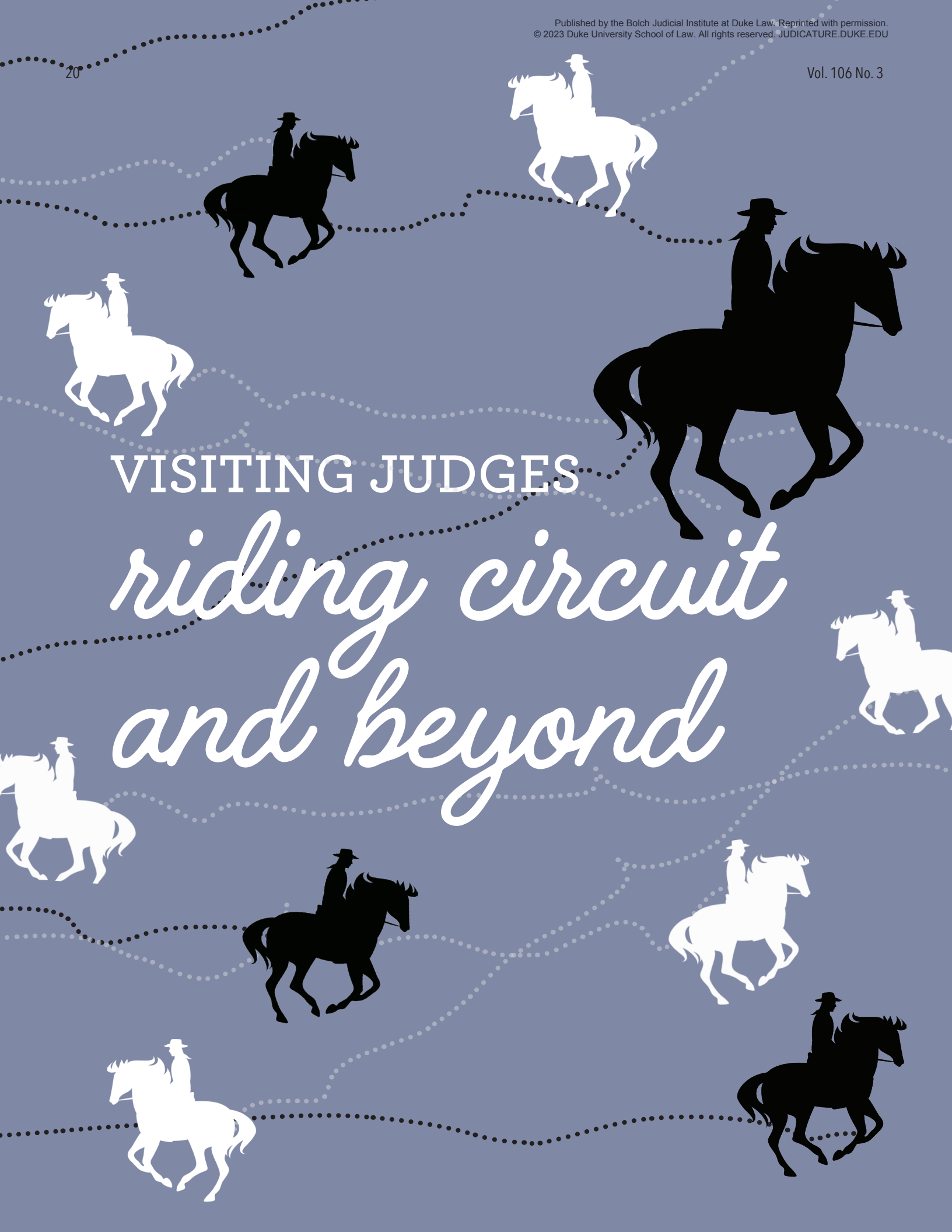


VISITING JUDGES

*riding circuit
and beyond*



The curious phenomenon of visiting judges and its serious benefits to the federal courts

BY MARIN K. LEVY

There is a curious phenomenon in the federal courts. An attorney recently arguing before the First Circuit found herself in front of a panel of three judges — two of that court, and retired Supreme Court Justice David Souter. A party bringing an appeal in Philadelphia had her case heard by two Third Circuit judges and a judge from the U.S. Court of International Trade. And a panel of the Ninth Circuit was composed of two court of appeals judges . . . and a district judge from the Eastern District of Kentucky. (Kentucky!)


Despite the fact that Article III judges are nominated for particular seats on particular courts, the federal system functions with judicial interchangeability every day. Hundreds of judges each year visit — or “sit by designation” on — another court, be it a court in a different location or in a different level of the judicial “hierarchy.” Collectively, these visitors help to decide thousands of cases in the federal courts each year.

Like all curious phenomena, the practice of sitting by designation prompts several questions. Why, exactly, are judges serving on courts other than their own (even if only temporarily)? When did the practice come about? How does it function today — which courts “borrow” judges and which courts “lend” them out? And how do judges themselves, both those

who have visited and those who have received visitors, view the practice? Drawing on an earlier article on the topic,¹ this essay takes up these questions as it explores the reliance on visiting judges — and hopes to suggest modest ways of improving this underappreciated yet important feature of our federal courts.

The History of Visiting Judges

Though visiting other courts is a common practice in the federal judiciary today, it was not always so. As Peter Graham Fish put it, “[f]or many years the organization of the federal courts was based not only on frozen district boundaries but on frozen judges within those confines as well.”²



Throughout their early years, the courts lacked any sort of provision for disability or retirement. Accordingly, when a judge was not keeping up with his workload due to illness, solutions were limited.

Those frozen district boundaries were set by the first Judiciary Act in 1789, which divided the country into three circuits³ and, within those, 13 districts.⁴ Each district was authorized one and only one district judge.⁵ Throughout this time, such judges were not permitted to sit outside their own district. Even if a district judge recused himself from a particular case (meaning, effectively, that there was no judge in the district to hear it), the case was then transferred out — no outside judge stepped in. Judges were appointed and confirmed to particular seats on particular courts, and that was where they served.

As with so many things, change came out of necessity. Throughout their early years, the courts lacked any sort of provision for disability or retirement. Accordingly, when a judge was not keeping up with his workload due to illness, solutions were limited — and dismal at that. In theory he could be removed (following conviction after trial on articles of impeachment) or he could resign (without a pension). Congress could also create another judgeship, but such a measure would have been considered drastic — an expensive enlargement of what was then a deliberately small federal judiciary. And so, it is perhaps unsurprising that a visiting scheme arose out of the need of a particular judge and his district. ►

When the Southern and Northern Districts of New York were created in 1814, the judge of the former was authorized to hold court for the judge of the latter⁶ — due to the ill health of Judge Tallmadge of the Northern District. By way of background, Matthias B. Tallmadge and William P. Van Ness (known locally as Aaron Burr’s “second” in his duel with Alexander Hamilton) had been serving together as the two judges for the District of New York ever since New York obtained a second judgeship in 1812. Then, in 1814, when Congress split the District in “An Act for the better organization of the courts of the United States within the State of New York,” Judge Tallmadge was assigned to the northern half and Judge Van Ness to the southern half. The same act “made [it] the duty” of Judge Van Ness to hold district court “in the said northern district, in case of the inability, on account of sickness or absence, of the said Matthias B. Tallmadge to hold the same.”⁸

One might wonder why Congress created two separate districts within New York, if only then to permit (and in fact, require) one judge to assist the other. According to H. Paul Burak, former chairman of the Special Committee on the History of the Federal Courts, there was “[a]nimos-ity between the two judges,” which “led Tallmadge to seek the separation of the State into two districts so that he might serve in one, unfettered by Van Ness.”⁹ Judge Tallmadge’s lobbying efforts apparently paid off, though he may have had buyer’s remorse. He technically remained a judge of a separate district, but once Judge Van Ness was authorized to assist him, the latter conducted the majority of the work in the Northern District as well as all the work in his own.

To be sure, the Act of 1814 can be seen as representing a modest allowance: A single judge was given permission to visit a single court. But it was a seminal point in the history of visiting judges. As Judge Charles Merrill Hough remarked 120 years after the Southern District’s organization, “[w]hile the right of the District Judges in New York to sit as well in one District as the other, was a concession to Tallmadge’s physical weakness, it marks the beginning of the system of using Judges out of their own Districts in order to relieve press of business.”¹⁰

The system steadily expanded from that point on. 1850 saw the passage of a bill that permitted the use of substitute judges in instances of “sickness or other disability of the judges of the district courts” — not just those districts within New York.¹¹ The one caveat was that the substituting judge had to be local; the circuit judge of the circuit in which the ailing district judge was located could designate another district judge within the same circuit to hold court.¹² If no circuit judge could make the designation, the chief justice of the United States could then designate any district judge within the circuit, or any district within a circuit

“next immediately contiguous” to the one of the judge requiring assistance.¹³

Then, in 1852, the act was amended to authorize the relevant circuit judge or chief justice to designate a visitor if it appeared that “the public interests, from the accumulation or urgency of judicial business in any district, shall require it to be done.”¹⁴ This meant that visitors no longer needed to be substitutes for an ailing judge; they could now come to provide relief to the court itself.

A similar pattern followed reliance on judges from farther afield. In 1907, Congress authorized the use of assistance from any part of the country for disabled judges¹⁵ and then the same in 1922 for workload relief.¹⁶

Thus, a little over a century after Judges Tallmadge and Van Ness participated in the first visiting arrangement, Congress permitted district judges from anywhere in the country to be certified to visit another court not simply because of the health of a single judge but for the health of a court and the public interest. Twenty years later, the same courtesy was extended to the courts of appeals, and today there stands a complete system for borrowing and lending judges in the federal courts.¹⁷

Visiting Today

Visitors serve throughout the federal courts today, though their contribution is felt most significantly in the courts of appeals. That is, the last courts to be included in the practice of visiting judges presently gain the most from it. All told, 237 visiting judges sat with appellate courts between September 2020 and September 2021, and participated in 2,910 out of 47,748 decisions.¹⁸ Within that set, they helped decide 1,280 out of 6,152 cases on the merits after oral argument — or just over

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20 percent.¹⁹ (By contrast, the district courts received 215 visitors who terminated 1,713 out of 335,473 cases.²⁰)

Specifically, district judges from in and outside a circuit, other circuit judges, and judges from Article III courts of “special” jurisdiction — the Federal Circuit and the U.S. Court of International Trade — all lend their services to various appellate courts.²¹ Even the Supreme Court has played its part — Justice David Souter has frequently visited the First Circuit since his departure from the Court, and his colleague, Justice Sandra Day O’Connor, visited nearly all of the circuits after she left the high bench.

But not every court today receives visitors. The D.C. Circuit has long eschewed utilizing visiting judges of any kind to decide its cases, and more recently other circuits, including the Seventh and Tenth, have followed suit.²²

For courts that do rely upon visitors, the apparatus that developed into the early 20th century remains largely in place today: The chief of a circuit in need of assistance has the authority to invite a judge from within that circuit to sit by designation.²³ If the judge being invited is an active judge, the chief judge of her district must consent²⁴; if the drafted judge is senior, the judge herself must consent.²⁵

Intercircuit assignments are different, reinforcing Congress’ own distinction from earlier times. If help is sought from outside a circuit, a higher level of authority is required: The chief justice of the United States must give permission.²⁶ The chief judge of the borrowing court must certify that assistance is needed and submit a request for aid to the Judicial Conference Committee on Intercircuit Assignments,²⁷ which in turn handles the arrangements of visits and submits the formal request to the chief justice.

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Once again, if the judge being assigned is active, her chief judge must approve (along with the chief judge of the borrowing circuit).²⁸ And if the judge being assigned is senior, she must consent to the assignment.²⁹

There is one final complication when bringing in an out-of-circuit judge: Intercircuit assignments must comport with the so-called “lender/borrower rule.” The nonstatutory rule dates back to 1997, when it was approved by Chief Justice William Rehnquist, and states that “a circuit that lends active judges may not borrow from another circuit within the same time period of the assignment; a circuit that borrows active judges may not lend within the same period of the assignment.”³⁰ (Senior judges are exempt from this rule.³¹)

Explaining – and Possibly Improving – the Practice Going Forward

Finally, how do judges themselves feel about judicial visitors? Answering this question requires going beyond a close reading of the historical record and pushes one inside the courthouse doors to speak with judges directly. For the expanded scholarly project, inter-

views of dozens of federal judges were conducted, with the results shedding light on the current practice of sitting by designation.

Though none of the appellate judges interviewed relished the thought of having strangers join them on the bench, they by and large noted the importance of visiting judges for workload relief. Indeed, some spoke of judicial emergencies on their courts — times when having outsiders step in was the only way to ensure that cases would be decided in a timely fashion. And while some judges noted potential limitations of visitors — that they might be overly deferential to “home” judges or might not shoulder the same weight of assignments — there was widespread recognition that the initial necessity rationale for permitting the practice remains a key rationale today.

Importantly, the interviews revealed a separate benefit that went beyond caseload relief — one based upon information exchange. Judges noted that in many (though not all) of the circuits, district judges are traditionally invited early in their tenure to sit by designation on their own court of appeals so that they may experience firsthand the appellate process and appreciate the norms and customs of that court. Those who had sat by designation when they were on the district court described it as quite valuable. Moreover, many observed that the benefits could run both ways, suggesting it could be helpful for more appellate judges to sit by designation on the trial court than the few who currently do. Specifically, several of the judges stated that being “in the trenches” would give them a better window into the pressures the district judges face and the challenges associated with trying cases. But none of the circuits surveyed had a tradition of sitting by “reverse designation,” that ▶

is, sending appellate judges to district courts (and indeed, several appellate judges stated that they would be reluctant to take on the assignment for fear of being reversed).

Such feedback prompts new questions about the practice. The current divergent practices concerning visiting judges would be understandable if visitors were brought in solely for workload relief. But given that there is another benefit to having judges sit by designation — that is, that district judges can learn more about the appellate court and its processes — perhaps all courts should consider permitting the practice.

Then apart from what we might call a matter of intercircuit consistency is a matter of consistency across the federal courts as a whole. Given that

a key benefit of visiting another court is acquiring information firsthand, perhaps more appellate judges should consider visiting the district courts, or sitting by “reverse designation.” There are no doubt difficulties associated with that practice (namely, an appellate judge visiting a district court would sit alone, while a district judge visiting the appellate court would have the benefit of two other judges). But if there are substantial benefits to be gained — as many of the judges suggest there are — it is worth asking if the practice of visiting should at least be encouraged in this direction.

Ultimately, the practice of sitting by designation reveals itself to be more than an odd curiosity within the federal courts. Born out of the necessity of a single district over 200 years ago,

the practice has become integral to the federal courts in current times. Today it involves hundreds of jurists of different kinds, helping to decide thousands of cases each year. After appreciating the expansion of the use of visiting judges over the life of our courts, we may wonder if it is time to expand it, even if only slightly, once again.



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1 See Marin K. Levy, *Visiting Judges*, 107 CAL. L. REV. 67 (2019).

2 PETER GRAHAM FISH, THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION 14 (1973).

3 See Judiciary Act of 1789, ch. 20, § 4, 1 Stat. 73, 74.

4 See *id.* at § 2.

5 See *id.* at § 3.

6 An Act of Apr. 9, 1814, ch. 49, 3 Stat. 120–21. The first section of the act divided the former District of New York into the Southern and Northern districts.

7 *Id.*

8 *Id.*

9 H. PAUL BURAK, HISTORY OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK 3 (1962).

10 See CHARLES MERRILL HOUGH, THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK: ITS GROWTH, AND THE MEN WHO HAVE DONE ITS WORK 1789–1919, at 19 (1934), <http://history.nysd.uscourts.gov/docs/Hough.pdf>.

11 An Act of July 29, 1850, ch. 30, 9 Stat. 442–43.

12 *Id.*

13 *Id.*

14 An Act of Apr. 2, 1852, ch. 20, 10 Stat. 5.

15 See An Act of Mar. 4, 1907, ch. 2940, 34 Stat. 1417.

16 See An Act of Sept. 14, 1922, ch. 306, 42 Stat. 837.

17 See An Act to Amend the Judicial Code to Authorize the Chief Justice of the United States to Assign Circuit Judges to Temporary Duty in Circuits Other Than Their Own of Dec. 29, 1942, 56 Stat. 1094. As for the remaining expansions of the practice, 1942 was also the year in which judges of the Court of Customs and Patent Appeals were authorized to serve on the courts of

appeals. See *id.* The chief justice was authorized to assign district judges to courts of appeals of other circuits in 1948. See 62 Stat. 901 (1948). And the Court of International Trade judges could be assigned to district courts or the courts of appeals from that court’s inception in 1980. See 94 Stat. 1727 (1980).

18 See ADMIN. OFF. U.S. CTS., JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2021 ANNUAL REPORT OF THE DIRECTOR, tbl.V-2, https://www.uscourts.gov/sites/default/files/data_tables/jb_v2_0930.2021.pdf; ADMIN. OFF. U.S. CTS., JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2021 ANNUAL REPORT OF THE DIRECTOR tbl.B-1, https://www.uscourts.gov/sites/default/files/data_tables/jb_b1_0930.2021.pdf.

19 See *id.*

20 According to the most recent data provided by the Administrative Office of the United States Courts, in the 12-month period ending Sept. 30, 2021, visitors to the U.S. district courts terminated 1,674 civil cases and 653 criminal defendants. See ADMIN. OFF. U.S. CTS., JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2021 ANNUAL REPORT OF THE DIRECTOR, tbl.V-1, https://www.uscourts.gov/sites/default/files/data_tables/jb_v1_0930.2021.pdf. During this time, the U.S. District Courts cumulatively terminated 271,625 civil cases and 63,848 criminal defendants. See ADMIN. OFF. U.S. CTS., JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2021 ANNUAL REPORT OF THE DIRECTOR tbl.C-1, https://www.uscourts.gov/sites/default/files/data_tables/jb_c1_0930.2021.pdf; ADMIN. OFF. U.S. CTS., JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2021 ANNUAL REPORT OF THE DIRECTOR tbl.D-1, https://www.uscourts.gov/sites/default/files/data_tables/jb_d1_0930.2021.pdf.

21 See ADMIN. OFF. U.S. CTS., JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2021 ANNUAL REPORT OF THE DIRECTOR, tbl.V-2, *supra* note 18.

22 See *id.*

23 See 28 U.S.C. § 291(b) (2012) (circuit judges); *id.* § 292(b) (district judges); *id.* § 294(c) (senior judges).

24 *Id.* § 295.

25 *Id.* § 294(c).

26 28 U.S.C. §§ 291(a), 292(d) (2012) (active judges); *id.* § 294(d) (senior judges).

27 *Id.* §§ 292(d), 292(e) (active judges); § 294(d) (senior judges).

28 28 U.S.C. § 295 (2012).

29 *Id.* § 294(d).

30 NICHOLLE STAHL-REISDORFF, FED. JUD. CTR., THE USE OF VISITING JUDGES IN THE FEDERAL DISTRICT COURTS: A GUIDE FOR JUDGES & COURT PERSONNEL (2001), <https://www.fjc.gov/sites/default/files/2012/Visijud3.pdf>.

31 *Id.*