences in priorities. I argue that the interplay between dockets and priorities is dynamic—courts are constantly responding to changes in their dockets by altering their practices in accordance with their priorities. Yet there is also a way in which this interplay is static—many of the courts' priorities are simply grounded in tradition. In Part IV, I address whether these reasons are sufficient to justify the differences in practice.

A. *Differences in Dockets*

The most apparent explanation for the differences in docket-management practices is the variation in the courts' dockets. As one senior member of a clerk's office explained, "There is nothing we can do to set the caseload,"³³³ and the circuits' caseloads differ greatly, both in number and in kinds of cases.

First, each circuit's volume of cases plays a significant role in determining that circuit's case-management practices. The clearest example of this can be seen with the D.C. Circuit, which had 1,178 filings in FY 2010,³³⁴ or approximately 131 appeals per active judge—the lightest caseload of the circuits surveyed here. To give a sense of scale, the D.C. Circuit had just over 20 percent of the appeals and just under 25 percent of the filings per active judge that the Second Circuit had in the same period.³³⁵ As one D.C. Circuit judge explained, in contrast to the judges on the other circuits, judges on his court enjoy a "greater luxury of time."³³⁶ Therefore, the D.C. Circuit is able to establish practices that require more judicial time—such as holding oral argument and publishing opinions in a higher portion of

333. Interviews with a Senior Member of the Clerk's Office, U.S. Court of Appeals for the 3d Circuit, *supra* note 129.

334. ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 10, at 83 tbl.B.

335. In FY 2010, the Second Circuit had 5,371 appeals filed in the circuit—or approximately 537 appeals per active judge. *Id.*

336. Interviews with a Judge on the U.S. Court of Appeals for the D.C. Circuit, *supra* note 196.

cases. Conversely, circuits without the same luxury rely more on practices that save judicial time—including holding oral argument and publishing opinions in a smaller portion of cases. It is no accident that, of cases terminated on the merits, the D.C. Circuit held oral argument in the highest percentage—44.4 percent, as compared to 28.9 percent in the First Circuit, 37.7 percent in the Second Circuit, 13.9 percent in the Third Circuit, and 13.1 percent in the Fourth Circuit.³³⁷ Likewise, it is no accident that the D.C. Circuit issued the lowest percentage of unpublished, as compared to published, orders in cases terminated on the merits—62.3 percent, as compared to 65.1 percent in the First Circuit, 88.3 percent in the Second Circuit, 89.8 percent in the Third Circuit, and 93.0 percent in the Fourth Circuit.³³⁸ Quite plainly, the disparity in the sizes of the courts' caseloads is one of the primary reasons why case-management practices diverge.

Second, the differences in the kinds of cases that come before each circuit play an important role in determining case-management practices. The D.C. Circuit, for example, has a steady flow of complex agency cases.³³⁹ The court has decided that these kinds of cases should be treated in a particular way—that each case should be allotted a lengthy argument time and that each case should be heard alone on a sitting day.³⁴⁰ Another prime example comes from the Second Circuit. Because it had experienced rapid growth in its immigration docket in recent years, the court decided that it needed to streamline its adjudication of these appeals.³⁴¹ As described in Part II, this increase in the number of asylum appeals spurred the development of the court's NAC. As such, many of the circuit's case-management practices are related to the particular kinds of cases it receives.

Although this connection may seem apparent, the interplay between the number and type of cases received by each court is also important to note. The Second Circuit created the NAC out of a perceived necessity, as a way to make the adjudication of asylum

337. *See supra* Part II.E.

338. *See supra* Part II.F.

339. *See* Spottswood W. Robinson, III, *The D.C. Circuit: An Era of Change*, 55 GEO. WASH. L. REV. 715, 715–16 (1987) (describing how the D.C. Circuit's docket has a substantial number of agency appeals). Judge Robinson's portrayal of the D.C. Circuit still holds true today, as nearly one-third of the cases that come to the circuit come from agencies. ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 10, at 96 tbl.B-3.

340. *See supra* text accompanying note 111.

341. *See* Newman, *supra* note 186, at 432 (“The court authorized its Backlog Reduction Committee to consider ways to reduce the extraordinary backlog precipitated by the avalanche of asylum cases.”).

appeals more efficient. Because the court already had a high volume of appeals, it could not treat each of these immigration appeals as a regular argument case without creating a severe backlog for its appeals.³⁴² If the court had received a much lower volume of cases, it is not clear that the NAC would have been born. In the other direction, the D.C. Circuit is able to hear each complex case on a single sitting day because it receives a manageable number of complex cases, and filings more generally, each year. If the D.C. Circuit suddenly experienced a surge in complex cases on par with the rise in immigration cases in the Second Circuit, it stands to reason that the court would have to significantly alter its treatment of complex cases.

In short, the size and nature of a court's docket greatly affect the case-management practices that the circuit adopts. Because the circuits have different dockets according to both metrics, they have different case-management practices. But dockets are only part of the story. The workload of each court establishes what the judges and staff have to respond to; the question of how they respond is informed by the priorities they set.

B. Differences in Priorities

Differences in dockets among circuits are well understood and relatively easy to observe and measure; their impact on case-management practices should come as no surprise. But the qualitative research for this Article revealed another important factor: differences in norms and priorities among the circuits. One senior member of the clerk's office for the Second Circuit referred to each court's "higher values";³⁴³ a judge from the same circuit described different courts as making different "policy choice[s]."³⁴⁴ A senior member of the clerk's office for the Third Circuit stated that "each circuit has its own culture,"³⁴⁵ and a judge on the same circuit

342. *See id.* ("Making no adjustment would have caused a huge increase in the time all litigants would have to wait to have their appeals considered.").

343. Interviews with a Senior Member of the Clerk's Office, U.S. Court of Appeals for the 2d Circuit, *supra* note 126.

344. Interviews with a Judge on the U.S. Court of Appeals for the 2d Circuit (June 7, 2010 & Jan. 4, 2011), *supra* note 6.

345. Interviews with a Senior Member of the Clerk's Office, U.S. Court of Appeals for the 3d Circuit, *supra* note 129.

agreed.³⁴⁶ A judge on the First Circuit said that courts simply have different “priorities,”³⁴⁷ and a judge on the Fourth Circuit noted that each court has different “philosophical preferences.”³⁴⁸ Whatever terms are used, the circuits clearly make different judgments when it comes to individual case-management practices. Though harder to quantify than docket pressures, these priorities have an enormous and heretofore unrecognized impact on how courts manage the appeals before them.

Judges and court administrators, both in the interviews I conducted and in published articles, have openly discussed the differing priorities of their courts. One senior member of the clerk’s office for the Second Circuit said that she thinks her court particularly prizes ensuring that a wide range of cases receives oral argument, that full opinions are written whenever possible, and that the median disposition time remains one of the shortest of all of the circuits.³⁴⁹ Judge Newman of the Second Circuit has noted that his court gives particular weight to oral argument, explaining that until the creation of the NAC, the circuit “prided itself as the last remaining circuit to afford oral argument to all litigants, with the exception of prisoners whose cases [had] been deemed of insufficient merit to warrant the appointment of counsel.”³⁵⁰ A judge for the Third Circuit stated that his court prioritizes having judges decide whether or not a particular case will go to oral argument—that placing this decision in the hands of judges is simply part of his court’s culture.³⁵¹ A senior member of the clerk’s office for the Fourth Circuit stated that her court’s “focus” is on ensuring that all cases receive proper review through the effective use of time for oral argument and for review of cases on the briefs.³⁵² Judge Harvie Wilkinson of the Fourth Circuit has similarly

346. Interviews with a Judge on the U.S. Court of Appeals for the 3d Circuit, *supra* note 235.

347. Interviews with a Judge on the U.S. Court of Appeals for the 1st Circuit, *supra* note 272.

348. Interview with a Judge on the U.S. Court of Appeals for the 4th Circuit, *supra* note 6.

349. Interviews with a Senior Member of the Clerk’s Office, U.S. Court of Appeals for the 2d Circuit, *supra* note 126.

350. Newman, *supra* note 186, at 433.

351. Interviews with a Judge on the U.S. Court of Appeals for the 3d Circuit, *supra* note 235.

352. Interviews with a Senior Member of the Clerk’s Office, U.S. Court of Appeals for the 4th Circuit, *supra* note 139.

discussed his circuit's priorities,³⁵³ noting that the court prizes being one of the most efficient in the country.³⁵⁴ Although these statements should not be taken as definitive statements on the preferences of the circuits,³⁵⁵ they reinforce the theory that each court has, even self-consciously, established certain priorities when it comes to case management, and that those priorities are quite different across the circuits.

Nearly all of these statements about the norms in each circuit are consistent with the descriptive account of court practices in Part II. Comments that the Second Circuit particularly prizes oral argument are reflected in the fact that the court had the second-highest percentage of orally argued cases of the circuits surveyed here, and more apparently in the fact that the court had the largest number of cases terminated on the merits after oral argument by a considerable degree³⁵⁶—compare 1,246 cases decided after oral argument in the Second Circuit with 231 in the D.C. Circuit, 279 in the First Circuit, 344 in the Third Circuit, and 379 in the Fourth Circuit.³⁵⁷ The Second Circuit's commitment to writing full opinions whenever possible is evidenced by the fact that the court published the highest number of signed opinions in FY 2010.³⁵⁸ And although the Second Circuit does not have a particularly short median disposition time compared to the courts surveyed here,³⁵⁹ it is worth noting that, unlike the other courts, the circuit's median disposition time dropped significantly between FY 2009 and FY 2010—from 16.9 months³⁶⁰ to 13.3 months³⁶¹—

353. See Wilkinson, *supra* note 55, at 417 (“I should emphasize that oral argument is essential in every difficult or doubtful case, but it adds unnecessary expense and delay to the system to drag attorneys to Richmond in cases whose outcome is not in doubt. . . . So when a case is scheduled for argument in the Fourth Circuit, it's because argument really can make a difference . . .”).

354. *Id.* at 417–18 (“The Fourth Circuit is also a court of uncommon efficiency. . . . [It] has for years been the most efficient circuit in the country, as measured by the time between the filing of a notice of an appeal and the final resolution of a case.”).

355. See *supra* note 55.

356. See *supra* Part II.E.

357. See *supra* Part II.E.

358. See *supra* Part II.F.

359. See ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 10, at 105 tbl.B-4 (listing the average time interval between the filing of a notice of appeal and the final disposition). For a measure of median disposition time, I looked to the median time interval between the filing of the notice of appeal and the filing of the final disposition in cases terminated after hearing or submission.

360. ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 222, at 103 tbl.B-4.

361. ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 10, at 105 tbl.B-4.

possibly suggesting that the court is, indeed, making having a low median disposition time a priority.

The priorities of the other circuits are similarly reflected in their case-management practices. Interviewees from the Third Circuit emphasized the circuit's commitment to having judges decide which cases will receive oral argument and which ones will not. Reflecting this priority, the Third Circuit is the only circuit surveyed here in which the judges actively screen³⁶² their own cases.³⁶³ Whereas the Second Circuit appears to value holding oral argument in as many cases as possible, the Fourth Circuit appears to prize holding oral argument only when it would be useful—a more limited approach. The latter approach is borne out by the fact that, among the courts surveyed here, the Fourth Circuit had the lowest percentage of cases decided after an oral hearing in FY 2010. Additionally, the Fourth Circuit's commitment to a short median disposition time is evidenced by the fact that it has the shortest median disposition time of all the circuits surveyed here by a considerable amount³⁶⁴: compare 9.1 months in the Fourth Circuit with 11.4 in the D.C. Circuit, 11.7 in the First Circuit, 13.3 in the Second Circuit, and 12.1 in the Third Circuit.³⁶⁵ In short, the descriptive accounts of case-management practices in Part II bolster the statements about the different priorities of the courts of appeals.

And yet determining that the circuits have different priorities as far as case-management practices only gets one so far. The more complicated task is determining where these priorities come from. Why would a circuit prioritize, say, publishing opinions over other practices?

At a basic level, these priorities stem from underlying values.³⁶⁶ For example, a court that makes publishing full-length opinions a priority might do so because its judges believe that writing opinions is the best way to capture any relevant errors in the decision below, which suggests that the court's priority derives from the underlying value of accuracy. Or a court that makes publishing full-length

362. Although the D.C., First, and Fourth Circuits rely on staff attorneys to screen cases, the Second Circuit does not actively screen cases at all, apart from routing certain classes of cases to the NAC. *See supra* Part II.B.

363. *See supra* Part II.B.

364. *See* ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 10, at 105 tbl.B-4.

365. *Id.*

366. Thanks to Josh Chafetz for illuminating several of the issues discussed in the remainder of this Section.

opinions a priority might do so because its judges believe that the parties will have more faith in the judicial system if they receive something more than a short order, which suggests that the underlying value is perceived legitimacy—that is, legitimacy perceived by the parties. Or a court might give priority to publishing full-length opinions because its judges believe that putting out a federal reporter full of decisions is necessary for the public to trust the courts, which suggests that the underlying value is a slightly different kind of perceived legitimacy—legitimacy perceived by the public.

Of course, the relationship between values is itself complicated and dynamic, even within particular circuits. The courts' priorities are likely informed by a combination of these values and others, including actual legitimacy, efficiency, and fairness, to name a few. For example, in describing the importance of oral argument Judge Feinberg of the Second Circuit stated:

The most obvious [benefit] is the chance for a face-to-face interchange between the lawyers and the bench, which furthers not only the substance but also the appearance of justice. . . . [T]here have been a few occasions where I have changed my mind completely in a case I had tentatively regarded as a summary affirmance. Why this is so is hard to articulate, but the alchemy of oral advocacy can and does affect the mode of disposition and, to a lesser extent, the outcome.

. . . To the extent that [oral argument] does increase the number of occasions when the judges are actually physically sitting with each other and, in the marginal appeals that elsewhere might be screened out of oral argument, agreeing in a face-to-face meeting on the result, . . . [i]t cannot help but improve the workings of the collegial process³⁶⁷

Here, the values of legitimacy, the appearance of legitimacy, fairness, and collegiality have all been invoked to support a single priority.

Maximizing as many of these values as possible at any given time is an ongoing optimization problem, one that assigns weights to the values themselves and then tries to determine which practices will best effectuate them. The purpose of this brief discussion is not to derive such an equation, but simply to demonstrate that the courts'

367. Feinberg, *supra* note 1, at 306–07.

priorities are tethered to underlying values. Judges decide which practices to favor based on the values they think are most important.

And yet determining that the priorities of the circuits stem from underlying values still leaves one question open. This Article has shown that the circuits have vastly different management practices, all of which derive in part from different priorities. Are those differences, in turn, attributable to different underlying values?

Identifying which values each circuit holds and whether each circuit holds the same values is an important but extremely complicated task. One might assume that because the circuits have different priorities, they have different underlying values. This is not necessarily so. Each circuit might hold exactly the same underlying values in equal measure, but hold different views regarding the best way to effectuate them. For example, judges on one circuit might generally believe that perceived legitimacy is best effectuated through oral argument, causing that circuit to prioritize holding oral argument in a high percentage of cases. Judges on another circuit, however, might generally believe that the same value is best effectuated through the publication of full-length opinions, leading that circuit to prioritize publishing full-length opinions in a high percentage of cases. Thus, just as one priority can be supported by different values, one value can lead to different priorities.

Due to this problem of overdetermination, it is difficult to say with certainty which underlying values a circuit holds. Exploring these values in depth is a project for another day and will undoubtedly require further qualitative analysis of each circuit. The important conclusion for now is that variations in case-management practices are driven by differences both in dockets and in the priorities of the circuits. These priorities, in turn, are informed by each court's underlying values, which may be, but are not necessarily, shared by all of the courts.

C. The Dynamic Interplay Between Dockets and Priorities

The account of case management thus far has focused on a single transaction: a court considers the docket it will likely face in a given year and, based on its priorities, adjusts its case-management procedures accordingly. In reality, these developments are iterative. Dockets shift and change, and, in response, old case-management procedures are updated, and new procedures are adopted. The

interplay between dockets and priorities is dynamic and has become more complicated as dockets have grown substantially.

When dockets were small, courts did not have to make as many difficult choices about which practices to prioritize because practices were not in competition. Indeed, one primary reason that scholars hearken back to the era of Learned Hand³⁶⁸ is that with only seventy-three filings per judge in 1950,³⁶⁹ federal judges could give oral argument and publish full-length opinions in as many cases as they wanted, all within a reasonable timeframe.³⁷⁰ In other words, judges could optimize the values of accuracy, perceived legitimacy, actual legitimacy, efficiency, and so on. The greater the caseload, the more a court's values are forced into competition with each other, and the more its case-management practices must adjust.

These adjustments can be seen frequently across the circuits. Certain circuits have particular practices that were put in place when their backlogs, by some measure, became too great. A prime example of this phenomenon is the D.C. Circuit's development of the backlog reduction/prevention panel, now known as the rapid response program.³⁷¹ This program and others like it serve as correcting mechanisms—when courts grow concerned that they are approaching a minimum level of efficiency or expediency, they adjust their procedures.³⁷²

These adjustments come at the expense of other practices. In the case of the D.C. Circuit, appeals that would once have been more fully worked up by staff attorneys and then have been discussed by judges during conferences now go in a batch to this special panel. The rationale for giving these cases a shortened form of review is that they are straightforward enough that there is no possibility that they will be decided incorrectly or that they could be due more

368. See, e.g., Richman & Reynolds, *supra* note 5, at 278 (referring to “the Learned Hand model” as the model for “traditional appellate procedure”).

369. COMM'N ON STRUCTURAL ALTS. FOR THE FED. COURTS OF APPEALS, *supra* note 20, at 14.

370. See MARVIN SCHICK, LEARNED HAND'S COURT 93–94 (1970).

371. Interview with Two Senior Members of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64.

372. The five courts surveyed here have median disposition times that vary, but not dramatically. According to the Administrative Office of the United States Courts, the median time intervals between filing and termination for cases terminated on the merits during FY 2010 were as follows: D.C. Circuit, 11.4 months; First Circuit, 11.7 months; Second Circuit, 13.3 months; Third Circuit, 12.1 months; Fourth Circuit, 9.1 months. ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 10, at 105 tbl.B-4.

consideration.³⁷³ Thus, when faced with caseload stress, courts may be concerned about the impact on certain values—typically efficiency or expediency—and may be willing to forgo some practices if they are not as concerned that other values—say, accuracy and legitimacy—will fall below some minimum standard.

This phenomenon occurs in the other direction as well—when a circuit’s caseload drops, the court sometimes adjusts its practices and returns to those that require more judicial time. For example, a few years ago the Second Circuit began placing criminal appeals that raised only sentencing issues on the NAC.³⁷⁴ Now that the court has a very low criminal backlog,³⁷⁵ sentencing-only cases are being placed on the regular argument calendar again.³⁷⁶ This demonstrates that when a court is no longer concerned that it is approaching a minimum level of expediency, it can afford to return to practices that require more judicial time. In other words, the correcting mechanism functions in both directions.

Thus, this Section demonstrates that a critical and ongoing interplay exists between a court’s docket and its priorities. As dockets expand and contract, courts adjust their practices to respond. If the dockets rise above a certain level, courts may become particularly concerned about preserving efficiency or expediency and may forgo or limit certain practices that require more judicial time. As the dockets or backlogs recede, courts may return to earlier practices. Determining an appellate court’s case-management practices is a dynamic process, one that continues to shift and change over time.

D. The Role of Path Dependence

The previous Section focused on the ways in which decisions about case management are dynamic. But decisions about case management are also static in one critical way. Although courts make changes to their practices, many of those changes are informed by what the courts have done in the past. The fact that a circuit has traditionally prioritized a particular practice tends to greatly affect the

373. Interview with Two Senior Members of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64.

374. *See supra* note 221 and accompanying text.

375. Interviews with a Senior Member of the Clerk’s Office, U.S. Court of Appeals for the 2d Circuit, *supra* note 126.

376. *See supra* note 223 and accompanying text.

current choices the circuit makes. Ultimately, path dependence plays an important role in the formulation of case-management practices.

Different circuits have different priorities and possibly different underlying values—but how do they arrive at those priorities and values? Do priorities reflect the majority view of the current judges? Or perhaps the majority view of past judges? The answer appears to be some of both. As one judge put it: “[T]he circuits’ practices as to arguments and related matters are a combination of priorities and habit; sometimes the priorities or habits represent conditions of an earlier era, sometimes conscious current policy, sometimes inertia”³⁷⁷

This kind of path dependence may come about because judges simply absorb the culture and traditions that exist when they come onto the bench. A new judge may learn quickly, for example, that her circuit values having judges screen cases for oral argument and may soon begin to value that herself, because that is the system she knows. But path dependence can also become its own self-enforcing norm, as judges consciously decide not to look outside their chambers to the practices of other courts. One judge said that when she first joined the bench, she was curious about the case-management practices of the other circuits. Yet when she shared this interest with another judge on her court, she was told not to bother—that each circuit was convinced that its case-management practices were the best and that comparative analysis would be a fruitless endeavor.³⁷⁸

Regardless of how the path dependence comes about—consciously or not—the result is the same: path dependence creates the potential for the stagnation or even the calcification of practices. As Professor Oona Hathaway observes in the context of substantive law, decisions by courts “can become locked-in and resistant to change.”³⁷⁹ This kind of entrenchment, in turn, can have detrimental effects: “inflexibility can lead to inefficiency when legal rules fail to respond to changing underlying conditions.”³⁸⁰ Such resistance to change is particularly worrisome in the context of case management because the benefits of entrenchment in the substantive-law

377. Interviews with a Judge on the U.S. Court of Appeals for the 1st Circuit, *supra* note 272.

378. Interview with a Judge on the U.S. Court of Appeals for the 4th Circuit, *supra* note 6.

379. Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 605 (2001).

380. *Id.*

context—*stare decisis* being a prime example—are simply not present, and yet the costs of inefficiency may be just as high.

Path dependence raises concerns not only about the practices courts choose, but also about the processes by which courts choose them. Some judges have argued that courts should be free to decide which practices are best for them,³⁸¹ but this argument may be called into question when a court's selection process is shaped by inertia, rather than by the values held by its current members, or when it is unclear that the court has even considered alternative practices. Part V addresses some of these concerns, but for now, the critical point is that although determining case-management practices is a dynamic process, it is also static—the decisions courts make with respect to case-management practices are affected by what courts have done in the past and create limitations on what courts will do in the future.

Ultimately, explaining why the case-management practices of the circuits vary so greatly is a difficult task. As one Second Circuit judge acknowledged, “Figuring out *why* circuits do things differently gets tricky.”³⁸² The critical factors seem to be dockets and court priorities. Courts are faced with changing dockets and respond by altering their practices in ways that optimize their values. This process is both dynamic—courts are constantly adjusting their practices to respond to changes in their dockets—and static—the adjustments courts make are informed by what they have done in the past. Having determined, at least in part, how variation has come about, I turn to the normative questions about case management.

IV. IS DISUNIFORMITY PROBLEMATIC?

The discussion up until this point has focused on documenting the differences in the case-management practices of the circuits and

381. See Wallace, *supra* note 17, at 211–12 (“It is up to each appellate court to select those mechanisms that will be most productive given its particular circumstances.”). Other judges have made similar arguments. In a 1980 article, Judge John C. Godbold, former director of the Federal Judicial Center and chief judge of two circuits (the old Fifth and the new Eleventh), describes the various choices appellate courts make about their dockets—from “decid[ing] some cases without oral argument” to writing “a terse statement of reasons” in other cases—and contends that “[a]n appellate court should not be denied the discretion to make these choices.” John C. Godbold, *Improvements in Appellate Procedure: Better Use of Available Facilities*, 66 A.B.A. J. 863, 864 (1980).

382. Interviews with a Judge on the U.S. Court of Appeals for the 2d Circuit (June 7, 2010 & Jan. 4, 2011), *supra* note 6.

explaining some of the most significant causes for those differences. Now I consider whether it is defensible to have such differences.

A federal system demands a certain level of uniformity.³⁸³ Indeed, one of the primary functions of courts is to ensure uniformity in the interpretation of substantive law.³⁸⁴ Additionally, federal rules exist to ensure uniformity in procedure.³⁸⁵ Against the backdrop of substantive law and procedure, this lack of uniformity in court practice is striking. Is it also problematic?

To be clear, the question posed is normative, not legal. I do not suggest that a party could have a cause of action because another party bringing an identical claim in another circuit might receive more judicial attention—say, in the form of an oral argument or the preparation of a published opinion. The Supreme Court has held that the Due Process Clause does not create an absolute right to oral argument,³⁸⁶ and the same is undoubtedly true of the other practices

383. The argument for uniformity is, of course, well tread in the substantive law context. Many scholars argue that citizens of different jurisdictions should not be subjected to different interpretations of the same law. *See, e.g.*, Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 852 (1994) (“National uniformity of federal law ensures that courts treat similarly situated litigants equally—a result often considered a hallmark of fairness in a regime committed to the rule of law.”); Stephen R. Perry, *Judicial Obligation, Precedent and the Common Law*, 7 OXFORD J. LEGAL STUD. 215, 244 (1987) (“[T]he state cannot justifiably permit the parties in one of its courtrooms to be treated in a manner that is at variance with how they (or any other set of litigants) would be treated in the courtroom next door.”); Peter L. Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court’s Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1096–97 (1987) (“In general, we think it more aggravating if citizens of Maine and Florida are threatened with having to live under different understandings of the same federal statute (as put in place by the judgments of their respective courts of appeals) than if citizens of Illinois are faced with a unique, and possibly erroneous, reading of another statute.”). *But see* Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1571 (2008) (arguing that uniformity may not be worth the cost of achieving it and that heterogeneity may, at times, be preferable).

384. *See, e.g.*, Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 38 (1994) (“Both the Constitution’s framers and the Supreme Court have stressed that the articulation of nationally uniform interpretations of federal law is an important objective of the federal adjudicatory process. Such uniform interpretation serves several laudable goals of a coherent and legitimate judicial system.” (footnotes omitted)).

385. *See* Erwin Chemerinsky & Barry Friedman, *The Fragmentation of Federal Rules*, 46 MERCER L. REV. 757, 757 (1995) (“In 1938, the Federal Rules of Civil Procedure were adopted. Their adoption represented a triumph of uniformity over localism.”).

386. *See* FCC v. WJR, the Goodwill Station, Inc., 337 U.S. 265, 275–76 (1949) (“[D]ue process of law has never been a term of fixed and invariable content. This is as true with reference to oral argument as with respect to other elements of procedural due process. For this

discussed here. In the words of Judge Wallace: “Due process, literally, is the amount of process due—that is, the proceedings to which a party is entitled to protect its rights in the face of the law’s coercive power. Flexibility inheres in this concept; surely not every appeal is ‘due’ extensive procedures.”³⁸⁷ The question here is whether, given the greater context of the federal system, such varying procedures are problematic.

The pragmatic way to begin answering this question is to consider what uniformity in case management across the circuits might entail. Immigration cases, to take one example, are handled quite differently by the circuits. The Second Circuit routes the majority of cases from the Board of Immigration Appeals to its NAC.³⁸⁸ The Third Circuit sends most of its immigration appeals to a special panel, where most of those cases are decided on the briefs.³⁸⁹ But the other circuits do not categorically treat immigration cases differently than any other type of case; quite possibly, an immigration case in these other circuits could be argued, and the decision could be drafted in chambers. Suppose that, to ensure uniform practices, all of the circuits agreed that cases from the Board of Immigration Appeals would receive oral argument and would be decided in dispositions drafted by judges. What would be the result?

Some of the circuits would experience virtually no change because they receive only a small number of immigration cases. For example, during FY 2010, the D.C. Circuit received only one case from the Board of Immigration Appeals.³⁹⁰ But for other circuits, particularly the Second Circuit, this change in practice would be seismic. Assuming all of its other practices were held constant, given the current number of cases that come to the Second Circuit from the Board of Immigration Appeals each year—there were 1,624 in FY 2009 and 1,299 in FY 2010³⁹¹—the circuit would quickly experience a significant backlog. One Second Circuit judge estimated that this change in practice would add “one or two years” to the average

Court has held in some situations that such argument is essential to a fair hearing, in others that argument submitted in writing is sufficient.” (footnote omitted) (citations omitted).

387. Wallace, *supra* note 17, at 212.

388. See *supra* note 124 and accompanying text.

389. See *supra* note 229 and accompanying text.

390. See ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 10, at 96 tbl.B-3.

391. *Id.* at 97 tbl.B-3. By comparison, the First Circuit had 137 cases from the Board of Immigration Appeals, the Third Circuit had 484 cases, and the Fourth Circuit had 191 cases. *Id.* at 96–97 tbl.B-3.

disposition time of all civil appeals in the circuit.³⁹² In light of the fact that the median disposition time for the Second Circuit in FY 2010 was just above thirteen months,³⁹³ the addition of another one to two years would have a significant impact on thousands of litigants. More than simply imposing a huge cost in expediency for all parties in civil appeals, such a change in practice would also impose a cost in uniformity—these parties would now have to wait for a judgment far longer than similarly situated parties in the other circuits.

To take another example, one could consider pro se appeals, which are also handled quite differently among the circuits. In the Fourth Circuit, pro se appeals do not go to argument;³⁹⁴ many are decided in oral presentations at which judges consider dispositions drafted by staff attorneys, but not memoranda.³⁹⁵ In other circuits, including the First and the Third, pro se appeals also go without oral argument,³⁹⁶ but staff attorneys in those cases not only draft dispositions but also prepare bench memoranda that detail information about the cases.³⁹⁷ In the Second Circuit, some pro se appeals do receive argument, and staff attorneys both draft a disposition and prepare a bench memorandum for each case.³⁹⁸ Finally, in the D.C. Circuit, pro se appeals do not generally go to argument;³⁹⁹ instead, the court holds conferences during which the staff attorneys and their supervisors are available to answer the judges' questions about each case, after the staff attorneys have drafted dispositions and prepared accompanying memoranda.⁴⁰⁰ Suppose that for the sake of uniformity, all of the circuits agreed that staff attorneys would prepare memoranda and draft dispositions in all pro se appeals, and that judges would have an opportunity during conferences to question the staff attorneys about the cases. What result?

Once again, the change in practice would have a different impact on the different circuits. In FY 2010, the D.C. Circuit had 414 pro se

392. Interviews with a Judge on the U.S. Court of Appeals for the 2d Circuit (June 7, 2010 & Jan. 4, 2011), *supra* note 6.

393. ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 10, at 105 tbl.B-4.

394. *See supra* note 139 and accompanying text.

395. *See supra* text accompanying notes 248, 250.

396. *See supra* notes 118, 229 and accompanying text.

397. *See supra* notes 211, 230 and accompanying text.

398. *See supra* note 284 and accompanying text.

399. *See supra* note 105 and accompanying text.

400. *See supra* notes 193–198 and accompanying text.

filings, the First Circuit had 508, the Second Circuit had 2,007, the Third Circuit had 2,016, and the Fourth Circuit had 2,641.⁴⁰¹ Quite plainly, the new rule would have a huge effect on the case processing of the Second Circuit, Third Circuit, and particularly the Fourth Circuit. To take the Fourth Circuit as an example, staff attorneys would suddenly be expected to draft memoranda in well over a thousand additional cases every year⁴⁰²—an enormous increase for an office with only thirty-eight attorneys.⁴⁰³ As in the previous example, the result would almost certainly be an increase in case disposition time, costing litigants several additional months before they could obtain a judgment.

These examples illustrate two main points: First, requiring courts to adopt the same case-management practices would have widely divergent impacts on the circuit courts because of their different dockets. The Second Circuit would be affected far more by rules regarding immigration appeals than the D.C. Circuit. The Fourth Circuit would be affected far more by rules regarding pro se appeals than the First Circuit. These effects, in turn, would result in litigants' receiving different treatment—litigants in one circuit would have to wait far longer for a decision than similarly situated litigants in another circuit. Thus, because the courts' dockets are so different, simplistic uniformity requirements might actually create new inequalities, which suggests that true uniformity may be impossible to achieve.

Second, even if uniformity could be achieved, it may be too costly. As Parts II and III have shown, the courts of appeals face quite different workloads and, accordingly, have different needs. In the words of then-Professor Robert Katzmann—now a judge on the Second Circuit—and Professor Michael Tonry, “No single approach can provide the solution to the problems of mounting caseloads, because appellate cases are not all alike. In a world in which judicial resources are not infinite, what is required is a mix of strategies,

401. ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 10, at 129–30 tbl.B-9.

402. As noted in Part II.D, approximately 40 percent of Fourth Circuit cases that are terminated on the merits and do not go to argument are decided in oral presentations, without memoranda. *See supra* note 248 and accompanying text. Assuming that this percentage applies to pro se appeals, it suggests that 40 percent of 2,641 pro se appeals—or approximately 1,054 pro se appeals—are not worked up with memoranda. Under the hypothetical rule, this set of appeals would now receive memoranda, thus requiring the preparation of over a thousand new memoranda per year.

403. *See supra* note 89 and accompanying text.

varying with the needs of particular circuits.”⁴⁰⁴ This argument is not quite the same as the laboratories-of-experimentation idea associated with federalism.⁴⁰⁵ The point is not that the courts should all be free to experiment with different solutions to the same problem, but rather that they should be free to experiment with different solutions to their own different problems. The Second Circuit should be able to experiment with how best to accommodate an influx of immigration appeals, and the Fourth Circuit should be able to experiment with how best to accommodate a large number of pro se appeals. To impose uniformity would be to deprive circuits of the ability to experiment and might result in great inefficiencies. As Professor Amanda Frost argues, in the substantive-law context, “uniformity for its own sake” may not always be “worth the (sometimes significant) costs of trying to achieve it”⁴⁰⁶

The preceding analysis suggests that although a lack of uniformity in practice may seem problematic, total uniformity may be impossible to achieve, and attempts to achieve it will often prove too costly—not least to the goal of uniformity itself. Accordingly, because of differences in dockets, some variation in case management is necessary. But this reasoning does not support the conclusion that all variation can be justified. Specifically, it does not address the lack of uniformity in court priorities. Should all courts have the same views about the utility of oral argument and the publication of dispositions? Should all courts agree about who should perform screening functions—staff attorneys or judges?

The answers to these questions turn, in large part, on whether it can be determined that the courts share the same or different sets of underlying values. If it could be determined that the courts all shared the same values, then courts might be justified in setting different priorities, at least for some time, as an extension of the true laboratories-of-experimentation argument.⁴⁰⁷ The rationale would be that courts should be allowed to experiment with finding the best ways to effectuate their shared values. Over time, one would expect

404. Katzmann & Tonry, *supra* note 2, at 3.

405. The standard laboratories-of-experimentation argument comes from Justice Brandeis’s famous statement that states may act as laboratories in the federal system: “It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

406. Frost, *supra* note 383, at 1571.

407. *See supra* note 405.

the circuits to share their results and settle on some basic best practices of case management. Ultimately, the range of disuniformity among the circuits would narrow.

If, however, it could be determined that the courts do not share the same values, or at least not to an equal extent, one may come to a different conclusion about the disuniformity of priorities. In simplified terms, it might become difficult to accept the divergent case-management practices of the Second and Fourth Circuits, for example, if the Second Circuit were being driven by the value of perceived legitimacy and the Fourth Circuit were being driven by the value of efficiency. Inasmuch as the bedrock of the federal justice system is that the courts should be animated and guided by the same basic principles,⁴⁰⁸ deep value disuniformity may be indefensible, which would mean that the resulting priority disuniformity may also be problematic.

Ultimately, this Part has shown that due to differences in the dockets of the courts of appeals, one cannot expect their case-management practices to be uniform. Accordingly, some disuniformity among case-management practices is defensible in a federal system. Concluding that the courts should not try to make their practices perfectly uniform, however, still leaves open a question about how much disuniformity among case-management practices can be tolerated. The answer to this question, in turn, rests on the source of the disuniformity in practices: disuniformity in priorities and, potentially, in underlying values. Future normative work, building on the qualitative and explanatory accounts given in this Article, will need to focus on determining the underlying values of the courts of appeals and how best to effectuate them.⁴⁰⁹ The primary way to facilitate answering these questions is through the increased sharing of information between the circuits.

V. A CALL FOR GREATER INFORMATION SHARING AND TRANSPARENCY

This Article began by noting just how little most judges and scholars know about the case-management practices of different circuits. The discussion contained here has itself begun to remedy this

408. See, e.g., Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 937–43 (1988) (describing the main values of Article III, including fairness, judicial integrity, and legitimacy).

409. I plan to explore these and related questions in future projects.

problem by providing a descriptive and explanatory account of the case-management practices of some circuits. But to improve current court practices and facilitate discussions about how practices relate to the courts' underlying values, greater transparency and information sharing among the circuits are needed.

A. *Information Sharing*

Currently, information about case-management practices is shared—when it is shared at all—through limited channels. As I noted in Part II, the Federal Judicial Center has produced extensive monographs on case management, but the last such report was issued over a decade ago.⁴¹⁰ Moreover, because the most comprehensive report was structured circuit-by-circuit, and not practice-by-practice, several judges have noted that they find it difficult to obtain a clear sense of how their practices compare.⁴¹¹ Judges may also learn about other circuits' practices by serving as visiting judges on other courts.⁴¹² Very little visiting occurs each year,⁴¹³ however, and not all circuits even accept visiting judges,⁴¹⁴ rendering this practice an ineffective means of significant information exchange. Additionally, judges may discuss docket-management practices at national judicial meetings, but they have many other matters to discuss at these conferences. The fact that almost none of the judges interviewed for this project had much information about the practices of other courts shows that, currently, these conferences are not a channel for substantial information sharing. Finally, the clerks of court of all of the circuits meet with each other a few times a year to discuss, among other

410. See MCKENNA ET AL., *supra* note 7.

411. See Interviews with a Judge on the U.S. Court of Appeals for the 2d Circuit (June 7, 2010 & Jan. 4, 2011), *supra* note 6; Interviews with a Judge on the U.S. Court of Appeals for the 2d Circuit (Mar. 26, 2010 & Apr. 1, 2011), *supra* note 6.

412. See *infra* note 417 and accompanying text; see also Stephen L. Wasby, *Intercircuit Conflict in the Courts of Appeals*, 63 MONT. L. REV. 119, 133 n.32 (2002) (“Knowledge of other courts of appeals’ views also results from judges sitting in those courts. In such situations, visiting judges learn primarily about new procedures for handling cases.”).

413. See ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 10, at 45 tbl.S-2 (noting that only 4.5 percent of the total cases terminated on the merits were decided by panels that included visiting judges).

414. See *A Conversation with Judge Harry T. Edwards*, 16 WASH. U. J.L. & POL’Y 61, 64 (2004) (noting that in the D.C. Circuit, “absent a grave emergency, the court will not use visiting judges to decide cases on [its] docket”). Additionally, according to one of the senior members of the Legal Division of the D.C. Circuit, “[t]he court has not used the services of visiting judges for several years.” Interview with Two Senior Members of the Legal Div., U.S. Court of Appeals for the D.C. Circuit, *supra* note 64.

matters, case management. But as one senior member of the clerk's office for the Second Circuit told me, "The amount of information about each other that we don't know far exceeds what we do know."⁴¹⁵

Increased information sharing between the circuits could yield several key benefits. First, intercircuit comparativism could result in some circuits' discovering and ultimately utilizing potentially helpful practices. Judge Newman on the Second Circuit has said that when he served as a visiting judge on another court, he learned of its process for identifying cases in which judges are disqualified⁴¹⁶—a process he found to be far more efficient than the one his own court employed at the time.⁴¹⁷ When he returned to his home circuit, he proposed adopting the other court's practice, which his court accepted and still uses today.⁴¹⁸ The opportunity to learn of a useful or efficient practice that could be emulated in one's own court is the reason several judges have said that it would be helpful to learn about the practices of other courts. In this way, information sharing would allow judges to counter the influence of path dependence and to consider alternative ways to manage their caseloads.

Second, and perhaps more important, increased information sharing would facilitate a much-needed discussion between judges and court administrators about the goals of case management. Members of the different courts could discuss why it is that they have such different priorities when it comes to individual practices and how those priorities relate to their underlying values.

A few modest changes would help to increase systematic information sharing. The first set of proposed changes involves new ways of updating the courts on changes in case-management practices. To that end, when a circuit makes a substantial change in the way it processes cases, the Federal Judicial Center could alert the other circuits through a written notice or email. Similarly, the *Third Branch*, a monthly newsletter by the Administrative Office of the United States Courts, could devote a column to the discussion of case

415. Interviews with a Senior Member of the Clerk's Office, U.S. Court of Appeals for the 2d Circuit, *supra* note 126.

416. A judge would be disqualified from a case if, for example, the judge had a financial interest at stake. 28 U.S.C. § 455(b)(4) (2006).

417. Interview with Jon O. Newman, Judge on the U.S. Court of Appeals for the 2d Circuit (June 7, 2010).

418. *Id.*

management.⁴¹⁹ By keeping the circuits apprised of new case-management techniques, the Federal Judicial Center would be acting in accordance with its congressional mandate to “further the development and adoption of improved judicial administration.”⁴²⁰

The second set of proposed changes relies on increasing communication between the circuits. Specifically, there could be additional meetings of judges, clerks of court, and staff attorneys devoted solely to discussing case-management practices and sharing their “laboratory results.” Alternatively, the courts could devote a session of the Federal Judicial Center’s periodic conference, the National Symposium of the U.S. Court of Appeals Judges, to the discussion of case management.⁴²¹ Both of these proposals are consistent with a recommendation that the Judicial Conference of the United States made in its 1995 report on the Long Range Plan for the Federal Courts, encouraging the courts of appeals to share more information about each other’s case-management techniques.⁴²² Although these proposals are fairly modest,⁴²³ they would greatly increase what the circuits know about each other’s practices and could ultimately lead to improved case-management strategies and much-needed discussions about court values.

For all of the benefits attendant on increased information sharing, there are some, including judges, who will see these efforts as being too costly in terms of time. The reason courts manage their dockets, after all, is because they are under stress. Why should they hold meetings to talk about how they should handle their busy caseloads when doing so would simply take time away from letting them handle those caseloads?

419. Thanks to Judge Robert Katzmann of the Second Circuit for this very helpful suggestion.

420. 28 U.S.C. § 620(a) (2006).

421. Thanks again to Judge Katzmann for this very helpful suggestion.

422. See JUDICIAL CONFERENCE OF THE U.S., *supra* note 51, at 67 (“It is important that the appellate courts take advantage of the varied experiences of other circuits by exchanging information about the operation and results of the use of particular case management techniques and systems.”).

423. Ultimately, a broader forum for judges and clerks of court to discuss case management with academics and other members of the public might prove useful. Scholars have advocated similar discussions on related topics. See Resnik, *supra* note 5, at 444 (“[T]he hard questions about pace . . . , allocation of authority . . . , and the continued existence of the adversary process . . . should be subjected to a more searching and free-ranging public debate.”); Carl Tobias, *The New Certiorari and a National Study of the Appeals Courts*, 81 CORNELL L. REV. 1264, 1269 (1996) (recommending an open discussion in Congress about access to the federal courts).

There are at least two responses to this objection: The first is a straightforward application of cost-benefit analysis. By sharing information, judges will learn ways to improve their current practices and, in particular, will find ways to increase efficiency, as Judge Newman did. In light of these expected reforms, the investment of a few days per year to more fully discuss case management will almost certainly be a net gain. The second response departs from possible benefits and argues that the investment of additional time is appropriate because issues of judicial administration are so important that they deserve to be discussed. As Judge Feinberg put it, these issues affect the quality of justice.⁴²⁴ Although the quality of justice is a difficult value to quantify, when such a value is implicated, surely the appellate courts can afford the time necessary to share information.

B. Transparency

As noted at the outset, little transparency exists when it comes to the case-management practices of the circuit courts. Some of the courts of appeals publish internal operating procedures, and all have published local rules; yet these publications often do not cover most court practices.⁴²⁵ Additionally, the Federal Judicial Center's last comprehensive monograph on the docket-management practices of the courts was published over a decade ago.⁴²⁶ In eleven years, a great deal has changed.⁴²⁷

Greater transparency is needed so that courts will have more accurate information about how other courts function and so that parties will know how their cases are being treated. Transparency would also enable scholars to assess and analyze court practices so they can, in turn, write scholarship that is useful for the judiciary. To this end, the courts could make information about their case-management practices public—either as part of their local rules or as information about court proceedings generally. Alternatively, the Federal Judicial Center could be charged with updating its case-management monograph on a more frequent—possibly annual—basis. Again, such a task would be consistent with one of the center's

424. Feinberg, *supra* note 1, at 298.

425. *See supra* note 10.

426. *See* MCKENNA ET AL., *supra* note 7.

427. For example, at that time, the Second Circuit was still holding oral argument in most cases decided on the merits. *See id.* at 70; *supra* note 217.

primary mandates.⁴²⁸ Either way, there is a need for current information about case-management practices that is both easily accessible and publicly available.

Critics might raise two objections to this modest proposal. The first such objection is that documenting the different practices of the circuits and making this information more easily accessible will lead to an increase in forum shopping. Forum shopping has long been decried in the context of substantive law, out of a concern that one party will unfairly be able to “shop” to find the jurisdiction that will provide him with the most favorable law.⁴²⁹ The concern here is that if people are willing to shop to obtain the most favorable substantive law, they will also be interested in shopping to increase the chances that they will receive oral argument or that the decision in their case will be prepared in chambers and so forth.

The concern over forum shopping highlights the fact that case-management practices are not necessarily party neutral. It might be tempting to think that case management, in contrast to substantive law, is not a zero-sum game. After all, if one side receives oral argument, the other side does as well; if one side has the decision in the case drafted in chambers, the other side does as well. And yet, if a party is appealing the decision below, it may prove advantageous, if not necessary, to have oral argument, in the hopes of swaying the appellate judges to overturn the ruling. The appellee, by contrast, is not likely to want a full hearing—nor perhaps a full appellate opinion—on the objections to a favorable ruling. In short, a particular party could have reasons for favoring a certain court’s case-management practices over another’s.

But this objection may be overstated for several reasons. First, many of the people who might be interested in forum shopping simply will not be able to do so. Nearly all of the parties appealing from a decision of the Board of Immigration Appeals and all of the defendants in direct criminal appeals cannot, as a matter of statutory

428. 28 U.S.C. § 620(a) (2006).

429. See Martin H. Redish & Carter G. Phillips, *Erie and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 HARV. L. REV. 356, 374 (1977) (“[The] inequality [that] may result from the encouragement of a forum choice between state and federal court . . . derives from a supposed superiority the out-of-state plaintiff receives if given the option of choosing between two sets of law; he may pick the body of law most beneficial to his cause, while the defendant must stand idly by.”).

law, choose to have their cases brought elsewhere.⁴³⁰ Second, parties that do have the ability to forum shop may have little incentive to do so. Corporations involved in lawsuits of consequence are presumably more likely to focus on the substantive law of the circuit and the practices they will encounter at the district level. Whether they are likely to get oral argument at the appeals stage will, in all probability, not be of immediate concern to them when they are looking for the most advantageous jurisdiction. Moreover, as Part II makes plain, cases like these are precisely the kind that will likely get argument in any circuit. In short, it seems highly unlikely that parties would forum shop for case-management practices—either because they will not be able to or because they do not have sufficient incentive to do so.

The second possible objection concerns the perceived legitimacy of the federal appellate courts. The federal courts of appeals, like all courts, need to ensure that the public perceives them as legitimate institutions.⁴³¹ The concern here is that once the public knows how many cases are decided without oral argument or how many decisions are largely the work of staff attorneys, its faith in the courts will be eroded.⁴³² This faith may be further shaken when the public learns that the different circuits have such different practices—each individual court’s practices may seem less legitimate.⁴³³

What is particularly interesting about this objection is that because case-management practices are currently so opaque, few people even have a basis for evaluating them. This presents an example of the old adage about trees falling in the forest with no one around—if no one knows about practices that could be perceived as

430. See 8 U.S.C. § 1252(b)(2) (2006) (“The petition for [judicial review of an order of removal] shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings.”); 28 U.S.C. § 1294(1) (2006) (specifying that, with a few exceptions, “appeals shall be taken . . . [f]rom a district court of the United States to the court of appeals for the circuit embracing the district”).

431. See, e.g., Ernest A. Young, *Stalking the Yeti: Protective Jurisdiction, Foreign Affairs Removal, and Complete Preemption*, 95 CALIF. L. REV. 1775, 1799 (2007) (“[A]ll courts in our system depend on their perceived legitimacy to give authority to their rulings.”).

432. For a more in-depth discussion of the relationship between the appearance of government and the public’s faith in government, see generally Adam M. Samaha, *Regulation for the Sake of Appearance* (May 25, 2011) (unpublished manuscript) (on file with the *Duke Law Journal*).

433. It is worth noting that although judges are restricted from discussing certain matters—such as the merits of impending cases—they are specifically not restricted from explaining “court procedures.” CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3(A)(6) (2011), available at <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/conduct/Vol02A-Ch02.pdf>.

illegitimate, are there legitimacy concerns? One of my objectives in this Article, and in the larger project of which it is a part, is to make judges, scholars, and others more aware of court practices and their significance. The attendant downside is that the more people know, the more they may question, leading to a loss in the perceived legitimacy of the courts of appeals.

Of the two possible objections to increasing the transparency of case-management practices, the second one is the more serious. Yet to the extent that transparency prompts difficult questions about how courts operate and what values they should try to effectuate, the courts can only be improved. What courts may lose temporarily in the way of perceived legitimacy will only be made up for in actual legitimacy. As such, the judicial system, and justice itself, can only be a beneficiary.

CONCLUSION

Case management remains a critical issue for the federal appellate courts. In the words of Judge Diarmuid O'Scannlain, "As a judge on the United States Court of Appeals for the Ninth Circuit for over twenty years, I can attest that the crisis has not passed. To outsiders, the federal courts may seem to be dispensing justice about as competently as before. But I submit to you that this is an illusion . . ." ⁴³⁴ It is therefore imperative that we examine more fully just how courts are managing their dockets and the ramifications of these practices.

This Article has taken the first step by analyzing the practices of several circuits. It has revealed the myriad ways in which those practices diverge—from screening to settlement to oral argument to publication. When combined with Judge Feinberg's original observation that case management impacts the quality of justice, it becomes clear not only that differences exist, but that they matter.

This Article has wrestled with the implications of these variations. It has given an analytical account of why courts have such divergent practices, exploring not only differences in the size and makeup of their caseloads, but also differences in their culture and priorities. It has also staked out the critical normative question of case management—whether such variation can be defended in a federal system—and has concluded that differences in courts' caseloads can

434. O'Scannlain, *supra* note 21, at 474.

justify much of the divergence in practice, but perhaps not all of it. Finally, it has called on the courts to improve their practice behind these practices—the way they share and make available information about their case-management practices.

Ultimately, this Article is only the beginning. The larger project of which it is a part seeks to accomplish the goal of more fully documenting, analyzing, and assessing the workings of the courts. Only through this kind of careful study and analysis can we hope to maintain, and even improve, the high quality of the justice system.