

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

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ABSTRACT

Case management practices of appellate courts have a significant effect on the outcome of appeals. 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oral argument, which will have dispositions written by staff attorneys in lieu of judges, and which will result in unpublished opinions exert a powerful influence on the quality of justice that can be obtained from the federal appellate courts.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, based on qualitative research in the form of interviews of appellate judges, clerks of court, court mediators, and staff attorneys. A 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 practice is more defensible than in substantive and procedural law, but that current practice can and should be improved through increased transparency and information sharing between the circuits.

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Table of Contents

| | |
|--------------------------------------------------------------------------|----|
| Introduction | 3 |
| I. A Background on Circuit Case Management | 6 |
| II. The Case Management Practices of Five Circuits | 11 |
| <i>A. General Figures and Statistics</i> | 13 |
| <i>B. Initial Screening</i> | 18 |
| <i>C. Mediation</i> | 24 |
| <i>D. Non-argument Track Cases and the Role of Staff Attorneys</i> | 28 |
| <i>E. Sittings and Argument</i> | 37 |
| <i>F. Publication of Dispositions</i> | 42 |
| <i>G. Additional Practices</i> | 45 |
| III. Explaining the Variation | 47 |
| <i>A. Differences in Dockets</i> | 47 |
| <i>B. Differences in Priorities</i> | 49 |
| <i>C. The Dynamic Interplay Between Dockets and Priorities</i> | 53 |
| <i>D. The Role of Path Dependency</i> | 55 |
| IV. Is Disuniformity Problematic? | 57 |
| V. A Call for Greater Information Sharing and Transparency | 63 |
| <i>A. Information Sharing</i> | 63 |
| <i>B. Transparency</i> | 66 |
| Conclusion | 68 |

INTRODUCTION

Twenty-five years ago, then-Chief Judge Wilfred Feinberg of the Court of Appeals for the Second Circuit wrote that “judicial 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 our justice system and that it is often overlooked—remain just as true, and just as troubling, today.

First, the decisions that appellate courts make about how to review their vast caseloads shape the consideration that appeals receive and possibly their outcomes. Determinations about “case management”—including whether a case will receive oral argument or 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 an unpublished, non-binding 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 relying on screening mechanisms, holding fewer oral arguments, or publishing fewer opinions.⁴ None outside the judiciary have undertaken

¹ Wilfred Feinberg, *Unique Customs and Practices of the Second Circuit*, 14 HOFSTRA L. REV. 297, 297-98 (1986) (internal quotation marks omitted).

² See Robert A. Katzmann & Michael Tonry, *The Crisis of Volume and Judicial Administration*, in *MANAGING APPEALS IN FEDERAL COURTS* (Robert A. Katzmann & Michael Tonry eds., 1988), at 4 (“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 recently described 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, 1675 (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 (1973). On the matter of forgoing oral argument, see, for example, Robert J. Martineu, *The Value of Appellate Oral*

the essential task of examining how these practices fit together within each of the circuits, and how their practices compare.⁵

What is more, even within the judiciary, there is a void in knowledge. Judges themselves acknowledge that they are unacquainted with the case management practices of courts outside their own. 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 case management practices of the federal appellate courts.⁶ At the time of writing this Article, however, the last such effort was more than a decade ago⁷; the practices have changed considerably in the interim.⁸ Moreover, a thorough discussion of case management requires not only a descriptive account, but also an analytical account about why courts operate the way that they do, and a normative account of whether differences in operation can be justified.

The Article therefore begins a long-overdue descriptive, analytical, and normative discussion about circuit case management practices. In order to fill the void created by the fact that there currently is no up-to-date compendium of court practice, it provides a general account of the practices of five circuits. As these practices are rarely written down or publicly available,⁹ this Article reports and explores a new dataset, culled

Argument: A Challenge to the Conventional Wisdom, 72 IOWA L. REV. 1 (1986). And on the use of unpublished opinions, see, for example, Johanna S. Schiavoni, *Who's Afraid of Precedent? The Debate Over the Precedential Value of Unpublished Opinions*, 49 UCLA L. REV. 1859 (2002); Vladeck & Gulati, *supra* note 3, at 1667.

⁵ There has been some study of the practices and case statistics of individual circuits. See 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); Stephen L. Wasby, *A Look at the Smallest Circuit*, 43 SUFFOLK U. L. REV. 417 (2010). Furthermore, some scholarship has examined case management practices generally, but without an examination into the specific practices of the different circuits. See Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues in the Federal Courts of Appeals*, 66 BROOK. L. REV. 685 (2000); William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273 (1996). Finally, it is worth noting that case management practices have been examined at the District Court level. See, e.g., Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 380 (1982).

⁶ See JUDITH A. MCKENNA ET AL., CASE MANAGEMENT PROCEDURES IN THE FEDERAL COURTS OF APPEALS (2000).

⁷ *Id.*

⁸ For example, in 2000, the Second Circuit had not yet created a non-argument calendar, which today is a submission-only track for approximately 45% of the cases that are decided on the merits in that Circuit. See *infra* note 211.

⁹ 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 Rule 34(a) that “[i]n the interest of docket control and to expedite the final disposition of

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 go to oral argument or be decided solely on the briefs, in some circuits this decision is made by a staff attorney, in others, by a judge.¹⁰ When it comes to which cases will be directed into a mediation program, in some circuits nearly all civil cases are sent, in others, a subset of cases are selected by the court.¹¹ When it comes to how many cases will actually go to oral argument, in some circuits this percentage is as high as 44.4% and in others as low as 13.1%.¹² And when it comes to how many cases are decided by unpublished order, in some circuits this percentage is as high as 93.0% and in others as low as 62.3%.¹³

Given such variation across circuits, the Article engages in an analytical discussion of the causes of this variation—including the size and makeup of the caseload, and even the various priorities of the circuits. Then the Article begins a normative discussion about whether we should be concerned that the mechanics of the federal courts of appeals—and perhaps therefore the quality of justice that they provide—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 practices of the D.C., First, Second, Third and Fourth Circuits, from screening to disposition. This Part demonstrates that the practices of the different courts—from screening to mediation to oral argument and to disposition—vary enormously. Part III attempts to explain why the circuits have such

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, tbl.S-1, at 44 (2010) [hereinafter 2010 ANNUAL REPORT] (noting that 86.9% of cases decided on the merits were submitted on the briefs during the twelve-month period ending September 30, 2010). Likewise, this rule does not convey that many non-argument cases will be decided in oral presentations, see *infra* note 243 and accompanying text, or that certain cases are more likely than others to be decided solely on the briefs, see *infra* note 136 and accompanying text.

¹⁰ See *infra* Section II.B.

¹¹ See *infra* Section II.C.

¹² See *infra* Section II.E.

¹³ See *infra* Section II.F.

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

varying practices, examining both differences in dockets and in the priorities of the courts. Part IV then considers the central normative question about the differences in case management practices—whether a 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 seen as necessary, given the differences in the volume and kinds of cases each circuit receives. Finally, Part V argues that even if we cannot expect, much less demand, uniformity across the circuits, we should still inquire whether the practices that the courts have in place can be improved—and to this end, there is a need 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 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 we conceive of it today—that is, they did not need to make decisions about the amount and kinds of judicial attention to give each case based on concerns about the size of the docket as a whole. 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”¹⁸ or even “model” of appellate decision making.¹⁹

But that era came to an end as the number of appeals began to rise. Between 1950 and 1978, the annual filings per judgeship in the federal courts of appeals nearly doubled—from 73 to 137.²⁰ The dramatic increase in filings has been attributed to the flurry of legislative activity in Congress

¹⁵ See *infra* note 377 and accompanying text.

¹⁶ See *infra* note 378 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.

²⁰ See COMM'N ON STRUCTURAL ALTERNATIVES FOR THE FED. COURTS OF APPEALS, FINAL REPORT 14 (1998).

starting in the 1960s, which created new causes of action,²¹ and ultimately made federal law more complex. In the words of Chief Justice William H. Rehnquist, the growth in filings, while “impressive,” does not convey the “increased[ed] complexity of the issues” before the courts.²² By the 1970s, the phrase “crisis in volume” was coined to describe the workload of the courts of appeals.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 designed to increase judicial efficiency.²⁵ This is how modern case management was born.

²¹ 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.”).

²² Rehnquist, *supra* note 18, at 3.

²³ DANIEL J. MEADOR, APPELLATE COURTS: STAFF AND PROCESS IN THE CRISIS OF VOLUME (1974). As Jeffrey O. Cooper and Douglas A. Berman have noted, however, academics have written about a caseload “crisis” since at least the late 1960s. Cooper & Berman, *supra* note 4, 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)).

It should be noted that not everyone 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 A. Cabranes, Vincent Aprile II, Senator Charles E. Grassley, and Diana Gribbon Motz (now Judge Motz)—stated that “the ‘alleged caseload crisis’ that is said to afflict the courts of appeals has not been adequately demonstrated.” REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 113, 123 (1990). The majority of the Committee went on to conclude that “[w]hile we have not joined in the chorus of crisis, there can be no doubt that the system and its judges are under stress.” *Id.* at 155. Still, the term “crisis” has been ubiquitously used in the literature on case management, including by appellate judges themselves. See Henry J. Friendly, *Averting the Flood by Lessening the Flow*, 59 CORNELL L. REV. 634, 634 (1974) (proposing solutions to the “crisis in the federal courts”); 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) (stating that “skyrocket[ing]” of cases in the federal courts between 1960 and 1988 caused a “crisis”).

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 ALTERNATIVES 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 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 functioning of courts. Federal Courts Study Act, Pub. L. No. 100-702, § 102, 102 Stat. 4644, 4644 (1988).

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 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.”).

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 opinions or orders in cases where they believed publication was not warranted,²⁸ and to spend less time per page on those dispositions as they were non-binding and not destined for the federal reporter.²⁹

Second, judges focused on decreasing the time spent preparing and hearing cases. Starting with the Fifth Circuit in 1968, courts of appeals began to develop screening processes, whereby staff or the judges themselves reviewed cases to determine if they could be disposed of without oral argument.³⁰ By 1979, Federal Rule of Appellate Procedure 34 was officially amended to authorize the resolution of an appeal without oral argument where the panel agreed that argument was unnecessary because (1) the appeal was “frivolous”, (2) the dispositive issue in the 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.”³¹ Although the rule reads as though oral argument is a default procedure, many thought the stated exceptions—particularly the broadly defined third exception—in actuality allowed courts increasingly to do away with oral argument.³²

²⁶ See REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 11 (1964); see also THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS 127 (1994).

²⁷ See William L. Reynolds & William M. Richman, *Limited Publication in the Fourth and Sixth Circuits*, 1979 DUKE L.J. 807, 808 (citing [1974] JUDICIAL CONFERENCE OF THE UNITED STATES REPORT 12-13).

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

²⁹ Comm’n on the Revision of the Fed. Court Appellate Sys., Structure and Internal Procedures: Recommendations for Change – A Preliminary Report 72 (1975) (describing how unpublished opinions save time because “judges no longer sense 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; 28 U.S.C. app. at 1227 (Supp. 111 1980).

³² 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

Third, judges increased their reliance on staff. Starting in 1973 with the Fifth Circuit, courts of appeals began to receive funding for staff clerks, as distinct from law clerks or “elbow” clerks, to review certain classes of cases.³³ In 1982, Congress officially authorized the creation of staff attorney offices, which were designed to review pro se prisoner cases.³⁴ As appellate filings continued to grow, the number and role of staff attorneys expanded.³⁵

Finally, courts began to adopt mediation or conference programs to help parties either settle their cases or narrow the range of issues on appeal.³⁶ In 1974, the Second Circuit became the first federal court of appeals to adopt a conference program.³⁷ By 1996, all eleven of the other regional circuits had followed suit.³⁸ The goal of this effort was clear: in the words of Judge Irving R. Kaufman of the Second Circuit, the architect of the first mediation program, by “encourag[ing] the resolution of appeals without participation of judges,” courts could “preserv[e] their scarcest and most precious asset, time” and “expedite the consideration” of all other appeals.³⁹

Despite these efforts, the courts today continue to operate under stress—all because the filings have, for the most part, continued to rise. The filings per year per judgeship, which had jumped from 73 in 1950 to

& 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.”).

³³ Press Release, Admin. Office of the U.S. Courts, Staff Attorney Offices Help Manage Rising Caseloads (Feb. 17, 2004). The key difference between law clerks and staff attorneys is still the one articulated by 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 non-argument 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).

³⁴ Press Release, Admin. Office of the U.S. Courts, Staff Attorney Offices Help Manage Rising Caseloads, *supra* note 33

³⁵ *Id.* (noting that by 1980, there were 117 staff attorneys working for the appellate courts and that by 2004, that number had grown to 380 attorneys and 12 senior staff attorneys; also noting 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.”).

³⁶ 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).

³⁷ *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).

³⁸ NIEMIC, *supra* note 36, at 4.

³⁹ Kaufman, *supra* note 37, at 756.

137 in 1978,⁴⁰ only continued to increase—to 194 in 1984 and 300 in 1997.⁴¹ Although filings in the regional courts of appeals are currently down from their peak in 2006, they still remain quite high—at 335 filings per judgeship.⁴² Numerous judges have spoken about the difficulties associated with such a voluminous caseload. Associate Justice Samuel Alito of the Supreme Court, himself a former Judge of the Court of Appeals for the Third Circuit, recently described the workload of the appellate courts as “crushing.”⁴³ And as Judge Robert M. Parker of the Fifth Circuit wrote in 1994: “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 structural configuration; the courts of appeal, especially, are suffering from case overload—with nothing but worse times ahead if present courses are continued.”⁴⁴

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.

⁴⁰ See COMM’N ON STRUCTURAL ALTERNATIVES FOR THE FED. COURTS OF APPEALS, *supra* note 20, at 14.

⁴¹ *Id.*

⁴² See 2010 ANNUAL REPORT, *supra* note 9, at 16. 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 Circuits.

It is striking that the per-judge filings have increased more than four times even as the number of regional courts of appeals judges has more than doubled—from 75 in 1950, see COMM’N ON STRUCTURAL ALTERNATIVES FOR THE FED. COURTS OF APPEALS, *supra* note 20, at 14, to 167 today, see 2010 ANNUAL REPORT, *supra* note 9, at 16.

⁴³ Interview by David F. Levi, with Samuel A. Alito, J., U.S. Supreme Court (September 15, 2010).

⁴⁴ Robert M. Parker & Leslie J. Hagin, *Federal Courts at the Crossroads: Adapt or Lose!*, 14 Miss. C. L. Rev. 211, 211 (1994); see also Stephen Reinhardt, *A Plea to Save the Federal Courts: Too Few Judges, Too Many Cases*, 79 A.B.A. J., Jan. 1993, at 52, 53 (“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.”).

II. THE CASE MANAGEMENT PRACTICES OF FIVE CIRCUITS

As the preceding Part makes plain, the twelve regional circuit courts of appeals⁴⁵ have adopted a multitude of case management practices over the past several decades.⁴⁶ Yet while the practices are all meant to address the same problem—the heavy caseload—and while the circuits are all acting under the same general rubric—namely the Federal Rules of Appellate Procedure—the practices vary greatly from circuit to circuit. In the words of the Federal Judicial Center, “[w]hile 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.”⁴⁷

Realizing “the potential of circuit-based experimentation with case management as a fertile source of ideas for improving the practices and procedures of the courts,”⁴⁸ the Judicial Conference of the United States has recommended that the circuits share information about their various docket management practices.⁴⁹ Accordingly, the Federal Judicial Center has periodically collected data and published reports on these practices.⁵⁰ However, as noted earlier, at the time of this Article the last such effort was in 2000, and many of the practices of the circuits have changed dramatically in the interim.⁵¹ While local rules can give some information about how courts operate,⁵² the majority of these practices are known only to the judges and administrators of the courts in which they operate.

My own information on these practices has come from qualitative research—primarily through a series of interviews of judges, clerks of court, chief circuit mediators, directors of staff attorneys offices, and supervisory

⁴⁵ Although I recognize that the original “circuit courts” were abolished by the Act of March 3, 1911, see ch. 231, § 289, 36 Stat. 1087, 1167, I use that term and the term “courts of appeals” (which came into existence through the Judiciary Act of 1891, also known as the Evarts Act, see ch. 517, § 6, 26 Stat. 826) interchangeably.

⁴⁶ I hold aside the Federal Circuit since its caseload is substantially different from the other circuits.

⁴⁷ JUDITH A. MCKENNA ET AL., *supra* note 6, at xi.

⁴⁸ *Id.*

⁴⁹ JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS Recommendation 35, at 67 (1995).

⁵⁰ See William L. Whittaker, *Differentiated Case Management in Appellate Courts* (1972); JOE S. CECIL & DONNA STIENSTRA, *DECIDING CASES WITHOUT ARGUMENT: A DESCRIPTION OF PROCEDURES IN THE COURTS OF APPEALS* (1985); *MANAGING APPEALS IN FEDERAL COURTS* (Robert A. Katzmann & Michael Tonry eds., 1988).

⁵¹ See *supra* notes 6 and 8.

⁵² See *supra* note 9 and accompanying text.

staff attorneys, conducted between March of 2010 and April of 2011.⁵³ 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 the practices of his or her circuit—specifically about which practices worked particularly well and which could stand to be improved. With rare exception,⁵⁴ all of the initial interviews were conducted in person, and lasted between half an hour and two hours. I then conducted follow-up interviews—often as many as three or four—by telephone, over electronic mail, and in person to verify the information that I had collected. I assured each person I interviewed that I would not directly quote him or her without explicit permission—this is why, with few exceptions, I attribute my findings to “a judge” or “a senior member of the Clerk's Office” or “a senior staff attorney” from a specific circuit.⁵⁵

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. While I recognize that this sample is by no means random and that these circuits share several, key characteristics—including that they are all on the east coast, are relatively small (geographically speaking), and most contain large urban centers—the 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, then I will have demonstrated that disuniformity exists in the whole set.⁵⁶

⁵³ The goal of speaking to members of the Clerk's Office and the staff attorneys 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 him or her, and then speaking to whomever he or she recommended (such as directors of the staff attorneys offices or supervisory staff attorneys). The goal of speaking to one or two judges from each circuit was less to learn about specific practices and more 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 Democrat and Republican Presidents, and at least one female judge). I fully recognize, however, as Judge J. Harvie Wilkinson has stated, 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.” See J. Harvie Wilkinson III, *The Fourth Circuit and Its Future*, 61 S.C. L. REV. 415, 416 (2010).

⁵⁴ I conducted two initial interviews by telephone and one only over electronic mail.

⁵⁵ All interview notes are on file with the Duke Law Journal.

⁵⁶ Furthermore, from what I have learned based on information from interviews and from the Federal Judicial Center's 2000 Report, a review of all of the regional circuits would have

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 then presents information about the courts practice by practice (including tables where helpful). I begin with the initial screening of appeals, and then mediation, followed by non-argument cases and then argument cases, and finally disposition procedures—describing and analyzing each practice. The discussion does not purport to capture every aspect of docket management in these five circuits (in some instances it proved necessary to give slightly simplified accounts),⁵⁷ but it is meant to convey a picture of the significant case management practices in these courts.

A. General Figures and Statistics

In light of the fact that many of the docket 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 attorneys work in 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 numbers of judges on the various courts, the numbers of staff attorneys are constantly changing.⁵⁸ 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 the end of September 30, 2010 (or “FY 2010”).

At the end of FY 2010, the D.C. Circuit had nine active judges, two vacancies, and five senior judges.⁵⁹ In FY 2010, there were 1,178 appeals

shown only more variation among practices. I plan to undertake the examination of the practices of all twelve regional circuit courts of appeals in future projects.

⁵⁷ I note when a particular account of a practice is simplified wherever possible.

⁵⁸ This is due largely to changes in the budget, but also due 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.

⁵⁹ See Federal Judicial Center, History of the Federal Judiciary, U.S. Court of Appeals for the District of Columbia, Judges, available at: <http://www.fjc.gov/servlet/nGetCourt?cid=14&order=c&ctype=ac&inststate=dc>; see also Federal Judicial Center, History of the Federal Judiciary, U.S. Court of Appeals for the District of Columbia, Legislative History, available at: http://www.fjc.gov/history/home.nsf/page/courts_coa_circuit_dc.html (noting that the

filed in the circuit⁶⁰ or approximately 131 appeals per active judge.⁶¹ As of the fall of 2010, the court's Legal Division was comprised of fourteen attorneys: one director, one assistant director, and twelve staff attorneys (ten of whom were full time and two of whom were part time).⁶² Of the twelve staff attorney positions, four were career attorneys and the rest had two-year terms that could be extended.⁶³ In general in the D.C. Circuit, staff attorneys perform the same functions (i.e. the attorneys do not specialize).⁶⁴

At the end of FY 2010, the First Circuit had six active judges and two senior judges.⁶⁵ In FY 2010, there were 1,530 appeals filed in the circuit⁶⁶ or approximately 255 appeals per active judge. As of the fall of 2010, the Office of the Staff Attorneys 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).⁶⁷ The staff attorneys tend to stay for long terms in the First Circuit.⁶⁸ As for specialization, the staff

current number of authorized judgeships for the D.C. Circuit is eleven).

⁶⁰ 2010 ANNUAL REPORT, *supra* note 9, tbl.B, at 83.

⁶¹ 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 (September 30, 2010) and reporting the closest whole number. This measure is imperfect by both under-inclusion and over-inclusion—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 (even, say, in August) are counted. 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, it is also worth noting that the measure of filings per active judge is an imperfect measure of workload as it does not include the contributions of judges who were senior throughout the year, nor of visiting judges. Yet again, because it is only meant to provide an approximate sense of relative workloads, this measure should be adequate.

⁶² Interview with two senior members of the Legal Division, U.S. Court of Appeals for the D.C. Circuit (May 7, 2010) (notes on file with the author); Interview with one senior member of the Legal Division, U.S. Court of Appeals for the D.C. Circuit (Jan. 10 & Jan. 14, 2011) (notes on file with the author).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ See Federal Judicial Center, History of the Federal Judiciary, U.S. Court of Appeals for the First Circuit, Judges, available at: <http://www.fjc.gov/servlet/nGetCourt?cid=19&order=c&ctype=ac&instat=01>; see also Federal Judicial Center, History of the Federal Judiciary, U.S. Court of Appeals for the First Circuit, Legislative History, available at: http://www.fjc.gov/history/home.nsf/page/courts_coa_circuit_01.html (noting that the current number of authorized judgeships for the First Circuit is six).

⁶⁶ See 2010 ANNUAL REPORT, *supra* note 9, tbl.B, at 83.

⁶⁷ Interview with a senior member of the Clerk's Office, U.S. Court of Appeals for the First Circuit (June 8 & Dec. 15, 2010 & Jan. 7, 2011) (notes on file with the author).

⁶⁸ *Id.*

attorneys all perform generally the same kind of work.⁶⁹ The Staff Attorney's Office "is simply too small" for specialization.⁷⁰

At the end of FY 2010, the Second Circuit had ten active judges, three vacancies, and twelve senior judges.⁷¹ In FY 2010, there were 5,371 appeals filed in the circuit⁷² or approximately 537 appeals per active judge. As of the fall of 2010, the Staff Attorney's Office for the Second Circuit was comprised 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.⁷³ In general in the Second Circuit, all of the staff attorneys who work on immigration appeals are hired for one-year terms with the possibility of renewal based on need and performance.⁷⁴ All of the regular staff attorneys are hired for a minimum of two years with the possibility of renewal.⁷⁵ For both the immigration and regular staff attorneys, renewal can be up to five years.⁷⁶ Unlike the staff attorneys of many of the other circuits, the staff attorneys in the Second Circuit specialize.⁷⁷ As noted above, there is a team of staff attorneys who work only on immigration appeals. The regular staff attorneys are split into three teams—those who work on pro se appeals, those who work on counseled motions, and those who work on pro se motions; the regular staff attorneys rotate through all three teams during their terms.⁷⁸

At the end of FY 2010, the Third Circuit had fourteen active judges and

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ See Federal Judicial Center, History of the Federal Judiciary, U.S. Court of Appeals for the Second Circuit, Judges, available at: <http://www.fjc.gov/servlet/nGetCourt?cid=22&order=c&ctype=ac&inststate=02>; see also Federal Judicial Center, History of the Federal Judiciary, U.S. Court of Appeals for the Second Circuit, Legislative History, available at: http://www.fjc.gov/history/home.nsf/page/courts_coa_circuit_02.html (noting that the current number of authorized judgeships for the Second Circuit is thirteen). As of July 2011, two new judges have joined the U.S. Court of Appeals for the Second Circuit: Raymond Lohier, Jr. and Susan L. Carney. See Federal Judicial Center, History of the Federal Judiciary, U.S. Court of Appeals for the Second Circuit, Judges, available at: <http://www.fjc.gov/servlet/nGetCourt?cid=22&order=c&ctype=ac&inststate=02> This now brings the active number of judges to thirteen, the number of vacancies to one, and the number of senior judges to twelve.

⁷² See 2010 ANNUAL REPORT, *supra* note 9, tbl.B, at 83.

⁷³ Interview with a senior member of the Staff Attorney's Office, U.S. Court of Appeals for the Second Circuit (May 17, Nov. 22 & Nov. 23, 2010) (notes on file with the author).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

nine senior judges.⁷⁹ In FY 2010, there were 3,951⁸⁰ appeals filed in the circuit or approximately 282 per active judge. As of the fall of 2010, the Staff Attorneys Office of the Third Circuit was comprised of thirty staff attorneys: one Senior Staff Attorney, four supervising attorneys, and twenty-five line attorneys.⁸¹ Of the staff attorneys, approximately half were serving temporary terms of one to two years (with the possibility of extension); the other half held permanent or long-term positions.⁸² Generally, the staff attorneys of the Third Circuit do not specialize.⁸³ The general rule is that “everybody works on everything” with one primary exception: only the most experienced staff attorneys work on death penalty cases.⁸⁴

At the end of FY 2010, the Fourth Circuit had thirteen active judges, two vacancies, and two senior judges.⁸⁵ In FY 2010, there were 4,854 appeals filed in the circuit,⁸⁶ or approximately 373 filings per active judge. As of the fall of 2010, the Staff Attorney Office of the Fourth Circuit was comprised of thirty-eight attorneys: one senior staff attorney, one deputy, four supervising attorneys and thirty-two line attorneys.⁸⁷ Of the thirty-two

⁷⁹ See Federal Judicial Center, History of the Federal Judiciary, U.S. Court of Appeals for the Third Circuit, Judges, available at: <http://www.fjc.gov/servlet/nGetCourt?cid=26&order=c&ctype=ac&instate=03>; see also Federal Judicial Center, History of the Federal Judiciary, U.S. Court of Appeals for the Third Circuit, Legislative History, available at: http://www.fjc.gov/history/home.nsf/page/courts_coa_circuit_03.html (noting that the current number of authorized judgeships for the Third Circuit is fourteen).

⁸⁰ See 2010 ANNUAL REPORT, *supra* note 9, tbl.B, at 83.

⁸¹ Interview with a senior member of the Staff Attorney’s Office, U.S. Court of Appeals for the Third Circuit (Apr. 30 & Dec. 6, 2010) (notes on file with the author).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ See Federal Judicial Center, History of the Federal Judiciary, U.S. Court of Appeals for the Fourth Circuit, Judges, available at: <http://www.fjc.gov/servlet/nGetCourt?cid=20&order=c&ctype=ac&instate=04>; see also Federal Judicial Center, History of the Federal Judiciary, U.S. Court of Appeals for the Fourth Circuit, Legislative History, available at: http://www.fjc.gov/history/home.nsf/page/courts_coa_circuit_01.html (noting that the current number of authorized judgeships for the Fourth Circuit is fifteen). As of July 2011, one new judge has joined the U.S. Court of Appeals for the Fourth Circuit: Albert Diaz. Additionally, one senior judge, Robert Foster Chapman, has retired and one active judge, M. Blane Michael, has passed away. See Federal Judicial Center, History of the Federal Judiciary, U.S. Court of Appeals for the Fourth Circuit, Judges, available at: <http://www.fjc.gov/servlet/nGetCourt?cid=20&order=c&ctype=ac&instate=04> This now brings the active number of judges to thirteen, the number of vacancies to two, and the number of senior judges to one.

⁸⁶ See 2010 ANNUAL REPORT, *supra* note 9, tbl.B, at 83.

⁸⁷ Interview with a senior member of the Staff Attorney’s Office, U.S. Court of Appeals for the Fourth Circuit (Oct. 1 & Nov. 22, 2010) (notes on file with the author). The staff

line attorneys, fifteen were permanent and seventeen were term.⁸⁸ In general in the Fourth Circuit, term attorneys are hired for two years, but those who do well may stay for three or four years, or even longer, and occasionally term staff attorneys are offered the opportunity to become permanent.⁸⁹ All staff attorneys work on criminal appeals and appeals involving post-conviction relief, but beyond that, when cases involving complicated statutory schemes are directed to the office—for example, tax, bankruptcy, immigration, and Social Security—they go to specific staff attorneys.⁹⁰ Accordingly, a handful of staff attorneys may handle almost all of the immigration appeals.⁹¹ Thus, there is a degree of de facto specialization that takes place among staff attorneys in the Fourth Circuit.⁹²

* * *

| <i>Circuit</i> | <i>Number of Active Judges (End of FY 2010)</i> | <i>Filings (FY 2010)</i> | <i>Filings Per Active Judge</i> | <i>Number of Staff Attorneys (Fall 2010)</i> |
|----------------|-------------------------------------------------|--------------------------|---------------------------------|----------------------------------------------|
| D.C. Circuit | 9 | 1178 | 131 | 14 |
| First Circuit | 6 | 1530 | 255 | 20 |
| Second Circuit | 10 | 5371 | 537 | 40 |
| Third Circuit | 14 | 3951 | 282 | 30 |
| Fourth Circuit | 13 | 4854 | 373 | 38 |

Two critical points emerge from this collection of data and statistics. First, circuits vary widely in the number of cases per active judge. While this figure does not fully capture how busy each judge is—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 still is useful in conveying some sense of a court’s workload.⁹³ The fact that the Second Circuit had approximately 537 appeals per active judge in FY 2010 and the D.C. Circuit had only 131 appeals per active judge in the same time period is striking. Moreover, these figures are relevant when assessing each circuit’s case management practices; how we think a court should handle its appeals is informed, at least in part, by the level of stress it is under from its caseload.

attorney I interviewed noted, however, that these figures fluctuate—in 2009, there were eighteen permanent staff attorneys and only thirteen term staff attorneys. He noted that the fluctuation mainly occurs in the number of temporary staff attorneys. *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *See supra* note 61.

Second, circuits vary widely in how many and what kinds of staff attorneys they hire. The Staff Attorney Office of the Second Circuit at forty attorneys in the fall of 2010 was nearly three times the size of the D.C. Circuit's Office. While the differences in office size may be understood as a function of docket size, what cannot be explained by dockets—and what therefore may be more surprising—is the variation in how the offices are staffed. As one senior staff attorney observed, the Third and Fourth Circuits are fairly similar in their composition of staff attorneys, but the First Circuit is more “top heavy” in permanent staff attorneys and the Second Circuit contains more temporary staff attorneys.⁹⁴ These differences are meaningful as the kind of staff attorneys each circuit employs affects what the circuit may ask of them.⁹⁵ A circuit might be comfortable asking its staff attorneys to screen cases for oral argument, for example, if its office is comprised of mostly permanent attorneys with many years of experience, rather than an office comprised of attorneys who have held the position for only one or two years. In short, there is significant variation among the demands on the circuits and the number and kinds of people who meet those demands, factors which 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, it 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 for technical defects, but also often for difficulty⁹⁶ and even in order to decide whether oral argument is warranted.⁹⁷ Depending on the circuit, this screening is performed by counsel in the Clerk's Office, by staff attorneys, or by judges. The appeal is

⁹⁴ *Id.*

⁹⁵ The logic here is somewhat chicken-and-egg-like: Just as the kinds of staff attorneys each circuit has affects what the circuit can ask of them, what each circuit intends to ask of the staff attorneys affects the kind of staff attorneys that the circuit hires.

⁹⁶ 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 numbers of ‘points.’”).

⁹⁷ 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 (noting the “practice of selecting cases for different kinds of decision-making procedures—often referred to as screening” that include decision with and without oral argument).

then routed to a particular destination—to a settlement program, a merits panel, or to a “non-argument track.”⁹⁸ This initial screening is only the beginning of a multi-layered review process—these cases will all be screened and sorted again—either once they are calendared (by judges) or set on the non-argument track (by staff attorneys and ultimately judges). How these cases are handled during this initial review stage and who handles them differs from circuit to circuit.

When an appeal is docketed in the D.C. Circuit, it is first screened within the Clerk’s Office for any jurisdictional defects.⁹⁹ Once any potential defects are resolved and any motions addressed, a staff attorney reviews the case and recommends that it either go to oral argument or be decided on the briefs (a decision which is then considered by a supervisor).¹⁰⁰ In making his or her recommendation, the staff attorney considers such factors as whether any novel issues of law are raised in the appeal, the number of issues raised, the number of parties, and the size of the record.¹⁰¹ 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 not go to argument unless the staff attorney later makes the (rare) recommendation to the panel that the court should appoint counsel or an amicus and hear argument.¹⁰² If the staff attorney has determined that oral argument is likely unnecessary, the Clerk’s Office sets forth the briefing schedule (for appellee’s brief and appellant’s reply) without an argument date.¹⁰³ 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.¹⁰⁴ 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.¹⁰⁵ These ratings are based on many of the same factors that

⁹⁸ I use the term “non-argument track” to refer generally to the processing route for cases that are not, at least initially, destined 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 be sent to a special panel or sent to a “non-argument calendar”—I say that the case or class of cases has been placed on a non-argument track. *See infra* Section II.D.

⁹⁹ Interview with two senior members of the Legal Division, U.S. Court of Appeals for the D.C. Circuit, *supra* note 62; Interview with one senior member of the Legal Division, U.S. Court of Appeals for the D.C. Circuit, *supra* note 62.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

determine whether or not to recommend argument, including whether novel issues of law are raised, the number of issues raised, the number of parties, and the size of the record.¹⁰⁶ Ratings become important when the cases are calendared—complex cases are always heard alone on a particular sitting day.¹⁰⁷ Also for the purposes of case distribution, cases that raise similar issues are “batched” or grouped together¹⁰⁸ to ensure that the same panel disposes of all of them.¹⁰⁹

In the First Circuit, the Clerk’s Office screens appeals for jurisdictional defects.¹¹⁰ Cases that are free from such defects are set for briefing, and once fully briefed, are screened for oral argument.¹¹¹ Unlike in the D.C. Circuit, only the senior staff attorney makes recommendations about whether appeals should be calendared for argument.¹¹² She reviews the briefs with an eye toward the number of issues presented in the appeal, the complexity of issues, and so forth.¹¹³ Certain kinds of cases tend not to get oral argument, including pro se cases, bail appeals, Social Security appeals, *Anders* brief cases,¹¹⁴ and cases from the Board of Immigration Appeals.¹¹⁵ The senior staff attorney gives each case a difficulty rating for case distribution purposes, based on an informal scale—cases are judged as being of average difficulty, more / less than average difficulty, or far more

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ 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.”).

¹⁰⁹ In the D.C. Circuit, this practice is called giving cases the “same day, same panel” designation. Interview with two senior members of the Legal Division, U.S. Court of Appeals for the D.C. Circuit, *supra* note 62; Interview with one senior member of the Legal Division, U.S. Court of Appeals for the D.C. Circuit, *supra* note 62.

¹¹⁰ Interview with a senior member of the Clerk’s Office, U.S. Court of Appeals for the First Circuit, *supra* note 67. Specifically, I was told that if any jurisdictional problems are found, the Clerk’s Office issues a show cause order. If there is no response to the show cause order, the Clerk’s Office dismisses the appeal for lack of prosecution. If a response is received, it is sent to the staff attorneys’ office. If the Staff Attorney’s Office determines that the appeal should be dismissed, an individual staff attorney prepares a recommendation, which is then circulated to a three-judge panel for review.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Following the Supreme Court case *Anders v. California*, 386 U.S. 738 (1967), if appointed counsel requests to withdraw after trial on the grounds 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.

¹¹⁵ Interview with a senior member of the Clerk’s Office, U.S. Court of Appeals for the First Circuit, *supra* note 67.

/ far less than average difficulty.¹¹⁶ 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—however, this practice occurs only occasionally in the First Circuit.¹¹⁷

The Second Circuit’s method of screening differs greatly from that of the D.C. and First Circuit. Although cases are screened by staff attorneys for jurisdictional or other technical defects, they are not formally screened for oral argument.¹¹⁸ Nearly all kinds of cases are sent on to the regular argument calendar, including *pro se* cases.¹¹⁹ The only exception to this rule is that most immigration appeals are sent to the non-argument calendar or “NAC” (which is discussed in greater detail in Part II.D).¹²⁰ Staff attorneys give cases a general difficulty rating of easy, medium, and difficult, as well as a case type designation.¹²¹ As in other circuits, this is done for case distribution purposes to try to ensure that all merits panels receive roughly equal workloads.¹²² Unlike the other circuits surveyed here, the Second Circuit does not batch like cases.¹²³ One judge I interviewed said that if anything, the court tries to be sure that no one panel receives too many of a particular kind of case¹²⁴—an opposite approach to batching.

In the Third Circuit, staff attorneys do not screen cases for oral argument or complexity.¹²⁵ All cases are initially screened at case opening

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Interview with a senior member of the Staff Attorney’s Office, U.S. Court of Appeals for the Second Circuit, *supra* note 73.

¹¹⁹ *Id.*

¹²⁰ 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

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

2D CIR. L.R. 34.2.

¹²¹ Interview with a senior member of the Staff Attorney’s Office, U.S. Court of Appeals for the Second Circuit, *supra* note 73.

¹²² Interview with a senior member of the Clerk’s Office, U.S. Court of Appeals for the Second Circuit (Sept. 23 & Dec. 10, 2010 & Jan. 5, 2011) (notes on file with the author).

¹²³ *Id.*

¹²⁴ Interview with a Judge of the U.S. Court of Appeals for the Second Circuit (June 7, 2010 & Jan. 4, 2011) (notes on file with the author).

¹²⁵ Interview with a senior member of the Clerk’s Office, U.S. Court of Appeals for the Third Circuit (Sept. 20 & Nov. 23, 2010 & Jan. 5, 2011) (notes on file with the author).

either by the Clerk's Office or the Staff Attorney's Office to ensure that there are no jurisdictional defects, that all necessary fees have been paid, that a certificate of appealability has been granted if one is needed,¹²⁶ and that no other procedural problems exist.¹²⁷ Cases with no procedural defects go on to briefing unless they are selected for mediation.¹²⁸ Whether a case will be orally argued is decided by the judges after briefing.¹²⁹ However, as in the Second Circuit, the Third Circuit has created special tracks for certain classes of cases. Most immigration cases are sent to standing immigration panels,¹³⁰ and pro se cases that do not involve direct criminal appeals are sent to standing pro se panels.¹³¹ Additionally, each capital appeal goes to a special panel constituted to hear only that death penalty case.¹³² Only after cases are scheduled for a sitting do the judges determine whether any of the cases should be decided on the briefs (a practice discussed in further detail in Part II.E).¹³³

In the Fourth Circuit, counsel in the Clerk's Office conduct an initial screening for oral argument.¹³⁴ As a rule, pro se cases are directed to be resolved without argument, although if a pro se case raises issues that warrant oral argument, a judge or panel may authorize appointment of counsel.¹³⁵ 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.¹³⁶ If the need for argument in a given case is apparent upon initial review of the briefs,

¹²⁶ “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).” FED. R. APP. P. 22(b).

¹²⁷ Interview with a senior member of the Clerk's Office, U.S. Court of Appeals for the Third Circuit, *supra* note 125.

¹²⁸ *Id.* Additionally, cases with jurisdictional defects, cases that need a certificate of appealability, and cases subject to dismissal under 28 USC § 1915(e) are sent to motions panels. *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Interview with a senior member of the Staff Attorney's Office, U.S. Court of Appeals for the Third Circuit, *supra* note 81.

¹³³ Interview with a senior member of the Clerk's Office, U.S. Court of Appeals for the Third Circuit, *supra* note 125.

¹³⁴ Interview with a senior member of the Staff Attorney's Office, U.S. Court of Appeals for the Fourth Circuit, *supra* note 87.

¹³⁵ Interview with a senior member of the Clerk's Office, U.S. Court of Appeals for the Fourth Circuit (Oct. 1 & Dec. 6, 2010 & Jan. 21, 2011) (notes on file with the author); *see also* 4TH CIR. R. 34(b).

¹³⁶ Interview with a senior member of the Staff Attorney's Office, U.S. Court of Appeals for the Fourth Circuit, *supra* note 87.

counsel in the Clerk's Office directs the case to the argument calendar.¹³⁷ If closer review of the case is needed, counsel in the Clerk's Office directs the case to the Office of Staff Counsel.¹³⁸ If the need for argument is not apparent, the case is assigned to a panel for resolution without argument.¹³⁹ Those cases that are placed on the argument calendar are reviewed for difficulty, with a rating of difficult, average, and below average, in an effort to equalize the difficulty of case assignments across the calendar.¹⁴⁰ Cases raising the same or closely related issues may be batched, and scheduled to be argued in *seriatim*.¹⁴¹

* * *

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 a non-argument calendar or panel for disposition before the judges have even received the briefs (although in every circuit, when judges review non-argument cases they always have the option to route cases back to the regular calendar).

Second, these practices vary tremendously, even in a sample comprised of just under half of all of the circuit courts. In the D.C., First, and Fourth Circuits, staff attorneys are heavily involved in the screening process, determining what cases will go on to oral argument and which ones 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, there is the ancillary issue of whether courts decide to batch appeals—a practice described by one court scholar as a way to “enhance productivity” while “impos[ing] no cost,”¹⁴² yet one may wonder whether such a practice also entrenches the views of a particular panel. The Fourth Circuit uses the practices frequently, the First Circuit uses it sparingly, and

¹³⁷ Interview with a senior member of the Clerk's Office, U.S. Court of Appeals for the Fourth Circuit, *supra* note 135.

¹³⁸ *Id.*

¹³⁹ *Id.*; see also 4TH CIR. R. 34(a).

¹⁴⁰ *Id.*

¹⁴¹ *Id.* Additionally, as with 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.*

¹⁴² Carl Tobias, *Fourth Circuit Publication Practices*, 62 WASH. & LEE L. REV. 1733, 1754 (2005).

the Second Circuit purposely does not batch appeals.

On a more general level, what emerges in the screening context (and will also prove true with other docket management practices) is that courts are making different determinations about appropriate trade-offs. The Third Circuit has decided that judges, and not staff attorneys, should decide whether a case will go to oral argument.¹⁴³ 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 a non-argument track to the regular calendar. How the 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

Even more so than appellate screening, the mediation of appeals has attracted surprisingly little scholarly attention. While 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 adjudication¹⁴⁴—one could survey the literature on “mediation” and “settlement” and be unaware that mediation programs exist at the appellate level.¹⁴⁵ And yet, as noted in Part I, all of the regional circuit courts rely on some sort of mediation or settlement program for civil appeals, and most of them have done so for several decades.¹⁴⁶

The general objectives of the mediation programs tend to be the same throughout the courts of appeals: by having the parties meet with a mediator, some issues within cases or even the cases themselves can be resolved, thereby saving judicial time.¹⁴⁷ Moreover, the timing of these programs tends to be the same throughout the circuit courts; eligible appeals in all of the circuits are routed to these programs generally after docketing and before parties file their briefs.¹⁴⁸

¹⁴³ See note 129 & accompanying text.

¹⁴⁴ See, e.g., Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Judith Resnik, *Many Doors? Closing Doors? Alternative Resolution and Adjudication*, 10 O. S. J. Dispute Res. 211 (1995).

¹⁴⁵ Although there are some articles that discuss settlement at the courts of appeals, see Samuel P. Jordan, *Early Panel Announcement, Settlement and Adjudication*, 2007 B.Y.U. L. REV. 55 (2007), there are not many. By way of comparison, a search conducted on WestLaw in December, 2010 for “federal district court” and either “settlement program” or “mediation program” yielded over 850 articles, whereas a search for “federal court(s) of appeal” and either “appellate mediation program” or “civil appeals management plan” yielded only 50 articles.

¹⁴⁶ See *supra* note 38 and accompanying text.

¹⁴⁷ See NIEMIC, *supra* note 36, at 5-6.

¹⁴⁸ *Id.* at 9.

Yet despite these commonalities, there are critical differences among the settlement programs. First, there are differences based on the kinds of appeals that pass through these programs, including whether nearly all civil appeals in a circuit or simply a subset of them go through mediation. As a related point, in some circuits there are general rules about which cases will go on to mediation, whereas in others, staff exercise discretion in selecting appeals for the program. Finally, there are differences in the number and kinds of mediators who staff the programs.

In the D.C. Circuit, civil appeals are selected for the Appellate Mediation Program by the Legal Division of the Clerk's Office, "working in concert" with the director of the Appellate Mediation Program.¹⁴⁹ Parties may request to participate in the mediation program, and these requests are given special consideration in deciding which cases will be selected.¹⁵⁰ Once a case is selected and mediation begins, participation is mandatory—that is, the parties are then required to meet with a mediator.¹⁵¹ Mediation is conducted by some forty volunteer attorneys from the Washington area.¹⁵² While mediation takes place, the appeal will continue in its normal course unless the parties file a motion to ask that it be held in abeyance.¹⁵³ Ultimately, roughly 30% of the cases that participate in the Appellate Mediation Program settle.¹⁵⁴ If a case does not settle and was previously removed from the calendar by a request of the parties, it is then placed back on the calendar and proceeds in the normal course.¹⁵⁵

In the First Circuit, nearly all counseled¹⁵⁶ civil appeals are sent automatically to the Civil Appeals Management Program or "CAMP."¹⁵⁷ Only a few classes of civil appeals, including habeas appeals, are not sent to the management program.¹⁵⁸ Despite the fact that CAMP is mandatory in most cases, parties can request and are sometimes granted a waiver.¹⁵⁹

¹⁴⁹ Interview with two senior members of the Legal Division, U.S. Court of Appeals for the D.C. Circuit, *supra* note 62; Interview with one senior member of the Legal Division, U.S. Court of Appeals for the D.C. Circuit, *supra* note 62.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ Interview with a senior member of the Appellate Mediation Program, U.S. Court of Appeals for the D.C. Circuit (Jan. 27 & Feb. 3, 2011).

¹⁵⁵ Interview with two senior members of the Legal Division, U.S. Court of Appeals for the D.C. Circuit, *supra* note 62; Interview with one senior member of the Legal Division, U.S. Court of Appeals for the D.C. Circuit, *supra* note 62.

¹⁵⁶ Pro se cases are excluded by local rule. *See* 1ST CIR. R. 33.0(f).

¹⁵⁷ Interview with a senior member of the Clerk's Office, U.S. Court of Appeals for the First Circuit, *supra* note 67.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

CAMP in the First Circuit is staffed by two retired state court judges who serve part-time as settlement counsel (one in Boston and one in Puerto Rico).¹⁶⁰ In Fiscal Year 2010, close to 400 cases were referred to CAMP, of which slightly over 55% were ultimately conferenced,¹⁶¹ approximately 40% of the conferenced cases settled.¹⁶² 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).¹⁶³

Like the First Circuit, the Second Circuit directs almost all counseled civil appeals to its Civil Appeals Management Program (about one thousand cases per year).¹⁶⁴ Participation is mandatory.¹⁶⁵ The Second Circuit's CAMP is staffed by three lawyers, one screener, and one to two staff persons.¹⁶⁶ The settlement rate appears to be approximately 30%.¹⁶⁷ Cases that do not settle continue to proceed in the normal course and often will ultimately be placed on the regular argument calendar.¹⁶⁸

In line with the D.C. Circuit, the Third Circuit directs only a subset of civil appeals to its Appellate Mediation Program.¹⁶⁹ Specifically, the "mediation office selects from the pool of eligible cases those that seem most amenable to mediation and settlement."¹⁷⁰ Additionally, the Third Circuit has the unique practice of mediating pro se appeals.¹⁷¹ If a pro se

¹⁶⁰ *Id.*

¹⁶¹ *Id.* There are a number of reasons why cases referred to CAMP may not ultimately be conferenced. 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.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ Interview with a senior member of the Staff Attorney's Office, U.S. Court of Appeals for the Second Circuit, *supra* note 73.

¹⁶⁵ Interview with a senior member of the Clerk's Office, U.S. Court of Appeals for the Second Circuit, *supra* note 121.

¹⁶⁶ *Id.* However, a senior member of the Staff Attorney's Office informed that "the settlement rate is higher if you take into account 42.1 stip[ulation]s without prejudice because a significant number of those are not reinstated and become final." Interview with a senior member of the Staff Attorney's Office, U.S. Court of Appeals for the Second Circuit, *supra* note 73.

¹⁶⁷ Interview with a senior member of the Clerk's Office, U.S. Court of Appeals for the Second Circuit, *supra* note 121. This figure was arrived at by measuring the number of FRAP 42 Stipulations, or voluntary dismissals, filed in the 2009 term, which would indicate the cases that settled after CAMP.

¹⁶⁸ *Id.*

¹⁶⁹ Interview with a senior member of the Clerk's Office, U.S. Court of Appeals for the Third Circuit, *supra* note 125.

¹⁷⁰ NIEMIC, *supra* note 36, at 31.

¹⁷¹ Interview with a senior member of the Clerk's Office, U.S. Court of Appeals for the

case is recommended by a staff attorney for mediation, the mediator will have an attorney represent the pro se litigant.¹⁷² Representation is limited to mediation only (the attorney need not stay on as counsel if the mediation fails).¹⁷³ The program is staffed by a director and staff mediation attorney, who oversee mediation in approximately 90% of the cases, and by senior circuit and district judges, who oversee mediation in the remaining 10% of cases.¹⁷⁴ In the 2009 calendar year, 378 cases were mediated and 143 settled (or approximately 37%).¹⁷⁵ If a case does not settle—either because the mediator rejects the case or because mediation fails—the case returns to the Clerk’s Office, a briefing schedule is issued, and after briefing the case will be sent to a regular merits panel.¹⁷⁶

In the Fourth Circuit, all civil and most agency appeals in which both parties are represented by counsel are directed to the Mediation Program.¹⁷⁷ Mediation is mandatory in eligible cases, although cases without settlement potential move through the program quickly.¹⁷⁸ The settlement rate of cases referred to the program is 34%.¹⁷⁹ Cases not settled through mediation are decided by the court after oral argument or submission on the briefs.¹⁸⁰

* * *

As this brief description demonstrates, many parties participate in a mediation or settlement program, even before they have submitted briefs or appeared in court. While the settlement rates of the programs are roughly comparable, there exist several key points of divergence between the programs: whether all civil cases participate in 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 sub-set of civil appeals to their mediation programs.

Third Circuit, *supra* note 125.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ NIEMIC, *supra* note 36, at 31.

¹⁷⁵ Interview with a senior member of the Clerk’s Office, U.S. Court of Appeals for the Third Circuit, *supra* note 125.

¹⁷⁶ *Id.*

¹⁷⁷ Interview with a senior member of the Clerk’s Office, U.S. Court of Appeals for the Fourth Circuit, *supra* note 135. Immigration appeals and appeals from the National Labor Review Board are not directed to the mediation program. *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

Additionally, most courts do not permit pro se appellants to participate in their mediation program—the Third Circuit is the only exception to this rule among the circuits surveyed here. Finally, in some circuits—the First and Third—parties may have judges acting as mediators, whereas in others—D.C. and Second and Fourth—parties have lawyers overseeing their mediation. While no individual difference 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. Non-argument 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.¹⁸¹ In the interest of judicial economy, courts have been holding fewer and fewer oral arguments relative to the caseload as a whole.¹⁸²

In addition to being one of the most widely used case management tools, the development of “non-argument tracks” has 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 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 some 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

¹⁸¹ There can 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 that in deciding particular motions, many courts 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 end up reviewing the merits of the case, decide that the appeal is frivolous, and dismiss the appeal before a formal adjudication has taken place. See 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. While this practice is significant, exploring the full range of motions practice—procedural, substantive, and emergency—is beyond the scope of this paper, and is something I plan to explore in future work.

¹⁸² See Ruggero J. Aldisert, *Perspective from the Bench on the Value of Clinical Appellate Training of Law Students*, 75 MISS. L.J. 645, 648-49 (2006). Judge Aldisert conducted a survey of the percentage of cases argued in the twelve regional circuits in 1990 and in 2004, and concluded that “[t]here has been a decline in oral argument in every circuit.” *Id.* at 649.

court would be futile.¹⁸³

Of course, the critical clause of this statement is “if further efforts to persuade the court would be futile.”¹⁸⁴ The practice of holding oral argument in a lower percentage of cases has been controversial precisely because there are those who believe that some cases that warrant oral argument are not being heard. David Stras and Shaun Pettigrew recently argued 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.”¹⁸⁵

This critique raises another controversial point about the move away from oral argument—the increased dependence on staff.¹⁸⁶ In many of the cases that are not tracked for argument, staff attorneys “work up” the case, meaning that they prepare a memorandum and draft disposition.¹⁸⁷ Yet the extent to which oral argument has been curtailed, staff are used, and how judges ultimately review that work differs greatly from circuit to circuit.

In the D.C. Circuit during the 2009-10 Term, one can approximate that 20 to 30% of cases that were decided on the merits were not placed on the argument calendar.¹⁸⁸ This set of cases, which is comprised of what are perceived to be straightforward appeals along with pro se appeals, are worked up by staff attorneys.¹⁸⁹ In many of these cases, the assigned staff attorney drafts a proposed disposition—almost always an order that will not technically be “published”—and submits the proposed decision along with an explanatory memorandum to a panel of three judges.¹⁹⁰ Then the panel sets a conference time to discuss the case.¹⁹¹ According to one D.C.

¹⁸³ Wallace, *supra* note 17, at 200.

¹⁸⁴ *Id.*

¹⁸⁵ Stras & Pettigrew, *supra* note 5, at 433.

¹⁸⁶ See generally Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 ARIZONA STATE L. J. 1 (2007) (arguing that the increased reliance on staff attorneys has impoverished the federal appellate system).

¹⁸⁷ See Vladeck & Gulati, *supra* note 3, at 1669.

¹⁸⁸ I was informed that during the 2009-2010 term, there were 271 lead case dispositions by the merits panel and 84 34(j) cases (or cases that were decided without oral argument). To obtain a rough estimate of what percentage of cases decided on the merits were not originally put on the argument calendar, I divided 84 by 355, which is approximately 25%. I hasten to note that this measure is imperfect, because more than one case can be grouped together under one lead case. To convey that this is a rough estimate and not a precise figure, I gave a range of 20 to 30%. The raw data was obtained from a follow-up by telephone on Jan 10, 2011 with a senior member of the Legal Division. Interview with one senior member of the Legal Division, U.S. Court of Appeals for the D.C. Circuit, *supra* note 62.

¹⁸⁹ *Id.*

¹⁹⁰ *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.*

¹⁹¹ In addition to deciding non-argument cases at these conferences, judges also decide

Circuit Judge, roughly half a dozen to two dozen cases are decided at a time during this kind of conference, and these conferences are held approximately twice a month.¹⁹² At the conference, the judges discuss the cases;¹⁹³ if they have questions, they address them to the authoring staff attorney who is present,¹⁹⁴ along with his or her supervisor.¹⁹⁵ The judges then decide whether they agree with the staff attorney's recommendation to dispense with oral argument, and if so, whether to adopt or alter the proposed disposition.¹⁹⁶

The remainder of the non-argument cases—those deemed to be truly frivolous—are treated in the Court's "Rapid Response" program.¹⁹⁷ Here, a staff attorney prepares a memorandum, which gives a brief abstract about each case and a proposed order or judgment for each case (and ten to twenty cases at a time can be decided in this form of review).¹⁹⁸ 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.¹⁹⁹ As with the other non-argument cases, the judges can decide that a case should be placed on the argument calendar.²⁰⁰ If the court decides that argument will not be held, however, the parties are notified.²⁰¹ Pursuant to D.C. Circuit Rule 34(j), a party may file a motion for reconsideration of this decision within ten days, but according to the Circuit Rule, "[s]uch motions are disfavored."²⁰² If the party does not object or the motion for reconsideration is denied, the court enters the judgment.²⁰³

In the First Circuit in FY 2010 it appears that approximately 71% of cases that were decided on the merits were not placed on the argument

motions. Interview with two senior members of the Legal Division, U.S. Court of Appeals for the D.C. Circuit, *supra* note 62; Interview with one senior member of the Legal Division, U.S. Court of Appeals for the D.C. Circuit, *supra* note 62.

¹⁹² Interview with a Judge of the U.S. Court of Appeals for the D.C. Circuit. (May 10, 2010) (notes on file with the author).

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ Interview with two senior members of the Legal Division, U.S. Court of Appeals for the D.C. Circuit, *supra* note 62; Interview with one senior member of the Legal Division, U.S. Court of Appeals for the D.C. Circuit, *supra* note 62.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* Motions can also be decided through the Rapid Response program. *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² D.C. CIR. R. 34(j).

²⁰³ Interview with two senior members of the Legal Division, U.S. Court of Appeals for the D.C. Circuit, *supra* note 62; Interview with one senior member of the Legal Division, U.S. Court of Appeals for the D.C. Circuit, *supra* note 62.

calendar.²⁰⁴ These are cases that were originally screened for non-argument by staff attorneys or where the parties waived argument before the case was calendared.²⁰⁵ In these matters, a staff attorney prepares a memorandum and drafts a short opinion for consideration by a panel of three judges.²⁰⁶ The panel members then review the materials on their own and, without formal, in-person conferencing, vote in a serial or “round-robin” fashion (discussed in greater detail below).²⁰⁷ If any single judge decides that the case should be argued, the appeal will be sent to the argument calendar automatically.²⁰⁸ Otherwise, the judges vote on whether to accept the drafted disposition.²⁰⁹ 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.²¹⁰

In the Second Circuit in recent terms, roughly 45% of cases decided on the merits were placed on the non-argument calendar.²¹¹ This figure marks a sea change in the Circuit, which until less than a decade ago claimed a tradition of hearing oral argument in nearly all cases.²¹² Once the court became overwhelmed by immigration appeals in the early part of the

²⁰⁴ I was informed that the First Circuit does not have precise statistics on the breakdown of argument / non-argument cases that are decided on the merits. However, the Administrative Office of the Federal Courts reports that during FY 2010, 28.9% of the cases terminated on the merits were decided after an oral hearing. See 2010 ANNUAL REPORT, *supra* note 9, tbl.S-1, at 44. This figure suggests that 71.1% of cases terminated on the merits were decided without argument. However, this figure alone does not capture cases not originally calendared, because it is possible for cases to be calendared but not ultimately argued. (I spoke with staff at the Administrative Office to verify that such cases are not captured in the 28.9% figure.) However, 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. Interview with a senior member of the Clerk’s Office, U.S. Court of Appeals for the First Circuit, *supra* note 67. Accordingly, approximately 71% of the cases that are ultimately decided on the merits are not placed on the argument calendar.

²⁰⁵ *Id.* Pursuant to First Circuit Rule 34.0(a), parties have the opportunity during briefing to set forth reasons why either oral argument should or should not be heard in their case. See 1ST CIR. R. 34.0(a) (“Any party who desires to do so may include, either in the opening or answer brief as the case may be, a statement limited to one-half page setting forth the reasons why oral argument should, or need not, be heard.”).

²⁰⁶ Interview with a senior member of the Clerk’s Office, U.S. Court of Appeals for the First Circuit, *supra* note 67.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ Interview with a senior member of the Staff Attorney’s Office, U.S. Court of Appeals for the Second Circuit, *supra* note 73. 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. See 2D CIR. L.R. 34.1(a).

²¹² See JUDITH A MCKENNA ET AL., *supra* note 6, at 70. The main exception to this rule at the time was that litigants who were incarcerated prisoners did not receive oral argument. *Id.*

decade,²¹³ 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.²¹⁴ The Circuit simultaneously decided that non-argument cases would be worked up by staff attorneys, who would prepare a bench memorandum and draft a summary order for each case.²¹⁵ This continues to be the practice of the non-argument calendar today. Until recently, sentencing-only appeals—that is, criminal appeals that raise issues only about the defendant’s sentence—were also sent to the non-argument calendar.²¹⁶ Because the Second Circuit has recently experienced a drop in the number of filings per judge,²¹⁷ sentencing-only cases are currently being routed to the regular argument calendar.²¹⁸ Accordingly, staff attorneys who work on non-argument calendar cases work only on immigration cases.²¹⁹ They submit their proposed summary orders and bench memoranda to a NAC panel comprised of three judges.²²⁰ 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 O. Newman of the Second Circuit:

A voting sheet accompanying the submission identifies each of the 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

²¹³ “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.” Newman, *supra* note 181, at 431.

²¹⁴ *Id.* at 433-34.

²¹⁵ *Id.* at 434.

²¹⁶ Interview with a senior member of the Clerk’s Office, U.S. Court of Appeals for the Second Circuit, *supra* note 121.

²¹⁷ When I was a law clerk during the 2008-2009 term, a week long sitting would consist of, on average, 36 cases. This figure has now dropped to 25-27 cases per week. Interview with a senior member of the Clerk’s Office, U.S. Court of Appeals for the Second Circuit, *supra* note 121. This drop in cases heard per week appears to be due to several factors, including (1) filings being down generally in the courts of appeals (specifically, filings were down six percent in the regional appeals courts in 2009, *see* ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: ANNUAL REPORT OF THE DIRECTOR 5 (2009) [hereinafter 2009 ANNUAL REPORT], and three percent in 2010, *see* 2010 ANNUAL REPORT, *supra* note 9, at 15); (2) to 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 the number of sitting days and the cases per sitting over the past few years in an effort to reduce its backlog, thereby reducing the current workload. Interview with a senior member of the Clerk’s Office, U.S. Court of Appeals for the Second Circuit, *supra* note 121.

²¹⁸ *Id.*

²¹⁹ Staff attorneys also work up pro se cases. However, because pro se cases are placed on the regular calendar, I discuss them in the section pertaining to sittings. *See infra* Section II.E.

²²⁰ Newman, *supra* note 181, at 434.

week's cases, is Judge 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's 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.²²¹

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 has meant that "voting is normally concluded within three weeks of submission."²²²

In the Third Circuit in FY 2009, 17-27% of cases decided on the merits were sent to non-argument panels.²²³ This is 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.²²⁴ Cases that are sent to non-argument panels are worked up by staff attorneys, who write both a memorandum and draft order, or possibly a draft per curiam opinion, for each case.²²⁵ Those materials are then sent to an appropriate standing

²²¹ *Id.*

²²² *Id.*

²²³ 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 non-argument panels, I simply divided 520 by 2,333, which comes to .22 or 22%. To account for the fact that this figure is only an estimate, I gave a range of 17 to 27%. The raw data comes from an interview with a senior member of the Clerk's Office, U.S. Court of Appeals for the Third Circuit, *supra* note 125.

²²⁴ *Id.* According to Local Appellate Rule 34.1, parties may file a statement with the court during briefing to request argument. *See* 3D CIR. L.A.R. 34.1(b) ("Any party to the appeal has the right to file a statement with the court setting forth the reasons why, in the party's opinion, oral argument should be heard. Such statement must be filed with the clerk within 7 days after the filing of appellee's or respondent's brief. . . .").

²²⁵ Interview with a senior member of the Staff Attorney's Office, U.S. Court of Appeals for the Third Circuit, *supra* note 81. Specifically, I was told that staff attorneys prepare a memorandum and proposed order (or a per curiam opinion, if appropriate) in any habeas case requiring a certificate of appealability, any immigration case in which a party has filed a

panel, such as a pro se panel.²²⁶ As is the case in the First and Second Circuits, the non-argument 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).²²⁷ However, unlike in the First and Second Circuits, voting in the Third Circuit is not sequential.²²⁸ Rather, the panel members generally transmit their votes to the “administrative” judge for the panel, with a copy to the other panel members, in no set order.²²⁹ According to one Judge of the Third Circuit, the decision to not employ serial voting was a deliberate one so as to minimize the extent that the judges would be influenced by each other when casting their votes.²³⁰

In the Fourth Circuit, it appears that close to 88% of cases decided on the merits are not placed on the argument calendar—the highest percentage of the circuits surveyed here.²³¹ These cases all go to the Office of the Staff Counsel.²³² There, staff attorneys review each case and, if they believe argument is warranted, place the case on the calendar.²³³ Cases that are set

motion, and any other civil matter in which one of the parties is proceeding pro se. *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ Interview with a Judge of the U.S. Court of Appeals for the Third Circuit (Sept. 20, 2010 & Jan. 11, 2011).

²³¹ Specifically, I was told that the Fourth Circuit each year hears argument in roughly 450 cases, and, recently, has decided approximately 3,800 cases on the merits. Of course, some cases that are initially slated for resolution without argument are ultimately put on the argument calendar (meaning that the 450 figure overcounts and the 3,800 figure undercounts). 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). I therefore treated the over and undercounting effects as net neutral, and simply divided the number of cases decided on the merits 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. Interview with a senior member of the Staff Attorney’s Office, U.S. Court of Appeals for the Fourth Circuit, *supra* note 87.

It is also important to note at this point that, 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. L.R. 34(a).

²³² Interview with a senior member of the Staff Attorney’s Office, U.S. Court of Appeals for the Fourth Circuit, *supra* note 87.

²³³ *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. If a staff attorney believes that a pro se case should be calendared, he or she must first write a calendaring memo to a panel of judges, setting out why the case should be argued and requesting appointment of counsel. (This is done because pro se litigants are not permitted oral argument in the Fourth Circuit.) If the panel agrees, the case is approved for

for submission without oral argument are first worked up by staff attorneys.²³⁴ For approximately 60% of these cases, the staff attorneys, as in the other circuits, generally prepare a memorandum and draft a disposition in each case for submission to a panel of three judges.²³⁵ Again, 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 his or her own.²³⁶ The Fourth Circuit then employs a modified or loose form of serial voting.²³⁷ Each panel has a “lead” judge—a position that is randomly assigned.²³⁸ That 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.²³⁹ The other two judges then submit their votes to their fellow panel members (in no set order).²⁴⁰ Again, as in all of the other circuits, if any 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.²⁴¹ If the judges all agree that a particular case should be decided on the briefs alone, the judges then vote whether to accept the disposition proposed by the staff attorneys, and if they do, decide on any changes to the proposed disposition.²⁴²

In the remaining 40% of the non-argument cases in the Fourth Circuit, the staff attorneys make oral presentations.²⁴³ Staff attorneys select the most straightforward appeals for this kind of decision.²⁴⁴ In oral presentation cases, staff attorneys draft proposed dispositions but not memoranda.²⁴⁵ A randomly selected three-judge panel then receives the draft dispositions, along with the rest of the file for each case (including the

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.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ Interview with a senior member of the Clerk’s Office, U.S. Court of Appeals for the Fourth Circuit, *supra* note 135.

²⁴² Interview with a senior member of the Staff Attorney’s Office, U.S. Court of Appeals for the Fourth Circuit, *supra* note 87.

²⁴³ *Id.*

²⁴⁴ *Id.* Specifically, for a term staff attorney to direct an appeal for decision by oral presentation, he or she would also need a supervisor to agree. However, permanent staff attorneys have the authority on their own to submit cases for decision by oral presentation. *Id.*

²⁴⁵ *Id.*

briefs and the judgment below).²⁴⁶ The panel “convenes” via telephone conference and the staff attorneys discuss each case.²⁴⁷ These meetings are held twice a month, and anywhere from forty-five to seventy-five appeals (with seventy-five being an informal limit) are decided during these conferences.²⁴⁸ In addition to deciding whether to accept the staff attorney’s proposed disposition, the judges can also decide to request that the case be “written up” more fully (with a memorandum), or even calendared (though this is rarely done).²⁴⁹

* * *

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, approximately 17-27% of cases decided on the merits were decided by panels without argument.²⁵⁰ In contrast, the comparable figure in the Fourth Circuit is nearly 88%.²⁵¹ While 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. As noted earlier, cases that are placed on a non-argument 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, a 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, there are key differences in the staff attorneys’ work product and the way that work is reviewed. On one end of the spectrum, there are the oral presentations of the Fourth Circuit—where staff attorneys only 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 of the D.C. Circuit—where judges have not only been given explanatory memoranda along with proposed decisions in each case, but then also have the opportunity to question the staff attorney who submitted the proposal at length at conferences where only ten or fifteen matters are

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ See *supra* note 223 and accompanying text.

²⁵¹ See *supra* note 231 and accompanying text.

considered at a time. Quite plainly, there is a significant range in the treatment of non-argument cases.

Finally, there are critical differences in the voting procedures of the circuits in non-calendared 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 his or her vote; another third of the time, a judge will know how two other panel members have voted before casting his or her vote. In contrast, the Third Circuit has judges submit their vote to the administrative judge of the panel, thereby allowing the other panel members to vote “blindly.”²⁵² Again, this is one more example of a key practice with significant variation across the circuits.

E. Sittings and Argument

Cases that survive initial screening and are not destined for a non-argument track are scheduled for a particular sitting. What follows for a subset of those cases most closely resembles the traditional model of appellate decision-making—that is, some of them will then be heard before a panel of three judges and those judges will then conference about, and ultimately resolve, those appeals.²⁵³ There are, however, a few caveats worth mentioning about cases set for sittings.

First, being set for a particular sitting does not mean that a case will be argued. Judges can decide even after a case is set on the calendar, that the case does not warrant oral argument.²⁵⁴ To what extent this practice is employed varies greatly from circuit to circuit. Once the panel decides that a case will go on submission, the case technically remains on the calendar but, like non-argument cases, is decided solely on the submitted materials.²⁵⁵ The key point here is that, unlike the other non-argument cases, cases that remain on the calendar are almost always worked up within chambers.²⁵⁶

Second, the percentage of cases that are actually decided after an oral

²⁵² Of course, both of these practices differ from what happens during oral presentations (or, for that matter, in conferences after an oral argument), where judges necessarily learn how the other panel members will vote.

²⁵³ See *supra* note 18 and accompanying text.

²⁵⁴ Of the circuits surveyed here, the Third Circuit is the prime example of a court that directs appeals to go on submission, even after argument is scheduled. See *infra* note 280 and accompanying text. See also JUDITH A. MCKENNA ET AL., *supra* note 6, at 86 (noting 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.”).

²⁵⁵ See *infra* notes 263, 267, 273, 280-282, 288 and accompanying text.

²⁵⁶ See *infra* notes 266, 271, 277, 286, 294 and accompanying text.

argument varies considerably—from 44.4%²⁵⁷ in one court down to 13.1%²⁵⁸ 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 argument.

Third, even if a case is still going to be argued, the structure of that argument also 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—usually about 15 minutes—to present arguments to the court.”²⁵⁹ In some circuits, oral argument typically lasts a total of forty minutes,²⁶⁰ and in others, argument can conclude in as few as ten minutes.²⁶¹ 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 then are argued in due course, unless the panel members unanimously decide that a case should go on submission.²⁶² The practice of directing a case to go on submission at this point—known in the circuit as “34j-ing a case” after the Circuit Rule on disposition without oral argument—occurs approximately 11% of the time.²⁶³ As for data on the cases that are actually argued, according to the Administrative Office of the United States Courts, in FY 2010, 231 or 44.4% of the D.C. Circuit cases terminated on the merits were decided after oral argument.²⁶⁴ As for the structure of the arguments in the D.C. Circuit, argument time is on average about fifteen minutes per side, but argument for complex cases can last up to two hours total.²⁶⁵ Once a case is set on the court’s calendar, the

²⁵⁷ See *infra* note 264 and accompanying text.

²⁵⁸ See *infra* note 290 and accompanying text.

²⁵⁹ *The Appeals Process*, U.S. COURTS, <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/HowCourtsWork/TheAppealsProcess.aspx> (last visited Nov. 15, 2010).

²⁶⁰ See *infra* note 292 and accompanying text.

²⁶¹ See *infra* note 276 and accompanying text.

²⁶² Interview with two senior members of the Legal Division, U.S. Court of Appeals for the D.C. Circuit, *supra* note 62; Interview with one senior member of the Legal Division, U.S. Court of Appeals for the D.C. Circuit, *supra* note 62.

²⁶³ *Id.* Specifically, over the last three court terms, the percentage of cases that are “34(j)ed” after being scheduled for argument is as follows: September 2007-08 Term: 11.2%; September 2008-09 Term: 12.3%; September 2009-10 Term: 10.2%. The three term average, which I cite above, is 11.3%. *Id.*

²⁶⁴ 2010 ANNUAL REPORT, *supra* note 9, tbl.S-1, at 44.

²⁶⁵ Interview with two senior members of the Legal Division, U.S. Court of Appeals for the D.C. Circuit, *supra* note 62; Interview with one senior member of the Legal Division, U.S. Court of Appeals for the D.C. Circuit, *supra* note 62.

disposition will be drafted within the chambers of one of the members of the panel that has heard the case.²⁶⁶

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.”²⁶⁷ As for the percentage of cases that receive oral argument, in FY 2010, 28.9% of the cases terminated on the merits were decided after an oral hearing.²⁶⁸ This figure corresponds to 279 cases.²⁶⁹ Allotted time typically ranges between ten and twenty minutes per side.²⁷⁰ As in the D.C. Circuit, once a case is on the argument calendar—whether or not it actually is argued—the decision will be drafted in judges’ chambers.²⁷¹

In the Second Circuit, cases that are not placed on the non-argument calendar or not otherwise disposed of go to the regular argument calendar.²⁷² Here, the majority of cases receive argument, unless the panel unanimously decides to direct a case to go on submission—something that does not occur often, if at all, in a given sitting.²⁷³ Roughly 90% of cases on the regular argument calendar actually receive argument (the remainder are decided on the briefs).²⁷⁴ Overall, during FY 2010, 37.7% of the cases terminated on the merits in the Second Circuit were decided after oral argument.²⁷⁵ This figure corresponds to 1,246 cases—well above the number of cases in the D.C. and First Circuits and even the remaining circuits noted here. 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 go over time.²⁷⁶ Cases that are on the regular argument calendar are generally worked up within the chambers of the judges, meaning that judges are responsible for drafting the dispositions.²⁷⁷ The only exception to this rule is that, beginning in the 2008-2009 Term, the Staff Attorneys Office began submitting a draft

²⁶⁶ *Id.*

²⁶⁷ Interview with a Judge of the U.S. Court of Appeals for the First Circuit (June 8, 2010 & Jan. 4., 2011) (notes on file with the author).

²⁶⁸ 2010 ANNUAL REPORT, *supra* note 9, tbl.S-1, at 44.

²⁶⁹ *Id.*

²⁷⁰ Interview with a senior member of the Clerk’s Office, U.S. Court of Appeals for the First Circuit, *supra* note 67.

²⁷¹ *Id.*

²⁷² Interview with a senior member of the Clerk’s Office, U.S. Court of Appeals for the Second Circuit, *supra* note 121.

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ 2010 ANNUAL REPORT, *supra* note 9, tbl.S-1, at 44.

²⁷⁶ Interview with a senior member of the Clerk’s Office, U.S. Court of Appeals for the Second Circuit, *supra* note 121.

²⁷⁷ *Id.*

summary order (accompanied by a memorandum) for all pro se appeals.²⁷⁸

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.²⁷⁹ The judges of each merits panel then decide which cases will receive oral argument.²⁸⁰ Because these cases have not previously been screened for oral argument, judges of the Third Circuit tend to direct a higher percentage of cases to go on submission.²⁸¹ Specifically, over 50% of cases that are set for any given sitting are ultimately decided on the briefs without argument.²⁸² Compared to the other circuits, the Third Circuit holds oral argument in a small percentage of cases—during FY 2010, only 13.9% of the cases decided on the merits were decided after oral argument.²⁸³ Yet the raw number of cases decided after oral argument—344²⁸⁴—is in the mid-range of the circuits surveyed here. As for argument itself, typically cases receive fifteen minutes per side (with less than fifteen minutes being a rarity).²⁸⁵ In general, cases that go to the argument calendar are decided in dispositions drafted in chambers.²⁸⁶

In the Fourth Circuit, only the cases that have been specifically selected for oral argument—either by counsel to the Clerk, staff attorneys, or by the judges when reviewing cases originally selected for decision solely on the briefs—are placed on the calendar.²⁸⁷ As in the other circuits, judges have the discretion to forgo oral argument in any case, even after the case is set for oral argument, so long as there is unanimity.²⁸⁸ This happens infrequently—in only about 5% of the cases calendared for argument.²⁸⁹ The Fourth Circuit has the lowest percentage of argued cases out of the circuits surveyed here—during FY 2010, 13.1% of the cases terminated on the merits were decided after oral argument.²⁹⁰ Yet the total number of

²⁷⁸ *Id.*

²⁷⁹ Interview with a senior member of the Staff Attorney's Office, U.S. Court of Appeals for the Third Circuit, *supra* note 81.

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² Interview with a Judge of the U.S. Court of Appeals for the Third Circuit, *supra* note 230.

²⁸³ 2010 ANNUAL REPORT, *supra* note 9, tbl.S-1, at 44.

²⁸⁴ *Id.*

²⁸⁵ Interview with a senior member of the Staff Attorney's Office, U.S. Court of Appeals for the Third Circuit, *supra* note 81.

²⁸⁶ *Id.*

²⁸⁷ Interview with a senior member of the Staff Attorney's Office, U.S. Court of Appeals for the Fourth Circuit, *supra* note 87.

²⁸⁸ Interview with a senior member of the Clerk's Office, U.S. Court of Appeals for the Fourth Circuit, *supra* note 135.

²⁸⁹ *Id.*

²⁹⁰ 2010 ANNUAL REPORT, *supra* note 9, tbl.S-1, at 44.

cases terminated on the merits decided after oral argument was the second-highest of the circuits surveyed here: 379.²⁹¹ Generally, the Fourth Circuit gives the most argument time of the considered circuits. The allotted time per side is twenty minutes for most cases, although agency, substantial evidence cases, and criminal sentencing cases are set for fifteen minutes per side.²⁹² Argument time is never set below fifteen minutes per side.²⁹³ As with the other circuits, cases that are on the regular calendar are decided in dispositions drafted in chambers.²⁹⁴

* * *

| <i>Circuit</i> | <i>Percentage of Cases Decided After an Oral Hearing of Those Decided on the Merits in FY 2010</i> | <i>Number of Cases Decided After an Oral Hearing of Those Decided on the Merits in FY 2010</i> |
|----------------|----------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------|
| D.C. Circuit | 44.4 | 231 |
| First Circuit | 28.9 | 279 |
| Second Circuit | 37.7 | 1246 |
| Third Circuit | 13.9 | 344 |
| Fourth Circuit | 13.1 | 379 |

Overall, it is striking that the prevalence of oral argument is dramatically different in the different circuits. In the Fourth Circuit, only 13.1% of cases terminated on the merits have oral argument, 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's number of cases decided after a hearing, 1,246, is staggering, especially when considering that the next highest number of cases, from the Fourth Circuit, is just under a third as many. Although these numbers, in turn, may be better understood when considering the differences in oral argument time; it is no accident that the Second Circuit holds the most, and also the shortest, oral arguments.

Furthermore, it is important to understand how these numbers come about. In the Third Circuit, judges direct more than 50% of calendared cases to be decided on the briefs,²⁹⁵ whereas in the First Circuit, judges cut very few cases from argument.²⁹⁶ Of course, these variations are due in part to the fact that, as described in Part II.B, initial screening processes

²⁹¹ *Id.*

²⁹² *See* 4TH CIR. R. 34(d).

²⁹³ Interview with a senior member of the Clerk's Office, U.S. Court of Appeals for the Fourth Circuit, *supra* note 135.

²⁹⁴ *Id.*

²⁹⁵ *See supra* note 282 and accompanying text.

²⁹⁶ *See supra* note 267 and accompanying text.

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 non-argument 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, a per curiam opinion, or by a short, unpublished, and non-precedential opinion or order.²⁹⁷ It is the increased use of the last category of dispositions that has received the most attention—and criticism—in the academic literature on case management.²⁹⁸ Critics have argued that the use of these short, unpublished opinions, (which may now be cited but are not precedential),²⁹⁹ has led to a decline in judicial accountability and responsibility,³⁰⁰ and has undermined our common law tradition by creating judgments that are not precedential.³⁰¹ Defenders of unpublished opinions respond that courts would not be able to work through their docket if they

²⁹⁷ As has been noted elsewhere, the term “unpublished opinion” has become something of a term of art. Despite the fact that these opinions are not published in the Federal Reporter, they are almost always published on the Westlaw and Lexis databases. See Martin, *supra* note 28, at 185.

²⁹⁸ Much of the initial criticism over 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 (1978) (“The Circuit court rules forbidding citation of published opinions have caused more controversy than any other facet of the limited publication debate”), which has now been remedied, see *infra* text accompanying note 299.

²⁹⁹ See FED. R. APP. P. 32.1(a).

³⁰⁰ 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 the 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% of its cases by oral disposition in 1977. See Feinberg, *supra* note 1, at 317 n.62.

³⁰¹ See Richard B. Cappalli, *The Common Law’s Case Against Non-Precedential Opinions*, 76 S. CAL. L. REV. 755, 759 (2003).

did not have this shorter, less formal form of disposition available, and that the publication of only a select set of cases results in clearer precedent.³⁰² In the midst of this controversy, it has gone unnoticed that the circuits use unpublished opinions to varying degrees—from in as little as 62.3%³⁰³ of cases terminated on the merits in one court to as much as 93.0%³⁰⁴ in another—and ultimately have significant variation in the total number of signed opinions they publish.

In the D.C. Circuit, of all cases decided on the merits during FY 2010, 62.3% were disposed of through unpublished opinions or orders.³⁰⁵ Virtually all non-argument track cases are disposed of by unpublished orders or judgments.³⁰⁶ Thus, published opinions—both signed and per curiam—come almost exclusively from argued cases. There were 187 signed opinions from cases terminated on the merits in FY 2010.³⁰⁷

In the First Circuit, of the cases terminated on the merits during FY 2010, 65.1% were disposed of through unpublished opinions.³⁰⁸ As in the D.C. Circuit, in the First Circuit most cases that have not been calendared are disposed by unpublished opinions. However, unlike the other circuits surveyed here, most of the calendared cases result in a full-length, published opinion—including those that are ultimately decided on the briefs.³⁰⁹ There were 318 such signed opinions from cases terminated on the merits in FY 2010.³¹⁰

In the Second Circuit, 88.3% of cases decided on the merits during FY 2010 resulted in an unpublished order.³¹¹ As in the D.C. and First Circuits, virtually all non-argument calendar cases are disposed of through (unpublished) summary orders.³¹² Of the cases that are on the regular

³⁰² 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.”).

³⁰³ See *infra* note 305 and accompanying text.

³⁰⁴ See *infra* note 318 and accompanying text.

³⁰⁵ 2010 ANNUAL REPORT, *supra* note 9, tbl.S-3, at 46.

³⁰⁶ Interview with two senior members of the Legal Division, U.S. Court of Appeals for the D.C. Circuit, *supra* note 62; Interview with one senior member of the Legal Division, U.S. Court of Appeals for the D.C. Circuit, *supra* note 62.

³⁰⁷ 2010 ANNUAL REPORT, *supra* note 9, tbl.S-3, at 46.

³⁰⁸ *Id.*

³⁰⁹ Interview with a senior member of the Clerk’s Office, U.S. Court of Appeals for the First Circuit, *supra* note 67.

³¹⁰ 2010 ANNUAL REPORT, *supra* note 9, tbl.S-3, at 46.

³¹¹ *Id.*

³¹² Interview with a senior member of the Clerk’s Office, U.S. Court of Appeals for the Second Circuit, *supra* note 121.

argument calendar, roughly three-quarters of those cases are disposed of through summary orders—the rest are disposed of by signed or per curiam opinions.³¹³ There were 324 signed opinions from cases terminated on the merits in FY 2010.³¹⁴

The Third Circuit’s “unpublished” rate is close to that of the Second Circuit—89.8% of cases terminated on the merits during FY 2010 were decided by a non-precedential opinion or “NPO” (the equivalent of an unpublished opinion).³¹⁵ Almost all cases that are submitted to a panel other than a regular merits panel are decided by NPO.³¹⁶ Accordingly, most of the published opinions come from argued cases. There were 246 signed opinions from cases terminated on the merits in FY 2010.³¹⁷

The Fourth Circuit has the highest rate of unpublished opinions. Overall, of the cases decided on the merits during FY 2010, 93.0% were disposed of by unpublished order.³¹⁸ As a rule, the Fourth Circuit does not publish opinions in cases that have not been argued.³¹⁹ Accordingly, all of its published opinions come from argued cases—and specifically, the court publishes opinions in about 55% of its argued cases.³²⁰ There were 193 signed opinions from cases terminated on the merits in FY 2010.³²¹

* * *

| <i>Circuit</i> | <i>Percentage of Cases Decided by Unpublished Order of Those Terminated on the Merits in FY 2010</i> | <i>Number of Cases Decided by Published, Signed Opinion of Those Terminated on the Merits in FY 2010</i> |
|----------------|------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------|
| 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 the figures above make

³¹³ *Id.*

³¹⁴ 2010 ANNUAL REPORT, *supra* note 9, tbl.S-3, at 46.

³¹⁵ *Id.*

³¹⁶ Interview with a senior member of the Staff Attorney’s Office, U.S. Court of Appeals for the Third Circuit, *supra* note 81.

³¹⁷ 2010 ANNUAL REPORT, *supra* note 9, tbl.S-3, at 46.

³¹⁸ *Id.*

³¹⁹ 4TH CIR. R. 36(a).

³²⁰ Interview with a senior member of the Clerk’s Office, U.S. Court of Appeals for the Fourth Circuit, *supra* note 135.

³²¹ 2010 ANNUAL REPORT, *supra* note 9, tbl.S-3, at 46.

clear, however, there are significant disparities in the non-publication rates of the circuits (compare 62.3% of cases decided on the merits in the D.C. Circuit with 93% in the Fourth Circuit).

Beyond appreciating the differences in publication rates, it is also important to understand just where these figures come from. Almost 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 the 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 other 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 lowest percentage of cases decided by unpublished order, it ultimately decided only 187 cases by signed, published order—just over half of the number of cases decided by the Second Circuit. While these figures can only convey so much—they cannot account for opinion length or how much judicial time they took—they at least 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 there are, of course, other practices beyond the ones mentioned here. For example, the courts have specific practices concerning how often they hold sittings³²² and where those sittings are held.³²³ The judges have different rules about sharing

³²² For example, in the 2010-11 Term, the Fourth Circuit held oral argument during six weeks, see *Oral Argument Calendar*, U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT, <http://www.ca4.uscourts.gov/argCal.htm> (last visited Feb 12, 2011), whereas during the same time period, the Second Circuit held oral argument nearly every week outside of two months in the summer, see *Court Calendar*, U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT, <http://www.ca2.uscourts.gov/calendars.htm> (last visited Feb. 12, 2011).

³²³ Some Circuits, such as the D.C. and Fourth Circuits, only hold sittings in one city: Washington D.C. and Richmond, Virginia respectively. The other circuits hold sittings in multiple cities. The First Circuit convenes in Boston, Massachusetts and also San Juan, Puerto Rico. 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. Finally, the Third Circuit hears most of its cases in Philadelphia, Pennsylvania but twice a year holds

opinions—whether they should circulate them to the entire court or only to the original panel before publication.³²⁴ There are even different practices concerning en banc³²⁵ and “mini en banc” procedures.³²⁶ In short, there are numerous points along the way from filing to disposition where the courts of appeals significantly diverge in their handling of appeals.

* * *

Ultimately, this review of the docket management practices of five circuits makes two points plain. The first is that the case management practices of any given circuit are deeply interconnected. The practices that a court adopts at one point in the review process affects 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 then 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. While it may be tempting to speak in general terms about the practices of the courts—e.g. the use of oral arguments is on the decline but that the use of staff attorneys is on the rise—when one more closely examines how each circuit functions, it becomes clear that each court has made very different decisions about how to manage appeals. Having documented the extensive differences among the circuits’ case management practices, we now turn to how such differences arose.

argument in Newark, New Jersey. It is also worth noting that while 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).

³²⁴ For example, some circuits, such as the Third Circuit, pre-circulate every opinion that is intended for publication to the entire circuit for comment. Interview with a Judge of the U.S. Court of Appeals for the Third Circuit, *supra* note 230. In contrast, the Second Circuit does not pre-circulate opinions beyond the original panel. Interview with a senior member of the Clerk’s Office, U.S. Court of Appeals for the Second Circuit, *supra* note 121.

³²⁵ The Second Circuit, for example, has historically avoided holding en banc hearings. *See* Feinberg, *supra* note 1, at 311.

³²⁶ Some courts hold “mini en bancs”—whereby a panel circulates an opinion that changes circuit law to the active members of the court, and if no one objects, notes the change in law. *See* *Shipping Corp. of India v. Jaldhi Overseas Pte Ltd.*, 585 F.3d 58, 67 (2d Cir. 2009) (Cabranes, J.).

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 questions about case management: to what extent the circuits can and should change their current practices.

In this Part, I argue that the differences between the practices of the circuits 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 dockets by altering their practices, in accordance with their priorities. Yet there is also a way in which this interplay is static—much of the reason courts have certain priorities (and, indeed practices) is out of tradition. The question of whether these reasons are sufficient for justifying these differences is addressed in Part IV.

A. Differences in Dockets

The most apparent explanation for the differences in docket management practices is the differences in dockets. As one senior member of a Clerk's Office stated, "There is nothing we can do to set the caseload,"³²⁷ and those 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 2010,³²⁸ or approximately 131 appeals per active judge—the lowest caseload of the circuits surveyed here. To give a sense of scale, the D.C. Circuit had just over 20% of the appeals and just under 25% of the filings per active judge of the Second Circuit in that same period.³²⁹ As one D.C. Circuit judge noted, in contrast to the judges of other circuits, judges on his court enjoy a "greater luxury of time."³³⁰ It is therefore possible for the D.C. Circuit to establish practices that require more judicial time—such as holding oral argument and publishing opinions in a higher portion of cases. Conversely, circuits without the same luxury rely more on practices that

³²⁷ Interview with a senior member of the Clerk's Office, U.S. Court of Appeals for the Third Circuit, *supra* note 125.

³²⁸ See 2010 ANNUAL REPORT, *supra* note 9, tbl.B, at 83.

³²⁹ In FY 2010, the Second Circuit had 5,371 appeals filed in the circuit or approximately 537 appeals per active judge. 2010 ANNUAL REPORT, *supra* note 9, tbl.B, at 83.

³³⁰ Interview with a Judge of the U.S. Court of Appeals for the D.C. Circuit, *supra* note 192.

save judicial time—including holding oral argument and publishing opinions in a lower 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 of cases—44.4% as compared to 28.9% in the First Circuit, 37.7% in the Second Circuit, 13.9% in the Third Circuit, and 13.1% in the Fourth Circuit;³³¹ and no accident that the D.C. Circuit published the lowest percentage of unpublished as compared to published orders, of cases terminated on the merits—62.3% as compared to 65.1% in the First Circuit, 88.3% in the Second Circuit, 89.8% in the Third Circuit, and 93.0% in the Fourth Circuit.³³² Quite plainly, the differences in the sizes of the caseloads is one of the primary reasons why case management practices diverge.

Second, the differences in the kinds of cases that come to 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.³³³ 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.³³⁴ Another prime example comes from the Second Circuit. Because in recent years it had rapid growth in its immigration docket, the Court decided that it needed to streamline its adjudication of these appeals.³³⁵ As described in Part II, this increase in the number of asylum appeals spurred the development of the court's non-argument calendar. As such, many of the circuits' case management practices are related to the particular kinds of cases it receives.

While this may seem apparent, it is important to note the interplay between the number and type of cases received by each court. The Second Circuit created the non-argument calendar as a way to make the adjudication of asylum appeals more efficient out of a perceived necessity. Because the court already had a high volume of appeals, it could not treat each of these appeals as a regular argument case without creating a severe backlog for all appeals.³³⁶ If the Court had experienced a much lower volume of cases, it is not clear that the non-argument calendar would have been born. In the other direction, the D.C. Circuit is able to hear each

³³¹ See *supra* Part II.E.

³³² See *supra* Part II.F.

³³³ See Spottswood W. Robinson, III, *The D.C. Circuit: An Era of Change*, 55 G.W. L. REV. 715, 715 (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 all cases that come to the circuit come from agencies. 2010 ANNUAL REPORT, *supra* note 9, tbl.B-3, at 96.

³³⁴ See *supra* note 107 and accompanying text.

³³⁵ See Newman, *supra* note 181, at 432.

³³⁶ *Id.*

complex case on a single sitting day because it receives a manageable number of complex cases, and filings more generally, each year. If there were suddenly 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 affects 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 each court faces 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 project 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;"³³⁷ a judge from the same circuit described different courts as making different "policy choice[s]."³³⁸ A senior member of the Clerk's Office for the Third Circuit stated that "each circuit has its own culture;"³³⁹ and a judge for the same circuit agreed.³⁴⁰ A judge of the First Circuit said that courts simply have different "priorities,"³⁴¹ and a judge of the Fourth Circuit noted that each court has different "philosophical preferences."³⁴² Whatever terms are used, the circuits clearly have 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.

³³⁷ Interview with a senior member of the Clerk's Office, U.S. Court of Appeals for the Second Circuit, *supra* note 121.

³³⁸ Interview with a Judge of the U.S. Court of Appeals for the Second Circuit, *supra* note 124.

³³⁹ Interview with a senior member of the Clerk's Office, U.S. Court of Appeals for the Third Circuit, *supra* note 125.

³⁴⁰ Interview with a Judge of the U.S. Court of Appeals for the Third Circuit, *supra* note 230.

³⁴¹ Interview with a Judge of the U.S. Court of Appeals for the First Circuit, *supra* note 267.

³⁴² Interview with a Judge of the U.S. Court of Appeals for the Fourth Circuit (Oct. 18, 2010) (notes on file with the author).

One senior member of the Clerk's Office for the Second Circuit said that she thought her court particularly prizes ensuring that a wide range of cases receive oral argument, that full opinions are written when possible, and that the median disposition time remains one of the shortest of all of the circuits.³⁴³ Judge Newman of the Second Circuit has also noted that his court particularly gives weight to oral argument, saying that until the creation of the non-argument calendar, 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."³⁴⁴ 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."³⁴⁵ 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 effective use of time for oral argument and for review of cases on the briefs.³⁴⁶ Judge Harvie Wilkinson of the Fourth Circuit has similarly discussed his Circuit's priorities,³⁴⁷ and notes that the court prizes being one of the most efficient in the country.³⁴⁸ While one certainly should not take the comments of a few as definitive statements on the preferences of their circuits,³⁴⁹ these comments reinforce the theory that each court, even "self-consciously," has established certain priorities when it comes to case management, and that those priorities are quite different.

Nearly all of the 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 can be seen in the fact that the court had the second-highest percentage of cases

³⁴³ Interview with a senior member of the Clerk's Office, U.S. Court of Appeals for the Second Circuit, *supra* note 121.

³⁴⁴ Newman, *The Second Circuit's Expedited Adjudication of Asylum Cases*, *supra* note 181, at 433.

³⁴⁵ Interview with a Judge of the U.S. Court of Appeals for the Third Circuit, *supra* note 230.

³⁴⁶ Interview with a senior member of the Clerk's Office, U.S. Court of Appeals for the Fourth Circuit, *supra* note 135.

³⁴⁷ See Wilkinson, *supra* note 53, 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 where 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[.]").

³⁴⁸ *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.").

³⁴⁹ See *supra* note 53.

terminated on the merits after oral argument 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 degree.³⁵⁰ (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.)³⁵¹ The Second Circuit's commitment to writing full opinions when possible is evidenced by the fact that the court published the highest number of signed opinions in FY 2010.³⁵² And while the Second Circuit does not have a particularly short median disposition time of the courts surveyed here,³⁵³ it is worth noting that, unlike the other courts, the circuit's median disposition time dropped significantly between FY 2009 and FY 2010—from 16.9³⁵⁴ to 13.3 months³⁵⁵—possibly suggesting that the court is, indeed, making a low median disposition time a priority.

Turning to the preferences of the other circuits, the suggestion that the Third Circuit particularly prioritizes having its judges decide which cases will receive oral argument and which ones will not is plainly supported by the fact that, contrary to the practices of the four other courts of appeals surveyed here, the Third Circuit judges screen their own cases.³⁵⁶ While the Second Circuit appears to value holding oral argument in as many cases as possible, it has been suggested that the Fourth Circuit prizes holding oral argument only when it would be useful—a more limiting approach. This view is supported by the fact that the Fourth Circuit's percentage of cases decided after an oral hearing of those decided on the merits in FY 2010 was the lowest of all the courts surveyed here (though it is worth noting that its total number of cases decided after oral argument was on the high end of the courts surveyed here).³⁵⁷ And 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 amount.³⁵⁸ (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,

³⁵⁰ See *supra* Part II.E.

³⁵¹ *Id.*

³⁵² See *supra* Part II.F.

³⁵³ See 2010 ANNUAL REPORT, *supra* note 9, tbl.B-4, at 105. For a measure of median disposition time, I look to the median time interval from the filing of the notice of appeal to the filing of the final disposition, in cases terminated after hearing or submission.

³⁵⁴ See 2009 ANNUAL REPORT, *supra* note 217, tbl.B-4, at 103.

³⁵⁵ See 2010 ANNUAL REPORT, *supra* note 9, tbl.B-4, at 105.

³⁵⁶ See *supra* Part II.B.

³⁵⁷ See *supra* Part II.E.

³⁵⁸ See 2010 ANNUAL REPORT, *supra* note 9, tbl.B-4, at 105.

and 12.1 in the Third Circuit.)³⁵⁹ In short, the descriptive accounts of the 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.³⁶⁰ For example, a court that gives priority to publishing full-length opinions 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 gives priority to publishing full-length opinions might do so because its judges believe that the parties will have more faith in the judicial system if they receive such an opinion rather than a short, unpublished order, which suggests that the underlying value is perceived legitimacy (as 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—one as 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 one 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. . . . Also, there have been a few occasions when 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. Moreover . . . [i]t cannot help but improve the workings of the collegial process when it turns to the more difficult cases.³⁶¹

³⁵⁹ *Id.*

³⁶⁰ Thanks to Josh Chafetz for illuminating several of the issues discussed in the remainder of this Section.

³⁶¹ See Feinberg, *supra* note 1, at 306-07.

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 those values as possible at any given time is an ongoing optimization problem, one which assigns weights to the values themselves and 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 priorities of courts are tethered to underlying values. Judges decide which practices to favor based on the values that they think are most important.

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

Identifying what values each circuit holds and whether each circuit holds the same values is an important but extremely complicated task. One might assume because the circuits have different priorities that 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 of 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, while judges of another circuit might generally believe that the same value is best effectuated through 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 over-determination, it is difficult to say with certainty what 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 the variations in case management practices are driven by differences both in dockets and in the priorities of the circuits. These in turn are informed by each court's underlying values, which may, 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 this series of actions is iterative. Dockets shift and change and, in response, old case management procedures are updated and new procedures adopted. The interplay between dockets and priorities is dynamic, and one that has become more complicated as dockets have grown substantially.

When dockets were small, courts did not have to make as many difficult choices when it came to which practices to prioritize because practices were not in competition. Indeed, a primary reason scholars hearken back to the era of Learned Hand³⁶² is that with only seventy-three filings per judge per year in 1950,³⁶³ federal judges could give oral argument and publish full-length opinions in as many cases as they wanted, all in a reasonable timeframe.³⁶⁴ 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 in competition and the more its case management practices must adjust.

These adjustments can be seen frequently across the circuits. As noted earlier, certain circuits have particular practices that they put in place when their backlog, 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).³⁶⁵ This program and others like it serve as a correcting mechanism—when courts grow concerned that they are approaching a minimum level of efficiency or expediency, they adjust their procedures (as the panel's former name suggests).³⁶⁶

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 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 sufficiently straightforward that there is no remote possibility that they will be decided incorrectly or that

³⁶² See, e.g., Richman & Reynolds, *supra* note 5, at 278.

³⁶³ COMM'N ON STRUCTURAL ALTERNATIVES FOR THE FED. COURTS OF APPEALS, *supra* note 20, at 14.

³⁶⁴ See MARVIN SCHICK, LEARNED HAND'S COURT 93-94 (1970)

³⁶⁵ Interview with two senior members of the Legal Division, U.S. Court of Appeals for the D.C. Circuit, *supra* note 62;

³⁶⁶ It is relevant to note that 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 for the circuits between filing and termination for cases terminated on the merits during FY 2010 is 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. 2010 ANNUAL REPORT, *supra* note 9, tbl.B-4, at 105.

they could be due more consideration. Thus, when faced with caseload stress, courts may be concerned about the impact on some values (typically efficiency or expediency), and may be willing to forgo some practices in instances in which they are not concerned that other values (say, accuracy and legitimacy) will fall below some minimum standard.

This phenomenon occurs in the other direction as well—when the caseload falls, circuits sometimes adjust their practices by returning to those that require more judicial time. For example, as noted earlier, a few years ago the Second Circuit began placing criminal appeals that raised only sentencing issues on the non-argument calendar.³⁶⁷ Now that the court has a very low criminal backlog,³⁶⁸ “sentencing only” cases are being placed on the regular argument calendar again.³⁶⁹ This demonstrates that when there is no longer a concern that the court 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.

In short, there is a critical and ongoing interplay between a court’s docket and its priorities. As dockets rise and fall, courts adjust their practices to respond. If the dockets rise above a certain level, courts may become particularly concerned with protecting 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 Dependency*

The previous Section focused on the ways in which decisions about case management are dynamic. But there is a critical way in which decisions about case management are also static. 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 current choices that the circuit makes. Ultimately, path dependence plays an important role in the formulation of case management practices.

Different circuits have different priorities and possibly underlying values—but how do they arrive at those priorities and values? Do priorities

³⁶⁷ See *supra* note 216 and accompanying text.

³⁶⁸ Interview with a senior member of the Clerk’s Office, U.S. Court of Appeals for the Second Circuit, *supra* note 121.

³⁶⁹ See *supra* note 218 and accompanying text.

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[.]”³⁷⁰

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 learns quickly 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 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.³⁷¹

Regardless of how the path dependence comes about—consciously or not—the result is still the same: there is potential for stagnation or even calcification of practices. As Oona Hathaway has observed in the substantive law context, decisions by courts “can become locked in and resistant to change.”³⁷² This kind of entrenchment, in turn, can have detrimental effects: “This inflexibility can lead to inefficiency when legal rules fail to respond to changing underlying conditions.”³⁷³ Such resistance to change is particularly worrisome in the context of case management, since the benefits of entrenchment in the substantive law context—*stare decisis* being a prime example—are simply not present, and the costs of inefficiency may be just as high.

Path dependence raises concerns not only about the practices that courts choose, but also about the process by which the courts choose them. Some judges have argued that courts should be free to decide what practices are best for them,³⁷⁴ but this argument may be called into question

³⁷⁰ Interview with a Judge of the U.S. Court of Appeals for the First Circuit, *supra* note 267.

³⁷¹ Interview with a Judge of the U.S. Court of Appeals for the Fourth Circuit, *supra* note 342.

³⁷² 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).

³⁷³ *Id.*

³⁷⁴ 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. Judge Jon C. Godbold, former director of the Federal Judicial

when a court's selection process is shaped by inertia rather than by the values that are consciously held by its current members, and when it is unclear that the court has even considered alternative practices to adopt. Part V addresses some of these concerns, but for now the critical point is that while determining case management practices is a dynamic process, it is also static—affected by what courts have done in the past and potentially limiting what courts will do in the future.

Ultimately, explaining why there is so much variation among the case management practices of the circuits is a difficult task. As one Second Circuit Judge acknowledged, “Figuring out *why* circuits do things differently gets tricky.”³⁷⁵ 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 (which may or may not be shared among the courts). 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, we 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 explaining some of the most significant causes for those differences. Now we must consider whether it is defensible to have such differences.

In a federal system, we demand a certain level of uniformity.³⁷⁶ We try

Center and Chief Judge of two circuits (the old Fifth and the new Eleventh) described the various choices appellate courts make about their dockets, from “deciding cases without oral argument” to writing “a terse statement of reasons” in other cases, and stated that “[a]n appellate court should not be denied the discretion to make these choices.” John Godbold, *Improvements in Appellate Procedure: Better Use of Available Facilities*, 66 A.B.A. J. 863, 864 (1980).

³⁷⁵ Interview with a Judge of the U.S. Court of Appeals for the Second Circuit, *supra* note 124.

³⁷⁶ The argument for uniformity is, of course, well tread in the substantive law context. There, it is generally assumed that it is problematic if citizens of different jurisdictions are 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 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.”); 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, 1096-96 (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

to ensure uniformity in interpretation of substantive law—indeed, this is one of the functions of our courts.³⁷⁷ We have federal rules to ensure uniformity in procedure.³⁷⁸ 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 has a cause of action because another party bringing an identical claim in another circuit would likely 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 one does not have an absolute Due Process right to oral argument,³⁷⁹ and the same is undoubtedly true of the other practices 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.”³⁸⁰ The question here is whether, given the greater context of the federal system, it is problematic to have such varying procedures.

The pragmatic way to begin to answer 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

possibly erroneous, reading of another statute.”); 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.”). *But see* Amanda Frost, *Overvaluing Uniformity*, 93 VA. L. REV. 1567 (2008) (arguing that uniformity may not be the worth the cost of achieving it and that heterogeneity may, at times, be preferable).

³⁷⁷ 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.”).

³⁷⁸ See generally the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure. See also 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.”).

³⁷⁹ See *Federal Communications Commission v. WJR, The Goodwill Station, Inc.*, 337 U.S. 265, 275-76 (1949) (stating that “due process of law has never been a term of fixed and variable content. This is as true with reference to oral argument as with respect to other elements of procedural due process. For this Court has held in some situations that such argument is essential to a fair hearing, in other that argument submitted in writing is sufficient” (citations omitted)).

³⁸⁰ Wallace, *supra* note 17, at 212.

Immigration Appeals to its non-argument calendar.³⁸¹ The Third Circuit sends most of its immigration appeals to a special panel, where most of those cases will be decided on the briefs.³⁸² But the other circuits do not categorically treat immigration cases differently than any other type of case; it is quite possible that an immigration case in these other circuits could be argued and the decision drafted in chambers. Suppose that in order to ensure uniform practices, all circuits agreed that cases from the Board of Immigration Appeals would receive oral argument and 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.³⁸³ But for others, particularly the Second Circuit, this change in practice would be seismic. Assuming all 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 2010),³⁸⁴ 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 disposition time of all civil appeals in the circuit.³⁸⁵ In light of the fact that the median disposition time for the Second Circuit in FY 2010 was just above 13 months,³⁸⁶ 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 in the different circuit courts. In the Fourth Circuit *pro se* appeals do not go to argument,³⁸⁷ and many are decided in oral presentations where judges consider dispositions drafted by staff attorneys, but not memoranda.³⁸⁸ In other circuits, including the First and the Third, *pro se* appeals go without oral argument,³⁸⁹ but staff attorneys in

³⁸¹ See *supra* note 120 and accompanying text.

³⁸² See *supra* note 224 and accompanying text.

³⁸³ See 2010 ANNUAL REPORT, *supra* note 9, tbl.B-3, at 96.

³⁸⁴ *Id.* at 97. By comparison, there were 137 cases from the Board of Immigration Appeals in the First Circuit, 484 in the Third Circuit, and 191 in the Fourth Circuit. See *id.*

³⁸⁵ Interview with a Judge of the U.S. Court of Appeals for the Second Circuit, *supra* note 124.

³⁸⁶ 2010 ANNUAL REPORT, *supra* note 9, tbl.B-4, at 105.

³⁸⁷ See *supra* note 135 and accompanying text.

³⁸⁸ See *supra* note 245 and accompanying text.

³⁸⁹ See *supra* notes 115 and 224 and accompanying text.

those cases not only draft dispositions but also prepare bench memoranda, which detail information about the cases.³⁹⁰ In the Second Circuit, some pro se appeals do receive argument, and staff attorneys in the circuit both draft a disposition and prepare a bench memorandum for each case.³⁹¹ Finally, in the D.C. Circuit, pro se appeals do not generally go to argument;³⁹² instead, the court holds conferences, during which the staff attorneys and their supervisors are available to the judges to answer questions about their cases (after the staff attorneys have drafted dispositions and prepared accompanying memoranda).³⁹³ 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 filings, the First Circuit had 508, the Second Circuit had 2,007, the Third Circuit had 2,016, and the Fourth Circuit had 2,641.³⁹⁴ 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 year³⁹⁵—an enormous increase for an office with only 38 attorneys.³⁹⁶ 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 those courts because of their different dockets. The Second Circuit would be affected far more by rules regarding immigration appeals than, say, the D.C. Circuit. The Fourth Circuit would be affected far more

³⁹⁰ See *supra* notes 206 and 225 and accompanying text.

³⁹¹ See *supra* note 278 and accompanying text.

³⁹² See *supra* note 102 and accompanying text.

³⁹³ See *supra* notes 189-195 and accompanying text.

³⁹⁴ 2010 ANNUAL REPORT, *supra* note 9, tbl.B-9, at 129-30.

³⁹⁵ As noted in Section II.D, approximately 40% of Fourth Circuit cases terminated on the merits that do not go to argument are decided in oral presentations (without memoranda). Assuming that this percentage applies to pro se appeals as much as it does to other appeals that do not go to argument, this would suggest that currently, 40% of 2,641 pro se appeals, or approximately 1,054 pro se appeals, currently are not “worked up” with memoranda. Under the hypothesized rule, this set of appeals would now receive memoranda, thus requiring the preparation of over a thousand new memoranda per year.

³⁹⁶ See *supra* note 87 and accompanying text.

by rules regarding pro se appeals than, say, the First Circuit. These effects, in turn, would result in litigants receiving different treatment—certain litigants in one circuit would have to wait far longer for a decision than similarly situated litigants in another circuit. Thus, because the dockets are so different, simplistic uniformity requirements may 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 Robert Katzmann (now a Judge of the Second Circuit) and 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, varying with the needs of particular circuits.”³⁹⁷ This argument is not quite the same as the “laboratories of experimentation” idea associated with federalism.³⁹⁸ 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; 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 the ability to experiment, and may result in great inefficiencies. As Amanda Frost has argued in the substantive law context, “uniformity for its own sake” may not always be “worth the (sometimes significant) costs of trying to achieve it.”³⁹⁹

What all of this suggests is that, while 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 going to be 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.

³⁹⁷ Katzmann & Tonry *in* MANAGING APPEALS IN FEDERAL COURTS *supra* note 2, at 3.

³⁹⁸ The standard “laboratories of experimentation” argument of course comes from Justice Brandeis’s famous statement that states can 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 (1992) (Brandeis, J., dissenting).

³⁹⁹ Frost, *supra* note 376, at 1571.

Should all courts have the same views about the utility of oral argument and 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 we could determine that the courts all share the same values, then we might be able to justify courts setting different priorities, at least for some time, as an extension of the true laboratories of experimentation argument.⁴⁰⁰ The rationale would be that courts should be allowed to experiment with finding the best ways to effectuate their shared values. Over time, we would expect 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, we could determine that the courts do not share the same values, or at least not to equal extents, we may come to a different conclusion about 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 our federal justice system is that the courts are animated and guided by the same basic principles,⁴⁰¹ we may conclude that deep value disuniformity is indefensible, which would mean that the resulting priority disuniformity is also problematic.

Ultimately, this Part has shown that due to differences in the dockets of the courts of appeals, we 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 still leaves open a question about how much disuniformity among practices can be tolerated. This answer to this question, in turn, rests on the source of the disuniformity: the 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.⁴⁰² The primary way to facilitate answering these questions is through increased sharing of information between the circuits.

⁴⁰⁰ See *supra* note 398.

⁴⁰¹ 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 and legitimacy).

⁴⁰² I plan to explore these and related questions in future projects.

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

A. Information Sharing

Currently information about case management practices is shared—when it is shared at all—through limited channels. As noted earlier, the Federal Judicial Center has produced extensive monographs on case management, but, as of the writing of this Article, the last such report was issued over a decade ago.⁴⁰³ Moreover, because the report has been 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.⁴⁰⁴ As for institutional practices that bring about information sharing, some judges serve as visiting judges on other courts, and in so doing can learn some of the other court's practices.⁴⁰⁵ However, very little visiting occurs each year,⁴⁰⁶ and not all circuits even accept visiting judges,⁴⁰⁷ rendering this an ineffective means of significant information exchange. Additionally, judges may discuss docket

⁴⁰³ See JUDITH A. MCKENNA ET AL., *supra* note 6.

⁴⁰⁴ See Interview with a Judge of the U.S. Court of Appeals for the Second Circuit, *supra* note 124; Interview with a Judge of the U.S. Court of Appeals for the Second Circuit (Mar. 26, 2010 & April 1, 2011).

⁴⁰⁵ See *infra* note 410 and accompanying text; see also Stephen L. Wasby, *Intercircuit Conflict in the Courts of Appeals*, 6 MONTANA 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.”).

⁴⁰⁶ See 2010 ANNUAL REPORT, *supra* note 9, tbl.S-2, at 45 (noting that only 4.5% of the total cases terminated on the merits were decided by panels that had visiting judges).

⁴⁰⁷ See Harry T. Edwards, *Access to Justice: The Social Responsibility of Lawyers*, 16 WASH. U. J.L. & POL’Y, 61, 64 (2004) (“[A]bsent a grave emergency, the court will not use visiting judges to decide cases on our docket . . .”). Additionally, according to one of the senior members of the Legal Division I interviewed, “The Court has not used the services of visiting judges for several years.” Interview with two senior members of the Legal Division, U.S. Court of Appeals for the D.C. Circuit, *supra* note 62; Interview with one senior member of the Legal Division, U.S. Court of Appeals for the D.C. Circuit, *supra* note 62.

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 information about the practices of other courts shows that currently, this is not a channel for substantial information sharing. Finally, the clerks of court meet with each other a few times a year to discuss, among other 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."⁴⁰⁸

Increased information sharing between the circuits could yield several, key benefits. The first benefit would come from inter-circuit comparativism and utilization of potentially helpful practices. Judge Newman of the Second Circuit has said that when he once served as a visiting judge on another court, he learned of its process for identifying cases in which judges are disqualified⁴⁰⁹—a process he found to be far more efficient than the one his own court employed at the time.⁴¹⁰ When he returned to his home circuit, he proposed adopting the other court's practice, which his court accepted and still uses today.⁴¹¹ The opportunity to learn of a useful or efficient practice that can then be emulated in one's own court is the reason several judges have said that it would be helpful to learn of the practices of other courts. In this way, information sharing would allow judges to counter the influence of path dependence and 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 moderate-to-significant change in the way it processes cases, the Federal Judicial Center could alert the other circuits to this change through a written notice or electronic mail. Similarly, the Third Branch, a

⁴⁰⁸ Interview with a senior member of the Clerk's Office, U.S. Court of Appeals for the Second Circuit, *supra* note 121.

⁴⁰⁹ A judge would be disqualified from a case if, for example, she had a financial interest at stake in the case.

⁴¹⁰ Interview with Judge Jon O. Newman of the U.S. Court of Appeals for the Second Circuit (June 7, 2010) (notes on file with the author).

⁴¹¹ *Id.*

monthly newsletter by the Administrative Office of the United States Courts, could devote a column to the discussion of case management.⁴¹² 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.”⁴¹³

The second set of proposed changes relies on increasing communications between the circuits through the use of court meetings. Specifically, there could be additional meetings of judges, clerks of court, and staff attorneys, devoted solely to discussing current case management practices and sharing their “laboratory results.” Alternatively, the courts could devote a session of the meetings already held once every four years to the discussion of case management.⁴¹⁴ Both of these proposals are consistent with a recommendation of the Judicial Conference of the United States, made in its 1995 report on the Long Range Plan of the Federal Courts, to encourage the courts of appeals to share more information about each others case management techniques.⁴¹⁵ While these proposals are fairly modest,⁴¹⁶ 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 the benefits attendant to increased information sharing, there are some, including judges, who will see these efforts as costly in terms of time. The reason courts manage their dockets, after all, is because they are under stress. Why should they add 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?

There are at least two responses to this objection. The first is simply a straightforward application of cost-benefit analysis. By sharing

⁴¹² Thanks to a Judge of the Second Circuit for this very helpful suggestion. *See* Interview with a Judge of the U.S. Court of Appeals for the Second Circuit (Mar. 26, 2010 & April 1, 2011), *supra* note 404.

⁴¹³ 28 U.S.C. § 620(a).

⁴¹⁴ Thanks again to a Judge of the Second Circuit for this very helpful suggestion. *See* Interview with a Judge of the U.S. Court of Appeals for the Second Circuit (Mar. 26, 2010 & April 1, 2011), *supra* note 404.

⁴¹⁵ JUDICIAL CONFERENCE OF THE U.S., *supra* note 49, 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.”).

⁴¹⁶ 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. Such discussions about related topics have been suggested by scholars in the past. *See* Resnik, *supra* note 4, at 444; Carl Tobias, *The New Certiorari and a National Study of the Appeals Courts*, 81 CORNELL L. REV. 1264, 1269 (1996).

information, judges will learn ways to improve their current practices, and in particular will find ways of increasing efficiency, as Judge Newman did. In light of this expected reform, 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.⁴¹⁷ That is of course a hard value to quantify, but where it is implicated surely the appellate courts can afford the time necessary to share information.

B. Transparency

As noted at the outset, there is little transparency 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.⁴¹⁸ Additionally, as noted earlier, the Federal Judicial Center created a comprehensive monograph on the docket management practices of the courts, but as of the time this Article was written, it was last updated over a decade ago.⁴¹⁹ In eleven years, a great deal has changed.⁴²⁰

Greater transparency of practices is needed so that courts can have more accurate information about how other courts function and so that parties can know how their cases are being treated. Additionally, transparency is needed for scholars to be able to assess and analyze court practices, so that 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 primary mandates.⁴²¹ Either way, there is a need for current information about case management practices that is easily accessible and publicly available.

At least two objections to this modest proposal might arise. The first, drawing on a concern in the substantive law context, is that documenting

⁴¹⁷ Feinberg, *supra* note 1, at 297-98.

⁴¹⁸ *See supra* note 9.

⁴¹⁹ *See* JUDITH A MCKENNA ET AL., *supra* note 6.

⁴²⁰ For example, at that time, the Second Circuit was still holding oral argument in most cases decided on the merits. *See id.*, at 70.

⁴²¹ 28 U.S.C. § 620(a).

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.⁴²² 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 problem 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, there are reasons why one party would favor a certain court’s case management practices over another.

Yet despite the importance of case management, this objection is not dispositive. First, many of the people who might be interested in forum shopping simply will not be able to do so. Nearly all parties appealing from a decision of the Board of Immigration Appeals or defendants in direct criminal appeals cannot, as a matter of statutory law, choose to have their case brought elsewhere. Second, parties that do have the ability to forum shop may have little incentive to do so. Corporations involved in lawsuits of consequence are 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 not be of immediate concern to them when looking for the most advantageous jurisdiction. Moreover, as Part II makes plain, cases like these are precisely the kind that will likely get argument, regardless of which circuit they are in. In short, it seems highly unlikely that parties would forum shop for case management practices—either because they will not be able to or be cause

⁴²² 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, 373-74 (1977) (describing the “dangers of forum shopping” as including first and foremost “the inequality [that] 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.”).

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.⁴²³ The concern here is that once the public knows just how many cases are decided without oral argument or just how many decisions are largely the result of the work of staff attorneys, their faith in the courts will be eroded.⁴²⁴ 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.

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, which could effectively stave off the legitimacy problem. This presents an example of the old adage of trees falling in the forest with no one around—if no one knows of what could be perceived as illegitimate practices, are there legitimacy concerns? One of the objectives of this Article, and 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, this 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, our courts can only be improved. What we may lose temporarily in the way of perceived legitimacy can only be made up in actual legitimacy. As such, our judicial system, and justice itself, can only be the beneficiary.

CONCLUSION

Case management remains a critical issue for the federal appellate courts. In the words of Judge Diarmuid O’Scannlain, “As a judge of the United States Courts of Appeals for the Ninth Circuit for over twenty years, I can attest that the crisis has not passed. To outsiders, the federal

⁴²³ See Ernest A. Young, *Stalking the Yeti: Protective Jurisdiction, Foreign Affairs Removal, and Complete Preemption*, 95 Cal. L. Rev. 1775, 1799 (2007) (“[A]ll courts in our system depend on their perceived legitimacy to give authority to their rulings.”).

⁴²⁴ For a more in depth discussion about the relationship between the appearance of government and the public’s faith in government, see Adam M. Samaha, *Regulation for the Sake of Appearance* (in progress) (draft on file with the author).

courts may seem to be dispensing justice about as competently before. But I submit to you that this is an illusion[.]”⁴²⁵ 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.

The Article has wrestled with the implications of this variation. It has given an analytical account of why the courts have such divergent practices, exploring not only differences in the size and makeup of the caseload, but also differences in court 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 concluded that differences in caseload can 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 the practice—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 our courts. Only through this kind of careful study and analysis can we hope to maintain, and even improve, the high quality of our justice system.

⁴²⁵ O’Scannlain, *supra* note 23, at 474.