

# THE CONTRIBUTION OF “EXTRA” JUDGES

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## INTRODUCTION

Commentators have often lamented the burgeoning caseload in the U.S. Courts of Appeals and the consequences thereof.<sup>1</sup> Indeed, the courts of appeals' combined caseload continues to increase, jumping another nine percent in 2005 to a record-high 68,473 cases.<sup>2</sup> Given that additional judgeships are not forthcoming from Congress, the circuits have established various means by which to deal with their burgeoning caseload: they hear oral argument in fewer cases; they publish opinions in fewer cases; cases are more frequently disposed of by summary dispositions prepared by staff attorneys; and they utilize judges other than those active in their own circuit to decide cases. Social scientists and legal academics know a little about all of these techniques though in all areas more information is desirable. This Article focuses on the use of “extra” judges by the circuit courts.

While orientation and collegiality are sometimes offered as reasons for the use of district judges on circuit panels,<sup>3</sup> it is most likely the case that chief

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1. See Justin J. Green & Burton M. Atkins, *Designated Judges: How Well Do They Perform?*, 61 JUDICATURE 358, 358–59 (1978); William H. Rehnquist et al., *Symposium: The Future of the Federal Courts*, 46 AM. U. L. REV. 263, 270 (1996) (keynote address by Chief Justice Rehnquist); William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273 (1996); Kenneth W. Starr, *The Courts of Appeals and the Future of the Federal Judiciary*, 1991 WIS. L. REV. 1, 3; Carl Tobias, *The New Certiorari and a National Study of the Appeals Courts*, 81 CORNELL L. REV. 1264 (1996).

2. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: ANNUAL REPORT OF THE DIRECTOR, at 13 (2005), available at <http://www.uscourts.gov/judbus2005/front/judicialbusiness.pdf> [hereinafter JUDICIAL BUSINESS].

3. See JONATHAN MATTHEW COHEN, INSIDE APPELLATE COURTS: THE IMPACT OF COURT ORGANIZATION ON JUDICIAL DECISION MAKING IN THE UNITED STATES COURTS OF APPEALS 200 (2002); Richard B. Saphire & Michael E. Solimine, *Diluting Justice on Appeal?: An Examination of the Use of District Court Judges Sitting by Designation on the United States Courts of Appeals*, 28 U. MICH. J.L. REFORM 351, 361–62 (1995); Stephen L.

judges go outside their circuits or outside the ranks of active judges to assign judges to cases to enhance the capacity of the courts to manage their case overload.<sup>4</sup> Hence, the use of extra judges is one way in which circuits have changed to accommodate their increasingly large dockets.

However, there are several unanswered questions about this practice, calling into question its *raison d'être*. First, do the extra judges actually shoulder their burden in reading and deciding cases and, thereby, serve their purpose? Second and relatedly, are some types of additional judges more useful than others? And finally, does the use of district judges in particular actually exacerbate the caseload problem by creating backlogs in the already-also-overburdened district courts? Jonathan Cohen, in substantial interviews with circuit judges, paints a dismal picture of the perceptions of circuit judges regarding the extent to which these extra judges (especially visitors from the districts) actually reduce workload.<sup>5</sup> The Ninth Circuit judges he interviewed touched on all three of the aforementioned questions:

Many judges are district judges who don't involve themselves intentionally in the work of the circuit. They just sit because they are asked to sit, and they expect the work will be done by the sitting circuit judges. They don't really contribute much.

....

[Visiting judges] are not really up on the way that we do business. They are not on our e-mail system. They can't enter their own orders. So it is just more work if there is somebody that is not on the circuit sitting with you.

....

[Visiting judges say,] "I don't know anything about your circuit law, and I don't want to tamper with your circuit law, so maybe you ought to write the decision."

....

[Y]ou have in mind [that] he is a district judge . . . so some of the decisions are ones that probably he or she would not want to write. . . . Some decisions ought to be written by a circuit judge, and you have that in mind.

....

If we bring district judges in, they come as volunteers, and of course, we appreciate all they have done for us. We could not have functioned without them. But their work goes on in their absence. . . . So you have to be mindful in assigning decisions.

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Wasby, "Extra" Judges in a Federal Appellate Court: *The Ninth Circuit*, 15 LAW & SOC'Y REV. 369, 378 (1980).

4. See James J. Brudney & Corey Ditslear, *Designated Diffidence: District Court Judges on the Courts of Appeals*, 35 LAW & SOC'Y REV. 565, 573 (2001); Saphire & Solimine, *supra* note 3, at 362-63.

5. COHEN, *supra* note 3, at 192.

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We get some visiting judges who are absolutely first-class troops, and they pull their weight and it is no problem. If you pull off a sitting district judge, an active district judge with a busy calendar, and put them on a panel with us, they get no credit for sitting with us. So this kind of thing is really kind of a distraction to them. They have a helluva time getting their share of the work done, so that slows us down some. I never feel that we are really first on their plate.

....

If it is a district judge [on the panel], you don't know what kind of load the judge has back home, so you tend not to assign. Those judges tend to get a lighter assignment so that the circuit judges have heavier loads when they sit with a district judge or visiting judge.<sup>6</sup>

Some of Stephen Wasby's interviews corroborate these perceived problems with the use of certain kinds of extra judges. One judge he interviewed discussed the workload problem created by the assignment of district court judges to panels: “[W]e dump work on top of theirs instead of replacing it.”<sup>7</sup> Another noted the delay in receipt of district judges' opinions. For these reasons, “the lighter cases” are said to land in the extra district court judges' laps.<sup>8</sup>

Green and Atkins, however, paint a much more positive image, drawing upon statements by Chief Justice Burger and by other legal academics.<sup>9</sup> To wit, Justice Burger is quoted as saying that “were it not for the continued work of these Senior Judges, the Federal Court system would have collapsed during the past 5 or 6 years,” and Professor Wright agreed that the effect on the Fifth Circuit would be “catastrophic” were designated judges not available to sit.<sup>10</sup> Wasby's interviewees conceded that without the services of these extra judges, they “couldn't survive.”<sup>11</sup>

The U.S. Courts of Appeals Database<sup>12</sup> is used, supplemented by data collected by the Administrative Office of the U.S. Courts and the Federal Judicial Center, to provide preliminary and empirically derived evidence about the contributions of extra judges, at least for the Ninth Circuit. Future research will, of course, expand the study so that, among other things, these questions can be comparatively analyzed across circuits.

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6. *Id.* at 192–99.

7. Wasby, *supra* note 3, at 375.

8. *Id.*

9. Green & Atkins, *supra* note 1, at 360.

10. *Id.* (quoting Press Release, Chief Justice Warren E. Burger, Year End Report by Chief Justice Warren E. Burger (Jan. 2, 1977), at 11).

11. Wasby, *supra* note 3, at 376.

12. THE S. SIDNEY ULMER PROJECT, THE U.S. COURTS OF APPEALS DATABASE, <http://www.as.uky.edu/polisci/ulmerproject/apctdata.htm> [hereinafter COURTS OF APPEALS DATABASE] (last visited Oct. 20, 2005) (compiled by Donald Songer).

## I. EXTRA JUDGES

What does “extra judges” mean? In this Article, the term “extra judges” is used to refer to all kinds of judges from outside the active judge ranks in a given circuit who participate in the decision of a particular case. Three sections of the United States Code are utilized to bring in outside judges. First, 28 U.S.C. § 291 provides that the Chief Justice may designate an active judge from one circuit to serve on another circuit upon request of the circuit’s chief judge or circuit justice. Second, 28 U.S.C. § 292 empowers the chief judges of a circuit to assign district judges from that circuit to serve on the appeals court and empowers the Chief Justice to designate and assign any district judge to service on any other circuit court “upon presentation of a certificate of necessity” from either the chief judge or the circuit justice. Finally, 28 U.S.C. § 294 gives the Chief Justice the ability to assign retired Justices to circuits, and it gives circuit chief judges the ability to assign retired circuit and district court judges from their own circuit to circuit court panels. Section 294 also permits the Chief Justice to assign retired circuit and district court judges to service on other circuits, again upon certification of need by the chief judge or circuit justice.

This Article seeks to lay a framework for analyzing the quantity and quality of work performed by extra judges. For all kinds of extra judges, the ultimate question is one of “contribution.” In other words, are these judges merely warm bodies, or do they actually relieve the Ninth Circuit judges of some of their workload? How often do they write majority, concurring, and dissenting opinions? Do they do so at the rate expected of a fully contributing member of the court? All of these questions are addressed in this Article via a combination of quantitative and qualitative data. The conclusions are interesting, although necessarily tentative.

This Article also analyzes the opinion writing contributions of each of six different categories of extra judges to determine whether contribution differs over types of judges. Included in the “extra” or “visiting” judge categories are: (1) senior circuit judges from other circuits; (2) senior district judges from within the Ninth Circuit; (3) senior district judges from outside the Ninth Circuit; (4) circuit judges from outside the Ninth Circuit; (5) district judges from the Ninth Circuit; and (6) district judges from outside the Ninth Circuit, as well as senior circuit judges from the Ninth Circuit. All of these judges are “extra” in the sense that they are not active judges on the circuit for which they are empaneled.<sup>13</sup>

## II. CONCERNS OVER THE CONTRIBUTIONS OF EXTRA JUDGES

While not much work has been done examining the practice of using any of the above categories of extra judges on the U.S. Courts of Appeals, some

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13. While many of the criticisms of extra judges do not resonate with respect to resident senior circuit judges, they remain different from active judges, and hence, consideration of their contribution and behavior, alongside that of judges from other courts and circuits, is warranted.

interesting arguments have been made about the problems they may introduce.<sup>14</sup> These arguments fall into two general categories: quality and quantity.

Scholars concerned with differential quality argue that decisions written by visiting judges (especially district court judges) are inferior;<sup>15</sup> others imply the same, noting the prevalence of en banc reviews of panels including designated judges.<sup>16</sup> Professor Michael Solimine's data indicates that twenty-nine percent of cases heard en banc from 1985 to 1987 were heard by panels including a district judge, a rate higher than the rate of their participation, thereby indicating that panels with district judges are more likely to be reviewed en banc.<sup>17</sup> A Ninth Circuit judge interviewed by Professor Stephen Wasby, sharing this negative view of designated judge authorship, said, "[I]f the case is important and it is assigned to the district judge to write the opinion, the case has an unavoidable asterisk by it which impairs it."<sup>18</sup>

Another argument related to quality accuses out-of-circuit visitors of muddying the law of the circuit by increasing instances where two panels of the same circuit disagree over the law.<sup>19</sup> This is so due both to problems in communication, exacerbated by the geography of the Ninth Circuit,<sup>20</sup> and to lack of knowledge of circuit law by visiting judges. Using intrapanel dissents as an indicator of inconsistency, however, Wasby showed that "extra" judges empaneled with other combinations of visitors and active judges behave not much differently from combinations of three active judges.<sup>21</sup> While he concludes that the use of "extra" judges may be "modestly disruptive" to circuit law, he urges that we not use his evidence to make any broad claims about the ills of extra judges.<sup>22</sup>

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14. Other research considers the question of how the designation decision is made, finding that chief judges designate individuals at least in part on the basis of similarity of ideology. See Todd C. Peppers, Katherine O'Harra Vigilante & Christopher Zorn, *Judicial Oversight and District Court Judge Designation in the U.S. Courts of Appeals* (May 9, 2006) (unpublished manuscript, on file with the Author). The potential for en banc or Supreme Court reversal (measured as the ideological distance between the chief judge and those bodies) mitigates the extent to which the chief judge can so behave.

15. Note, *The Second Circuit: Federal Judicial Administration in Microcosm*, 63 COLUM. L. REV. 874, 878-79 (1963).

16. A. Lamar Alexander, Jr., *En Banc Hearings in the Federal Courts of Appeals: Accommodating Institutional Responsibilities* (pt. 1), 40 N.Y.U. L. REV. 563, 595-97 (1965); Saphire & Solimine, *supra* note 3, at 374-75.

17. Michael E. Solimine, *Ideology and En Banc Review*, 67 N.C. L. REV. 29, 61 (1988).

18. Wasby, *supra* note 3, at 375.

19. Saphire & Solimine, *supra* note 3, at 372-73; Wasby, *supra* note 3, at 370 (citing, among others, the Commission on Revision of the Federal Court Appellate System ("Hruska Commission")).

20. Wasby, *supra* note 3, at 370, 376.

21. Stephen L. Wasby, *Of Judges, Hobgoblins, and Small Minds: Dimensions of Disagreement in the Ninth Circuit*, in JUDICIAL CONFLICT AND CONSENSUS: BEHAVIORAL STUDIES OF AMERICAN APPELLATE COURTS 154, 174 (Sheldon Goldman & Charles M. Lamb eds., 1986).

22. *Id.*

Some research has assessed the contribution of extra judges to the workload of the circuits (for example, the quantity issue), finding evidence that, while extra judges have not done more than their share, they have tended to write as often as expected. Professors Green and Atkins showed this to be so from 1965 to 1969, although such judges did not dissent or concur even remotely as often as might be expected.<sup>23</sup> As Green and Atkins concluded:

It seems clear that designated judges are not workhorses who enable circuit judges to evade some of their responsibilities. And they are not ciphers, put on the bench merely to fill a seat. They contribute by voting, writing their share of opinions and expressing their own views when sufficiently provoked.<sup>24</sup>

Professors Saphire and Solimine, using a rich datasource (from the Federal Judicial Center including all appeals terminated from 1987 to 1992), updated the Green and Atkins study, with similar findings.<sup>25</sup> They found that panels reversed the lower courts at similar rates whether extra judges participate or not; extras write the court's decision almost as often as other judges; and extra judges dissent and concur much less frequently than the active judges.<sup>26</sup>

Professors Brudney and Ditslear, however, have provided evidence that visiting district court judges write less than their share of majority opinions and dissenting opinions in the area of labor law and that their votes do not correlate with background factors to the same extent as the active judges' votes do, suggesting that district judges merely "play the part of dutiful followers on labor law matters" rather than making independent decisions.<sup>27</sup>

### III. TAKING UP SPACE?

Some prior research highlights the importance of status considerations in understanding decisionmaking, something on which "small group theory" focuses. The idea of small group theory is that an individual behaves differently as a member of a group than he or she might behave alone.<sup>28</sup> How does this relate to the question of the contribution of extra judges? Quite simply, small group theory leads us to expect that status in the group matters to decisionmaking and that "the individual who feels inferior and needs approval will, in the group context, behave in a conforming manner."<sup>29</sup> This is especially true in the context of a three-judge group, which "tends to break into a dyad and an isolate."<sup>30</sup> In other words, the

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23. Green & Atkins, *supra* note 1, at 367-68.

24. *Id.* at 370.

25. Saphire & Solimine, *supra* note 3, at 368-70.

26. *Id.* at 369.

27. Brudney & Ditslear, *supra* note 4, at 599.

28. See S. SIDNEY ULMER, COURTS AS SMALL AND NOT SO SMALL GROUPS (1971); Thomas G. Walker, Judges in Concert: The Influence of the Group on Judicial Decision-Making (1970) (unpublished Ph.D. dissertation) (on file with Author).

29. ULMER, *supra* note 28, at 13.

30. *Id.* at 16.

circumstance of being an extra judge hearing cases on a circuit panel may serve to exert pressure on the outsider to "go along."<sup>31</sup>

Green and Atkins discussed this idea, referring to designated judges as "a unique group" with varying levels of legal standing and experience that create divisions between the designated judges and the active judges of the circuit.<sup>32</sup> Like Ulmer, they suggest that these differences in status may affect behavior.<sup>33</sup> Walker concurred, arguing that "relative status levels" and "each member's degree of expertise or problem familiarity" affects the influence of members of small groups.<sup>34</sup> If one adds the possible role perceptions a designated judge may have and potential strategic considerations she might consider, such as reversal avoidance or promotion to a higher court, behavioral consequences seem almost inevitable.<sup>35</sup> Cohen's interviews are again illustrative. One Ninth Circuit judge said that visiting district court judges "are more willing to follow our precedents"; another said that they are "[sensitive] to the hierarchy" and "a little bit deferent."<sup>36</sup> And Sapphire and Solimine quoted a district judge, in dissent, who discusses the "temerity required of a district judge in dissenting from the opinion of an appellate panel on which he sits by designation."<sup>37</sup>

Viewed through this small group lens, all extra judges are not equal. As pointed out by Green and Atkins and Wasby, senior circuit judges may be the best suited for visiting judgeships given their experience, their lack of other case-resolving responsibilities, and their familiarity with the circuit law (if they are designated in the circuit on which they were active).<sup>38</sup> These judges are surely accorded a higher status than their district court counterparts. For example, the judges Professor Wasby interviewed said that senior judges "crank out a first-rate product" and are "priceless" in terms of "experience and wisdom."<sup>39</sup> District and circuit judges from other circuits, on the other hand and as noted above, leave "a crowded docket in their home circuit, often leading them to neglect their visiting responsibilities after their return."<sup>40</sup> District judges from the circuit, while familiar with circuit law, may be less credible policymakers, as noted above. They also

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31. See Sapphire & Solimine, *supra* note 3, at 375–83.

32. Green & Atkins, *supra* note 1, at 361.

33. See *id.*

34. Thomas G. Walker, *Behavioral Tendencies in the Three-Judge District Court*, 17 AM. J. POL. SCI. 407, 408 (1973) (emphasis omitted). Walker studied three-judge district court panels, which he conceptualized as "*ad hoc* political group[s], [and] temporary and single task oriented bod[ies]." *Id.* He found that in these three-judge panels, which consisted of the original district judge, a circuit court judge, and another district court judge, the circuit judge was the most influential as measured by opinion authorship and support for opinions. *Id.* at 409, 413. Rotating circuit panels seem relatively similar (though certainly more long-lasting).

35. See Brudney & Ditslear, *supra* note 4, at 583.

36. COHEN, *supra* note 3, at 193 (alteration in original).

37. Sapphire & Solimine, *supra* note 3, at 380 (quoting *Anderson v. Evans*, 660 F.2d 153, 161 (6th Cir. 1981) (Rice, J., dissenting)).

38. Green & Atkins, *supra* note 1, at 362; Wasby, *supra* note 3, at 377.

39. Wasby, *supra* note 3, at 377 (internal quotation marks omitted).

40. Green & Atkins, *supra* note 1, at 362.

may not be well-suited to the appellate enterprise.<sup>41</sup> Some have also questioned their ability to be impartial when considering the work of a fellow district court judge, suggesting that they might be less likely to reverse lower court decisions.<sup>42</sup>

Based on this discussion, the following hypotheses are advanced: First, judges will write as many majority opinions as expected given their participation, fewer dissenting opinions than expected given the dissent rate for the entire period in the Ninth Circuit, and fewer concurring opinions than expected given the rate of concurrence for the entire period in the Ninth Circuit ("Hypothesis 1"). Second, once type of judge is controlled, some of these expectations with respect to opinion authorship will change. Namely, senior Ninth Circuit judges, senior Ninth Circuit district judges, and Ninth Circuit district judges will author more than the expected contribution for all opinion types ("Hypothesis 2").

#### IV. DATA AND METHOD

The *U.S. Courts of Appeals Database*, compiled by Donald Songer, is used to test the hypotheses about the contributions of extra judges on the Ninth Circuit.<sup>43</sup> The database employs a random sample of circuit-years from 1925 to 1996. In the earlier period, the coders sampled fifteen random published cases from each circuit in each year; in later years (after 1981), they sampled thirty published cases per year per circuit. Because the interest here is in the contribution of extra judges to the Ninth Circuit, analysis is restricted to three-judge panel decisions made by the Ninth Circuit; en banc decisions, on which extra judges usually do not participate,<sup>44</sup> are excluded. The unit of analysis is the judge. Here, 4333 votes cast over seventy years are considered.<sup>45</sup> Extra judges are divided into several categories, using Songer's judge codes (including Ninth Circuit Senior Judges, Ninth Circuit District Judges, Senior Ninth Circuit District Judges, Visiting Active Circuit Judges, Visiting Senior Circuit Judges, Visiting District

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41. See Saphire & Solimine, *supra* note 3, at 393-94; Wasby, *supra* note 3, at 379-80. Saphire and Solimine argue that district judges are considered differently than circuit judges by the President and the Senate and that, because district judges were not confirmed to sit on the circuit courts, they do not belong there. Saphire & Solimine, *supra* note 3, at 400-03. There are higher standards for circuit judgeships, some suggest, and the two types of judgeships demand different kinds of people. *Id.* at 392-98. Brudney and Ditslear note that the ABA Standing Committee on the Federal Judiciary also makes a distinction between the two types of judges in terms of qualifications. Brudney & Ditslear, *supra* note 4, at 574.

42. Wasby, *supra* note 3, at 379; *cf.* Green & Atkins, *supra* note 1, at 367.

43. See COURTS OF APPEALS DATABASE, *supra* note 13.

44. On the Ninth Circuit, senior circuit judges can sometimes participate in en banc decisions if (1) the judge was chosen to hear a particular case en banc before taking senior status or (2) the judge elects to be eligible, just like an active judge, to be selected for an en banc court reviewing a case in which the judge participated. 9TH CIR. ADVISORY COMM. NOTE TO R. 35-1 TO 35-3, pt. (2).

45. These 4333 votes are also referred to as "judicial participations" throughout the remainder of this Article.

Judges, and Visiting Senior District Judges).<sup>46</sup> For information on when each judge in the database took senior status, the *Auburn Database*<sup>47</sup> was used for circuit judges and the Federal Judicial Center's *Biographical Directory of Federal Judges* database was used for district judges and judges of specialized courts.<sup>48</sup>

**TABLE 1**  
**EXTRA JUDGES ON THE NINTH CIRCUIT**  
**1925-1996**

Type	Number of Participations in Dataset	Percentage of Total Participations
Ninth Circuit District Judge	321	7.41%
Senior Ninth Circuit District Judge	117	2.70%
Visiting Active Circuit Judge	31	0.72%
Visiting Senior Circuit Judge	43	0.99%
Visiting District Judge	2	0.05%
Visiting Senior District Judge	38	0.88%
Total "Visiting" Judge Participations	552	12.74%
Senior Ninth Circuit Judge	343	7.92%
Total "Extra" Judge Participations	895	20.66%

Source: U.S. Courts of Appeals Database

To begin, Table 1 explains the make-up of the data set and demonstrates the extent to which the Ninth Circuit uses various kinds of extra judges. As can be seen, senior judges from the circuit (both circuit and district) are the judges most often designated to hear cases on the circuit. Ninth Circuit district judges participate frequently as well. Very rarely do judges of any type (district judges, active circuit judges, senior district judges, or senior circuit judges) from outside the circuit participate on Ninth Circuit panels. This certainly allays many concerns regarding a lack of understanding of circuit law. Other concerns, including their actual contribution to the workload, however, remain.

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46. Most of these judge types are self-explanatory, but for clarity note that "Visiting District Judges" and "Visiting Senior District Judges" are district and senior district judges drawn from other circuits.

47. Gary Zuk, Deborah J. Barrow & Gerard S. Gryski, *Attributes of U.S. Court of Appeals Judges, 1801-1994*, <http://www.as.uky.edu/polisci/ulmerproject/auburndata.htm> (last visited Oct. 20, 2005).

48. Fed. Judicial Ctr., *Biographical Directory of Federal Judges*, <http://www.fjc.gov/public/home.nsf/hisj> (last visited Oct. 20, 2005).

## V. FINDINGS

**TABLE 2**  
**OPINION WRITING BY EXTRA JUDGES**  
**1925-1996**

Does Extra Judge Write the Opinion?	Number (Percent)
Yes (Visitor Wrote)	118 (2.96%)
Yes (Senior Ninth Circuit Judge Wrote)	111 (2.56%)
No	4104 (94.71%)
Total	4333 (100%)

Source: U.S. Courts of Appeals Database

While data limitations prevent more systematic evaluation, the hypotheses can be tested using a comparison between the number of opinions fully contributing members of the circuit courts could be expected to author and the actual number of opinions authored. Of the 4333 judicial participations in the database, 229 include decisions written by an extra judge (5.29%), of which 111 (or 2.56% of total participations) involve senior Ninth Circuit judges.<sup>49</sup> To determine whether that is as many as we would expect were extra judges contributing equally, both the percentage of cases resulting in signed opinions and the panel structure are considered. The expected number of opinions by extras is 239.47.<sup>50</sup> When that number is compared to the number of signed opinions written by extra judges, we find evidence to support the hypothesis that the extra judges are writing at nearly the level expected. Hence, designated judges seem to be pulling their weight, at least with respect to majority opinion authorship.

**TABLE 3**  
**OPINION WRITING BY TYPE OF EXTRA JUDGE**  
**1925-1996**

Visitor Write?	Visiting Judges						Total Visiting Judges
	v dj9	sen dj9	v ca	sen cao	v djo	sen djo	
Yes	76 (23.68%)	19 (16.24%)	5 (16.13%)	9 (20.93%)	1 (50%)	8 (21.05%)	118
No	245 (76.32%)	98 (83.76%)	26 (83.87%)	34 (79.07%)	1 (50%)	30 (78.95%)	434
Total	321	117	31	43	2	38	552

49. See tbl.2.

50. This number is obtained by taking the total number of participations by visitors (895) and multiplying it by the percentage of cases overall that result in a signed opinion (80.27%). This obtains 718.42 opinions. Of these, we expect visiting judges to author one-third since each visitor is one-third of the membership on a panel. Dividing 718.42 by 3, we obtain 239.47, or 10.47 decisions more than the judges actually write.

Visitor Write?	Senior Ninth Circuit Judges	Total Visiting and Senior Ninth Circuit
Yes	111 (32.36%)	229
No	232 (67.64%)	666
Total	343	895

Source: U.S. Courts of Appeals Database

v\_dj9 = Ninth Circuit District Judge

v\_djo = Visiting District Judge

sen\_dj9 = Senior Ninth Circuit District Judge

sen\_djo = Visiting Senior District Judge

v\_ca = Visiting Active Circuit Judge

sen\_ca9 = Senior Ninth Circuit Judge

sen\_cao = Visiting Senior Circuit Judge

Chi-square significant at 0.000.

When we break down opinion writing by type of extra judge, there is strong evidence that, indeed, all visitors are not the same.<sup>51</sup> The only type of judge that actually meets the expected number of opinions is the Ninth Circuit senior judge, who actually exceeds expectations. Indeed, given the percentage of signed opinions and the assumption that each visitor will be one-third of a panel, we would expect senior Ninth Circuit judges to author 91.77 opinions; as Table 3 shows, they actually wrote 111, or nearly twenty more than expected. The only other category that meets expectations is visiting district judges, but given the tiny number of participations, no conclusions can be drawn from their behavior. The district judges of the Ninth Circuit do a decent job of helping out as well, writing in 76 of their 321 participations, but we would have expected them to author more (85.89 opinions).

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51. See tbl.3.

**TABLE 4**  
**Dissents and Concurrences by Type of Extra Judge**  
**1925–1996**

Dissent?	Visiting Judges						Total Visitor
	v dj9	sen dj9	v ca	sen cao	v djo	sen djo	
Yes	5 (1.56%)	4 (3.42%)	1 (3.23%)	0 (0%)	1 (50%)	0 (0%)	11
No	316 (98.44%)	113 (96.58%)	30 (96.77%)	43 (100%)	1 (50%)	38 (100%)	541
Total	321	117	31	43	2	38	552
Concur?	Visiting Judges						Total Visitor
	v dj9	sen dj9	v ca	sen cao	v djo	sen djo	
Yes	6 (1.87%)	5 (4.27%)	1 (3.23%)	0 (0%)	0 (0%)	1 (2.63%)	13
No	315 (98.13%)	112 (95.73%)	30 (96.77%)	43 (100%)	2 (100%)	37 (97.37%)	539
Total	321	117	31	43	2	38	552

Dissent?	Senior Ninth Circuit Judges	Total Visiting and Senior Ninth Circuit
Yes	12 (3.5%)	23 (2.6%)
No	331 (96.5%)	872 (97.4%)
Total	343	895
Concur?	Senior Ninth Circuit Judges	Total Visiting and Senior Ninth Circuit
Yes	2 (0.58%)	15 (1.70%)
No	341 (99.42%)	880 (98.3%)
Total	343	895

Source: U.S. Courts of Appeals Database

v\_dj9 = Ninth Circuit District Judge

v\_djo = Visiting District Judge

sen\_dj9 = Senior Ninth Circuit District Judge

sen\_djo = Visiting Senior District Judge

v\_ca = Visiting Active Circuit Judge

sen\_ca9 = Senior Ninth Circuit Judge

sen\_cao = Visiting Senior Circuit Judge

Chi-square for dissents and concurrences significant at 0.000.

The story is far different when we consider the frequency with which these extra judges file dissenting and concurring opinions. Given the rate of dissent as shown in the database (7.06% of participations involve dissents), we would expect extra judges to issue 63.187 dissents ( $895 \times 0.0706$ ). However, as shown in Table 4, they issued only 23! This is a major downward departure from expected levels. The same is true with concurrences; given the rate of 4.57% in the data, we would expect 40.902 concurrences. As Table 4 demonstrates, extra judges sitting with the Ninth Circuit by designation issued only 15. It is clearly the case that, in our random sample of Ninth Circuit decisions from 1925 to 1996, extra judges write separately very infrequently.

One might wonder whether we would again find differences across judge types, and we do, but still, no judge type dissents as often as we would expect given the dissent rate, and only one type (senior Ninth Circuit district court judges) concurs at a rate similar to the entire group.<sup>52</sup> In general, Hypothesis 1, positing (consistent with prior research) that extra judges would contribute regularly to majority opinions but would rarely issue dissents and concurrences, is confirmed quite strongly. In addition, we find some support for Hypothesis 2, which posits that senior judges and Ninth Circuit district judges will write more frequently, as Tables 3 and 4 show differences across judge types with respect to opinion authorship of all kinds.<sup>53</sup>

## VI. CONCLUSION AND DIRECTIONS FOR FUTURE RESEARCH

The contention that extra judges are useful in terms of assisting the circuit with its caseload has been examined here. There is evidence that these judicial helpers are indeed writing their share of the opinions, especially the senior Ninth Circuit judges, but that all types are notably reticent when it comes to expressing

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52. See tbl.4.

53. One might wonder, after considering these findings, whether there are other aspects of workload not tapped by the opinion-writing measure. Are there other ways that using extra judges actually increases workload? Perhaps, due to the earlier-mentioned issue of the legitimacy of opinions written by extras, active judges feel the need to express their view more often in those cases in which the extra judge writes the majority. In other words, perhaps it is the case that an opinion authored by an extra judge occasions more work for the circuit judges because they feel compelled to either concur to explain or dissent to take issue with the majority opinion more often. While there are a few more dissents than usual in cases authored by extra judges (nine percent versus seven percent), there are actually fewer concurrences in such cases.

It may be the case, however, that other workload considerations emerge. Perhaps communication is more difficult with a judge who is not an active Ninth Circuit judge and hence takes up more precious time. Perhaps also, because visitors to the circuit are unclear on certain circuit practices, time spent explaining norms increases the active judges' workloads as well. It must also take additional work to reconvene a panel should a case come back on remand when one of its members was a visitor, either from another circuit or from the Ninth Circuit's district courts. And perhaps extra judges of all types slow down the work of the circuit by not filing opinions in a timely manner. While some of these questions would be impossible to study without access to the papers of the judges, it seems that one might investigate the amount of time that elapses between case submission and case filing and whether that time is lengthened when an extra judge is doing the writing (controlling for whether there is a separate opinion in process, of course).

opinions separately. This seems to lend some credence to the earlier-noted small-group theories and to previous research. Indeed, the results are consistent with the idea that extra judges may be more compliant when serving on panels than active circuit court judges are. That they write their share of opinions shows that they carry part of the burden, but also that they are in the majority often enough to share the load. While there is no *a priori* reason to expect these extra judges not to agree with circuit judges on the merits, that they so rarely express dissent, rarely even for an institution in which dissent is rarely voiced, suggests that they go along for reasons other than legal or attitudinal agreement. Recent research, focusing only on district court judges sitting by designation, confirms our results here.<sup>54</sup>

Future research opportunities abound. It might be useful to consider both other kinds of impact on workload, including communication and logistical difficulties and dealing with remands, and the impact of the use of extra judges on delay in filing opinions. It may be that while extra judges write their share of decisions, at least some types of them, especially district judges, are assigned easier cases, as noted by some of the interviewed judges. While neither Green and Atkins nor Wasby found evidence that extra judges are assigned "less important" cases, further analysis of the assignment decisions involving these judges might be productive.<sup>55</sup> Finally, a close look at what happens when visiting district court judges leave their districts also seems warranted. It may indeed be the case that visiting district court judges are helpful to the circuits, but at some price to their home districts.

More research should also consider what drives decisionmaking by extra judges. For example, do background characteristics matter as they might for active judges, akin to Brudney and Ditslear's analysis? Is deference a driving force in their decisions? Small group theory also suggests influences of the presence of an outsider on the behavior of the active judges, and some of the judges interviewed by various scholars note potential influences in that regard as well; for example, that active judges come to argument more prepared when empaneled with a visitor from another circuit.<sup>56</sup> And, of course, some of the other concerns voiced about extra judges, including intracircuit consistency, the likelihood of en banc and Supreme Court review, and the legitimacy of the opinions written by nonactive members of a given circuit, remain open questions and crave some additional, empirical research.

One might also investigate the extent to which service as a visiting district court judge affects judicial behavior when district judges are then elevated to the circuit court. There is a large literature in political science on socialization and freshman effects<sup>57</sup>—is it easier for a frequent visitor to ease into the appellate role?

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54. See Brudney & Ditslear, *supra* note 4.

55. Green & Atkins, *supra* note 1, at 365–66; Wasby, *supra* note 3, at 382.

56. COHEN, *supra* note 3, at 201.

57. See, e.g., Saul Brenner, *Another Look at Freshman Indecisiveness on the United States Supreme Court*, 16 POLITY 320, 320 (1983); Saul Brenner, *Research Note: Majority Opinion Assignment in Salient Cases on the U.S. Supreme Court: Are New Associate Justices Assigned Fewer Opinions?*, 22 JUST. SYS. J. 209 (2001); Saul Brenner & Timothy M. Hagle, *Opinion Writing and the Acclimation Effect*, 18 POL. BEHAV. 235, 235–

Does that ease in transition translate, perhaps, into more frequent opinion writing or more consistent policymaking?

In short, we (political scientists especially) know woefully little about these judges who, in 2005, participated in fully 20,420 cases in the courts of appeals.<sup>58</sup> It is about time we started paying attention to them and to their peculiar characteristics that may well affect how they decide cases.

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36 (1996); Virginia A. Hettinger, Stefanie A. Lindquist & Wendy L. Martinek, *Acclimation Effects and Separate Opinion Writing in the U.S. Courts of Appeals*, 84 Soc. Sci. Q. 792 (2003).

58. JUDICIAL BUSINESS, *supra* note 2, at tbl.S-2, available at <http://www.uscourts.gov/judbus2005/tables/s2.pdf> (table entitled *U.S. Courts of Appeals—Total Case Participations in Cases Terminated on the Merits After Oral Hearings or Submission on Briefs During the 12-Month Period Ending September 30, 2005*). This number includes resident senior circuit judges (15,733 cases) as well as “visiting” judges (4687 cases). *Id.*

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