WHY DO JUDGES COMPETE FOR CASES?

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ABSTRACT

It's not just parties to litigation who forum shop. Sometimes judges forum sell *by trying to attract cases to their courts. This judicial competition for cases has been documented in areas ranging from bankruptcy to antitrust to, most infamously, patent law. Despite the ubiquity of judicial case-seeking behavior, one important question remains unanswered: why? Why do judges—particularly federal district judges, who enjoy life tenure and are paid fixed salaries—seek out* more *work, especially in cases that can be quite complex?*

This Article answers that question by developing a first-of-its-kind model of judicial behavior in the context of court competition. The incentives judges act on, we argue, range from the seemingly innocuous, such as intellectual interest in or prior experience with particular types of cases, to the definitely pernicious, such as economic benefits for the local bar, community, and even the judges themselves. Somewhere in between are the human desires for fame and adulation that come with being known as the *expert on a given topic and the satisfaction of making decisions that are consistent with one's normative beliefs about the world.*

The federal courts are facing threats to their legitimacy. Case-seeking activity by district judges further undermines public faith in (and the efficiency of) the litigation system. We conclude the Article by outlining legal reforms that would incentivize judges to work hard on cases they find interesting without perpetuating the biases endemic in the current "free market" of court competition.

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CONTENTS

INTRODUCTION

Forum shopping. Despite the term's negative connotations,[1] it's an essential component in any litigator's toolkit.[2] Legal scholars often treat forum shopping as being driven *entirely* by lawyers, on behalf of their clients.[3] Plaintiffs file suit where they think they have the best chance of a good outcome; defendants try to escape using jurisdictional arguments, venue objections, and transfer motions.[4]

It's becoming clear, however, that there's another player in the forum-shopping game—judges.[5] Recent scholarship, including our own,[6] has shown how judges actively seek to attract certain types of cases to their courtrooms. That judicial behavior has been described as "court competition,"[7] or, alternatively, "forum selling."[8]

Though court competition and forum selling have occurred in fields ranging from bankruptcy[9] to antitrust[10] to (arguably) litigation over public health measures related to COVID-19[11] and the constitutionality of the Affordable Care

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[1] *See, e.g.*, Henry J. Friendly, *Averting the Flood by Lessening the Flow*, 59 CORNELL L. REV. 634, 641 (1974) (discussing the "evil of forum shopping").

[2] *See, e.g.*, Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553, 571-72 (1989) ("[F]ailure to select an advantageous forum may amount to malpractice, for attorneys owe a duty to vindicate their clients' rights wherever they can expect the best results." (footnote omitted)). As Judge Skelly Wright famously put it, forum shopping is "a national legal pastime." J. Skelly Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 WAYNE L. REV. 317, 333 (1967).

[3] *See, e.g.*, Debra Lyn Bassett, *The Forum Game*, 84 N.C. L. REV. 333, 379 (2006) ("The players in forum shopping include the plaintiff(s) and counsel, the defendant(s) and counsel, and any anticipated additional participants.").

[4] *See* Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1679-80 (1990).

[5] *See, e.g.*, Lynn M. LoPucki, *Chapter 11's Descent into Lawlessness*, 96 AM. BANKR. L.J. 247, 258 (2022) (describing competition by federal bankruptcy judges to attract large corporate filings).

[6] *See generally* J. Jonas Anderson & Paul R. Gugliuzza, *Federal Judge Seeks Patent Cases*, 71 DUKE L.J. 419 (2021).

[7] J. Jonas Anderson, *Court Competition for Patent Cases*, 163 U. PA. L. REV. 631, 634-35 (2015); Lynn M. LoPucki & Sara D. Kalin, *The Failure of Public Company Bankruptcies in Delaware and New York: Empirical Evidence of a "Race to the Bottom,"* 54 VAND. L. REV. 231, 270 (2001).

[8] Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. CAL. L. REV. 241, 243 (2016).

[9] LYNN M. LOPUCKI, COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS 15 (2005).

[10] Stefan Bechtold, Jens Frankenreiter & Daniel Klerman, *Forum Selling Abroad*, 92 S. CAL. L. REV. 487, 550 (2019).

[11] *See* Lydia Wheeler & Madison Alder, *Republicans Find Home Court for Biden Suits in Western Louisiana*, BLOOMBERG L. (Dec. 20, 2022, 4:45 AM), https://news.bloomberglaw.com/us-law-week/western-louisiana-becomes-gop-home-court-for-suits-against-biden-21.

Act,[12] case-seeking behavior by judges is particularly long-standing, ferocious, and pernicious in patent law.[13] Over the past two decades, some federal district judges have worked hard to create patent litigation hotspots in unlikely locales. For instance, in 2015, over 2,500 patent cases—nearly 50% of all patent cases nationwide—were filed in the U.S. District Court for the Eastern District of Texas.[14] The vast majority of those cases were filed in the town of Marshall (population 23,000)[15] and heard by a single judge, Rodney Gilstrap.[16] That massive patent docket was the result of a concerted, fifteen-year campaign by the court's judges to bring the nation's biggest patent cases to the piney woods of East Texas.[17]

A 2017 Supreme Court decision about patent venue requirements curbed filings in Marshall somewhat.[18] But a new competitor rapidly emerged. In 2021, nearly a thousand patent cases—almost a quarter of the nationwide total—were filed in the *Western* District of Texas.[19] Practically all of those cases were again before a single judge, Alan Albright, who sits in the Western District's Waco Division.[20]

In prior work, we have examined both why litigants are attracted to places like the Eastern and Western Districts of Texas and how judges have

[12] *See* Steve Vladeck, Opinion, *Texas Judge's Covid Mandate Ruling Exposes Federal 'Judge-Shopping' Problem*, MSNBC (Jan. 11, 2022, 6:33 PM), https://www.msnbc.com/opinion/texas-judge-s-covid-mandate-ruling-exposes-federal-judge-shopping-n1287324 [https://perma.cc/QB5J-PZLU].

[13] For an early discussion of how district courts acted to attract patent cases, see Yan Leychkis, *Of Fire Ants and Claim Construction: An Empirical Study of the Meteoric Rise of the Eastern District of Texas as a Preeminent Forum for Patent Litigation*, 9 YALE J.L. & TECH. 193 (2007).

[14] J. Jonas Anderson, *Reining in a "Renegade" Court:* TC Heartland *and the Eastern District of Texas*, 39 CARDOZO L. REV. 1569, 1575 (2018).

[15] *See* Melissa Repko, *How Patent Suits Shaped a Small East Texas Town Before Supreme Court's Ruling*, DALLAS MORNING NEWS, https://www.dallasnews.com/business/technology/2017/05/23/how-patent-suits-shaped-a-small-east-texas-town-before-supreme-court-s-ruling (last updated May 23, 2017, 6:25 PM CDT).

[16] *See* Anderson, *supra* note 14, at 1575-76.

[17] *See* Megan M. La Belle, *Influencing Juries in Litigation "Hot Spots*,*"* 94 IND. L.J. 901, 931-33 (2019).

[18] *See* TC Heartland LLC v. Kraft Foods Grp. Brands LLC, 581 U.S. 258, 267-68 (2017); *see also infra* Part II.A (providing additional background on *TC Heartland* and venue requirements in patent cases). Since *TC Heartland*, the Eastern District of Texas has been receiving about 10% of patent cases filed nationwide. *See* DOCKET NAVIGATOR, 2021 PATENT LITIGATION YEAR IN REVIEW 16 (2021).

[19] Anderson & Gugliuzza, *supra* note 6, at 447.

[20] *2021 Patent Dispute Report: Year in Review*, UNIFIED PATENTS (Jan. 3, 2022), https://www.unifiedpatents.com/insights/2022/1/3/2021-patent-dispute-report-year-in-review [https://perma.cc/5TGM-BD2K]. Before President Trump appointed Judge Albright to the bench in 2018, the number of patent cases filed in Waco annually was in the single digits. *See* Anderson & Gugliuzza, *supra* note 6, at 451 fig.3.

successfully brought cases into their courtrooms.[21] For the judges, publicly advertising an interest in certain types of cases is a start.[22] But, to actually *get* cases, judges must give plaintiffs—who choose where to file—what they want. In patent cases especially, what plaintiffs want are *procedural advantages* that create leverage in negotiating settlements.[23] Though the prospect of a favorable ruling on the merits plays some role in patentee forum selection,[24] most patent cases settle.[25] Thus, the procedures that *lead to* that probable settlement drive the plaintiff's forum choice.

In other areas of law where cases have become concentrated before one or a small number of judges, outcomes on the merits may be more important. For instance, plaintiffs in politically charged cases, such as challenges to federal vaccination and mask mandates, prefer judges who are willing to use the remedial mechanism of the so-called nationwide injunction[26] or to overlook weak theories of standing or venue.[27]

But, regardless of the outcome a plaintiff hopes to achieve—a lucrative settlement or a victory on the merits—there is one procedural feature that a court seeking cases in any field of law *must* offer: the court must allow the plaintiff to

[21] *See, e.g.*, Anderson & Gugliuzza, *supra* note 6, at 452; Anderson, *supra* note 7, at 634; Paul R. Gugliuzza, *The Federal Circuit as a Federal Court*, 54 WM. & MARY L. REV. 1791, 1838-39 (2013).

[22] *See* Mike Masnick, *Former Patent Litigator Becomes Federal Judge and Begins Advertising for Patent Trolls to Come to His Court (and They Have in Droves)*, TECHDIRT (Oct. 5, 2020, 9:31 AM), https://www.techdirt.com/2020/10/05/former-patent-litigator-becomes-federal-judge-begins-advertising-patent-trolls-to-come-to-his-court-they-have-droves [https://perma.cc/4B6M-UQLL].

[23] Anderson & Gugliuzza, *supra* note 6, at 423; Klerman & Reilly, *supra* note 8, at 250; *accord* Bechtold et al., *supra* note 10, at 490 ("German patent and press law judges seem to compete for litigation mostly by interpreting procedural rules in a pro-plaintiff way . . . .").

[24] Some evidence suggests that patentees are more likely to win in the Eastern District of Texas than in other districts, but a win is far from guaranteed. *See* John R. Allison, Mark A. Lemley & David L. Schwartz, *Understanding the Realities of Modern Patent Litigation*, 92 TEX. L. REV. 1769, 1793-94 tbl.3A (2014) (studying cases filed in 2008 and 2009 and reporting a 45% patentee win rate in Eastern District versus 26% overall).

[25] *See* Megan M. La Belle, *Against Settlement of (Some) Patent Cases*, 67 VAND. L. REV. 375, 395 (2014) (citing studies); *see also* Christopher A. Cotropia, Jay P. Kesan & David L. Schwartz, *Heterogeneity Among Patent Plaintiffs: An Empirical Analysis of Patent Case Progression, Settlement, and Adjudication*, 15 J. EMPIRICAL LEGAL STUD. 80, 108 (2018) (reporting that over 80% of patent infringement cases in 2010 and 2012 settled).

[26] *See, e.g.*, Health Freedom Def. Fund, Inc. v. Biden, 599 F. Supp. 3d 1144, 1178 (M.D. Fla. 2022) (issuing nationwide injunction against federal masking requirement on public transportation); *see also* Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920, 922-23 (2020) (citing commentary critical of the practice).

[27] *See infra* Part IV.

judge shop.[28] That is, the plaintiff must be able to know, before a case is filed, that the case will be assigned to a favorable judge. Though judicial case assignments in the federal courts are often assumed to be random, they are not.[29] And, in the federal district courts, they are not required to be.[30] In some circumstances, courts have crafted case assignment rules specifically designed to facilitate judge shopping.[31] In others, judges have taken advantage of preexisting rules that just happened to make case assignment predictable.[32]

So, we know *what* litigants are looking for and *how* judges give it to them. But one crucial question that, to date, has gone mostly unanswered is *why*—why do judges actively seek out particular types of cases?[33] Federal district judges are paid a fixed salary, enjoy life tenure, and their prospect of promotion to a higher court is low. What incentives do they have to seek out *more* work—particularly in complex cases?[34] From the perspective of neoclassical economics, that's precisely opposite of the behavior we'd expect from someone whose pay doesn't depend on the quantity or quality of their work.[35]

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[28] *See* Alex Botoman, *Divisional Judge-Shopping*, 49 COLUM. HUM. RTS. L. REV. 297, 305-07 (2018); Jonas Anderson, *Judge Shopping in the Eastern District of Texas*, 48 LOY. U. CHI. L.J. 539, 547 (2016).

[29] *See* Adam S. Chilton & Marin K. Levy, *Challenging the Randomness of Panel Assignment in the Federal Courts of Appeals*, 101 CORNELL L. REV. 1, 2-5 (2015).

[30] The federal statute on case assignment in the district courts provides only that "[t]he business of a court having more than one judge shall be divided among the judges as provided by the rules and orders of the court." 28 U.S.C. § 137(a).

[31] For instance, for much of the past decade, 100% of patent cases filed in the Marshall Division of the Eastern District of Texas were assigned to Judge Gilstrap. *See, e.g.*, General Order Assigning Civil and Criminal Actions (E.D. Tex. Apr. 30, 2021) [hereinafter General Order 2021-08], https://www.txed.uscourts.gov/sites/default/files/goFiles/GO%2021-08%20Assigning%20Civil%20and%20Criminal%20Actions.pdf [https://perma.cc/5FNX-EJPU].

[32] For instance, until recently, Judge Albright received 100% of the cases filed in the Waco Division of the Western District of Texas because he is the only judge sitting there. Amended Order Assigning the Business of the Court at 3 (W.D. Tex. May 10, 2021) [hereinafter Amended Order 2021-05-10], https://www.txwd.uscourts.gov/wp-content/uploads/Standing%20Orders/District/Amended%20Order%20Assigning%20Business%20of%20the%20Court%20051021.pdf [https://perma.cc/S3UD-9767].

[33] Several scholars who have written about case-seeking behavior by judges have considered the question of motives. *See, e.g.*, LOPUCKI, *supra* note 9, at 19-24; Bechtold et al., *supra* note 10, at 513-17; Klerman & Reilly, *supra* note 8, at 270-77. But this Article is the first devoted entirely to unpacking judicial incentives and developing a comprehensive theory of why judges compete for particular sorts of cases.

[34] Bankruptcy judges, it's worth noting, are Article I judges who are appointed for a (renewable) term of fourteen years, unlike Article III district judges who are appointed for life. 28 U.S.C. § 152(b). So, bankruptcy judges' behavior may be more strongly influenced by a desire for reappointment or by financial considerations after they leave the bench. *See infra* Part IV.

[35] *See generally* Daniel A. Farber, *Public Choice Theory and Legal Institutions*, *in* 1 THE OXFORD HANDBOOK OF LAW AND ECONOMICS 181, 196 (Francesco Parisi ed., 2017) ("[T]o

In this Article, we peer into the "empty black box" surrounding the "motivation of judges in an independent judiciary"[36] and explain why judges sometimes compete to attract case filings. Our analysis begins with patent litigation as an example, both because it's the field we know best and because it's the area in which court competition affects the greatest number of cases.[37] But we also extend our model to other areas of law in which judges have actively sought cases, and we provide numerous examples from outside of patent law to illustrate the trans-substantive nature of court competition for cases.

In brief, we argue that incentives for seeking out cases include: (1) intellectual interest in or prior experience with the case subject matter; (2) the "comparative advantage" that some types of litigation have over others; (3) prestige, popularity, and fame; (4) normative beliefs about "what the law should be"; (5) economic benefits to the local bar and community; (6) additional resources for the judge, district, and what we call "judicial adjuncts" (magistrates, technical advisers, etc.); and (7) post-judicial career opportunities.[38]

We also examine how each of those incentives might undermine public faith in, or the efficiency or fairness of, the litigation system. In numerous instances, courts competing for cases have shaped procedure, and, sometimes, outcomes, in ways that are clearly biased toward the party who chooses the forum. Moreover, in a regime of court competition, procedure is not designed to balance the costs of the litigation process with the accuracy of outcomes, as it should be.[39] Instead, procedure is designed to attract cases, which means imposing disproportionate burdens (both in terms of litigation expenses and error costs) on the party that does *not* choose the forum.[40]

We conclude the Article by outlining ways to curb harmful court competition while capturing some of its redeeming aspects, such as having cases decided by judges who are truly knowledgeable about a complicated topic.[41] Among other reforms, we recommend memorializing—in federal law—a requirement that all district court cases be randomly assigned among multiple judges, and that

the extent judges enjoy independence, the usual economic incentives are absent or at least substantially weakened." (citation omitted)).

[36] DENNIS C. MUELLER, PUBLIC CHOICE III 401 (2003).

[37] For instance, nearly 60% of the 4,000-plus patent cases filed in the United States in 2021 were filed in just three districts: the Eastern and Western Districts of Texas and the District of Delaware—two of which, we explain below, have actively competed for patent litigation. *See* DOCKET NAVIGATOR, *supra* note 18; *see also infra* Part II.B.

[38] *See infra* Part III.

[39] *See* Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUD. 307, 308 (1994); *see also* Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 183 (2004) (arguing that "meaningful participation is an essential prerequisite for . . . legitimate authority" and that such participation requires both "notice and opportunity to be heard" and a "reasonable balance between cost and accuracy").

[40] *See infra* Part V.A.

[41] *See infra* Part V.B-C.

districts' case assignment rules be adopted through a process that is transparent and inclusive of all parties who appear before the court, which is often not the case.[42] Turning back to patent law, specifically, we float the idea of a specialized federal trial court that would exist alongside the district courts.[43] With the right judges and thoughtfully designed "removal" rights for defendants, parallel systems could inspire *healthy* competition—not the bias toward case-placers that is endemic in the current free market.

The remainder of the Article proceeds as follows. Part I provides theoretical grounding, surveying prior scholarship on judicial incentives and developing a model for the behavior of an ideal federal district judge. As an example of the problem that motivates this Article, Part II takes a deep dive into court competition in patent law, a field in which judicial case-seeking behavior affects thousands of cases every year. Part III presents our analysis of *why* judges compete for patent cases. Part IV extends that analysis to other fields in which court competition has occurred. Finally, Part V critiques the prevailing dynamic of court competition. It also proposes reforms that would help eliminate the excesses of the current system and, perhaps, harness some of competition's benefits.

I. THEORIZING JUDICIAL BEHAVIOR

We begin our analysis by theorizing the behavior of federal district judges. Specifically, we summarize existing literature in law, economics, and political science modeling judicial behavior and explain how a close examination of case-seeking behavior by federal district judges fills a gap in that literature. We then develop a normative framework for evaluating court competition and explain, as a general matter, how case-seeking behavior imperils the core values of the judicial system.

A. *Incentives for Judges*

Under Article III of the Constitution, federal judges are appointed for life and their salaries cannot be reduced.[44] By statute, all active judges at a particular

[42] *See* Katherine A. Macfarlane, *A New Approach to Local Rules*, 11 STAN. J. C.R. & C.L. 121, 135 (2015) ("[U]nlike the Federal Rules' amendment process, local rules are adopted and amended less transparently . . . .").

[43] Though we are not the first to suggest trial-court specialization in patent cases, see, for example, Arti K. Rai, *Specialized Trial Courts: Concentrating Expertise on Fact*, 17 BERKELEY TECH. L.J. 877, 877 (2002); and John B. Pegram, *Should There Be a U.S. Trial Court with a Specialization in Patent Litigation?*, 82 J. PAT. & TRADEMARK OFF. SOC'Y 765, 767 (2000), we are the first to develop the idea as a cure for harmful court competition, compare Rai, *supra*, at 878 (emphasizing the factual complexity of patent litigation). And the parallel system we propose could have the unique benefit of preserving competition in its most laudable forms. *Cf.* Kimberly A. Moore, *Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation?*, 79 N.C. L. REV. 889, 932 (2001) (exploring possibility of a "specialized trial court with *exclusive* jurisdiction over patent cases" (emphasis added)).

[44] U.S. CONST. art. III, § 1.

level of the judicial system are paid the same,[45] with cost-of-living increases made most years.[46] Judges receive their salary regardless of how good or bad they are at their job, whether they are the most meticulous judge or the laziest judge on their court.

True, there are corrective processes for federal judges who engage in "conduct prejudicial to the effective . . . administration . . . of the courts" or who have a disability that makes them unable to do their job.[47] And an exceptionally debauched federal judge can be impeached by the House of Representatives and removed from office by the Senate.[48] But the carrots and sticks available for a typical worker—promotions, raises, and bonuses; demotions, pay cuts, and firings—are of little concern to an Article III judge. Some judges may *aspire* to promotion[49]—a district judge to the court of appeals, a circuit judge to the Supreme Court. And it sometimes happens.[50] But, for any individual judge, the odds of promotion are pretty long.[51]

[45] 28 U.S.C. §§ 5, 44(d), 135.

[46] *Judicial Compensation*, U.S. CTS., https://www.uscourts.gov/judges-judgeships/judicial-compensation [https://perma.cc/VZG5-GQ8X] (last visited Dec. 16, 2024). In 2024, district judges received a salary of $243,300, court of appeals judges received a salary of $257,900, the Associate Justices of the Supreme Court received $298,500, and the Chief Justice received $312,200. *Id.*

[47] 28 U.S.C. § 351(a). Sanctions typically consist of private or public censure or reprimand and temporary withholding of cases from the judge. *See Judges and Judicial Administration – Journalist's Guide*, U.S. CTS., https://www.uscourts.gov/statistics-reports/judges-and-judicial-administration-journalists-guide [https://perma.cc/2DZ4-RAQ4] (last visited Dec. 16, 2024). Formal disability proceedings, though rarely invoked, have recently grabbed the spotlight in appellate patent litigation. *See* Paul R. Gugliuzza, *Judicial Disability and the "Great Dissenter,"* PATENTLYO (May 11, 2023), https://patentlyo.com/patent/2023/05/judicial-disability-dissenter.html (discussing proceedings regarding Federal Circuit Judge Pauline Newman).

[48] In the history of the United States, only fifteen federal judges have been impeached; eight have been removed from office. *See Impeachments of Federal Judges*, FED. JUD. CTR., https://www.fjc.gov/history/judges/impeachments-federal-judges [https://perma.cc/7R6Z-RK98] (last visited Dec. 16, 2024).

[49] *See* Mark A. Cohen, *The Motives of Judges: Empirical Evidence from Antitrust Sentencing*, 12 INT'L REV. L. & ECON. 13, 26-27 (1992) (contending that the potential for promotion to a higher court affects sentencing in criminal antitrust cases).

[50] *See* Karen Swenson, *Promotion of District Court Judges to the U.S. Courts of Appeals: Explaining President Reagan's Promotions of His Own Appointees*, 27 JUST. SYS. J. 208, 209 (2006).

[51] For instance, only 121 Justices have served on the Supreme Court in U.S. history. *See Justices 1789 to Present*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/members_text.aspx [https://perma.cc/3LUG-XX9A] (last visited Dec. 16, 2024). But there are currently 179 authorized judgeships on the federal courts of appeals. *See* 28 U.S.C. § 44(a). And there are nearly four times as many authorized judgeships on the district courts (667) as on the courts of appeals. *See id.* § 133(a).

Given the security of a fixed salary and life tenure, and with options for outside compensation limited by statute,[52] we might expect federal judges to maximize the other aspect of workers' neoclassical utility function: leisure.[53] But they don't. Many federal judges work hard, and often to an older age than lawyers in private practice.[54] As recently as 2017, the average age of federal circuit judges was sixty-five, and the average age of federal district judges was sixty-one.[55]

We are by no means the first to suggest that judicial behavior is influenced by factors beyond pay and leisure. In a path marking economic analysis, Richard Posner identified several elements of what he called the "judicial utility function," including: popularity (particularly with the practicing bar), prestige (both of the individual judge and of the institutions of which the judge is a member), avoiding reversal, reputation (both among fellow judges and within the legal community at large), and the pure consumptive value of casting votes that decide real disputes and affect the path of the law.[56]

Political scientist Lawrence Baum has similarly articulated a list of "operative goals" that judges seek, including: accuracy, clarity, and consistency in decisions; making policy consistent with the judge's preferences; popularity and respect in the legal community and the community as a whole; promotion to a higher court; attaining attractive non-judicial positions after leaving the bench; harmony with colleagues; holding power within the court; limiting workload; and maximizing court resources.[57]

Both Posner's and Baum's models are highly useful, and we draw from them in our quest to explain why district judges seek out certain types of cases. But Posner was straightforwardly focused on the behavior of *appellate* judges.[58] Likewise, Baum, though acknowledging the heterogeneity in goals among judges at various levels and on various courts, focused on appellate courts, the U.S. Supreme Court in particular.[59]

There is, to be sure, existing literature attempting to model the behavior of judges on trial courts. But much of that literature focuses on state courts (where

[52] *See, e.g.*, 28 U.S.C. § 454 ("Any justice or judge appointed under the authority of the United States who engages in the practice of law is guilty of a high misdemeanor.").

[53] *See* GEORGE J. BORJAS, LABOR ECONOMICS 26-27 (8th ed. 2020); *cf.* RICHARD A. POSNER, OVERCOMING LAW 117-18 (1995) (mentioning leisure as source of "judicial utility").

[54] Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 13 (1993) (opining that most federal appellate judges "work quite hard—often at an age when their counterparts in private practice have retired and are living in Scottsdale or La Jolla").

[55] BARRY J. MCMILLION, CONG. RSCH. SERV., R43426, U.S. CIRCUIT AND DISTRICT COURT JUDGES: PROFILE OF SELECT CHARACTERISTICS 11, 23 (2017).

[56] Posner, *supra* note 54, at 13-23.

[57] LAWRENCE BAUM, THE PUZZLE OF JUDICIAL BEHAVIOR 15, 17 (1997). For earlier work by Baum sketching this model, see Lawrence Baum, *What Judges Want: Judges' Goals and Judicial Behavior*, 47 POL. RSCH. Q. 749, 752 (1994).

[58] Posner, *supra* note 54, at 1-2.

[59] Baum, *supra* note 57, at 750-51.

the prospect of standing for reelection—irrelevant to a federal district judge—plays an outsized role)[60] or on criminal cases (where the potential for inter-court competition is limited).[61]

Perhaps most pertinent to our analysis is recent scholarship by Merritt McAlister chronicling the emergence of what she calls "macro-judging"—the ways in which Article III judges have shaped the institution of judging itself to entrench and maintain judicial prestige, give judges greater control over their work, increase that work's sophistication, and attract more recognition for it.[62] McAlister uses that descriptive story to critique what she calls "Article III elitism"—the notion that the federal courts should be small, elite, and focused on "big" or "important" cases.[63] As we explain below, the desire for sophisticated, attention-grabbing cases is a major reason why judges have actively sought out certain types of litigation.

B. *The Federal District Judge*

Given that scholars such as Posner and Baum (and many others) have thoroughly explored behavioral incentives for appellate judges,[64] we next explain why *district* judges—and in particular case-seeking behavior by those judges—warrant independent analysis.

For starters, the *work responsibilities* of appellate and district judges are much different. All things considered, the job of a federal appellate judge is luxurious—or at least intellectualistic.[65] Much of the day is devoted to reading, thinking, case discussions with law clerks, and writing.[66] A few days a month, for a few hours a day, the judge appears in court, usually with two other colleagues, to hear oral arguments. After discussing the cases argued (or submitted on the briefs alone) and doling out writing assignments, the judges

[60] *See, e.g.*, Greg A. Caldeira, *Judicial Incentives: Some Evidence from Urban Trial Courts*, 4 IUSTITIA, no. 2, 1977, at 1, 8; Austin Sarat, *Judging in Trial Courts: An Exploratory Study*, 39 J. POL. 368, 375 (1977).

[61] *E.g.*, Cohen, *supra* note 49, at 13-14 (analyzing judicial behavior in criminal antitrust sentencing); *see also* U.S. CONST. amend. VI (requiring a criminal trial to take place in "the State and district wherein the crime shall have been committed").

[62] Merritt E. McAlister, *White-Collar Courts*, 76 VAND. L. REV. 1155, 1158-60 (2023).

[63] *Id.* at 1158.

[64] *See, e.g.*, LEE EPSTEIN & KEREN WEINSHALL, THE STRATEGIC ANALYSIS OF JUDICIAL BEHAVIOR 1 (2021); Jeffrey A. Segal, *Judicial Behavior*, *in* THE OXFORD HANDBOOK OF POLITICAL SCIENCE 275, 284 (Robert Goodin ed., 2011); *see also* Marin K. Levy, *Visiting Judges*, 107 CALIF. L. REV. 67 (2019) (analyzing the behavior of judges *temporarily* serving on federal courts of appeals).

[65] For two noteworthy descriptions of the job of the appellate judge, by appellate judges, see FRANK M. COFFIN, ON APPEAL: COURTS, LAWYERING, AND JUDGING (1994); and RICHARD A. POSNER, REFLECTIONS ON JUDGING (2013).

[66] In part thanks to the staff attorneys who do the federal appellate courts' most routine or, some might say, boring, work behind the scenes. *See* Merritt E. McAlister, *Bottom-Rung Appeals*, 91 FORDHAM L. REV. 1355, 1360-62 (2023).

retreat to chambers for more reading, thinking, case discussion, and writing. Appellate judges' contact with the parties litigating before them is limited, deadlines are few, and working schedules are, therefore, relatively flexible.[67]

The work of a district judge is much different. There are more cases and fewer law clerks to help process them.[68] Unlike appellate cases, where the parties' briefs and appendices of the record present the dispute in a neat package, district judges render all sorts of different decisions: rulings on motions (dispositive and not), resolving discovery disputes, conducting trials (both bench and jury), handing down criminal sentences . . . the list goes on.[69] And the work, though important to the parties to any given case, is less prestigious and less influential. A written opinion by a district judge (assuming the judge has time to prepare one[70]) doesn't have stare decisis effect.[71] Though some judges surely thrive on the hustle and bustle of a trial court or enjoy the autonomy of being the sole decision-maker, the relative lack of luxury[72] could make post-judicial employment opportunities more attractive to district judges than to court of

[67] Judges who take too long to finish opinions assigned to them might, of course, be subject to censure by their colleagues. For instance, one of us clerked for a federal court of appeals judge who made every effort to circulate opinions promptly after case submission, for fear of ending up on what the judge jokingly called "the bad judge list"—a list the court clerk's office maintained of cases that were lingering on the docket. *Cf.* Miguel F.P. de Figueiredo, Alexandra D. Lahav & Peter Siegelman, *The Six-Month List and the Unintended Consequences of Judicial Accountability*, 105 CORNELL L. REV. 363, 371 (2020) (suggesting that a federal statute requiring district judges to disclose data about backlogs has affected case outcomes, leading, in certain time periods, to increases in defendant wins, increases in settlements, and higher appellate remand rates).

[68] Federal court of appeals judges typically have four law clerks; district judges typically have three. *See* Mitu Gulati & Richard A. Posner, *The Management of Staff by Federal Court of Appeals Judges*, 69 VAND. L. REV. 479, 480 (2016).

[69] For a survey of the many responsibilities of a federal district judge, see Jack B. Weinstein, *The Roles of a Federal District Court Judge*, 76 BROOK. L. REV. 439 (2011).

[70] For an analysis of *why* a time-crunched district judge may (or may not) write an opinion, see David A. Hoffman, Alan J. Izenman & Jeffrey R. Lidicker, *Docketology, District Courts, and Doctrine*, 85 WASH. U. L. REV. 681, 684 (2007) (hypothesizing that "trial court opinion writing is motivated by the fear of reversal").

[71] For discussions of how district judges aren't bound by the decisions of other district judges (or even their own decisions), see Maggie Gardner, *Dangerous Citations*, 95 N.Y.U. L. REV. 1619, 1627 (2020); and Elizabeth Y. McCuskey, *Submerged Precedent*, 16 NEV. L.J. 515, 546 (2016).

[72] *Cf.* Neil Thompson, Brian Flanagan, Edana Richardson, Brian McKenzie & Xueyun Luo, *Trial by Internet: A Randomized Field Experiment on Wikipedia's Influence on Judges' Legal Reasoning*, *in* THE CAMBRIDGE HANDBOOK OF EXPERIMENTAL JURISPRUDENCE (Kevin Tobia ed., forthcoming 2025) (manuscript at 23), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4174200 [https://perma.cc/UK3C-5ZNX] (presenting results from study of Irish judicial decision-making that Wikipedia use was heavier among trial courts than appellate courts and attributing it to trial courts' heavier workloads).

appeals judges.[73] Also, because district judges' decisions are less important to the legal system as a whole, the consumptive value of simply rendering those decisions is reduced.[74]

Paradoxically, in any given case, a district judge wields a lot *more* power than an appellate judge.[75] Most obviously, district judges hear cases alone; appellate judges decide cases in multi-judge panels. And many decisions that district judges make, day in and day out, are committed to their discretion as a matter of law, are unreviewable on appeal as a practical matter, or are never appealed because the case—like most federal cases—settles or ends in a plea bargain.[76]

Less obviously, district judges have more power than appellate judges over the *types of cases* they hear. That power is exercised both through formal mechanisms, such as courts' case assignment orders and practices, and informal mechanisms, such as efforts to attract particular types of cases to their courtrooms (both of which we discuss in more detail below). Federal appellate judges, by contrast, are generalists.[77] They hear cases across the many varied areas of federal law, as well as cases arising under state law but falling within the federal courts' diversity or supplemental jurisdiction. Even the judges of the U.S. Court of Appeals for the Federal Circuit, the only Article III court of appeals whose jurisdiction is entirely defined by case subject matter and not geography, hear cases in several different areas, including patents, trademarks, international trade, veterans' benefits, tax law, government contracts, government employment disputes, and more.[78]

To be sure, *because of* their geographically defined jurisdiction, certain courts of appeals hear more of some types of cases than others. The Second Circuit, home to Wall Street, is a leader on securities law and financial regulation.[79] The

[73] *See* Stephen B. Burbank, S. Jay Plager & Gregory Ablavsky, *Leaving the Bench, 1970-2009: The Choices Federal Judges Make, What Influences Those Choices, and Their Consequences*, 161 U. PA. L. REV. 1, 15, 87 (2012) (providing examples of federal judges who "complained about their work as federal judges in explaining their decisions to resign").

[74] *Cf.* Saul Levmore, *Voting with Intensity*, 53 STAN. L. REV. 111, 128 (2000) (describing electoral voting "as a kind of consumption activity").

[75] *See* Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 849 (1984) (discussing the "substantial powers" trial judges enjoy, such as the abilities "to make some types of decisions free from appellate review" and "to run courtrooms with little supervision").

[76] *See* Richard L. Marcus, *Slouching Toward Discretion*, 78 NOTRE DAME L. REV. 1561, 1562 (2003) (discussing the benefits of giving trial judges wide latitude in procedural practices and substantive rulings); Stephen G. Valdes, *Frequency and Success: An Empirical Study of Criminal Law Defenses, Federal Constitutional Evidentiary Claims, and Plea Negotiations*, 153 U. PA. L. REV. 1709, 1710 (2005) ("[O]nly about five percent of criminal cases are decided at trial . . . .").

[77] *See* Diane P. Wood, *Generalist Judges in a Specialized World*, 50 SMU L. REV. 1755, 1759 (1997).

[78] *See* 28 U.S.C. § 1295 (outlining the Federal Circuit's jurisdiction).

[79] Karen Patton Seymour, *Securities and Financial Regulation in the Second Circuit*, 85 FORDHAM L. REV. 225, 225 (2016).

Ninth Circuit (Hollywood) is a leader in copyright law and other areas of entertainment and celebrity.[80] The D.C. Circuit's quasi-specialization in administrative law is partly a function of geography but also of statutes that give it exclusive jurisdiction over various types of agency-related proceedings.[81] In addition, several studies have shown that individual circuit judges specialize in the subject matter of the opinions they write.[82] That sort of appellate opinion specialization seems to occur on the already specialized Federal Circuit, too.[83]

In general, however, federal appellate judges decide the cases that come to them from the district courts in their circuit,[84] whatever the subject matter. When shopping for a district court, parties certainly consider the relevant circuit's law and perhaps the political disposition of the circuit's judges.[85] But the ability of a lone circuit judge to influence parties' initial decisions about where to file a case is limited.

Federal district judges, however, can *directly* influence parties' filing decisions, which gives them an opportunity to attract litigation in a particular area of law and create a specialty of their choosing. That is particularly true when a district's system for assigning judges to cases allows parties to know, before filing, which judge will hear their case. Perhaps surprisingly to anyone who didn't read the introduction to this article, that sort of "judge shopping" is possible in many federal district courts.

Some background: the federal judicial system is divided into ninety-four districts.[86] Over half of those districts are further subdivided into divisions.[87] By one account, in eighty-one of those divisions, spread across thirty districts, one or two judges hear all cases filed in the division.[88] In other words, by filing one of those divisions, a litigant can have, at worst, a fifty-fifty chance of getting the

[80] *See* White v. Samsung Elecs. Am., Inc., 989 F.2d 1512, 1521 (9th Cir. 1993) (Kozinski, J., dissenting) ("For better or worse, we *are* the Court of Appeals for the Hollywood Circuit.").

[81] *See* John M. Golden, *The Federal Circuit and the D.C. Circuit: Comparative Trials of Two Semi-Specialized Courts*, 78 GEO. WASH. L. REV. 553, 554-55 (2010). *But cf.* Andrew Hammond, *The D.C. Circuit as a Conseil d'État*, 61 HARV. J. ON LEGIS. 81, 86 (2024) (suggesting that "the D.C. Circuit's leadership in shaping federal administrative law may be at an end" because "[t]he Supreme Court increasingly relies not on the D.C. Circuit, but on other appellate courts, like the Fifth Circuit, to tee up administrative law cases").

[82] *See, e.g.*, Edward K. Cheng, *The Myth of the Generalist Judge*, 61 STAN. L. REV. 519, 540 (2008); Jonathan Remy Nash, *Expertise and Opinion Assignment on the Courts of Appeals: A Preliminary Investigation*, 66 FLA. L. REV. 1599, 1657 (2014).

[83] Melissa F. Wasserman & Jonathan D. Slack, *Can There Be Too Much Specialization? Specialization in Specialized Courts*, 115 NW. U. L. REV. 1405, 1410 (2021).

[84] 28 U.S.C. § 1294(1).

[85] *See* Linda Greenhouse, Opinion, *What Happens When a Court Goes Rogue?*, N.Y. TIMES (Nov. 18, 2021), https://www.nytimes.com/2021/11/18/opinion/abortion-covid19-supreme-court.html.

[86] *See* 28 U.S.C. §§ 81-144.

[87] *See id.*

[88] Botoman, *supra* note 28, at 319.

case assigned to their preferred judge.[89] At best (from a plaintiff's perspective), the judicial assignment is 100% guaranteed. As we explain shortly, this system of predictable judge assignment is not only exploited by litigants; some judges have capitalized on this system to attract particular types of cases and litigants to their courtrooms.[90]

C. *A Model District Judge*

We've hinted at what district judges *can* do, as a descriptive matter, in terms of influencing parties' filing decisions and shaping their docket to their preferences. But how should we evaluate district judges' behavior as a normative matter? Obviously, there are many criteria and analytical methods we could use to assess the performance of our court system and the judges serving within it. Scholarship on procedural justice provides a general and, we think, relatively uncontroversial list of values we would expect a court and its judges to embody. Those values relate to both (1) the procedures the court uses and (2) the outcomes it achieves.[91] They include:

- **Representativeness:** All affected parties should have control over and voice in the decision-making process.
- **Consistency:** Like cases should be treated alike.[92]
- **Impartiality:** The judge should not have a vested interest in the outcome, nor should the judge rely on the judge's prior views rather than the evidence in making a decision.
- **Accuracy:** The judge should reach outcomes that are objectively of a high quality, which depends on using reliable information and rendering informed decisions.
- **Correctability:** There should be opportunities to correct erroneous decisions.

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[89] Many district courts partially thwart judge shopping by requiring that the case have a factual connection to the chosen division. *See, e.g.*, D. Mass. R. 40.1(d)(1); Sixth Amended Standing Order No. 1, Method of Assignment of Civil and Criminal Matters to District Judges, No. 5:00-MC-10 (N.D.W. Va. Jan. 2, 2020), https://www.wvnd.uscourts.gov/sites/wvnd/files/Sixth%20amended%20order%20Distritc%20judges.pdf [https://perma.cc/2KH3-YR5U]. The Texas district courts in which patent judge shopping is endemic, however, have no such divisional venue rule.

[90] Federal bankruptcy judges have similarly capitalized on predictable case assignment rules to attract debtors to their courtrooms. *See* Adam J. Levitin, *Judge Shopping in Chapter 11 Bankruptcy*, 2023 U. ILL. L. REV. 351, 354.

[91] *See* TOM R. TYLER, ROBERT J. BOECKMANN, HEATHER J. SMITH & YUEN J. HUO, SOCIAL JUSTICE IN A DIVERSE SOCIETY 75 (1997).

[92] *Cf.* Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. REV. 767, 782 (2017) (examining departures from norm of "trans-substantive" procedure in certain types of cases).

- **Ethicality:** The judge's decision-making process should satisfy general standards of fairness and morality. For instance, there should be no deception or bribery.[93]

To be sure, there are other evaluative criteria we could use. For instance, one might be more concerned about the distributional consequences of outcomes than about the process of making decisions.[94] Or one might reasonably combine some of the factors we've listed.[95] Similarly, some of our criteria (ethicality perhaps most notably) could be reframed to explicitly include considerations such as *mercifulness*[96] or *doing justice*.[97] Indeed, some judges have lately written openly about their view that judges have an ethical obligation to make the court system "as fair, equitable, and effective as possible."[98] Most fundamentally (or, perhaps, cynically), in a society with vast resource disparities between the "haves" and the "have nots," one might question whether *any* adversarial dispute resolution mechanism can ever be fair, just, moral, ethical, or representative.[99]

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[93] *See* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 118-19 (2006) (citing Gerald S. Leventhal, *What Should Be Done with Equity Theory? New Approaches to the Study of Fairness in Social Relationships*, *in* SOCIAL EXCHANGE: ADVANCES IN THEORY AND RESEARCH 27, 39 (Kenneth J. Gergen, Martin S. Greenberg & Richard H. Willis eds., 1980)).

[94] *See* Volker H. Schmidt, *Procedural Aspects of Distributive Justice*, *in* PROCEDURAL JUSTICE 161, 161 (Klaus F. Röhl & Stefan Machura eds., 1997) ("The concept of distributive justice centres on the fairness or rightness of the ways in which valued goods and necessary burdens are distributed in society."). To be clear, however, the procedural justice approach doesn't suggest we shouldn't *care* about distributive consequences—it just acknowledges that fairness of process is a separate consideration from fairness of outcome. *See* Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution*, 2011 J. DISP. RESOL. 1, 5.

[95] See, for example, Solum, *supra* note 39, at 305-07, which organizes the analysis around broad principles of participation and accuracy, though those principles could be understood to incorporate several of the factors we list in the text. For instance, considerations about correctability and judicial ethics ultimately serve the accuracy goal of "maximiz[ing] the chances of achieving the legally correct outcome." *Id.* at 311, 321.

[96] *See, e.g.*, Doron Menashe, *Should We Be Merciful to the Merciless—Mercy in Sentencing*, 35 EMORY INT'L L. REV. 549, 553 (2021).

[97] *See, e.g.*, Anthony D'Amato, *On the Connection Between Law and Justice*, 26 U.C. DAVIS L. REV. 527, 529 (1992). Conversely, other criteria (such as consistency and accuracy) might be reframed in a more imperious fashion, such as *strictly—or impersonally—applying the law as written*. *See* Steven G. Calabresi & Gary Lawson, *The Rule of Law as a Law of Law*, 90 NOTRE DAME L. REV. 483, 486 (2014) (discussing Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989)); *see also* Joseph Kimble, Opinion, *Rule-of-Law Judge? That's Code for Ideologically Conservative Judging*, MICH. LAWS. WKLY. (Feb. 15, 2023), https://milawyersweekly.com/news/2023/02/15/op-ed-rule-of-law-judge-thats-code-for-ideologically-conservative-judging-2 (arguing that assertions that "judges should 'simply apply the law as written'" mask inclinations to "ma[k]e it harder for plaintiffs to sue and recover" and "ma[k]e it easier . . . for the prosecution in criminal cases").

[98] *See* Bridget Mary McCormack, *Staying Off the Sidelines: Judges as Agents for Justice System Reform*, 131 YALE L.J. F. 175, 186 (2021).

[99] Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 98-103 (1974).

We acknowledge those concerns, as well as the growing literature on critical procedure.[100] We could probably write an entire article expanding on ideas about what trial judges *should* do, as opposed to this Article, which focuses on questionable things judges *have done* to attract cases to their courtrooms. Still, we think the criteria above, even if incomplete or subject to debate, provide a rough metric for evaluating the judicial behavior we describe throughout the remainder of the Article.

D. *How Court Competition Imperils Those Values*

Before answering the question of *why* judges compete to hear certain types of cases, one last matter of theoretical ground clearing: what are the possible *harms* of courts seeking out particular kinds of litigation? That is, how does court competition jeopardize the values we have just discussed? In a general sense, there are at least three potential harms from court competition.

The first is *judicial partiality*, or, what one of us has called elsewhere, *court capture*.[101] In order to attract cases, it's not enough for a judge to express interest in hearing them. Those advertisements can help grab attention. But, if the judge doesn't give the parties choosing the forum what they want, they won't file there for long. So, courts competing for cases must shape procedure, and, sometimes, outcomes, in ways that favor the party who chooses the forum—as well as that party's lawyers.[102] That dynamic not only jeopardizes the value of impartiality, in that the judge has a vested interest in the outcome (keeping cases coming); processes and outcomes that systematically favor one side raise concerns about representativeness, accuracy, and even ethicality.

The second potential harm from court competition is *inefficiency*. Under the standard law-and-economics account, the goal of the court system should be to balance the costs of the litigation process with the accuracy of outcomes.[103] But, in a regime of court competition, procedure isn't constructed to maximize social welfare; it's designed to attract cases. To do that, the court might impose disproportionate or unnecessary costs (both in terms of litigation expenses and the error costs of over- or under-enforcing legal rights) on the party who does *not* choose the forum, imperiling (again) the values of representativeness,

[100] *See, e.g.*, Brooke Coleman, Suzette Malveaux, Portia Pedro & Elizabeth Porter, *Introduction* to A GUIDE TO CIVIL PROCEDURE: INTEGRATING CRITICAL LEGAL PERSPECTIVES 1 (Brooke Coleman, Suzette Malveaux, Portia Pedro & Elizabeth Porter eds., 2022).

[101] J. Jonas Anderson, *Court Capture*, 59 B.C. L. REV. 1543, 1547 (2018).

[102] *See* Rafael I. Pardo & Kathryn A. Watts, *The Structural Exceptionalism of Bankruptcy Administration*, 60 UCLA L. REV. 384, 457 (2012) (discussing the role of lawyers as an interest group capturing bankruptcy courts).

[103] *See* Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 400 (1973).

accuracy, and ethicality.[104] Relatedly, *litigants'* competition for a *judge's* attention is a zero-sum game: a judge who seeks out one type of case may give short shrift to cases the judge is less interested in.[105]

A final potential harm stemming from court competition is structural: undermining *separation of powers*. Reasonable minds might of course differ about the ontological value of maintaining strict divisions between the branches of government.[106] But, to us, it seems uncontroversial to look askance at a single judge who tries to centralize as many cases of a given type as possible in that judge's court. Such successful attracting of cases looks, to us, like the judiciary veering into the legislative lane, because one successful forum selling judge can shift the law due to the concentration of cases in one courtroom. In a similar vein, scholars in the field of federal courts have argued that judges are not the optimal actors for reforming judicial institutions both because of self-interest[107] and because judge-led court reform may be unconstitutional.[108] Those concerns resonate in the values of representativeness (judicial reform without the participation of key stakeholders) and impartiality (the judge pursuing the judge's own self-interest in effecting reform), among others.[109]

II. PATENT LAW AND COURT COMPETITION FOR PATENT CASES

Having developed a theoretical framework for identifying and critiquing court competition, we now discuss an area of law in which court competition has been long-standing and pernicious: patent law.

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[104] In patent cases, disproportionate litigation and error costs also undercut the incentive function of exclusive rights. *See* Anup Malani & Jonathan S. Masur, *Raising the Stakes in Patent Cases*, 101 GEO. L.J. 637, 641 (2013).

[105] *See* Tejas N. Narechania, Tian Kisch & Delia Scoville, *Forum Crowding*, 112 CALIF. L. REV. 327, 332-33 (2024) (finding that, when a federal judicial district gets "crowded" with particular types of cases, judges move through their dockets more quickly and see their decisions reversed more frequently on appeal).

[106] *Compare* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 484 (2010) ("[M]ultilevel protection from removal is contrary to Article II's vesting of the executive power in the President. The President cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them."), *with id.* at 514 (Breyer, J., dissenting) ("[T]he Court's . . . holding threatens to disrupt severely the fair and efficient administration of the laws.").

[107] *See* Jonathan Remy Nash, *Courts Creating Courts: Problems of Judicial Institutional Self-Design*, 73 ALA. L. REV. 1, 9 (2021) (noting that, in enacting reforms, "[o]ne might expect judges to give substantial weight to their own preferences or the preferences of their colleagues"); *see also* McAlister, *supra* note 62, at 1209 (noting the "risk that judges [will] prioritize their own values over serving broader institutional needs").

[108] *See* Nash, *supra* note 107, at 7-9 (raising concerns about nondelegation, Article III limits, and separation of powers).

[109] For instance, a judge who seeks out particular cases based on personal preference could be viewed as undermining the "rule of law," to the extent that concept is understood to encompass judicial decisions unaffected by "feelings," personal "opinion[s]," or "mood." Cass R. Sunstein, The Rule of Law 26 (Mar. 30, 2023) (unpublished manuscript), https://ssrn.com/abstract=4405238.

A. *Patents and Patent Litigation*

By statute, only the federal courts have subject matter jurisdiction over patent infringement suits; state courts are off limits.[110] Personal jurisdiction in patent infringement suits is broad and rarely contested.[111] Which leaves only the requirement of venue—an arcane doctrine, but one that's important to understanding court competition for patent cases.

The relevant statute, 28 U.S.C. § 1400(b), states that venue over a patent infringement suit is proper in the judicial district (i) "where the defendant resides" or (ii) "where the defendant has committed acts of infringement and has a regular and established place of business."[112] For decades, the Federal Circuit had held that large corporations "resided"—and hence could be sued for patent infringement—in practically every district in the country.[113] But, in 2017, in *TC Heartland LLC v. Kraft Foods Group Brands LLC*,[114] the Supreme Court overturned that decades-old rule and instead held that a corporation "resides" only in the state in which it is incorporated.[115]

Accordingly, today, venue in patent infringement suits against U.S. corporations[116] is proper only in (1) the defendant's state of incorporation or (2) any district in which the defendant has committed acts of infringement and has a regular and established place of business. Because most patent infringement defendants are incorporated in Delaware,[117] establishing venue anywhere else requires a patentee to show that the defendant has a permanent, physical location in the proposed district from which it steadily does business[118]—something that's not always easy to establish in a rural or sparsely populated district.

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[110] 28 U.S.C. § 1338(a) ("No State court shall have jurisdiction over any claim for relief . . . relating to patents . . . .").

[111] *See, e.g.*, Beverly Hills Fan Co. v. Royal Sovereign Corp., 21 F.3d 1558, 1565 (Fed. Cir. 1994) (holding that a defendant creates the required "minimum contacts" any time its products travel through the stream of commerce to be sold in a particular state).

[112] 28 U.S.C. § 1400(b).

[113] *See* VE Holding Corp. v. Johnson Gas Appliance Co., 917 F.2d 1574, 1575 (Fed. Cir. 1990), *abrogated by* TC Heartland LLC v. Kraft Foods Grp. Brands LLC, 581 U.S. 258 (2017).

[114] 581 U.S. 258 (2017).

[115] *Id.* at 262-63.

[116] Foreign defendants may be sued for patent infringement in any district. 28 U.S.C. § 1391(c)(3); *see In re* HTC Corp., 889 F.3d 1349, 1354 (Fed. Cir. 2018).

[117] *See About the Division of Corporations*, DEL. DIV. OF CORPS., https://corp.delaware.gov/aboutagency [https://perma.cc/AF8U-PJZ8] (last visited Dec. 16, 2024) ("More than 66% of the Fortune 500 have chosen Delaware as their legal home.").

[118] *See In re* Cray Inc., 871 F.3d 1355, 1362-63 (Fed. Cir. 2017).

B. *Court Competition for Patent Cases*

With this doctrinal foreshadowing, we can now tell the story of court competition in patent law. Though the federal Patent Act was one of the first statutes passed by the First Congress,[119] we can start in the 1980s, when the modern era of patent litigation began.[120] During that decade, Congress created the Federal Circuit to hear appeals in all patent cases nationwide,[121] jury trials returned to patent litigation after several decades of absence,[122] the amount of patent litigation increased,[123] and the practice of patent law began to shift from the domain of specialist lawyers at boutique law firms to a key revenue stream for large general practice firms.[124]

With the unification of *substantive* patent law under the Federal Circuit,[125] savvy lawyers representing patentees began to search for district courts that offered *procedural* advantages.[126] Patent cases have long naturally clustered in districts with large population centers, patent intensive industries, or both.[127] It's not surprising that the districts that consistently have the largest dockets of patent cases include the Northern and Central Districts of California (Silicon Valley and Los Angeles, respectively), the Northern District of Illinois (Chicago), the District of Massachusetts (Boston/Cambridge and Route 128), and the District of New Jersey ("Pharm Country").[128]

[119] Patent Act of 1790, Pub. L. No. 1-7, 1 Stat. 109.

[120] For some historical context, see Christopher Beauchamp, *The First Patent Litigation Explosion*, 125 YALE L.J. 848, 882 (2016) (discussing the quantity of patent litigation from the 1830s through present).

[121] Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25.

[122] In 1978, only 8.3% of patent trials were before a jury but, today, more than 70% of patent trials involve a jury. *See* Mark A. Lemley, *Why Do Juries Decide if Patents Are Valid?*, 99 VA. L. REV. 1673, 1706 (2013).

[123] Mark A. Lemley, *The Surprising Resilience of the Patent System*, 95 TEX. L. REV. 1, 3-4 (2016) (noting that less than one thousand patent cases were filed in 1980 but over five thousand were filed in 2012).

[124] *See* Paul R. Gugliuzza, *Elite Patent Law*, 104 IOWA L. REV. 2481, 2482 (2019).

[125] For an early study documenting the uniformity the Federal Circuit brought to patent law, see Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1, 8 (1989).

[126] *See* Megan M. La Belle, *The Local Rules of Patent Procedure*, 47 ARIZ. ST. L.J. 63, 66 (2015) (discussing how "fragmented" procedural practice from one district to another encourages forum shopping); *see also* Moore, *supra* note 43, at 892 ("The differing procedures for resolving patent cases and differing potential outcomes create an environment in which forum shopping has a major impact on litigation.").

[127] *See* Jeanne C. Fromer, *Patentography*, 85 N.Y.U. L. REV. 1444, 1447 (2010).

[128] *See* Matthew Sag, *IP Litigation in U.S. District Courts: 1994-2014*, 101 IOWA L. REV. 1065, 1087-88, 1097 tbl.7 (2016); Franklin Carpenter, *The Top 6 Pharmaceutical Companies in New Jersey*, BIOSPACE (June 23, 2017), https://www.biospace.com/top-9-biotech-giants-to-work-for-in-new-jersey [https://perma.cc/5YTW-B43F] ("New Jersey . . . plays a large role in both the U.S. pharmaceutical industry and the Pharm Country hotbed.").

In the tale of court competition for patent cases, however, three districts stand out: the Eastern District of Texas, the Western District of Texas, and the District of Delaware.

1. Eastern District of Texas

Around the turn of the millennium, the Eastern District of Texas was an afterthought for most patent litigants. Besides a few infringement suits filed by Texas Instruments, which was trying to avoid the crowded docket in the Northern District of Texas (which includes the company's Dallas headquarters), hardly any patent cases were filed there.[129]

In 1999, T. John Ward was sworn in as district judge in Marshall.[130] Judge Ward soon began following patent local rules that borrowed heavily from the Northern District of California's local rules. Judge Ward was able to process patent cases quickly, and the Eastern District soon became known as a patent "rocket docket."[131] Around the same time, the Texas legislature enacted several laws limiting liability and damages in tort cases, which spurred some lawyers who previously practiced personal injury law to move into patent litigation.[132]

Patentees appreciated Judge Ward's interest in patent cases and his court's predictable procedures for handling patent cases. The number of patent cases filed in the Eastern District of Texas increased from 32 in 2002 to more than 200 in 2006.[133] Patentees liked the Eastern District for many reasons, including the speed at which cases progressed through discovery and toward trial,[134] the court's reluctance to grant dispositive motions,[135] the low rate at which it granted

[129] *See* Timothy T. Hsieh, *Approximating a Federal Patent District Court After* TC Heartland, 13 WASH. J.L., TECH. & ARTS 141, 146 (2018).

[130] Hilda Galvan, Chad Everingham, Clyde Siebman, George Bramblett & Xuan-Thao Nguyen, *The America Invents Act: A Tribute to the Honorable John Ward*, 15 SMU SCI. & TECH. L. REV. 459, 465 (2012).

[131] *See* Hsieh, *supra* note 129, at 146-47.

[132] *See* Ronen Avraham & John M. Golden, *"From PI to IP": Litigation Response to Tort Reform*, 20 AM. L. & ECON. REV. 168, 196-97 (2018).

[133] Julie Creswell, *So Small a Town, So Many Patent Suits*, N.Y. TIMES (Sept. 24, 2006), https://www.nytimes.com/2006/09/24/business/24ward.html.

[134] For instance, the Northern District of California's patent rules provided for an eighteen-month discovery period; Judge Ward permitted only nine months. Anderson, *supra* note 7, at 652.

[135] *See* Mark A. Lemley, *Where to File Your Patent Case*, 38 AIPLA Q.J. 401, 411 tbl.4 (2010) (reporting that, from 2000 through 2010, 8% of cases in Eastern District of Texas made it to trial, second highest among all districts).

motions to transfer venue,[136] and patentees' high rate of success at trial (often attributed to a jury pool that strongly favored property rights).[137]

In 2011, Judge Ward retired, and Judge Rodney Gilstrap took over the Eastern District's Marshall Division. Judge Gilstrap adopted practices that made his courtroom even more appealing for patentees, such as requiring defendants to file what might be called *meta motions*—motions requesting permission to file motions for summary judgment or to invalidate a patent for lack of eligible subject matter.[138] And the patent cases kept coming: between 2013 and 2017, over 5,000 patent disputes were filed in Judge Gilstrap's court, including 1,686 in 2015 alone.[139]

How did not just a single district, but a *single judge*—in Marshall, Texas, of all places—end up with 40% of the country's patent cases? It was the Eastern District's division-based case assignment practice, which enabled (and still enables) judge shopping. For many years, the Eastern District assigned 100% of patent cases filed in Marshall to Judge Gilstrap[140] (and to Judge Ward before that). Under the most recent general order, Judge Gilstrap receives 90% of civil cases filed in Marshall (including patent cases).[141] Thus, patentees can effectively select Judge Gilstrap by simply filing their case in Marshall, which entails nothing more than selecting "Marshall" as an option on the court's electronic filing system.

The vast majority of infringement suits filed in the Eastern District of Texas were (and still are) filed by non-practicing entities ("NPEs") (or, more pejoratively, "patent trolls")—entities that don't make any products or provide services but that exist only to enforce patents.[142] Whatever one thinks of that as a business model,[143] the litigation strategy for many NPEs is clear: file a case,

[136] *See* Brian J. Love & James Yoon, *Predictably Expensive: A Critical Look at Patent Litigation in the Eastern District of Texas*, 20 STAN. TECH. L. REV. 1, 17 (2017).

[137] In 2006, *The New York Times* reported that patent plaintiffs in Marshall won at trial 78% of the time. Creswell, *supra* note 133. For a counter to the conventional wisdom that East Texas juries favor patentees, see Andrei Iancu & Jay Chung, *Real Reasons the Eastern District of Texas Draws Patent Cases—Beyond Lore and Anecdote*, 14 SMU SCI. & TECH. L. REV. 299, 302-04 (2017).

[138] *See Judge Gilstrap Removes Letter Briefing Requirement for Summary Judgment Motions in Patent Cases*, HARPER & BATES LLP (July 25, 2016), https://www.harperbates.com/news/judge-gilstrap-removes-letter-briefing-requirement-for-summary-judgment-motions-in-patent-cases [https://perma.cc/6CYE-ZBH4].

[139] Anderson & Gugliuzza, *supra* note 6, at 440.

[140] *See, e.g.*, General Order 2021-08, *supra* note 31.

[141] *See* General Order Assigning Civil and Criminal Actions (E.D. Tex. Dec. 16, 2021), http://www.txed.uscourts.gov/sites/default/files/goFiles/GO%2021-19%20Assigning%20Civil%20and%20Criminal%20Actions.pdf [https://perma.cc/MWR2-LGUF].

[142] *See* Ofer Eldar & Neel U. Sukhatme, *Will Delaware Be Different? An Empirical Study of* TC Heartland *and the Shift to Defendant Choice of Venue*, 104 CORNELL L. REV. 101, 113 (2018).

[143] And reasonable minds can differ. *See* David L. Schwartz & Jay P. Kesan, *Analyzing the Role of Non-Practicing Entities in the Patent System*, 99 CORNELL L. REV. 425, 427 (2014).

spend as little as possible, avoid an early dismissal, obtain a settlement (often for an amount below what it would cost the defendant to actually litigate the case), and move on to the next defendant.[144]

Though not every case filed in the Eastern District fit that model, a lot did. Tech companies (large and small) and public interest groups complained that accused infringers couldn't get a fair shake in Marshall.[145] The Federal Trade Commission in 2016 concluded that the behavior of many NPEs was "consistent with nuisance litigation."[146] During a Supreme Court oral argument in a patent case that didn't even arise from the Eastern District, Justice Scalia identified patentees' affinity for Marshall as a "problem" and suggested that the Eastern District was a "renegade jurisdiction[]."[147] Even comedian John Oliver weighed in, noting that, to curry favor with potential jurors, frequent defendant Samsung built an ice skating rink across the street from the Marshall federal courthouse.[148]

Possibly spurred by these grievances, the Supreme Court intervened with its 2017 decision in *TC Heartland*. In that case, as discussed, the Court limited patentees' venue options to (1) the defendant's state of incorporation or (2) any district in which the defendant has committed an act of infringement and has a "regular and established place of business." Because few corporate patent defendants (think: Apple, Google, Samsung, Microsoft, and the like) are incorporated in Texas, and many lack offices or stores in the mostly rural Eastern District,[149] forum-shopping patentees were left to look for a new destination.

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[144] *See* Mark A. Lemley & A. Douglas Melamed, *Missing the Forest for the Trolls*, 113 COLUM. L. REV. 2117, 2126 (2013).

[145] *See, e.g.*, Vera Ranieri, *It's Time for the Federal Circuit to Shut Down the Eastern District of Texas*, EFF (Oct. 29, 2015), https://www.eff.org/deeplinks/2015/10/its-time-federal-circuit-shut-down-eastern-district-texas [https://perma.cc/2W42-AFS7]; Joe Mullin, *Patent Defendants Won't Receive a "Get Out of East Texas Free" Card*, ARSTECHNICA (Apr. 29, 2016, 3:50 PM), https://arstechnica.com/tech-policy/2016/04/patent-appeals-court-rejects-challenge-to-venue-rules.

[146] SUZANNE MUNCK ET AL., U.S. FTC, PATENT ASSERTION ENTITY ACTIVITY 4 (2016), https://www.ftc.gov/system/files/documents/reports/patent-assertion-entity-activity-ftc-study/p131203_patent_assertion_entity_activity_an_ftc_study_0.pdf [https://perma.cc/XG63-YGWE].

[147] *See* Transcript of Oral Argument at 10-11, eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388 (2006) (No. 05-130).

[148] "An outdoor ice rink in Texas?" Oliver quipped. "It's like building a bowling alley in space!" Last Week Tonight, *Patents: Last Week Tonight with John Oliver (HBO)*, YOUTUBE (Apr. 20, 2015), https://youtu.be/3bxcc3SM_KA.

[149] Apple even closed the two stores it had in the Eastern District to avoid having a "regular and established place of business" there. Sarah Perez, *Apple Confirms Its Plans to Close Retail Stores in the Patent Troll-Favored Eastern District of Texas*, TECHCRUNCH (Feb. 22, 2019, 12:47 PM), https://techcrunch.com/2019/02/22/apple-confirms-its-plans-to-close-retail-stores-in-the-patent-troll-favored-eastern-district-of-texas [https://perma.cc/U7CC-PVUJ]. The Eastern District's biggest city is the Dallas suburb of Plano, population 288,000.

2. Western District of Texas

The Western District of Texas is big. It spans from Interstate 35, which links Waco, San Antonio, and, crucially, Austin, in the east to El Paso, 600 miles away in the far western reaches of the state. It is much easier for a plaintiff to establish venue in the Western District than the Eastern District. Practically every major tech company has an office in Austin, if not a retail outlet or a manufacturing or research and development facility somewhere in the Western District.

Judge Albright, a former patent litigator,[150] came along at just the right time to successfully attract patent cases to his courtroom. He took the bench in 2018, the year after the Supreme Court decided *TC Heartland*, and immediately began advertising for patent plaintiffs to file suit in his courtroom, speaking at patent law conferences, giving speeches at dinners hosted by patent valuation companies, appearing on law firm webcasts about patent law, and presenting at numerous patent bar events, all with the express purpose of encouraging patentees to come to his court.[151]

Judge Albright's efforts to attract patent plaintiffs to Waco succeeded. In the two years before President Trump appointed Judge Albright, a total of five patent cases were filed in the Western District's Waco Division. In Judge Albright's first three years on the bench, over 2,000 patent cases—nearly a quarter of all patent cases nationwide—were filed there.[152]

Patentees prefer Judge Albright for many of the same reasons they liked Judge Ward, Judge Gilstrap, and the Eastern District of Texas. First, until a recent change, the Western District's case assignment practice, like the Eastern District's, enabled judge shopping. Under the Western District's general order assigning cases, Judge Albright got 100% of the cases filed in Waco.[153] And Judge Albright gives patentees the procedural features they want: fast-track case schedules,[154] a reluctance to transfer venue,[155] and a disinclination to grant early dispositive motions.[156]

Whether patentees fare better in jury trials, like in the halcyon days of the Eastern District, is not entirely clear. Overall, patentees won eleven out of the

[150] ALAN D ALBRIGHT & U.S. SENATE COMMITTEE ON THE JUDICIARY, QUESTIONNAIRE FOR JUDICIAL NOMINEES 30-41 (2018), https://www.judiciary.senate.gov/imo/media/doc/Albright%20SJQ.pdf [https://perma.cc/FY6Y-KE4Z].

[151] *See* Anderson & Gugliuzza, *supra* note 6, at 421-22.

[152] *See id.* at 451 fig.3.

[153] Amended Order 2021-05-10, *supra* note 32, at 3 (W.D. Tex. May 10, 2021), https://www.txwd.uscourts.gov/wp-content/uploads/Standing%20Orders/District/Amended%20Order%20Assigning%20Business%20of%20the%20Court%20051021.pdf [https://perma.cc/M36A-H6G2].

[154] Anderson & Gugliuzza, *supra* note 6, at 455.

[155] Paul R. Gugliuzza & Jonas Anderson, *How It Started. . .How It's Going: Venue Transfers in the Western District of Texas*, PATENTLYO (Oct. 28, 2021), https://patentlyo.com/patent/2021/10/startedhow-transfers-district.html.

[156] Anderson & Gugliuzza, *supra* note 6, at 468-69 (suggesting that defendants "have all but given up on early eligibility motions as a means to quickly end infringement disputes" in Judge Albright's court).

twenty-one jury trials Judge Albright conducted (52%) through May 31, 2023.[157] The patentee-favoring verdicts, however, include an eye-popping $2.18 billion verdict against Intel,[158] as well as several cases in which the jury found infringement to be willful, which permits the judge to increase damages up to three times the amount awarded by the jury.[159]

Over the past couple years, the Federal Circuit, members of Congress, and even the Chief Justice of the United States have shown concern about the tactics Judge Albright has used to attract (and keep) cases in Waco. The Federal Circuit has focused on Judge Albright's reluctance to grant motions to transfer venue. In more than twenty cases from October 2020 through the end of 2022, the circuit granted the extraordinary writ of mandamus to overturn a decision by Judge Albright denying a motion to transfer.[160] Over roughly the same time period, all other federal courts of appeals combined granted exactly one mandamus petition challenging a venue decision.[161]

In addition, in November 2021, the chair and ranking member of the Senate Judiciary Committee's intellectual property subcommittee asked the Judicial Conference of the United States (which drafts the Federal Rules of Civil Procedure) to review the judge-assignment practices of the federal district courts in patent cases.[162] A month later, Chief Justice Roberts, in his annual report on the federal judiciary, flagged the "arcane but important matter" of "judicial assignment and venue for patent cases" as a topic that "will receive focused attention" from the Judicial Conference (of which he is the chair) in the future.[163]

All of this concern led to change. In July 2022, the chief judge of the Western District of Texas entered an order stating that patent cases filed in Waco—and only patent cases filed in Waco—will be assigned randomly among twelve of the district's judges, who sit in divisions as far flung as Austin, San Antonio, El Paso, and Midland.[164]

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[157] *See infra* Appendix A.

[158] VLSI Tech. LLC v. Intel Corp., No. 21-CV-00057, 2022 WL 1477725, at *10-11 (W.D. Tex. Mar. 2, 2021), *affirmed in part, reversed in part*, 87 F.4th 1332 (Fed. Cir. Dec. 4, 2023).

[159] *See* 35 U.S.C. § 284.

[160] *See infra* Appendix B.

[161] *See* J. Jonas Anderson, Paul R. Gugliuzza & Jason A. Rantanen, *Extraordinary Writ or Ordinary Remedy? Mandamus at the Federal Circuit*, 100 WASH. U. L. REV. 327, 346 (2022).

[162] Letter from Thom Tillis, U.S. Sen., & Patrick Leahy, U.S. Sen., to John Roberts, C.J. 1 (Nov. 2, 2021) [hereinafter Tillis & Leahy Letter], https://www.patentprogress.org/wp-content/uploads/2021/11/11.2-TT-PL-Ltr-to-Judicial-Conference-re-Patent-Forum-Shopping-Final.pdf [https://perma.cc/HUG3-RLH5].

[163] CHIEF JUSTICE JOHN G. ROBERTS, JR., 2021 YEAR-END REPORT ON THE FEDERAL JUDICIARY 3, 5 (2021), https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf [https://perma.cc/6YP9-DNVM].

[164] Order Assigning the Business of the Court as It Relates to Patent Cases (W.D. Tex. July 25, 2022) [hereinafter W.D. Tex. Patent Case Assignment Order], https://www.txwd.uscourts.gov/wp-content/uploads/Standing%20Orders/District/Order%20

This randomized case assignment procedure prevents plaintiffs from choosing their judge by simply filing their case in Waco. But many new patent cases are still being assigned to Judge Albright on the ground that they are related to cases already pending before him or to cases that were assigned to him in the past.[165] And, even if judge shopping has been curbed in the Western District of Texas (for now[166]), history teaches us that a new court competitor for patent litigation will soon emerge.

3. District of Delaware

The District of Delaware has long been among the federal judicial districts with the most patent cases, largely because, as the most popular state of incorporation,[167] it's easy for plaintiffs to show that jurisdiction and venue are proper there. In every year since at least 2008, the District of Delaware has ranked among the top three districts in the country for the number of patent cases filed. Over the ten-year period from 2012 through 2021, the district received over 850 cases per year, on average.[168]

Unlike the courts that have actively sought to attract patent litigation, it's not clear the Delaware judges *want* as many patent cases as they get. Nearly a thousand patent cases every year is a lot for a district that has only four active judges[169]—not to mention a district that has dealt with multiple concurrent vacancies over the past decade[170] and that, unlike districts in Texas, receives a disproportionate share of *pharmaceutical* patent cases, which are technical,

Assigning%20the%20Business%20of%20the%20Court%20as%20it%20Relates%20to%20Patent%20Cases%20072522.pdf [https://perma.cc/93BB-GX6F].

[165] *See* Dennis Crouch, *Throwing Some Chill Back on WDTex*, PATENTLYO (Dec. 16, 2022), https://patentlyo.com/patent/2022/12/throwing-chill-wdtex.html.

[166] The chief judge could rescind or amend the order on assignment of patent cases at any time. *See* Andrew Karpan, *As WDTX Gets New Top Judge, Patent Attys Play Wait and See*, LAW360 (Nov. 18, 2022, 9:27 PM), https://www.law360.com/articles/1539706. Plus, there are indications that other judges in the Western District will adopt the procedures that attracted patentees to Judge Albright's court in the first place. *See* Michael Shapiro, *West Texas Still Tops Patent Venues, Even After Cases Randomized*, BLOOMBERG L. (Dec. 27, 2022, 5:15 AM), https://www.bloomberglaw.com/bloomberglawnews/ip-law/BNA%2000000184f23ad494a18fff3fdcbd0001.

[167] *See* DEL. DIV. OF CORPS., *supra* note 117 ("More than 66% of the Fortune 500 have chosen Delaware as their legal home.").

[168] One can verify these numbers by using the Court and Judge Comparison Report tool on Docket Navigator. DOCKET NAVIGATOR, https://search.docketnavigator.com/patent/search (last visited Dec. 16, 2024).

[169] *See* 28 U.S.C. § 133(a).

[170] Jeff Mordock, *Delaware Court to Solve Judicial Shortage with Visiting Judges*, DEL. ONLINE, https://www.delawareonline.com/story/money/2017/05/30/delaware-court-meet-case-demand-visiting-judges/354631001 [https://perma.cc/Z49A-TE7W] (last updated May 30, 2017, 2:27 PM).

complex, and less likely to settle.[171] The district's bench has been stretched so thin that it's brought in visiting judges for the sole purpose of hearing patent cases.[172]

In contrast to the Texas courts that have tried to attract patent cases, the District of Delaware has begun to take steps that, arguably, are designed to dissuade patentees from filing there. Most notably, the district's chief judge, Colm Connolly, entered an order requiring plaintiffs to disclose whether their cases are being financed by third parties.[173] Many patentees—particularly non-practicing entities—are loath to disclose that information and have fought Judge Connolly's order, characterizing it as an "inquisition" that's "legally irrelevant" and "legally indefensible."[174] Proper or not, Judge Connolly's order is viewed as "encouraging would-be filers to seek other venues for their suits."[175] Early indications are that the order is having that impact: the number of patent cases filed in Delaware declined by over 30% in the five months after Judge Connolly's order took effect.[176] But, if this eulogy for Delaware as a patent hotspot is premature, it wouldn't be the first time.[177]

The salient point is that, though some judges have competed to *attract* patent litigation, others have tried to *deter* patent filings. Still other judges—who we haven't even discussed yet—have tried to (or hoped to) bring patent litigation to their districts, but unsuccessfully.[178] Judicial behavior designed to attract or dissuade patent filings complicates the common perception of forum shopping as a process driven entirely by the parties and their lawyers.

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[171] *See generally* MICHAEL FLYNN & BEN YENERALL, MORRIS NICHOLS ARSHT & TUNNELL, 2022: D. DEL. PATENT LITIGATION REVIEW 2 (2022), https://www.morrisnichols.com/media/publication/15192_MorrisNichols_2022-DDel-Patent-Litigation-Review.pdf [https://perma.cc/W6LV-GSA4] (noting that, in 2022, 63% of all pharmaceutical patent cases were filed in Delaware).

[172] *See* Andrew E. Russell, *A New Visiting Judge for Patent Cases in Delaware?*, IP/DE (Jan. 3, 2022), https://ipde.com/blog/2022/01/03/a-new-visiting-judge-for-patent-cases-in-delaware [https://perma.cc/GD3Y-JYWX].

[173] Standing Order Regarding Third-Party Litigation Funding Arrangements (D. Del. Apr. 18, 2022), https://www.ded.uscourts.gov/sites/ded/files/Standing%20Order%20Regarding%20Third-Party%20Litigation%20Funding.pdf [https://perma.cc/H269-EBNE].

[174] Petition for a Writ of Mandamus at 25, *In re* Nimitz Techs. LLC, No. 21-CV-01247 (Fed. Cir. Nov. 16, 2022).

[175] Andrew Strickler, *Del. Judge's Tough Stance on Disclosures Roils Patent Bar*, LAW360 (Dec. 2, 2022, 4:33 PM), https://www.law360.com/ip/articles/1554050.

[176] *See* Shapiro, *supra* note 166.

[177] *See* Klerman & Reilly, *supra* note 8, at 282 (noting a decline in Delaware's patent case load in 2014 due to procedural changes that were "widely seen as aiming to curb abusive patent litigation by patent assertion entities").

[178] *See* Anderson, *supra* note 7, at 659-60 (discussing the Western District of Pennsylvania and Northern District of Texas); *see also infra* notes 262-63.

III. WHY DO JUDGES COMPETE FOR PATENT CASES?

Most people are surprised to hear there are judges who seek out cases to adjudicate. It's inconsistent with the notion of a judge as a neutral arbiter. And the incentives to seek out more work aren't obvious: a judge who hears a lot of cases isn't paid more than a judge who hears few.

In this Part of the Article, we provide a novel contribution to the scholarly literature on judicial behavior by identifying numerous incentives that, we think, explain the counterintuitive phenomenon of judges—federal district judges in particular—trying to attract case filings. We initially provide examples drawn from patent law, where the phenomenon is most established, before extending our model to other areas of the law in the next Part.

A. *Intellectual Interest or Prior Experience*

The simplest reason judges seek out certain types of cases, and one that might seem benign on first glance, is that the cases are interesting to the judge, often because of the judge's prior experience in the field. All humans have preferences,[179] and those preferences manifest in the work lives we pursue. There's no reason to think it's any different for a judge. A judge who enjoys history might be eager to hear a case about an ancient shipwreck; a judge who is a musician might be drawn to copyright cases.[180]

Consider Judge Ward of the Eastern District of Texas, the first judge who actively sought to increase his district's patent caseload. Prior to taking the bench, he had almost no patent experience.[181] But that didn't stop him from encouraging patent litigants to come to his courtroom. The intellectual challenge of patent disputes was a key reason Judge Ward gave for his interest in the field.[182]

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[179] *See* Franz Dietrich & Christian List, *Where Do Preferences Come From?*, 42 INT'L J. GAME THEORY 613, 614-15 (2012).

[180] And, if a judge is both a history buff and a musician, the judge might be lucky enough to hear a case about a shipwreck *and* copyright. *See* Allen v. Cooper, 589 U.S. 248 (2020).

[181] *See* Panel Discussion, *The History and Development of the EDTX as a Court with Patent Expertise: From TI Filing, to the First* Markman *Hearing, to the Present*, 14 SMU SCI. & TECH. L. REV. 253, 256 (2011).

[182] Klerman & Reilly, *supra* note 8, at 266; *see also* Ryan Davis, *Icon of IP: Former U.S. District Judge T. John Ward*, LAW360 (July 8, 2016, 8:13 PM), https://www.law360.com/articles/814679/icon-of-ip-former-u-s-district-judge-t-john-ward.

Other judges feel similarly to Judge Ward about the challenge and appeal of patent cases.[183] While the attraction of patent cases is far from universal,[184] ninety-four district judges from fourteen district courts willingly participated in the now-defunct Patent Pilot Program,[185] which allowed judges to volunteer to hear more patent cases than they would normally be assigned.[186]

Judge Albright of the Western District of Texas has also said that he enjoys the challenge of patent cases:

> In the 1990s as a magistrate, I handled some patent trials. I saw that area of the law as a real challenge but enjoy the issues. By 2001 I think I was doing patent trials [in private practice]. I like the triumvirate of working with patent law, having to learn new technology after new technology, and being a good trial lawyer.[187]

As Judge Albright's comment suggests, a common reason judges prefer to hear certain types of cases is because of prior professional experience in the area. Several judges with heavy dockets of patent cases worked in patent law before taking the bench (though none of them have gone to the lengths Judge Albright has to bring patent cases into their courtrooms). Judge Lucy Koh, now on the Ninth Circuit and formerly on the Northern District of California, litigated many software patent cases.[188] She presided over numerous high-profile patent

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[183] *See, e.g.*, Tim McGlone, *Resigning Judge Says He Was Tired of Drug and Gun Cases*, VIRGINIAN-PILOT, https://www.pilotonline.com/2008/02/14/resigning-judge-says-he-was-tired-of-drug-and-gun-cases (last updated Aug. 4, 2019, 7:14 PM) (reporting that U.S. District Judge Walter D. Kelley Jr. enjoyed complex intellectual property cases more than drug and gun cases); Diane P. Wood, *Is It Time to Abolish the Federal Circuit's Exclusive Jurisdiction in Patent Cases?*, 13 CHI.-KENT J. INTELL. PROP. 1, 10 (2013) (stating she personally "would welcome the re-integration of [patent] law in the regional circuits" by abolishing the Federal Circuit's exclusive jurisdiction).

[184] *See, e.g.*, *Judicial Panel Discussion on Science and the Law*, 25 CONN. L. REV. 1127, 1145 (1993) (Judge Alfred Covello: "[A patent trial is] like somebody hit you between your eyes with a four-by-four. It's factually so complicated.").

[185] Patent Cases Pilot Program, Pub. L. No. 111-349, 124 Stat. 3674 (2011); *see* Ron Vogel, *The Patent Pilot Program: Reassignment Rates and the Effect of Local Patent Rules*, N.Y. INTELL. PROP. L. ASS'N BULL., Oct./Nov. 2013, at 5 app. C (listing participating judges).

[186] *See* Vogel, *supra* note 185.

[187] *The Boss Is in the Courthouse: Federal Judge Alan Albright Talks Bruce Springsteen, Rules on Patent Law & More*, MAGNA LEGAL SERVS., https://magnals.com/newsletter/magnafyi-june-2021/one-on-one-with-federal-judge-alan-albright [https://perma.cc/F8ZW-GCVJ] (last visited Dec. 16, 2024); *see also* Stephen Paulsen, *The Rise and Fall of a Texas Patent Court*, COURTHOUSE NEWS SERV. (Oct. 28, 2022), https://www.courthousenews.com/the-rise-and-fall-of-a-texas-patent-court (describing an interview with Judge Albright in which he stated that "he'd loved patent law since the 1990s" because it was "an 'amazing combination' of trial law, nuances of the patent system and 'learning about technology'").

[188] In her written testimony before the Senate Judiciary committee, Judge Koh listed five patent infringement cases among her ten "most significant litigated matters." *See* LUCY

disputes as a district judge[189] and has been widely praised for her decision-making in patent cases.[190] Judge Kent Jordan followed a similar path: IP litigator to district judge (in Delaware) to appellate judge (Third Circuit).[191] Along the way, he's heard numerous patent cases, including some as a volunteer visiting judge on his old district court.[192] And Judge Cathy Bencivengo of the Southern District of California was, prior to her appointment, a partner at DLA Piper where, she said, "approximately 80%" of her practice was "intellectual property litigation, mostly patent cases."[193] Judge Bencivengo's courtroom has not become a patent litigation hotbed. But, in public remarks that both of us have seen, she's (somewhat jokingly) expressed envy of judges, like Judge Albright, whose dockets are heavily populated with patent cases.

Though seeking out cases because of intellectual interest or prior experience might seem benign from a normative perspective, it isn't harmless. As we discussed above, to bring cases in and keep them coming, judges must favor the party who chooses the forum. So, a judge who seeks cases based on interest or expertise risks imperiling the core value of impartiality. Moreover, a judge whose attention is occupied with, say, patent cases, might not give the same attention or care to nonpatent cases,[194] raising questions about accuracy, representativeness, and ethicality.

B. *Lawyering Quality and the Comparative Advantage*

Because of the large damages at stake,[195] patent cases tend to be litigated by competent (and well-compensated) lawyers.[196] Over the past few decades, the largest, most prestigious general practice law firms have cannibalized smaller

HAERAN KOH & U.S. SENATE COMM. ON THE JUDICIARY, QUESTIONNAIRE FOR JUDICIAL NOMINEES 1, 64-69 (2016), https://www.judiciary.senate.gov/imo/media/doc/Koh%20Senate%20Questionnaire%20Final.pdf [https://perma.cc/TT7U-JUYN].

[189] *See, e.g.*, Apple, Inc. v. Samsung Elecs. Co., 920 F. Supp. 2d 1079 (N.D. Cal. 2013), *affirmed in part, reversed in part*, 786 F.3d 983 (Fed. Cir. 2015), *reversed and remanded*, 580 U.S. 53 (2016).

[190] *See, e.g.*, Press Release, U.S. Cts. for the Ninth Cir., Senate Confirms Judge Lucy Haeran Koh to Seat on U.S. Court of Appeals for the Ninth Circuit (Dec. 14, 2021), https://cdn.ca9.uscourts.gov/datastore/ce9/2021/12/Koh_Lucy_Confirmed.pdf [https://perma.cc/X77K-7W62].

[191] *Kent A. Jordan*, PENN CAREY L. U. OF PA., https://www.law.upenn.edu/faculty/kentj [https://perma.cc/X3KP-RV53] (last visited Dec. 16, 2024).

[192] Mordock, *supra* note 170.

[193] *See* CATHY ANN BENCIVENGO, U.S. SENATE COMM. ON THE JUDICIARY, QUESTIONNAIRE FOR JUDICIAL NOMINEES 26-27 (2011), https://www.judiciary.senate.gov/imo/media/doc/CathyBencivengo-PublicQuestionnaire.pdf [https://perma.cc/H885-AENL].

[194] *See* Narechania et al., *supra* note 105, at 376 (finding "negative effects on decision quality" among "those judges who have evinced some preference for patent cases").

[195] *See* Douglas J. Kline, *Patent Litigation: The Sport of Kings*, MIT TECH. REV. (Apr. 28, 2004), https://www.technologyreview.com/2004/04/28/232981/patent-litigation-the-sport-of-kings [https://perma.cc/TA3Q-PTLP].

[196] *See* Richard A. Posner & Albert H. Yoon, *What Judges Think of the Quality of Legal Representation*, 63 STAN. L. REV. 317, 331 tbl.6 (2011).

patent boutiques.[197] Many patent cases are now handled on contingency arrangements, supported by third-party funding from sophisticated investors, or both.[198] At the appellate level, patent litigation is increasingly dominated by a small group of über-elite advocates with significant experience across all federal courts of appeals and the U.S. Supreme Court.[199]

It's not a stretch to suggest that, all things being equal, a judge would prefer to preside over cases involving high-quality (and high-cost) attorneys, like the ones who litigate most patent cases, to cases litigated by lawyers retained by less well-heeled clients.[200] Lower skilled advocates can require the judge and the judge's staff to do more independent research into the facts or relevant law.[201] Also, most federal judges were litigators before taking the bench,[202] so they likely appreciate hearing from lawyers who are skilled at the craft. Of course, having attorneys willing to fight about every single issue may not always be a good thing from a judge's perspective.[203] But, if your job is listening to and deciding between lawyerly claims, it's appealing to have quality advocates to deal with. After all, though an Article III judgeship is a revered position, some judges ultimately find it to be repetitive, monotonous, and even boring.[204]

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[197] *See* Derek Handova, *Who's Winning: Big Law Moving into IP Practice or IP Boutiques Holding Their Own?*, IPWATCHDOG (Nov. 7, 2016, 9:30 AM), https://ipwatchdog.com/2016/11/07/big-law-ip-practice-ip-boutiques [https://perma.cc/NY6C-P5VJ]; *see also* David L. Schwartz, *The Rise of Contingent Fee Representation in Patent Litigation*, 64 ALA. L. REV. 335, 353 (2012) (stating that general practice firms have "poached experienced patent lawyers from the boutiques").

[198] Kelcee Griffis, *Litigation Finance Gains Traction in Patent Infringement Cases*, BLOOMBERG L. (Oct. 20, 2022, 4:46 AM), https://news.bloomberglaw.com/ip-law/litigation-finance-gains-traction-in-patent-infringement-cases. For a general discussion of why third-party litigation funding has become more common in the United States, see Joanna M. Shepherd & Judd E. Stone II, *Economic Conundrums in Search of a Solution: The Functions of Third-Party Litigation Finance*, 47 ARIZ. ST. L.J. 919, 920 (2015).

[199] Gugliuzza, *supra* note 124, at 2482.

[200] *See* Bechtold et al., *supra* note 10, at 514.

[201] *See* Posner & Yoon, *supra* note 196, at 331 tbl.6, 336 tbl.10 (reporting that judges were more likely to be forced to conduct additional legal research when skill of parties' lawyers was imbalanced and that skill imbalance happens less in intellectual property cases than others); *see also* Katherine Shaw, *Friends of the Court: Evaluating the Supreme Court's Amicus Invitations*, 101 CORNELL L. REV. 1533, 1542 (2016) (describing the Justices' appreciation of the high-quality advocacy provided by elite Supreme Court bar).

[202] *See* Albert Yoon, *Love's Labor's Lost? Judicial Tenure Among Federal Court Judges: 1945-2000*, 91 CALIF. L. REV. 1029, 1044 tbl.2 (2003).

[203] *See generally* Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 635 (1985) ("[M]ost lawyers . . . prefer to leave no stone unturned, provided, of course, they can charge by the stone. . . . [M]ore is always better. For the client and the courts, the calculus may be otherwise.").

[204] *See* Jeffrey W. Stempel, *Two Cheers for Specialization*, 61 BROOK. L. REV. 67, 81 (1995); *see also* Richard A. Posner, *Will the Federal Courts of Appeals Survive Until 1984?*

Not only is high-quality lawyering desirable in and of itself, patent cases (and cases in other well-lawyered fields) may be attractive to judges in places that lack busy dockets or whose dockets are otherwise populated by cases that are not intrinsically appealing. The Eastern District of Texas attracted patent plaintiffs in part because it had a light civil docket[205] and a relatively average number of criminal cases.[206]

Unlike the Eastern District of Texas, the Western District of Texas has a heavy criminal caseload. In 2021, the district received more criminal felony filings per judge than any district in the country.[207] But the number of criminal filings varies significantly among the district's divisions. Two divisions, El Paso and Del Rio, handle over 64% of the district's criminal cases.[208] The Waco Division, on the other hand, handles only 3% of the district's criminal docket.[209] Thus, a judge in Waco would seem to have plenty of time to fill with other types of cases. Like patent cases.[210]

Regardless of caseload, patent litigation may appeal to judges because the alternative (few complex civil cases, or, more likely, an endless stream of routine criminal guilty pleas[211]) is far *less* appealing. Judge Ward of the Eastern District of Texas, asked once at a panel discussion why he decided to court patent litigants, put it bluntly: "I find those cases intellectually challenging. Nothing would be worse than trying nothing but FELA cases. Products liability dockets are gone and have started to change. I found these cases intellectually challenging."[212]

An Essay on Delegation and Specialization of the Judicial Function, 56 S. CAL. L. REV. 761, 779 (1983) ("One does not have to be a Marxist, steeped in notions of anomie and alienation, to realize that monotonous jobs are unfulfilling for many people . . . .").

[205] *See* Avraham & Golden, *supra* note 132, at 168-69.

[206] U.S. CTS., U.S. DISTRICT COURTS—COMBINED CIVIL AND CRIMINAL FEDERAL COURT MANAGEMENT STATISTICS 12-MONTH PERIOD ENDING DECEMBER 31, 2021, at 5 (2021) https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distcomparison1231.2021.pdf [https://perma.cc/X8FL-RJX8] (last visited Dec. 16, 2024) (reporting that, in 2021, the Eastern District received 154 criminal felony filings per judge, slightly below the average of all district courts in the Fifth Circuit (158)). In a similar vein, the District of Delaware has a very light criminal docket: in 2021, it received only 20 criminal filings per judge. *Id.* at 3.

[207] *Id.* at 5.

[208] U.S. DIST. CT. W. DIST. OF TEX., 2021 CALENDAR YEAR STATISTICAL REPORT 3 (2021), https://www.txwd.uscourts.gov/wp-content/uploads/District%20Statistics/2021/Calendar%20Year%20Statistics%20-%202021.pdf [https://perma.cc/4R84-Y7XH].

[209] *Id.*

[210] *But cf.* Narechania et al., *supra* note 105, at 353 (discussing the "crowding" of Judge Albright's docket and its consequences).

[211] *See* Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1304-05 (2018).

[212] *See* Panel Discussion, *supra* note 181, at 257. FELA is an acronym referring to the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, which governs the rights of injured railroad employees.

C. *Prestige, Popularity, and Fame*

The prestige, popularity, and influence of federal appellate judges is a well-explored topic in legal scholarship.[213] But district judges have mostly escaped that sort of analysis.[214] True, certain district *courts* are viewed as more prestigious than others.[215] But individual judges—not as much. In part that's because, empirically, it's hard to analyze district judge influence with the usual tool—citations—because many district court rulings are not easily accessible in commercial databases.[216]

But even if it's hard to measure the influence of a particular district judge, one way a judge can increase the judge's public profile is by specializing in a particular area of law. As Edward Cheng has written: "From the standpoint of reputation, perhaps judges become most famous when practitioners regularly read their opinions, and since legal practice is balkanized into narrow subfields, *judge[s] who specialize can capture the recognition of those subfields*."[217] So, becoming known as, say, *the* patent judge carries celebrity and attention from litigants, scholars, and commentators who work in that field.[218]

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[213] For a small sample of the literature, see generally David Klein & Darby Morrisroe, *The Prestige and Influence of Individual Judges on the U.S. Courts of Appeals*, 28 J. LEGAL STUD. 371 (1999); William M. Landes, Lawrence Lessig & Michael E. Solimine, *Judicial Influence: A Citation Analysis of Federal Courts of Appeals Judges*, 27 J. LEGAL STUD. 271 (1998); and Stephen Choi & Mitu Gulati, *A Tournament of Judges?*, 92 CALIF. L. REV. 299 (2004).

[214] *But cf.* Kerry Kassam, *Judging the Judges: Who Are the Most-Cited New Jurists on the Federal Bench?*, ABOVE THE L. (Apr. 23, 2015, 2:46 PM), https://abovethelaw.com/2015/04/judging-the-judges-who-are-the-most-cited-new-jurists-on-the-federal-bench [https://perma.cc/9GGS-2KKY] (ranking district judges according to citation numbers).

[215] The Southern District of New York and the District of the District of Columbia come to mind because of, among other things, their geographic locations, the high-profile nature of their dockets, and their reputations for sending judges (and their law clerks) to higher courts. If you want proof, there's a forum on the website, *Top Law Schools*, titled "'Best' non-D.DC/SDNY district courts." *"Best" Non-D.DC/SDNY District Courts Forum*, TOP L. SCHS., https://www.top-law-schools.com/forums/viewtopic.php?f=34&t=252309 (last visited Dec. 16, 2024).

[216] *See* Christina L. Boyd, Pauline T. Kim & Margo Schlanger, *Mapping the Iceberg: The Impact of Data Sources on the Study of District Courts*, 17 J. EMPIRICAL LEGAL STUD. 466, 467-69 (2020).

[217] Edward K. Cheng, Specialist Judges 17-18 (Apr. 14, 2008) (unpublished manuscript), https://ssrn.com/abstract=1119603 (emphasis added).

[218] *See, e.g.*, Hal Wegner, *Next Tuesday! Chief Judge Holderman (N.D. Ill.), Leading Patent Jurist, Speaks at GW April 16th; Sidney Katz Remembered*, L.A. INTELL. PROP. L. ASS'N (Apr. 9, 2013), https://web.archive.org/web/20141206042119/http://www.laipla.net/next-tuesday-chief-judge-holderman-n-d-ill-leading-patent-jurist-speaks-at-gw-april-16th-sidney-katz-remembered; Edward Reines, *Northern District of California's New Patent Rules*, PATENTLYO (Feb. 3, 2008), http://patentlyo.com/patent/2008/02/northern-distri.html (describing the district's local patent rules as "the vision of Judge Ronald M. Whyte, a leading jurist in the patent field").

Specialization can also create opportunities for appointment to a more prestigious position—a federal court of appeals. Though for any given district judge the odds of promotion are long,[219] in the last two decades, at least four district judges who were known for handling patent cases have been appointed to a federal court of appeals: Kent Jordan (Third Circuit), Kathleen O'Malley (Federal Circuit), Lucy Koh (Ninth Circuit), and Leonard Stark (Federal Circuit).[220] And though the Federal Circuit has rarely invited district judges to sit by designation the past few years, those invitations almost always go to judges with heavy patent dockets.[221]

Even without elevation to a court of appeals, judges with large dockets of patent cases become celebrities in the patent law community. Judge Ward of the Eastern District of Texas, for example, was once described as a "patent 'rock star.'"[222] High-profile and well-funded patent bar associations often invite "patent judges" to speak at their conferences. As Dan Klerman and Greg Reilly observed in writing about the Eastern District, "[t]hese are not the type of opportunities normally available to judges in a rural district."[223]

Judge Albright has been a particularly hot commodity, being a featured speaker at meetings of the American Intellectual Property Law Association,[224] the Intellectual Property Owners Association,[225] the IP Summit in Utah (tagline: "CLE and Ski"[226]—not to be confused with "IP and Ski" in Colorado[227]), and

[219] *Cf.* McMillion, *supra* note 55, at 13-14 (noting that, as of June 1, 2017, 26% of federal appellate judges came from a district court).

[220] *See supra* Part III.A; *Kathleen O'Malley*, SULLIVAN & CROMWELL LLP, https://www.sullcrom.com/Lawyers/Kathleen-O-Malley [https://perma.cc/8XES-ET7G] (last visited Sept. 16, 2024); *Leonard P. Stark*, GEO. WASH. L., https://www.law.gwu.edu/leonard-p-stark [https://perma.cc/M42B-NDFY] (last visited Dec. 16, 2024).

[221] *See, e.g.*, Apple Inc. v. Omni MedSci Inc., No. 2023-1034, 2024 WL 3084509 (Fed. Cir. June 21, 2024) (Albright, J., sitting by designation).

[222] Leychkis, *supra* note 13, at 207.

[223] Klerman & Reilly, *supra* note 8, at 272.

[224] Ryan Davis, *Albright Says He'll Very Rarely Put Cases on Hold for PTAB*, LAW360 (May 11, 2021, 6:50 PM), https://www.law360.com/articles/1381597.

[225] Dani Kass, *Albright Tells IP Owners He's a "Trial Lawyer's Judge*,*"* LAW360 (Sept. 30, 2021, 9:58 PM), https://www.law360.com/articles/1418566.

[226] INTELL. PROP. L. SECTION OF THE UTAH STATE BAR, IP SUMMIT, http://www.ipsummit.org/wp-content/uploads/2022/02/2022-IP-Summit-Agenda_7.pdf [https://perma.cc/4KG8-EEQD] (last visited Dec. 16, 2024); *IP Summit: CLE & Ski*, INTELL. PROP. L. SECTION OF THE UTAH STATE BAR, https://ip.utahbar.org/ip-summit.html [https://perma.cc/L8DY-YPVE] (last visited Dec. 16, 2024).

[227] Dennis Crouch, *IP & Ski 2025: The Ultimate Intellectual Property Conference Returns to Vail*, PATENTLYO (Nov. 3, 2024), https://patentlyo.com/patent/2024/11/ultimate-intellectual-conference.html ("[W]here else can you discuss the latest IP law developments with leaders in the field while riding a chairlift up to 11,500 feet[?] . . . This year's program features an extraordinary lineup of speakers, including Judge Kara Stoll from the Federal Circuit, Judge Alan Albright from the Western District of Texas, and top in-house counsel, including from Microsoft, Cisco, and Novartis.").

the Sedona Conference,[228] among others.[229] Who *wouldn't* like that sort of attention from large groups of influential and powerful people?

But attention-seeking judicial behavior raises questions not just about impartiality but also ethicality. To be clear, we don't doubt that most federal judges, when invited to participate in a conference, comply with all of the relevant ethics *rules*.[230] But the attention *alone* has value,[231] and the travel (whether paid for by the conference organizers or not) is often to fancy hotels in nice locations.[232] For example, since 2017, the Federal Circuit "Bench and Bar" Conference, organized by the Federal Circuit Bar Association, has been held at: the Coeur d'Alene Resort in Coeur d'Alene, Idaho (2017), the Hotel del Coronado in San Diego, California (2018), The Broadmoor in Colorado Springs, Colorado (2019 and 2023), the Sea Island Resort in Sea Island, Georgia (2022), and the Wild Dunes Resort in the Isle of Palms, South Carolina (2024).[233] District judges with reputations as patent experts are often invited to speak at the Federal Circuit Bench and Bar Conference.[234]

Likewise, the bench and bar conferences of patent-heavy district courts, while nominally generalist in nature, often end up being populated with patent attorneys seeking access to the judiciary's patent icons. The three most recent in-person Bench and Bar Conferences of the Eastern District of Texas, for

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[228] *The Sedona Conference WG9 and WG10 Joint Annual Meeting 2021*, SEDONA CONF., https://thesedonaconference.org/wg_9_10_joint_annual_meeting_2021 [https://perma.cc/3UYF-NUJ3] (last visited Dec. 16, 2024).

[229] *See, e.g.*, Angela Morris, *Top US Patent Judge Speaks Up About Random Case Assignments*, IAM (Nov. 18, 2022), https://www.iam-media.com/article/top-us-patent-judge-speaks-about-random-case-assignments; Eileen McDermott, *IPWatchdog LIVE Launches with Judge Albright; First Ever Paul Michel Award Goes to Kappos*, IPWATCHDOG (Sept. 12, 2021, 11:00 PM), https://ipwatchdog.com/2021/09/12/ipwatchdog-live-launches-judge-albright-first-ever-paul-michel-award-goes-kappos [https://perma.cc/YRB2-2TK6].

[230] *See generally Judiciary Financial Disclosure Report*, U.S. CTS., https://www.uscourts.gov/judges-judgeships/judiciary-financial-disclosure-reports [https://perma.cc/XR8F-CAEF] (last updated May 2024); U.S. CTS., GUIDE TO JUDICIARY POLICY: VOL. 2: ETHICS AND JUDICIAL CONDUCT: PT. D: FINANCIAL DISCLOSURE (2024), https://www.uscourts.gov/sites/default/files/guide-vol02d.pdf [https://perma.cc/8AAT-4QEB].

[231] *See* Shibeal O'Flaherty, Michael T. Sanders & Ashley Whillans, *Research: A Little Recognition Can Provide a Big Morale Boost*, HARV. BUS. REV. (Mar. 29, 2021), https://hbr.org/2021/03/research-a-little-recognition-can-provide-a-big-morale-boost.

[232] *See* Crouch, *supra* note 227 (reporting that the 2025 IP & Ski Conference will be held at "the ski-in/ski-out Grand Hyatt Vail").

[233] *See Bench & Bar Conference*, FED. CIR. BAR ASS'N, https://fedcirbar.org/programs/bench-and-bar-conference/ [https://perma.cc/K2SM-84XX] (last visited Dec. 16, 2024).

[234] *See, e.g.*, 2024 *Bench & Bar Conference*, *supra* note 233 ("Panelists will include star appellate practitioners, Federal Circuit, government, and district judges, and corporate lawyers who are experts in their respective fields.").

instance, have featured a who's who of patent judges: multiple judges from the Federal Circuit, many district judges with large dockets of patent cases—including several from outside of the Eastern District of Texas, the chief judge of the Patent Trial and Appeal Board, and the Executive Director of the Federal Circuit Bar Association.[235] The conferences have also featured dinner at AT&T Stadium (home of the Dallas Cowboys), with photos on the fifty-yard line; golf at a local country club; skeet shooting at a gun range; and indoor skydiving(!)—all with the judges of the Eastern District.[236]

Even though patent cases comprise only 10-15% of the Eastern District's overall caseload,[237] the Bench and Bar program consists of mostly patent-focused panels.[238] In fact, the non-patent sessions—which cover topics ranging from criminal law to qui tam actions to copyright and trademark law—have in the past been grouped under the label, "Non-Patent Track."[239] (The patent track, meanwhile, was called the "Main Track."[240]) The Eastern District's Bench and Bar conference has even featured entire panels of district judges *from outside the Eastern District* who have reputations as "patent judges."[241]

The fame that comes from being a patent judge can, in short, generate invitations to lavish affairs attended by some of the most powerful lawyers in America and sponsored by the world's largest law firms and corporations.[242] To

[235] *Conference Schedules: IP/Civil and Criminal Tracks*, E. DIST. OF TEX. BAR ASS'N, https://edtxbenchbar.com/2023-schedule [https://perma.cc/8PG3-UAVF] (last visited Dec. 16, 2024); *Panelists and Special Guests*, E. DIST. OF TEX. BAR ASS'N, https://web.archive.org/web/20230208193225/https://edtxbenchbar.com/panelists-2022 (last visited Dec. 16, 2024); *2019 Eastern District of Texas Bench Bar Conference Schedule*, E. DIST. OF TEX. BAR ASS'N, https://edtxbenchbar.com/wp-content/uploads/2019/08/2019-Eastern-District-of-Texas-Bench-Bar-Conference-ScheduleDraft9.CMS_.pdf?x45487 [https://perma.cc/AFU2-LJA3] (last visited Dec. 16, 2024).

[236] *See* sources cited *supra* note 235.

[237] *See* U.S. CTS., UNITED STATES DISTRICT COURTS — NATIONAL JUDICIAL CASELOAD PROFILE 35, https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0630.2024.pdf [https://perma.cc/SML6-EB49] (last visited Dec. 16, 2024) (showing the Eastern District of Texas's pending caseload to be 6,449 cases as of June 30, 2023).

[238] *See* sources cited *supra* note 235.

[239] *See 2019 Eastern District of Texas Bench Bar Conference Schedule*, *supra* note 235.

[240] *Id.* In 2023, the conference relabeled the tracks as IP/Civil and Criminal. *See Conference Schedules: IP/Civil and Criminal Tracks*, *supra* note 235.

[241] *See 2019 Eastern District of Texas Bench Bar Conference Schedule*, *supra* note 235 (featuring a panel including Judge Richard Andrews, District of Delaware; Judge Cathy Bencivengo, Southern District of California; Chief Judge Nannette Jolivette Brown, Eastern District of Louisiana; Chief Judge Barbara Lynn, Northern District of Texas; and Judge Lee Yeakel, Western District of Texas).

[242] *See, e.g.*, *2024 EDTX Bench Bar Conference: Sponsors*, E. DIST. OF TEX. BAR ASS'N, https://edtxbenchbar.com/become-a-sponsor [https://perma.cc/4SZB-5MUA] (last visited Dec. 16, 2024); *National Leaders Circle and Global Series Sponsors*, FED. CIR. BAR ASS'N, https://fedcirbar.org/sponsorships/national-leaders-circle-global-series [https://perma.cc/T4MS-6VUX] (last visited Dec. 16, 2024) (listing, among others, Google and Microsoft as sponsors).

put it bluntly, *everyone* in the patent field—and even many people who aren't patent specialists—knows who Alan Albright is.[243] The benefits of that fame—both tangible and intangible—seem clear.[244]

D. *Normative Beliefs About What the Law Should Be*

Most lawyers and law professors would agree that, in at least some cases, the law or facts (or both) are indeterminate enough to make a case's outcome impossible to predict in advance.[245] The frequency of that indeterminacy is a subject of fierce debate.[246] But it's clear that judges sometimes have leeway to make whatever decision comports with their normative beliefs about what the law *should be*.[247] Though some amount of judicial lawmaking is inevitable, it can be problematic when judges seek out cases *for the purpose of* changing or influencing the law.

Judge Albright, for instance, definitely has views about how the patent system *should* work. He has made clear that he strongly believes in the right to a jury trial in patent cases,[248] invoking that view as a reason to deny motions to stay infringement litigation pending administrative review of patent validity at the

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[243] *See, e.g.*, Brief of Professor Stephen I. Vladeck as Amicus Curiae in Support of Petitioners at 24, United States v. Texas, 599 U.S. 670 (2023) (No. 22-58) [hereinafter Vladeck Brief] (amicus brief in a case involving a Republican challenge to President Biden's immigration policies, criticizing the plaintiffs for selecting a district in which they could judge shop and noting that "patent litigants took advantage of the very same quirk in Texas procedure to file a wildly disproportionate percentage of patent suits in the Waco Division of the Western District of Texas").

[244] *See* Bechtold et al., *supra* note 10, at 515-16 (noting that judges may seek out patent litigation "to build a reputation as a successful and influential judge"); *see also* Marcus Cole, *"Delaware Is Not a State": Are We Witnessing Jurisdictional Competition in Bankruptcy?*, 55 VAND. L. REV. 1845, 1875 (2002). (reporting that "some . . . judges used the term 'psychic income' to refer to [the] prestige and satisfaction" of presiding over a large corporate bankruptcy").

[245] *See* Gary Lawson, *Legal Indeterminacy: Its Cause and Cure*, 19 HARV. J.L. & PUB. POL'Y 411, 411 (1996).

[246] So fierce it has its own Wikipedia page. *Indeterminacy Debate in Legal Theory*, WIKIPEDIA, https://en.wikipedia.org/wiki/Indeterminacy_debate_in_legal_theory [https://perma.cc/F4YG-2HDR] (last visited Dec. 16, 2024). For a more scholarly treatment, see Lawrence Solum, *Legal Theory Lexicon: Indeterminacy, Determinacy, and Underdeterminacy*, LEGAL THEORY BLOG (Dec. 8, 2019, 9:00 AM), https://lsolum.typepad.com/legaltheory/2019/12/legal-theory-lexicon-indeterminacy-determinacy-and-underdeterminacy.html.

[247] *See* KEITH J. BYBEE, ALL JUDGES ARE POLITICAL—EXCEPT WHEN THEY ARE NOT: ACCEPTABLE HYPOCRISIES AND THE RULE OF LAW 4-6 (2010).

[248] Texas Intellectual Property Law Journal, *Judge Alan Albright and Kat Li Speak About IP Litigation*, YOUTUBE, at 5:00 (Mar. 8, 2022), https://www.youtube.com/watch?v=h8fHZZOZqvI&t=645s.

PTAB.[249] Yet the Supreme Court has, contrary to Judge Albright's normative belief, squarely rebuffed a Seventh Amendment challenge to jury-less PTAB adjudication of patent validity.[250]

Likewise, Judge Albright has steadfastly refused to decide the question of patent eligibility at the pleading stage of the case—an important way for courts to invalidate weak patents at low cost.[251] He has insisted that deciding eligibility is "rarely appropriate" early in a case because the relevant legal test is "difficult . . . to apply and yields inconsistent results."[252] Yet the Federal Circuit has, again contrary to Judge Albright's normative belief, frequently approved of district courts deciding the issue of patent eligibility on the pleadings alone.[253]

Judge Albright also has particular views about transfer of venue. As we discussed above, the Federal Circuit has reversed his decisions on that issue more than twenty times.[254] In response to those reversals, Judge Albright has occasionally dug in, reissuing decisions not to transfer after the Federal Circuit expressed concerns about an earlier ruling.[255] Also, in numerous opinions, Judge Albright has questioned the wisdom of appellate case law governing transfer.[256]

To be sure, the law on issues like patent eligible subject matter and transfer of venue is not always clear.[257] And certain districts that *defendants* prefer in patent cases—the Northern District of California, most notably—have gained that reputation by taking precisely the opposite tack as Judge Albright: using

[249] *E.g.*, Text Order Denying Motion to Stay Case, Cont'l Intermodal Grp. – Trucking LLC v. Sand Revolution LLC, No. 18-CV-00147 (W.D. Tex. July 22, 2020).

[250] Oil States Energy Servs. v. Greene's Energy Grp., 584 U.S. 325, 335 (2018) (also holding that inter partes review does not violate Article III).

[251] *See* Paul R. Gugliuzza, *Quick Decisions in Patent Cases*, 106 GEO. L.J. 619, 652-53 (2018).

[252] Slyce Acquisition Inc. v. Syte – Visual Conception Ltd., No. 19-CV-00257, 2020 WL 278481, at *3, *6 (W.D. Tex. Jan. 10, 2020).

[253] Anderson & Gugliuzza, *supra* note 6, at 475 n.330 (collecting cases).

[254] *See supra* Part II.B.3.

[255] *See In re* DISH Network L.L.C., No. 2021-182, 2021 WL 4911981, at *1 (Fed. Cir. Oct. 21, 2021).

[256] *See* Motion Offense, LLC v. Google LLC, No. 21-CV-00514, 2022 WL 5027730, at *1 (W.D. Tex. Oct. 4, 2022) (lamenting (on our reading of the opinion) that "[t]his Court cannot ignore or overrule cases from the Federal Circuit"); Voxer, Inc. v. Facebook, Inc., No. 20-CV-00011, 2020 WL 3416012, at *3 (W.D. Tex. June 22, 2020) (critiquing the relevant case law as "somewhat anachronistic").

[257] *See* KEVIN J. HICKEY, CONG. RSCH. SERV., R45918, PATENT-ELIGIBLE SUBJECT MATTER REFORM: BACKGROUND AND ISSUES FOR CONGRESS 20-23 (2022) (noting that the Supreme Court's recent decisions on patent eligible subject matter have been "criticized as excessively vague, subjective, and unpredictable in application"); Joshua L. Sohn & Paul R. Gugliuzza, *Certifying Questions in Patent Cases*, 109 IOWA L. REV. 791, 807-08 (2024) (discussing difficulties faced by courts that must apply transfer of venue precedent developed by regional circuits—which don't hear patent cases—to transfer issues arising in patent infringement disputes).

summary judgment to avoid trial[258] and granting early motions to dismiss cases on patent eligibility grounds.[259]

But the judiciary's status as an impartial arbiter is undermined when a judge *advertises*—either in advance or as an obvious signal to litigants in future cases—strong normative views about how certain issues should be decided. The value of accuracy is also compromised when judges appear to reach decisions based not on the proof of facts or law presented in the case—and that, indeed, might be flatly inconsistent with binding law—but instead on the judge's preexisting views about the world.

E. Economic Benefits to the Local Bar and Local Community

Court competition is a business unto itself—the cases a judge brings in provide economic benefits to the local bar and local community. To be clear, when we say "economic benefits," we're not suggesting direct financial payments or bribery.[260] Rather, a judge's colleagues in the practicing bar benefit financially when a judge attracts cases. Conversely, when a judge, like Judge Connolly in Delaware, takes steps that dissuade parties from filing in a particular court, the local bar, predictably, vociferously objects.[261]

Local bar associations are closely connected with the district judges who sit in their cities. Those bar associations have an interest in increasing the legal

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[258] For instance, a simple search of Docket Navigator, *supra* note 168, reveals that, from 2020 through 2022, the Northern District of California granted 44% (34 of 77) of motions for summary judgment of noninfringement, invalidity, or unenforceability (excluding partial grants and denials). By contrast, over the same time period, the Western District of Texas granted only 26% (12 of 46) of those motions. *See* DOCKET NAVIGATOR, *supra* note 168.

[259] *See* Brandon Rash, Andrew Schreiber & Brooks Kenyon, *Overlooked Patent Cases: Lessons on Section 101 Motions*, LAW360 (Sept. 22, 2020, 1:48 PM), https://www.law360.com/articles/1310545.

[260] That said, at least one district judge with a large docket of patent cases has maintained improper financial interests in litigants that appeared in his court. *See* Joe Palazzolo, James V. Grimaldi & Coulter Jones, *Judge Rodney Gilstrap Sets an Unwanted Record: Most Cases with Financial Conflicts*, WALL ST. J. (Sept. 29, 2021, 9:02 AM), https://www.wsj.com/articles/judge-rodney-gilstrap-sets-an-unwanted-record-most-cases-with-financial-conflicts-11632920541. And the chief bankruptcy judge in the Southern District of Texas—a leading court competitor for large corporate bankruptcies—recently resigned after it was revealed that he had heard numerous cases in which his live-in girlfriend was a lawyer for the debtor. *See* Alexander Gladstone, Andrew Scurria & Akiko Matsuda, *This Judge Made Houston the Top Bankruptcy Court. Then He Helped His Girlfriend Cash In.*, WALL ST. J. (June 19, 2024, 9:00 PM), https://www.wsj.com/finance/bankruptcy-court-houston-jones-freeman-dbba77e9 (noting that the judge had approved more than $1 million in legal fees billed by his girlfriend).

[261] *See* Strickler, *supra* note 175 ("Delaware's top federal district judge is on the offensive against perceived rule-breaking in an ongoing crush of patent suits filed by 'nonpracticing' entities, roiling the local patent bar . . . .").

work in their communities.[262] Because judges often come from those same groups and maintain friendships and relationships within those groups, they may feel a sense of pride in bringing in business for local attorneys.[263] Many district courts have rules that require local counsel in all cases before the court.[264] And, even if it's not required, it can be important as a matter of strategy or practicality to retain a local lawyer.[265] In the patent realm, we've seen national law firms flock to areas of high patent litigation concentration, bringing with them work for local attorneys. Austin and Waco have seen an influx of firms with the boom in patent filings in the Western District of Texas.[266]

The effects of increased litigation can spill over beyond lawyers and law firms. Cities seeing a growth of litigation, particularly smaller ones, have experienced a noticeable increase in demand for office space, hotel rooms, and catering when the lawyers come to town.[267] As Klerman and Reilly colorfully noted, the Fairfield Inn in Marshall, Texas, "bought a subscription to PACER, the docket system for the federal courts, to cold-call lawyers scheduled for trial and sell them rooms."[268]

In addition, defendants who repeatedly litigate in a particular court find it beneficial to invest in the community. Take, as an example, Samsung—the Korean electronics giant and one of the most frequent defendants in U.S. patent

[262] For instance, in the Western District of Pennsylvania, the district's selection for the Patent Pilot Program was seen by both judges and the local patent bar as an opportunity to increase the ability to attract "out of state" patent cases. *See* Katie Angliss, *Patent Law in Pittsburgh: Perspectives from the Bench*, 11 PITT. J. TECH. L. & POL'Y, Spring 2011, at 1, 3 (2011).

[263] *See* Molly Hensley-Clancy, *U.S. District Court of Western Pennsylvania Attracts Patent Cases*, PITT. POST-GAZETTE (July 23, 2012), https://www.post-gazette.com/business/legal/2012/07/23/U-S-District-Court-of-Western-Pennsylvania-attracts-patent-cases/stories/201207230211 (discussing judges' enthusiasm for Patent Pilot Program based on the benefits to the local legal community).

[264] *See, e.g.*, D. DEL. R. 83.5(d).

[265] Klerman & Reilly, *supra* note 8, at 273.

[266] For example, Winston & Strawn opened an office across from the Waco courthouse specifically because of Judge Albright's patent docket. Jessica Corso, *Why Winston & Strawn Has Its Sights on Waco*, LAW360 (Sept. 8, 2021, 4:21 PM), https://www.law360.com/pulse/texas-pulse/articles/1418767/why-winston-strawn-has-its-sights-on-waco; *see also* Chris Opfer, *McDermott Joins Big Law Austin Rush, Raiding Baker Botts IP Team*, BLOOMBERG L. (June 30, 2022, 12:54 PM), https://news.bloomberglaw.com/business-and-practice/mcdermott-debuts-new-austin-office-with-eight-ip-partners ("Kirkland & Ellis, Latham & Watkins, Quinn Emanuel, Urquhart & Sullivan, O'Melveny & Myers and Morrison & Foerster are among major firms opening Austin offices since 2021.").

[267] Creswell, *supra* note 133; *see also* Joe Nocera, *In Town that Patent Trolls Built, Supreme Court Ruling Is Big News*, MERCURY NEWS, https://www.mercurynews.com/2017/05/26/justices-jangle-nerves-in-texas-town-that-patent-trolls-built (last updated May 26, 2017, 1:33 PM) (quoting a Marshall restaurant owner who said that catering to patent litigants makes up "50 percent of my business").

[268] Klerman & Reilly, *supra* note 8, at 273.

litigation.[269] Not only did Samsung build a skating rink across from the Marshall courthouse,[270] it has awarded over $50,000 in scholarships to students from the Eastern District.[271] Many festivals in Marshall are sponsored by Samsung or feature Samsung booths giving out freebies.[272] Local schools have received Samsung products for free and taken field trips to Samsung's semiconductor plant in Austin.[273]

Not to be outdone, patent plaintiffs have showered Marshall residents—that is, potential jurors—with gifts. For instance, during trial of a patent infringement case, TiVo purchased the Grand Champion Steer—that is, a bull—from a local festival called Farm City Week for $10,000.[274] Two weeks later, a jury awarded TiVo $74 million dollars in damages.[275] Not a bad return on investment. Critics complained that TiVo was trying to influence the jury pool in a small city.[276] TiVo claimed that it was showing its appreciation for the hospitality it had been shown.[277] And the bull? It was apparently renamed "TiVo."[278]

All of these benefits to the local bar and community can be desirable to a judge. Who doesn't like to make their friends happy? But economic benefits shouldn't motivate judicial behavior. Among other things, this dynamic raises questions about representativeness—whose values are being reflected in the decision-making process?—and ethicality—who's *benefitting* from the judge's case-seeking behavior?

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[269] *See* Pedram Sameni, *Rising to the Top in a Post-Pandemic IP World: A Look at the Most Active Patent Litigators and the Latest District Court Patent Litigation Data*, IPWATCHDOG (Jan. 31, 2023, 7:15 AM), https://ipwatchdog.com/2023/01/31/rising-top-post-pandemic-ip-world-look-active-patent-litigators-latest-district-court-patent-litigation-data/id=155974 [https://perma.cc/V6ZY-5A3Q].

[270] *See* Last Week Tonight, *supra* note 148.

[271] Joe Mullin, *Patent Troll Claims to Own Bluetooth, Scores $15.7M Verdict Against Samsung*, ARS TECHNICA (Feb. 17, 2015, 6:48 PM), https://arstechnica.com/tech-policy/2015/02/patent-troll-claims-to-own-bluetooth-scores-15-7m-verdict-against-samsung (reporting that scholarship winners received giant checks with the Samsung logo on them).

[272] For example, the Wonderland of Lights Festival is sponsored by Samsung and features the Samsung ice rink. *See Marshall, Texas Prepares to Turn On Millions of Holiday Lights*, LEDINSIDE (Nov. 8, 2013), https://www.ledinside.com/news/2013/11/marshall_texas_prepares_to_turn_on_millions_of_holiday_lights [https://perma.cc/3QP3-VTFR].

[273] Mullin, *supra* note 271 (discussing an $8,000 donation of Samsung monitors to Marshall High School).

[274] *See* La Belle, *supra* note 17, at 944-45.

[275] *Id.*

[276] Zusha Elinson, *IP Trial Strategy: Buying TiVo's Bull*, ALM: THE RECORDER (June 25, 2009, 12:00 AM), https://www.law.com/therecorder/almID/1202431746710&IP_Trial_Strategy_Buying_Tivos_Bull [https://perma.cc/JA3R-W5MB].

[277] *Id.*

[278] *Id.*

F. *Additional Resources for the Judge, the Court, and Judicial Adjuncts*

The question of *who benefits* is put into stark relief when considering how case-seeking behavior can lead to additional resources for the judge, court, and people with close professional relationships to either.

Scholars have long argued that government institutions seek to maximize their budgets and power.[279] Bureaucracy theorists posit that agency officials care about "salary, perquisites of the office, public reputation, power, patronage, output of the bureau, ease of making changes, and ease of managing the bureau," all of which depend on—and can dictate—the amount of funding the organization receives.[280] The employees of the organization, this theory goes, share an interest in budget maximization because largess and power redound to them in the form of better career prospects.[281] In the patent realm, scholars have shown that the Patent Office tends to preferentially grant patents that generate larger fees for the agency.[282] And there's much about judicial behavior on the Federal Circuit that can be understood through the lens of maximizing the court's power over the patent system.[283]

For district courts, the financial benefits of a large patent docket are clear. District courts with bigger caseloads receive more funding for improvements and upgrades to physical facilities, courtroom technology, and administrative personnel. The courtrooms in the Eastern District of Texas, for instance, were renovated in the early 2000s, in part to accommodate the district's patent caseload.[284]

The institutional benefits from an influx of patent cases are also apparent in the Western District of Texas. In July 2021, the Judicial Conference of the United States authorized the district to hire an additional magistrate judge in Waco, specifically to help Judge Albright manage the wave of patent litigation

[279] *See* WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 38-41 (1971).

[280] *Id.* at 38.

[281] William A. Niskanen, *A Reflection on Bureaucracy and Representative Government*, *in* THE BUDGET-MAXIMIZING BUREAUCRAT: APPRAISALS AND EVIDENCE 13, 18-19 (André Blais & Stéphane Dion eds., 1991); *see also* Margaret H. Lemos & Max Minzner, *For-Profit Public Enforcement*, 127 HARV. L. REV. 853, 870-71 (2014) (arguing that even low-level employees have an interest in budget maximization due to trickle-down effects on their careers).

[282] Michael D. Frakes & Melissa F. Wasserman, *Does Agency Funding Affect Decisionmaking?: An Empirical Assessment of the PTO's Granting Patterns*, 66 VAND. L. REV. 67, 70 (2013).

[283] *See* Gugliuzza, *supra* note 21, at 1796; *see also* Arti K. Rai, *Engaging Facts and Policy: A Multi-Institutional Approach to Patent System Reform*, 103 COLUM. L. REV. 1035, 1041 (2003) (examining "the Federal Circuit's assertion of power over factual issues and the manner in which this arrogation conflicts with existing principles of power allocation between administrative agencies, trial courts, and appellate courts").

[284] Xuan-Thao Nguyen, *Justice Scalia's "Renegade Jurisdiction": Lessons for Patent Law Reform*, 83 TUL. L. REV. 111, 142 n.153 (2008).

engulfing his courtroom.[285] Who did Judge Albright hire? Derek Gilliland, a local lawyer who, as one report put it, is "a defender of [Judge Albright's] broad venue stance and his former co-counsel in a massive patent case."[286] Prior to his appointment, Gilliland represented several patent plaintiffs in the Western District of Texas, including one NPE, Ikorongo, that engaged in what the Federal Circuit called "venue manipulation" in order to avoid having a case transferred out of Judge Albright's court.[287]

In addition, Judge Albright has appointed his former law clerk, Joshua Yi, as a technical advisor in numerous cases.[288] In the first half of 2021 alone, Yi received $709,714 in compensation from the litigants in cases in which he was involved.[289] Judge Albright has since appointed several additional technical advisors, including an Austin lawyer named Darryl Adams, whose firm bio identifies him as "one of the most experienced patent litigators in the Waco division of the Western District of Texas,"[290] and a Houston lawyer named Scott Woloson, who served as a law clerk to Judge Ward in the *Eastern* District of Texas.[291] As of the end of 2022, Judge Albright had entered an order directing the parties to pay a technical advisor in nearly 200 cases, in amounts ranging from a few thousand dollars to tens of thousands.[292] So, we're talking about literally millions of dollars being paid to lawyers in private practice who have been designated by Judge Albright as, essentially, surrogate law clerks.

It may not be surprising to learn that the only other district court with a patent-heavy docket that makes such extensive use of technical advisors is the Eastern District of Texas, which entered roughly 100 orders to pay technical advisors

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[285] Dani Kass, *Waco's Bulking Up to Meet Albright's Growing Docket*, LAW360 (July 27, 2021, 7:35 PM), https://www.law360.com/articles/1406765.

[286] Dani Kass, *Albright Names WDTX Litigator as New Magistrate Judge*, LAW360 (Nov. 29, 2021, 3:46 PM), https://www.law360.com/articles/1444055. Technically, the judges of the district as a whole, including Judge Albright, decide on magistrate judge appointments. *See* 28 U.S.C. § 631(a). But the smart money is that the choice was up to Judge Albright. *See* Kass, *supra* note 285.

[287] *In re* Samsung Elecs. Co., 2 F.4th 1371, 1378 (Fed. Cir. 2021).

[288] Scott Graham, *How a Former Law Clerk Earned $700K This Year as a Court-Appointed Technical Advisor*, ALM: TEX. LAW. (Aug. 26, 2021, 10:51 AM), https://www.law.com/texaslawyer/2021/08/26/how-a-former-law-clerk-earned-700k-this-year-as-a-court-appointed-technical-adviser.

[289] *Id.*

[290] *Darryl J. Adams*, SGB, https://sgbfirm.com/darryl-adams [https://perma.cc/85WX-ZWF5] (last visited Dec. 16, 2024).

[291] *About Scott Woloson*, LAW OFF. OF SCOTT WOLOSON, https://www.scottwolosonlaw.com/index.php/about-scott [https://perma.cc/2VMD-J77M] (last visited Dec. 16, 2024).

[292] https://www.bloomberglaw.com/#advanced-search/dockets_v3 (type "order to pay technical advisor" in quotations in the space for keywords, select "U.S. District Court for the Western District of Texas" for the court, then click search).

from 2019 through 2022.[293] Those advisors include Woloson,[294] David Keyzer, who clerked for Judge Folsom on the Eastern District and whose practice appears to consist entirely of serving as a technical advisor or special master,[295] and Michael Paul, a San Antonio lawyer with little online presence.[296]

To be sure, it's not unprecedented for the parties to retain a court-appointed expert in a factually complex case.[297] And it seems plausible that neutral experts can improve the dispute resolution process.[298] But the sheer quantity of appointments going to a small number of lawyers in Texas—and the large amounts of money changing hands—raises questions about ethicality and presents an opportunity for corruption.[299]

G. *Post-Judicial Career Opportunities*

Another reason a judge might seek out cases is to improve the judge's post-judicial career opportunities. Though most federal judges serve for the balance of their professional lives, an increasing proportion have resigned or retired for financial reasons and entered (or re-entered) private practice.[300] The door between the federal bench and big law firms seems to be revolving ever more quickly these days, in part because of the increased tendency of Presidents to appoint judges who are young and who, the President might hope, will serve for a long time. Some of those young-and-retiring judges have been forthright about their financial motives for seeking opportunities with the biggest and most profitable law firms in the world.[301]

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[293] https://www.bloomberglaw.com/#advanced-search/dockets_v3 (type "order to pay technical advisor" in quotations in the space for keywords, select "U.S. District Court for the Eastern District of Texas" for the court; select date range of 01/01/2019 – 12/31/2022, then click search).

[294] *See About Scott Woloson*, *supra* note 291.

[295] *Law Office of David Keyzer, P.C.*, DAVID KEYZER, https://www.keyzerlaw.com [https://perma.cc/QD4V-HAUN] (last visited Dec. 16, 2024).

[296] *See Find a Lawyer: Mr. Michael Dean 'Mike' Paul*, STATE BAR OF TEX., https://www.texasbar.com/AM/Template.cfm?Section=Find_A_Lawyer&template=/Customsource/MemberDirectory/MemberDirectoryDetail.cfm&ContactID=286658 [https://perma.cc/9FPM-ZMND] (last visited Dec. 16, 2024).

[297] *See* FED. R. EVID. 706(a) ("The court may appoint any expert that the parties agree on and any of its own choosing.").

[298] *See* Judge Bradford H. Charles, *Rule 706: An Underutilized Tool to Be Used When Partisan Experts Become "Hired Guns*,*"* 60 VILL. L. REV. 941, 951-54 (2015) (listing several benefits of neutral experts).

[299] For a discussion of whether taking actions with the motive to attract cases is appropriately labeled as "corrupt," see Lynn M. LoPucki, *Where Do You Get Off? A Reply to* Courting Failure*'s Critics*, 54 BUFF. L. REV. 511, 517-18 (2006).

[300] *See* Mary L. Clark, *Judicial Retirement and Return to Practice*, 60 CATH. U. L. REV. 841, 864 (2011); Burbank et al., *supra* note 73.

[301] Justin Wise, *Wave of Federal Judges Ditch Bench for Lucrative Big Law Jobs*, BLOOMBERG L. (Mar. 16, 2023, 5:30 AM), https://news.bloomberglaw.com/business-and-practice/wave-of-federal-judges-ditch-bench-for-lucrative-big-law-jobs (quoting retiring

In the past fifteen years, several judges from patent-heavy districts have begun working as patent litigators, including two former chief judges of the Eastern District of Texas.[302] In some cases, the judges who left the bench had little or no experience with patent law prior to serving as a judge,[303] but are now highly sought after patent attorneys due to expertise and, presumably, their connections to the judges sitting on their patent-heavy former district courts.[304] Several former judges have gotten family in on the action.[305]

In a similar vein, many federal judges who resign (including magistrate judges, who serve for fixed terms[306]) join one of the major alternative dispute resolution providers, JAMS or FedArb.[307] Former judges can be well

District of Maryland Judge George Hazel: "[T]he reality of my situation is I've been in public service for about 18 years . . . . I get to 47, I'm thinking about what my market value could be. I don't come from generational wealth").

[302] *Judge T. John Ward*, MILLER FAIR HENRY PLLC, https://millerfairhenry.com/attorneys/t-john-ward [https://perma.cc/33PW-MWNE] (last visited Dec. 16, 2024); *Meet David Folsom*, FOLSOM ADR PLLC, https://folsomadr.com/about-us [https://perma.cc/X83B-ZT7Q] (last visited Dec. 16, 2024).

[303] Judge Ward is one example. *See* Panel Discussion, *supra* note 181. Judge Folsom is another. *See Confirmation Hearings on Federal Appointments: Hearings Before the Comm. on the Judiciary*, 104th Cong. 196 (1995), https://babel.hathitrust.org/cgi/pt?id=pur1.32754066796461&view=1up&seq=203&q1=folsom [https://perma.cc/AM4M-H4WG] ("I typically represent injured persons in automobile products liability and other personal injury causes."). Ditto Judge Joseph Farnan, formerly of the District of Delaware. He was a former U.S. Attorney who retired from the bench in 2010 and started a law firm with his sons, listing his specialty as patent litigation. *See Joseph J. Farnan Jr.*, FARNAN LLP, https://www.farnanlaw.com/attorneys/joseph-farnan-jr [https://perma.cc/3Z9N-FQDA] (last visited Dec. 16, 2024). And Judge Leonard Davis of the Eastern District of Texas. *Leonard Davis*, FISH & RICHARDSON, https://www.fr.com/team/judge-leonard-davis [https://perma.cc/U45U-98L5] (last visited Dec. 16, 2024).

[304] *See, e.g.*, *Judge T. John Ward*, *supra* note 302 ("The invitation to join the firm came a year before Judge Ward retired in 2011 from the high-profile courtroom where he presided over some of the nation's most complex intellectual property and class-action lawsuits."); *Meet David Folsom*, *supra* note 302 (noting that Folsom focuses his practice on "mediation and arbitration, with a primary focus on mediating patent cases").

[305] *See* Klerman & Reilly, *supra* note 8, at 275 ("[B]oth Judge Ward and Judge Davis have sons who practice law in the Eastern District of Texas and focus on patent litigation."); *accord Joseph J. Farnan Jr.*, *supra* note 303.

[306] Magistrate judges are appointed for eight-year terms, which can be renewed. *See* 28 U.S.C. § 631(e).

[307] *See About Us*, JAMS, https://www.jamsadr.com/about [https://perma.cc/L7TH-D22U] (last visited Dec. 16, 2024) ("JAMS is the world's largest private alternative dispute resolution (ADR) provider."); FEDARB, https://www.fedarb.com [https://perma.cc/ND8C-Y6YY] (last visited Dec. 16, 2024) (claiming "the largest roster of former Article III judges in the country").

compensated for their arbitration and mediation services.[308] To attract business, aspiring alternative dispute resolution ("ADR") providers create online profiles touting their experience—essentially, advertisements.[309] Predictably, many judges highlight their experience with patent cases, which can be lucrative targets for mediation or arbitration.[310]

We examined the profiles of every former federal district judge and magistrate judge on the roster of JAMS and FedArb as of February 2023. Out of ninety-six JAMS and FedArb members who were district or magistrate judges, sixty-six of their profiles mentioned patent law.[311] And thirty-eight extensively discussed the judge's experience and familiarity with patent law.[312]

The geography of where those judges sat tended to affect whether they listed patent law as a credential. Judges from districts within the Fifth and Ninth Circuits had among the highest percentage of profiles mentioning patent law, 80% and 100%, respectively.[313] The Ninth Circuit is home to several patent heavy districts, including the Northern District of California and the Central District of California; the Fifth Circuit is home to the Eastern District of Texas and Western District of Texas. The judges from courts within the Fifth Circuit had the highest percentage of profiles extensively discussing patent law, with 70%—including all three former judges from the Eastern District of Texas who were on the lists.[314] The Ninth Circuit was also above average, with 47%—including four of the five former judges from the Northern District of California.[315] In a similar vein, 63% of judges from the District of New Jersey, which sees a lot of high-stakes pharmaceutical patent cases, had profiles that extensively discussed patent law.[316]

The problems that could arise from a judge seeking to attract patent cases while on the bench in order to cash in as a former "patent judge" after leaving

[308] *See* Deborah Rothman, *Trends in Arbitrator Compensation*, 2017 DISP. RESOL. MAG., Spring 2017, at 8, 8, https://www.americanbar.org/content/dam/aba/publications/dispute_resolution_magazine/spring2017/3_rothman_trends_in_arbitrator.authcheckdam.pdf (reporting that JAMS fees "rang[e] from $400 per hour to $15,000 or more per day").

[309] *See About Us*, *supra* note 307 (listing online profiles of ADR providers and allowing searches by judicial background and practice area).

[310] *See* David A. Allgeyer, *Using Arbitration to Resolve Patent Disputes: The Right Thing for the Right Case*, 2016 FED. LAW., Oct./Nov. 2016, at 32, 32, https://www.fedbar.org/wp-content/uploads/2016/10/Patent-Tips-pdf-1.pdf [https://perma.cc/ZK9B-3URN].

[311] *See infra* Appendix C.

[312] *Id.* We considered a discussion of patent law to be extensive if it met one of the following criteria: (1) patent law was listed as a heading or subheading on the judge's profile page, (2) the judge's profile mentioned patent law more than five times, (3) the profile indicated that the judge had been involved in more than twenty patent cases, or (4) patent law was listed as a "specific" area of expertise.

[313] *Id.*

[314] *Id.* Judge Ward, Judge Folsom, and Judge Michael Schneider.

[315] *Id.* Judge Vaughn Walker, Judge James Ware, Magistrate Judge Edward A. Infante, and Magistrate Judge Elizabeth Laporte.

[316] *Id.*

the judiciary are self-evident. And, to be clear, many—indeed, most—retired judges with patent expertise did not actively seek out patent cases while on the bench. Yet the Eastern and Western Districts of Texas—where competition for cases *has* occurred—have (and have had) several judges who can honestly hold themselves out as patent experts. That expertise has a lot of market value when a judge leaves the bench.

IV. JUDICIAL COMPETITION BEYOND PATENT LAW

Court competition for cases is less widespread outside of patent law, but it has occurred. Many of the behavioral incentives we identified in the previous Part find analogues in politically charged cases, bankruptcy cases, and others.

A. *Politically Charged Cases*

Conservative political groups have recently been searching for friendly courts in which to challenge various policies of the Biden Administration. They've found one in the Northern District of Texas, which—no surprise—has case assignment rules that allow plaintiffs to know, with certainty, which individual judge will be assigned to their case if they file in certain divisions of the district.[317] (Interestingly, as Steve Vladeck notes, Democratic plaintiffs challenging Republican policies "have barely ever gone judge shopping," instead opting for "friendly district courts" where cases are still subject to random assignment among multiple judges.[318])

And the Northern District of Texas's judges have made clear that they welcome those lawsuits, which often align with their preappointment experience and normative beliefs about the law. For instance, prior to his appointment by President Trump, Judge Matthew Kacsmaryk of the district's Amarillo Division served as deputy general counsel for the First Liberty Institute, working on cases that challenged reproductive freedom and writing derisively about same-sex relationships and transgender persons.[319] Predictably, he's ruled favorably in

[317] *See* Alexandra Hutzler, *Unprecedented Texas Abortion Pill Ruling Sparks Debate About "Judge Shopping,"* ABC NEWS (Apr. 13, 2023, 6:36 AM), https://abcnews.go.com/Politics/unprecedented-texas-abortion-pill-ruling-sparks-debate-judge/story?id=98531203 [https://perma.cc/P464-8X28] ("Texas is home to four federal district courts, and several of them have created so-called 'single judge divisions' where just one judge is responsible for hearing 100% of the cases filed there.").

[318] Stephen I. Vladeck, *Don't Let Republican 'Judge Shoppers' Thwart the Will of Voters*, N.Y. TIMES (Feb. 5, 2023), https://www.nytimes.com/2023/02/05/opinion/republicans-judges-biden.html.

[319] *See* Nate Raymond, *Abortion Pill Lawsuit Faces Texas Judge Who Often Rules for Conservatives*, REUTERS (Feb. 13, 2023, 3:48 PM), https://www.reuters.com/legal/abortion-pill-lawsuit-faces-texas-judge-who-often-rules-conservatives-2023-02-10; Ian Millhiser, *How an Obscure Christian Right Activist Became One of the Most Powerful Men in America*, VOX (Dec. 17, 2022, 7:00 AM), https://www.vox.com/policy-and-politics/2022/

cases pursuing causes that align with his prior work. Most notably, he issued a ruling—ultimately reversed by the Supreme Court—restricting the Food and Drug Administration's longstanding approval of mifepristone, a drug commonly used in medication abortion.[320]

In addition to favorable rulings on the merits, Judge Kacsmaryk, like judges seeking patent litigation, has leveraged *procedure* to make his courtroom more attractive to forum-shopping plaintiffs. For instance, he (and other judges appointed by President Trump) have refused to transfer cases out of their courthouses for convenience reasons.[321] He's also embraced an expansive conception of who has standing to sue when challenging the actions of the federal government.[322]

But, unlike in patent cases, where the vast majority of cases settle, rulings on the merits are more important in fueling court competition outside the patent realm. In addition to Judge Kacsmaryk, plaintiffs favoring conservative causes have filed numerous cases with Judge Reed O'Connor of the Wichita Falls division of the Northern District of Texas, where the case assignment rules similarly permit a plaintiff to know that a case filed there will be assigned to him.[323] Judge O'Connor (appointed by President George W. Bush) has delivered, issuing rulings that have declared the Affordable Care Act unconstitutional, blocked an Obama Administration rule guaranteeing transgender students access to an appropriate bathroom, and demanded exemptions to federal COVID vaccine mandates.[324] And, like Judge Kacsmaryk, Judge O'Connor has endorsed a broad view of who has standing to challenge insurance coverage mandates in the Affordable Care Act[325] and provided

12/17/23512766/supreme-court-matthew-kacsmaryk-judge-trump-abortion-immigration-birth-control [https://perma.cc/HJ8G-ELJY].

[320] All. for Hippocratic Med. v. U.S. Food & Drug Admin., 668 F. Supp. 3d 507, 560 (N.D. Tex.), *aff'd in part, vacated in part*, 78 F.4th 210, 222 (5th Cir. 2023), *rev'd*, 602 U.S. 367, 368 (2024).

[321] *See, e.g.*, *In re* Planned Parenthood Fed'n of Am., Inc., 52 F.4th 625, 632 (5th Cir. 2022) (rejecting mandamus petition challenging Judge Kacsmaryk ruling denying transfer); Utah v. Walsh, No. 23-CV-016, 2023 WL 2663256, at *1 (N.D. Tex. Mar. 28, 2023) (Kacsmaryk, J.) (denying transfer in a challenge to a rule adopted by the Department of Labor about how retirement plan managers choose investments); Texas v. U.S. Dep't of Homeland Sec., 661 F. Supp. 3d 683, 687 (S.D. Tex. 2023) (Tipton, J.) (denying transfer in a challenge to an immigration parole program).

[322] *See* Henry Gass, *'Wildly Problematic': Standing, the Supreme Court, and Mifepristone*, CHRISTIAN SCI. MONITOR (Apr. 22, 2023, 4:59 PM), https://www.csmonitor.com/USA/Justice/2023/0421/Wildly-problematic-Standing-the-Supreme-Court-and-mifepristone [https://perma.cc/747N-CMYU].

[323] *See* Vladeck, *supra* note 12.

[324] *Id.*

[325] *See, e.g.*, Braidwood Mgmt. Inc. v. Becerra, 666 F. Supp. 3d 613, 625 (N.D. Tex. 2023).

numerous other procedural advantages to plaintiffs pursuing conservative causes.[326]

Conservatives have also headed to the Monroe Division of the Western District of Louisiana, where Chief Judge Terry Doughty (a Trump appointee) has recently been assigned between 80% and 100% of cases.[327] In suits filed by Republican attorneys general, Judge Doughty has ordered the Biden Administration to restart oil and gas leasing on federal land and issued a nationwide injunction blocking a federal COVID vaccine mandate for healthcare workers.[328]

Judge O'Connor, Judge Doughty, and Judge Kacsmaryk—as well as other Republican judges who have received an inordinate number of politically charged cases[329]—would surely claim they are not *seeking out* these cases. Judge Doughty, for instance, has insisted that he's "not political" and that he simply "likes hearing cases challenging the separation of powers between the executive and legislative branches."[330] But, as we saw above, "interest" in particular types of cases is a common mask behind which court-competing judges hide. Indeed, judges in Texas and Louisiana are surely aware of the judge-shopping game landing so many politically charged cases in their courtrooms,[331] where, conveniently, any appeal will lie to the very conservative Fifth Circuit.[332]

Recent opinions by district judges who, arguably, have tried to bring high-profile, politically salient cases into their courtrooms read unmistakably like auditions for appointment to a higher court.[333] Judge Kacsmaryk, for instance, in his order restricting the FDA's approval of mifepristone, repeatedly deployed language used by anti-abortion activists, calling the fetus an "unborn child," referring to abortion providers as "abortionists," and using the term "chemical

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[326] *See, e.g.*, Polymer80, Inc. v. Garland, No. 23-CV-00029, 2023 WL 3605430, at *1 (N.D. Tex. Mar. 19, 2023) (granting the plaintiff's motion for a preliminary injunction against a federal regulation limiting the sale of firearm kits but refusing to decide the Biden Administration's motion to transfer venue).

[327] Wheeler & Alder, *supra* note 11.

[328] *Id.*

[329] *See* Vladeck Brief, *supra* note 243, at 8 ("Texas has filed 20 lawsuits against the federal government without ever risking more than a five-percent chance of having the matter initially assigned to a judge appointed by a Democratic president.").

[330] Wheeler & Alder, *supra* note 11.

[331] *See* Taylor Goldenstein, *Paxton's Legal Tactic: Find the Right Judge*, HOUS. CHRON., Apr. 23, 2022, at A1 (supporter of the Texas Attorney General's judge-shopping behavior stating that it's a "long-standing, across-the-board tactic").

[332] Ian Millhiser, *The Trumpiest Court in America*, VOX (Dec. 27, 2022, 6:00 AM), https://www.vox.com/policy-and-politics/2022/12/27/23496264/supreme-court-fifth-circuit-trump-court-immigration-housing-sexual-harrassment [https://perma.cc/4JK8-4NN4].

[333] For several examples, see Sophia Cai, *Trump Judges Audition for Supreme Court*, AXIOS, https://www.axios.com/2022/04/27/trump-judges-audition-for-supreme-court (last updated Apr. 27, 2022).

abortion" in place of "medication abortion."[334] This sort of brashness makes judges famous in certain circles and provides assurances that those judges, if appointed to a higher court, will deliver the rulings their patrons want.[335]

B. *Fees and Fame: Bankruptcy, Antitrust, and More*

Though politically charged cases are surely important to the lives of those affected by courts' rulings, those cases, unlike patent cases, don't usually bring armies of lawyers to town in a way that would benefit the local community financially. Bankruptcy cases, however, fit that mold. Lynn LoPucki for instance, has chronicled how Delaware's emergence as the bankruptcy court of choice in the 1990s resulted from the efforts of its lone bankruptcy judge to attract "a major industry to her state."[336] One of the key ways in which bankruptcy courts attracted cases was by raising the amount of professional fees they would approve—to the benefit of the local bankruptcy bar.[337] Competition for bankruptcy cases has also led to legislation granting additional judgeships and infrastructure investments in the districts that have succeeded in attracting bankruptcy plaintiffs.[338] The bankruptcy bars in numerous cities reacted to Delaware's emergence as the forum of choice by convening committees to bring cases back to those cities.[339]

And favorable legal rulings—both substantive[340] and procedural[341]—played a major role in bringing cases to particular districts. As LoPucki noted, many changes courts made to attract large corporate bankruptcies "simply flouted the law."[342] More recently, bankruptcy judges have competed on their willingness to approve what Adam Levitin has called "drive-thru" bankruptcies—plans that are confirmed within days or even hours of case filing.[343]

Bankruptcy judges who hear many large corporate bankruptcies, like judges who hear lots of patent cases, also attain a degree of fame. Summarizing interviews with several federal bankruptcy judges, Marcus Cole wrote that

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[334] All. for Hippocratic Med. v. U.S. Food & Drug Admin., 668 F. Supp. 3d 507, 520 n.1, 521-22, 525 (N.D. Tex. 2023).

[335] For some evidence that district judges write opinions to signal their desire for promotion to a higher court, see Andrew P. Morriss, Michael Heise & Gregory C. Sisk, *Signaling and Precedent in Federal District Court Opinions*, 13 SUP. CT. ECON. REV. 63, 80-81, 92-93 (2005).

[336] LOPUCKI, *supra* note 9, at 75-76.

[337] *Id.* at 140.

[338] *Id.* at 245-46.

[339] *Id.* at 126.

[340] *See id.* at 17 (distinguishing between "situations in which judges expressed views that attracted cases" and judges "changing their views in order to compete with other courts for cases").

[341] *See, e.g.*, *In re* Enron Corp., 274 B.R. 327 (Bankr. S.D.N.Y. 2002) (denying motion to transfer venue).

[342] LoPucki, *supra* note 299, at 516.

[343] Levitin, *supra* note 90, at 355.

"[a]lmost all of the judges suggested that there is a level of prestige and satisfaction that attaches to hearing and deciding important cases."[344]

Likewise, in assessing court competition for antitrust cases, Stefan Bechtold and co-authors recounted the following anecdote: "[A] lawyer answered a question about judges' motives for attracting litigation as follows: . . . . 'Advantage: enhanced reputation. One gets better known. They are only human. . . . Why do we want to get better known? Because everyone wants to be famous.'"[345]

V. EVALUATING JUDICIAL COMPETITION

Having set out the reasons *why* judges seek out particular types of cases, we now take a normative turn. We first discuss in more detail how case-seeking behavior strains the model of the ideal district judge we developed in Part I above. We then leverage that analysis to explore how we could eliminate the pernicious effects of judicial competition and maybe even extract benefits by acknowledging that judges have preferences about the cases they like to hear.

A. *The Model Revisited*

1. Representativeness

The first principle we mentioned above is that all affected parties should have control over and voice in the decision-making process. In a regime of judges competing for cases, that doesn't happen. Procedural rules and substantive rulings are made not in the best interest of all stakeholders but in the interest of the party who chooses the forum.

Lack of transparency is also a problem in a world of court competition.[346] For example, the Western District of Texas (like many district courts) has a Local Court Rules Committee staffed by judges and practicing lawyers.[347] But its mandate appears limited to drafting the local court rules—matters outside those rules are left entirely to the judges' discretion. When it comes to individual judges' procedures and standing orders, there's simply no process at all. Though it's clear that some practicing lawyers have input,[348] the who, how, what, and when are all unclear.

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[344] Cole, *supra* note 244, at 1875.

[345] Bechtold et al., *supra* note 10, at 515-16.

[346] *See* La Belle, *supra* note 126, at 108.

[347] *See* Amended Order Assigning the Business of the Court, at ix (W.D. Tex. May 1, 2023), https://www.txwd.uscourts.gov/wp-content/uploads/2022/12/AmendedOrderAssigningBusinessoftheCourt-050123-Updated.pdf [https://perma.cc/NW9X-ZFPJ].

[348] *See, e.g.*, Steve Brachmann, *Judge Albright Enters New Standing Orders on Motions to Transfer for Conformity with CAFC Mandates*, IPWATCHDOG (June 15, 2021, 4:15 PM), https://ipwatchdog.com/2021/06/15/judge-albright-enters-new-standing-orders-on-motions-to-transfer-for-conformity-with-cafc-mandates [https://perma.cc/2ZV4-UHFJ] (reporting on

By contrast, the process of making and amending the Federal Rules of Civil Procedure allows myriad stakeholders to make their voices heard.[349] Though the federal rulemaking process has been critiqued as captured by the corporate defense bar,[350] and the outputs of that process are not always ideal,[351] it at least provides a structure for stakeholder input all along the way: from comments and testimony at the committee stage to Congressional and Supreme Court approval.[352]

To prevent judges from leveraging procedural law for case-seeking purposes, district courts should adopt a similar process for all significant procedural rules and orders. A more transparent and collaborative model would ensure that local procedural practices are responsive to the needs of *all* court users and don't simply cater to the parties who choose the forum.[353] Though individual judges should, of course, have discretion to manage their courtroom, when judges do seek outside input (as some have done on patent issues), the process should be accessible to everyone.

2. Consistency

The second principle that district courts should aspire to is consistency. To be sure, no legal system can achieve perfect consistency; there will always be similar cases that are decided differently by different judges or juries.[354] And percolation, of course, has been praised as a virtue, at least when it comes to different federal appellate courts trying out different rules of law.[355] But a well-

an interview with "David G. Henry, Partner and Registered Patent Attorney at Gray Reed and one of the initial members of Judge Albright's working group that offers input to the court in developing procedural rules for patent cases").

[349] ELMO B. HUNTER, FED. JUD. CTR., THE JUDICIAL CONFERENCE AND ITS COMMITTEE ON COURT ADMINISTRATION 3 (1986).

[350] *See* Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005, 1017 (2016).

[351] *E.g.*, Robert G. Bone, *Making Effective Rules: The Need for Procedural Theory*, 61 OKLA. L. REV. 319, 326 (2008) ("Rather than resolving difficult and often divisive normative questions . . . the Advisory Committee tends to draft general rules with vague standards that in effect leave the hard questions for trial judges to resolve in individual cases.").

[352] Richard D. Freer, *The Continuing Gloom About Federal Judicial Rulemaking*, 107 NW. U. L. REV. 447, 466-67 (2013).

[353] *Cf.* La Belle, *supra* note 126, at 123 (suggesting, for similar reasons, a nationwide set of procedural rules for patent cases). For a timely example of how district judges' discretion over matters of court administration can be used to further certain ideologies, see Adam Chilton, Christopher Cotropia, Kyle Rozema & David Schwartz, *Political Ideology and Judicial Administration: Evidence from the COVID-19 Pandemic*, J.L. ECON. & ORG., Sept. 27, 2023, at 1, 2 (finding that the political ideology of the chief district judge influenced whether masks were required in federal courthouses and linking the lack of mask requirements to increased postponing of trials).

[354] *See* John E. Coons, *Consistency*, 75 CALIF. L. REV. 59, 60-62 (1987).

[355] *But cf.* Michael Coenen & Seth Davis, *Percolation's Value*, 73 STAN. L. REV. 363, 367 (2021) ("At best, we think, percolation's benefits will outweigh its costs under limited and contingent conditions—conditions not likely to replicate themselves across a broad range of cases.").

functioning legal system should ensure that, in general, like cases are treated alike.

Consistency breaks down in a regime of court competition. Courts and individual judges vary procedural practices to attract cases. In patent law, some courts grant motions to transfer venue frequently, others rarely.[356] Judge Albright never grants early invalidity motions; others do so regularly.[357]

Unlike with procedural rules, it might not be possible to "legislate" case-to-case consistency from one judge to another. But recall that another factor in our model of the ideal district judge is correctability. Outside of patent law, it takes only one court of appeals to look the other way for case-seeking behavior to become a difficult-to-solve problem.[358] In patent cases, however, effective appellate review by the Federal Circuit—the only appellate court that hears patent cases—could single-handedly curb harmful court competition.

As an example, the Federal Circuit has looked closely at Judge Albright's rulings on transfer motions, and its intervention seems to have worked: Judge Albright has recently become much more likely to transfer venue.[359] Early eligibility motions may be a harder fix, because the Federal Circuit is itself divided about the issue.[360] But it's plausible that appellate decisions in the near future will provide at least a little more consistency in lower court rulings.[361] Going forward, the Federal Circuit might consider looking at other seemingly mundane procedural mechanisms (in addition to transfer of venue), such as judge assignment practices, that are crucial levers for court competition.[362]

3. Impartiality

The notion of an impartial judge is fundamental to our system of justice. As the Supreme Court has put it: "A fair trial in a fair tribunal is a basic requirement

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[356] Anderson & Gugliuzza, *supra* note 6, at 461.

[357] *See supra* Part II.B.2.

[358] The Fifth Circuit, for instance, has no problem with Republican attorneys general shopping for judges in its district courts. *See, e.g.*, Texas v. United States, 40 F.4th 205, 213 (5th Cir.) (per curiam), *cert. granted*, 143 S. Ct. 51 (2022) (mem.). In bankruptcy, the courts of appeals have played a more mixed role in condoning or opposing case-seeking behavior. *See* LOPUCKI, *supra* note 9, at 133-34.

[359] *See* Dani Kass, *Albright May Be Getting Fed. Circ.'s Message on Venue*, LAW360 (Mar. 7, 2022, 7:57 PM), https://www.law360.com/articles/1470334.

[360] *See, e.g.*, Am. Axle & Mfg., Inc. v. Neapco Holdings LLC, 966 F.3d 1347, 1348 (Fed. Cir. 2020) (denying, by a vote of six-to-six, a petition for rehearing en banc in an eligibility dispute).

[361] *See, e.g.*, Ryan Davis, *Are Winds of Change Finally Blowing on Patent Eligibility?*, LAW360 (Dec. 21, 2022, 10:37 PM), https://www.law360.com/ip/articles/1559866.

[362] *But cf.* O2 Micro Int'l Ltd. v. Monolithic Power Sys., Inc., 467 F.3d 1355, 1363 (Fed. Cir. 2006) (rejecting a challenge to local procedural rules, emphasizing district courts' discretion over case management).

of due process. . . . To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome."[363]

We've discussed above the threat that court competition poses to judicial impartiality in patent law. Likewise, Lynn LoPucki has suggested that the District of Delaware overtook the Southern District of New York as the go-to district for large corporate bankruptcies because the (lone) judge in Delaware in the late 1980s and early 1990s made rulings and developed procedural rules that appealed to "case placers," i.e., the debtor corporation's executives and attorneys.[364] The predictability of case assignment in a one-judge district also didn't hurt.[365] Nor did a predilection to deny motions to transfer.[366]

Sound familiar?

Every example of court competition we've provided in this article shares one thing in common: the successful competitors offer plaintiffs the ability to judge shop. In our minds, being able to choose the individual judge who hears your case is almost as bad as a judge deciding a case in which the judge has an interest in the outcome.[367] Congress—or the courts themselves—could (and should) put a stop to that by mandating at least some degree of random assignment in every case.

Fortunately, the Western District of Texas recently recognized the need for randomization to curb potential bias. Now, patent-case plaintiffs who select Waco will randomly be assigned to one of twelve judges sitting in various divisions of the Western District.[368] This will help reduce Judge Albright's ability to sell plaintiffs on his courtroom; he can make his courtroom plaintiff-friendly, but plaintiffs will only have a one-in-twelve chance of getting him.[369] That order will restore some of the impartiality to the Western District of Texas that was lost in its efforts to attract patent plaintiffs. Yet there's still nothing in federal law that *requires* randomized case assignment.[370]

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[363] *In re* Murchison, 349 U.S. 133, 136 (1955); *see also* Debra Lyn Bassett & Rex R. Perschbacher, *The Elusive Goal of Impartiality*, 97 IOWA L. REV. 181, 208-14 (2011) (proposing reforms to the recusal standard to increase judicial impartiality).

[364] LOPUCKI, *supra* note 9, at 56-76; *see also id.* at 117 ("Delaware processes cases faster than other jurisdictions . . . .").

[365] *Id.* at 75.

[366] *Id.* at 38-39.

[367] *See* ROBERTS, *supra* note 163, at 5 (noting that "the Judicial Conference has long supported the random assignment of cases" as a measure "important to public confidence in the courts").

[368] W.D. Tex. Patent Case Assignment Order, *supra* note 164.

[369] Unless, of course, the case is related to a case that's already pending before Judge Albright. *See* Crouch, *supra* note 165. Moreover, the Western District's primary standing order on case assignment allows "any judge [to] reassign any case" to another judge "by mutual consent." Amended Order Assigning the Business of the Court (W.D. Tex. May 1, 2023), https://www.txwd.uscourts.gov/wp-content/uploads/2022/12/AmendedOrderAssigningBusinessoftheCourt-050123-Updated.pdf [https://perma.cc/UK7L-B66S].

[370] As this Article was going to press, the Judicial Conference of the United States (a group of judges that oversees the operation of the federal courts), issued a policy encouraging district

4. Accuracy

Another principle we discussed above is that a judge should strive to make decisions that are objectively of a high quality, which depends on using accurate information and rendering informed decisions. Of course, many cases that are litigated are the "hard cases" that don't have objectively "correct" results.[371] And, if we're talking about court competition for politically charged cases related to immigration or abortion or the like—well, one might reasonably suggest that objective accuracy is not a value worth talking about.[372]

But in less charged areas, such as patent law, we should expect that judges' decisions will be based on the best information available. Judge Albright's approach toward record development in patent cases provides an interesting example. On one hand, he has made a point of closely scrutinizing affidavits offered in connection with motions to transfer venue, praising litigants that present affiants who have done extensive due diligence and openly criticizing those who haven't.[373] Ditto with his approach to early-stage motions to dismiss. The ostensible reason he refuses to decide the issue of patent eligibility early in a case is that claim construction[374] "can affect—and perhaps, in most cases, will affect—a court's . . . eligibility analysis."[375]

Those practices may have ulterior motives, in that they make Judge Albright's courtroom more attractive to judge-shopping patentees by helping them avoid

courts to ensure that cases are randomly assigned among multiple judges, particularly in the politically charged cases being disproportionately filed in the Northern District of Texas. JUD. CONF. COMM. ON CT. ADMIN. & CASE ASSIGNMENT, GUIDANCE FOR CIVIL CASE ASSIGNMENT IN DISTRICT COURTS 1 (2024), https://cdn.patentlyo.com/media/2024/03/Guidance.pdf [https://perma.cc/FV8Q-8W5S]. Predictably, the beneficiaries of judge shopping—namely, Republicans—decried the policy as politically motivated and urged district courts to ignore it, which the judges of the Northern District did. Paul R. Gugliuzza & J. Jonas Anderson, *Judge Shopping Is Destroying the Courts' Credibility. Judges Shrug, GOP Senators Cheer.*, TPM (Apr. 8, 2024, 9:30 AM) https://talkingpointsmemo.com/cafe/judge-shopping-is-destroying-the-courts-credibility-judges-shrug-gop-senators-cheer [https://perma.cc/W5NX-Y3HQ].

[371] George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 20 (1984).

[372] *Cf.* Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 97 (2022) ("[T]he [Supreme] Court has begun to implement the policy preferences of its conservative majority . . . by simultaneously stripping power from every political entity *except* the Supreme Court itself.").

[373] *See* Kelcee Griffis, *Big Tech Bids to Move Texas Patent Cases Need Fuller Evidence*, BLOOMBERG L. (Dec. 5, 2022, 5:18 AM), https://www.bloomberglaw.com/bloomberglawnews/ip-law/X1TTAD2S000000.

[374] That is, the process by which the court determines the meaning of the patent's claims—the stylized sentences at the end of the patent document that define the patentee's legal rights. *See* Markman v. Westview Instruments, Inc., 517 U.S. 370, 372 (1996).

[375] Slyce Acquisition Inc. v. Syte – Visual Conception Ltd., No. 19-CV-00257, 2020 WL 278481, at *5 (W.D. Tex. Jan. 10, 2020).

transfer or an early dismissal. So, while it's laudable that Judge Albright is demanding hard evidence on which to base his decisions, it's also important for the Federal Circuit to ensure the decisions *comport* with that evidence and police the court competition game.

5. Correctability

There are many important decisions at the trial level that are not reviewable on appeal, either as a legal or practical matter. Judges who are interested in attracting cases to their courtrooms have made heavy use of those largely unreviewable decisions,[376] including the process for assigning judges to cases, denying motions to dismiss, or delaying decision on particular issues.

But it doesn't have to be that way. Transfer of venue, for instance, is a decision that is normally within the discretion of the district judge,[377] but the Federal Circuit regularly reviews transfer decisions (of the district courts that compete for patent cases, at least[378]) through the extraordinary writ of mandamus. Likewise, the Federal Circuit has granted mandamus in cases in which Judge Albright has inappropriately delayed decision on transfer motions.[379] In that vein, the Federal Circuit could certainly review discretionary case management practices, at least when they threaten the legitimacy of the courts and the patent system. Even the denial of a motion to dismiss, though normally not appealable because it's not a case-ending final judgment,[380] could potentially be reviewed under the collateral order doctrine,[381] as a controlling

[376] Anderson, *supra* note 7, at 667-68 (noting that district courts attract litigants by offering more predictable management procedures, which "are often insulated from appellate review"); *accord* Klerman & Reilly, *supra* note 8, at 301 ("In competing, courts are likely to adopt methods that immunize their decisions from appellate review.").

[377] *Cf.* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 257 (1981) ("The *forum non conveniens* determination is committed to the sound discretion of the trial court [and] may be reversed only when there has been a clear abuse of discretion . . . .").

[378] Anderson, Gugliuzza & Rantanen, *supra* note 161, at 365 (showing that out of forty-one transfer-related mandamus grants from 2008 through 2021, thirty-eight were in cases from the Eastern or Western District of Texas).

[379] *E.g.*, *In re* SK hynix Inc., 835 F. App'x 600, 600-601 (Fed. Cir. 2021) ("We agree with SK hynix that the district court's handling of the transfer motion up until this point in the case has amounted to egregious delay and blatant disregard for precedent.").

[380] *See* 15A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3914.1 (2024), Westlaw FPP.

[381] On the theory that a party has a right not to be burdened with discovery in a case involving a patent that should plainly be held to be invalid. *See id.* § 3914.10.2 (discussing interlocutory appeals from orders denying claims of official immunity).

question of law under 28 U.S.C. § 1292(b),[382] or, perhaps most realistically, via mandamus.[383]

6. Ethicality

The final factor we identified in our ideal district judge is ethicality. That is, the decision-making process should comport with general standards of fairness and morality, and there should be no deception or bribery.

Judges who hear lots of patent cases have been criticized for violating ethics rules, including Judge Gilstrap of the Eastern District of Texas. As the *Wall Street Journal* reported, Judge Gilstrap presided over 130 cases in which he or his family members owned stock.[384]

While we don't condone judges hearing cases involving litigants in which they have a financial interest, it would be too much to suggest that financial interests are the reason Judge Gilstrap attracted patent cases to his court. Judge Gilstrap, like other judges in patent-heavy districts, receives many cases involving publicly traded companies, including Microsoft, Google, Samsung, and Apple. But, if Judge Gilstrap were favoring those large companies, we'd expect that they would welcome the Eastern District of Texas as a venue. Yet we see precisely the opposite behavior, with large tech companies among the heaviest filers of motions to transfer *out of* the Eastern District of Texas. We also could not identify a single instance where those companies chose the Eastern District of Texas for the purpose of filing a declaratory judgment action to have a patent ruled invalid or not infringed. To be sure, Judge Gilstrap should have recused himself in the cases in which he or a family member had a financial interest. And he acknowledged his error not long after the articles first appeared.[385]

Much more threatening, in our view, are the *indirect* interests, financial and otherwise, that judges have for bringing litigation into their courts: benefits for their colleagues, their court, and their communities, as well as the fame and prestige that come from being at the center of the patent universe. Eliminating

[382] This statute permits a district judge to certify for appeal a non-final order that "involves a controlling question of law as to which there is substantial ground for difference of opinion" in cases where "an immediate appeal . . . may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b).

[383] On the theory that Judge Albright has repeatedly engaged in "a significant, erroneous practice"—the systematic denial of motions to dismiss on eligibility grounds. *See* Paul R. Gugliuzza, *The New Federal Circuit Mandamus*, 45 IND. L. REV. 343, 394 (2012) (discussing a similar step the Federal Circuit took to correct the Eastern District of Texas's erroneous denials of transfer motions).

[384] Palazzolo et al., *supra* note 260.

[385] Coulter Jones, Joe Palazzolo & James V. Grimaldi, *Federal Judge Files Recusal Notices in 138 Cases After WSJ Queries*, WALL ST. J. (Nov. 2, 2021, 1:58 PM), https://www.wsj.com/articles/federal-judge-files-recusal-notices-in-138-cases-after-wsj-queries-11635875891.

those incentives could be a harder task. It might require higher salaries for judges, more Article III judgeships so courts aren't forced to rely so heavily on magistrates and technical advisors (and the corruptible processes for choosing them), and increased public investment in small, rural communities, like Marshall, Texas.

B. *Eliminating Competition, Improving the Courts*

A few concrete law-reform steps flow from our analysis of court competition. First, in designing procedural rules and practices, district courts ought to employ transparent advisory committees consisting of a representative body of attorneys who practice in the district.[386] Those bodies should be empowered to provide input on all procedural matters—not just the drafting of local rules—and be representative across practice areas, geographic regions, race, gender, and ethnicity, as well as the plaintiff and defense bars and the government lawyers who appear before the court. Representative advisory committees will help balance procedural practices and prevent judges from using them as levers for attracting litigation.

Second, district courts should adopt rules that ensure random assignment of cases to judges, as we've discussed at length elsewhere.[387] The Western District of Texas's recent order is a step in the right direction. But it could be rescinded at any time and only applies to patent cases in the Waco Division.[388] The bigger problem of judge shopping remains intact, and as we've shown, judge shopping is a prerequisite to successful court competition, in patent law, bankruptcy law, and elsewhere. Though random assignment will not eliminate court competition entirely,[389] there's no good reason Congress should not require *some* degree of randomness in judge assignment for all cases filed in the federal courts.

Third, court competition highlights the need to engage in a more capacious discussion of what "judicial ethics" mean. For the most part, judges aren't seeking out cases because they're receiving bribes or own stock in the litigants. As we've shown, the incentives are more complex. And doing things like hiring one's former work associates as magistrates and technical advisors probably doesn't break any ethical rules. But case-seeking behavior that results in a financial windfall for friends, colleagues, and the local community is problematic. Making appointment of special masters or technical advisors something other than a matter of pure judicial discretion might be one useful

[386] The Northern District of California, for instance, has an attorney advisory committee specifically for its local *patent* rules. *Local Rules Attorney Advisory Committees*, U.S. DIST. CT. N. DIST. OF CAL., https://cand.uscourts.gov/rules/local-rules/local-rules-attorney-advisory-committees [https://perma.cc/EM9R-WSJR] (last visited Dec. 16, 2024).

[387] *See, e.g.*, Anderson & Gugliuzza, *supra* note 6, at 478-80.

[388] W.D. Tex. Patent Case Assignment Order, *supra* note 164.

[389] *See* Klerman & Reilly, *supra* note 8, at 305 (noting that some courts that have successfully competed for patent cases already use random assignment and arguing that other courts have too few judges for random assignment to eliminate case-seeking behavior).

step.[390] Indeed, simply calling more attention to the subtle and intertwined influences we've identified in this article can, we think, make a difference: it was scholarly criticism of judge shopping that called the Senate Judiciary Committee's attention to the practice[391] and that ultimately led to randomized assignment of patent cases in Waco.

C. *Harnessing Judicial Competition*

Corporate law scholarship has examined at length whether competition among states (and state courts) leads to good (that is, more efficient) corporate law.[392] Proponents of competition argue that states competing against each other for litigants leads to law that is preferred by plaintiffs and defendants alike.

But, as with the competition for corporate charters,[393] there is reason to doubt that competition for patent lawsuits—or any other type of lawsuit—is likely to lead to better, or more efficient, law or case adjudication. Plaintiffs choose the venue for litigation and, as a group, they care only about courts facilitating the highest recovery in the least amount of time.[394] Thus, we would expect the courts that win the competition for cases to be the courts that offer *plaintiffs* the best outcomes, which is what we see, in patent law and beyond.[395]

Still, we don't want to entirely quash the potential of inter-jurisdictional competition, especially if judges could be incentivized to act in a more even-

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[390] For a discussion of the "capture and cronyism" concerns that accompany the process for appointing special masters, see Elizabeth Chamblee Burch & Margaret S. Williams, *Judicial Adjuncts in Multidistrict Litigation*, 120 COLUM. L. REV. 2129, 2206 (2020).

[391] *See* Tillis & Leahy Letter, *supra* note 162, at 1 n.1 (citing Anderson & Gugliuzza, *supra* note 6).

[392] *See, e.g.*, ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW 148 (1993) ("The best available evidence indicates that, for the most part, the race is for the top and not the bottom in the production of corporation laws."); FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 214 (1991) ("As a matter of theory, the 'race for the bottom' cannot exist."). *But cf.* Lynn M. LoPucki, *Corporate Charter Competition*, 102 MINN. L. REV. 2101, 2108 (2018) ("[C]orporate charter competition as a system is neither a race to the top or the bottom. It is capable of generating only one result: deregulation.").

[393] *See* Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 684 (2002).

[394] *See* Daniel Klerman, *Jurisdictional Competition and the Evolution of the Common Law*, 74 U. CHI. L. REV. 1179, 1183 (2007).

[395] For an example of a field in which there's been debate about whether forum selling hinges on case-processing speed or substantive outcomes, consider domain-name dispute resolution. *Compare* Jay P. Kesan & Andres A. Gallo, *The Market for Private Dispute Resolution Services—An Empirical Re-assessment of ICANN-UDRP Performance*, 11 MICH. TELECOMM. & TECH. L. REV. 285, 330 (2005) (arguing that complainants choose the dispute-resolution provider based on speed), *with* Daniel Klerman, *Forum Selling and Domain-Name Disputes*, 48 LOY. U. CHI. L.J. 561, 574 (2016) (arguing that complainants are most influenced by win-rates).

handed manner. We've heard from litigators on both sides of patent cases who like Judge Albright's procedural practices and his enthusiasm for patent law. There's no doubt that, as a former patent litigator, Judge Albright brings valuable expertise to bear in any given case. But the large numbers of defendants who seek transfer away from his court suggest that his expertise is not being deployed impartially. At best, it indicates that Judge Albright's efficiency and expertise isn't enough to outweigh the downsides of litigating in Waco.

Congress is best positioned to use the laboratory of the federal courts to identify useful procedures and practices, while also reducing the harms of "free market" case competition among the courts. In patent law, Congress could create a system of specialized trial courts. To cabin the worries about tunnel vision or capture that often meet proposals for judicial specialization,[396] the new court could work alongside the current district courts. A plaintiff could choose to bring suit in a district court or the specialized patent court. Defendants could be given a removal right, similar to the way a case may be filed in state court by a plaintiff, but, in certain circumstances, removed to federal court by the defendant.[397]

A parallel system of federal patent trial courts could have myriad benefits. The patent courts would offer judicial expertise while also having incentives to not be overly friendly to patentees to attract cases because defendants could simply remove every case filed there to the district court. Also, a parallel system would reduce the incentive of district courts to permit judge shopping because the defendant's "removal" option would prevent a plaintiff-friendly judge, division, or district from capturing large amounts of patent litigation.

There's a lot more to think through, of course, including the possible downsides of giving *defendants* the last word on forum choice and potential limits we might place on defendants' right to move cases from one court to another.[398] But our broader point is an institutional one: court competition is a market failure. Rather than having cases amass in particular districts because of judges acting in their own self-interest, judicial competition should take place in a regulated process subject to oversight by key stakeholders.[399]

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[396] *See* Dreyfuss, *supra* note 125, at 8.

[397] *See* 28 U.S.C. § 1441.

[398] A possible model to draw on might come from the bankruptcy realm where, in certain circuits, appeals from the orders of bankruptcy judges are handled not by district judges but by a three-judge panel of bankruptcy judges—but only if both parties agree. 28 U.S.C. § 158(c)(1). Some evidence suggests that the decisions of those three-judge Bankruptcy Appellate Panels are perceived to be of higher quality than the decisions of district judges in bankruptcy appeals. *See* Jonathan Remy Nash & Rafael I. Pardo, *An Empirical Investigation into Appellate Structure and the Perceived Quality of Appellate Review*, 61 VAND. L. REV. 1745, 1805-06 (2008).

[399] Greg Reilly makes this institutional point in critiquing the arguments of those who defend the concentration of patent cases in places like the Eastern and Western Districts of Texas:

> The policy outcomes touted by forum selling's defenders—a de facto specialized district court and pro-patentee advantages—do not result from the considered judgment of those with the legitimate authority to determine national patent policy but instead from the

CONCLUSION

District judges are the engine of the federal judiciary. Despite their importance, the role of the federal district judge has been undertheorized. This article has provided a framework for district-judge behavior that prioritizes representativeness, consistency, impartiality, accuracy, correctability, and ethicality.

That framework has been undermined by judicial competition for cases. Federal judges in certain districts in numerous areas of law have sought to attract litigation to their courtrooms through a mix of plaintiff-friendly procedures and favorable substantive rulings. Judges have done this for reasons that range from intellectual interest in a particular area of law and prior experience in the field to economic benefits for the judge and the judge's professional associates. The human desires for fame and adulation and the satisfaction of making decisions that are consistent with our beliefs about the world also surely play a role.

Judicial competition for cases has led to a breakdown in the features of judging that ensure litigants are treated fairly and impartially. But the problems that stem from unfettered competition can be fixed. Courts can deny parties the ability to judge shop. Congress could mandate randomized assignment of judges. More ambitiously, in patent law at least, Congress could create a parallel system of specialized and generalist courts that harnesses the benefits of judicial expertise while reducing the incentives for judges to appeal solely to the party who decides where to file a case.

unilateral actions of a single (or a couple) of the nearly 700 federal district judges in one (or a couple) of the ninety-four federal district courts nationwide.

Greg Reilly, *Online Symposium: Forum Selling and Legitimate Authority in the Patent System*, FEDCIRCUITBLOG (Feb. 21, 2022), https://fedcircuitblog.com/2022/02/21/online-symposium-forum-selling-and-legitimate-authority-in-the-patent-system [https://perma.cc/2AGR-FQHD].

APPENDIX A:

JUDGE ALBRIGHT PATENT JURY TRIAL VERDICTS (THROUGH MAY 31, 2023)

Case	Docket No.	Date	Winner	Damages
Dropbox, Inc. v. Motion Offense, LLC	6-20-cv-251	12-May-2023	Defendant	
Global eTicket Exch. Ltd. v. Ticketmaster LLC	6-21-cv-399	30-Apr-2023	Defendant	
Hafeman v. LG Elecs. Inc.	6-21-cv-696	28-Apr-2023	Defendant	
Repeat Precision, LLC v. Dynaenergetics Eur. GmbH	6-21-cv-104	3-Apr-2023	Defendant	
VLSI Tech. LLC v. Intel Corp.	6-19-cv-977	15-Nov-2022	Patentee	$948.9 million
Ravgen Inc. v. Lab'y Corp. of Am. Holdings	6-20-cv-969	23-Sep-2022	Patentee	$272.5 million*
NCS Multistage Inc. v. TCO AS	6-20-cv-622	26-Aug-2022	Patentee	$1.9 million
Caddo Sys., Inc. v. Microchip Tech. Inc.	6-20-cv-245	10-Jun-2022	Patentee	$235,000
Appliance Computing III Inc. Redfin Corp.	6-20-cv-376	17-May-2022	Defendant	
Densys Ltd. v. 3Shape Trios A/S	6-19-cv-680	8-Apr-2022	Patentee	$11.9 million*
EcoFactor, Inc. v. Google LLC	6-20-cv-75	10-Feb-2022	Patentee	$20 million
NCS Multistage Inc v. Nine Energy Serv., Inc.	6-20-cv-277	21-Jan-2022	Patentee	$486,400
VideoShare, LLC v. Google LLC	6-19-cv-633	16-Nov-2021	Patentee	$25.9 million
Jiaxing Super Lighting Elec. Appliance Co. v. CH Lighting Tech. Co.	6-20-cv-18	4-Nov-2021	Patentee	$14.2 million*
Profectus Tech. LLC v. Google LLC	6-20-cv-101	6-Oct-2021	Defendant	
Freshub, Inc. v. Amazon.com Inc.	6-21-cv-511	22-Jun-2021	Defendant	
CloudofChange, LLC v. NCR Corp.	6-19-cv-513	20-May-2021	Patentee	$13.2 million*
VLSI Tech. LLC v. Intel Corp.	6-21-cv-299	21-Apr-2021	Defendant	
ESW Holdings, Inc. v. Roku, Inc.	6-19-cv-44	9-Apr-2021	Defendant	
VLSI Tech. LLC v. Intel Corp	6-21-cv-57	2-Mar-2021	Patentee	$2.2 billion**

Case	Docket No.	Date	Winner	Damages
MV3 Partners LLC v. Roku, Inc.	6-21-cv-308	14-Oct-2020	Defendant	

*jury found willful infringement
**reversed on appeal by the Federal Circuit

APPENDIX B:

FEDERAL CIRCUIT MANDAMUS DECISIONS ON JUDGE ALBRIGHT 28 U.S.C. § 1404(A) TRANSFER OF VENUE RULINGS (THROUGH DEC. 31, 2022)

Case	Docket No.	Date	Outcome
In re Amazon.com, Inc., 2022 WL 17688072	22-157	15-Dec-2022	Granted
In re Cloudflare, Inc., 2022 WL 17075045	22-167	18-Nov-2022	Denied
In re Wenger S.A., 2022 WL 4393032	22-158	23-Sep-2022	Denied
In re Hewlett Packard Enter. Co., 2022 WL 3209326	22-154	9-Aug-2022	Denied
In re Apple Inc., 2022 WL 1676400	22-137	26-May-2022	Granted in part
In re Trend Micro Inc., 2022 WL 1485183	22-133	11-May-2022	Denied
In re ZTE Corp., 2022 WL 1419605	22-122	5-May-2022	Denied
In re Apple Inc., 2022 WL 1196768	22-128	22-Apr-2022	Granted
In re Canon Inc., 2022 WL 1197337	22-130	22-Apr-2022	Denied
In re Canon Inc., 2022 WL 1197336	22-131	22-Apr-2022	Denied
In re Medtronic, Inc., 2021 WL 6112980	22-107	27-Dec-2021	Denied
In re accessiBe Ltd., 2021 WL 5764861	22-113	6-Dec-2021	Denied
In re Atlassian Corp., 2021 WL 5292268	21-177	15-Nov-2021	Granted
In re Google LLC, 2021 WL 5292267	21-178	15-Nov-2021	Granted
In re Apple Inc., 2021 WL 5291804	21-181	15-Nov-2021	Granted
In re Quest Diagnostics Inc., 2021 WL 5230757	21-193	10-Nov-2021	Granted
In re DISH Network L.L.C., 2021 WL 4911981	21-182	21-Oct-2021	Granted
In re Netscout Sys., Inc., 2021 WL 4771756	21-173	13-Oct-2021	Granted
In re Pandora Media, LLC, 2021 WL 4772805	21-172	13-Oct-2021	Granted
In re Google LLC, 2021 WL 4592280	21-171	6-Oct-2021	Granted
In re Juniper Networks, Inc., 2021 WL 4519889	21-156	4-Oct-2021	Granted
In re Apple Inc., 2021 WL 4485016	21-187	1-Oct-2021	Granted
In re Google LLC, 2021 WL 4427899	21-170	27-Sep-2021	Granted

Case	Docket No.	Date	Outcome
In re Intel Corp., 2021 U.S. App. LEXIS 29135	21-168, 21-169	27-Sep-2021	Denied
In re G&H Diversified Mfg., LP, 859 F. App'x 905	21-176	27-Sep-2021	Denied
In re Juniper Networks, Inc., 14 F.4th 1313	21-160	24-Sep-2021	Granted
In re DISH Network L.L.C., 856 F. App'x 310	21-148	13-Aug-2021	Denied
In re Google LLC, 855 F. App'x 767	21-144	4-Aug-2021	Denied
In re Apple Inc., 855 F. App'x 766	21-147	4-Aug-2021	Denied
In re Hulu, LLC, 2021 WL 3278194	21-142	2-Aug-2021	Granted
In re TCO AS, 853 F. App'x 670	21-158	13-Jul-2021	Denied
In re Uber Techs., Inc., 852 F. App'x 542	21-150	8-Jul-2021	Granted
In re Samsung Elecs., Co. 2 F.4th 1371	21-139, 21-140	30-Jun-2021	Granted
In re W. Digital Techs., Inc., 847 F. App'x 925	21-137	10-May-2021	Denied
In re Tracfone Wireless, Inc. 852 F. App'x 537	21-136	20-Apr-2021	Granted
In re True Chem. Sols., LLC, 841 F. App'x 240	21-131	23-Mar-2021	Denied
In re SK hynix Inc., 847 F. App'x 847	21-114	25-Feb-2021	Denied
In re Intel Corp., 843 F. App'x 272	21-111	21-Jan-2021	Denied
In re Intel Corp., 841 F. App'x 192	21-105	23-Dec-2020	Granted
In re Apple Inc., 979 F.3d 1332	20-135	9-Nov-2020	Granted
In re Nitro Fluids L.L.C., 978 F.3d 1308	20-142	28-Oct-2020	Granted-in-part
In re Adobe Inc. 823 F. App'x 929	20-126	28-Jul-2020	Granted
In re Apple Inc. 818 F. App'x 1001	20-127	16-Jun-2020	Denied
In re Apple Inc., 2019 WL 13095535	20-104	20-Dec-2019	Denied

APPENDIX C:

FORMER DISTRICT AND MAGISTRATE JUDGES ON FEDARB OR JAMS WITH PROFILES MENTIONING OR EXTENSIVELY DISCUSSING PATENT LAW (AS OF FEBRUARY 2023)

FEDARB

NAME	COURT	MENTIONED	EXTENSIVE
Robert Bonner	Central District of California	Yes	No
Stephen G. Larson	Central District of California	Yes	Yes
A. Howard Matz	Central District of California	Yes	Yes
Alan H. Nevas	District of Connecticut	No	No
Jonathan Lebedoff	District of Minnesota	No	No
Dennis M. Cavanaugh	District of New Jersey	Yes	Yes
H. Lee Sarokin	District of New Jersey	No	No
William G. Bassler	District of New Jersey	Yes	Yes
Raymond T. Lyons	District of New Jersey	No	No
John W. Bissell	District of New Jersey	No	No
Stephen M. Orlosfky	District of New Jersey	Yes	Yes
Alfred J. Lechner, Jr.	District of New Jersey	Yes	Yes
Faith S. Hochberg	District of New Jersey	Yes	Yes
Ernest C. Torres	District of Rhode Island	No	No
Paul G. Cassell	District of Utah	No	No
James M. Moody	Eastern District of Arkansas	No	No
Oliver W. Wanger	Eastern District of California	Yes	No
George C. Pratt	Eastern District of New York	No	No
Melanie L. Cyganowski	Eastern District of New York	No	No
Edward N. Cahn	Eastern District of Pennsylvania	Yes	Yes
Bruce W. Kauffman	Eastern District of Pennsylvania	No	No
T. John Ward	Eastern District of Texas	Yes	Yes
David Folsom	Eastern District of Texas	Yes	Yes
Stephen N. Limbaugh, Sr.	Eastern/Western District of Missouri	No	No
Frank W. Bullock, Jr.	Middle District of North Carolina	Yes	Yes
Frank H. McFadden	Northern District of Alabama	No	No
Vaughn R. Walker	Northern District of California	Yes	Yes
Paul R. Matia	Northern District of Ohio	No	No
Richard B. McQuade, Jr.	Northern District of Ohio	Yes	No
Joe Kendall	Northern District of Texas	No	No
W. Royal Furgurson, Jr.	Northern District of Texas	Yes	Yes
Thomas E. Scott	Southern District of Florida	No	No
Abraham D. Sofaer	Southern District of	Yes	Yes

NAME	COURT	MENTIONED	EXTENSIVE
	New York		
Barbara S. Jones	Southern District of New York	No	No
John S. Martin	Southern District of New York	Yes	No
Robert O'Conor, Jr.	Southern District of Texas	Yes	Yes
F.A. Little, Jr.	Western District of Louisiana	No	No
Ralph G. Thompson	Western District of Oklahoma	No	No

JAMS

NAME	COURT	MENTIONED	EXTENSIVE
Dickran M. Tevrizian	Central District of California	Yes	No
Gary L. Taylor	Central District of California	Yes	No
George H. King	Central District of California	Yes	No
Ann I. Jones	Central District of California	Yes	No
Jay C. Gandhi	Central District of California	Yes	Yes
Margaret A. Nagle	Central District of California	Yes	Yes
Stephen E. Haberfeld	Central District of California	Yes	No
Rosalyn Chapman	Central District of California	Yes	Yes
Ricardo M. Urbina	District of Columbia	Yes	No
Gregory M. Sleet	District of Delaware	Yes	Yes
William G. Connelly	District of Maryland	No	No
Benson Evrett Legg	District of Maryland	Yes	No
Frederic N. Smalkin	District of Maryland	Yes	Yes
Joan N. Feeney	District of Massachusetts	No	No
James M. Rosenbaum	District of Minnesota	Yes	Yes
Janice M. Symchych	District of Minnesota	Yes	No
Carl W. Hoffman	District of Nevada	Yes	No
Peggy A. Leen	District of Nevada	Yes	No
Philip M. Pro	District of Nevada	Yes	Yes
Garrett E. Brown, Jr.	District of New Jersey	Yes	Yes
John C. Lifland	District of New Jersey	Yes	Yes
John J. Hughes	District of New Jersey	Yes	No
William F. Downes	District of Wyoming	Yes	No
Frank C. Damrell, Jr.	Eastern District of California	Yes	No
Gerald E. Rosen	Eastern District of Michigan	Yes	No
Phillip J. Shefferly	Eastern District of Michigan	No	No
Steven M. Gold	Eastern District of New York	Yes	Yes
James R. Melinson	Eastern District of Pennsylvania	Yes	Yes
Thomas J. Rueter	Eastern District of Pennsylvania	Yes	No
Diane M. Welsh	Eastern District of Pennsylvania	No	No
Michael H. Schneider, Sr.	Eastern District of Texas	Yes	Yes

NAME	COURT	MENTIONED	EXTENSIVE
Charles N. Clevert, Jr.	Eastern District of Wisconsin	No	No
Thomas M. Blewitt	Middle District of Pennsylvania	No	No
James Ware	Northern District of California	Yes	Yes
Edward A. Infante	Northern District of California	Yes	Yes
Wayne D. Brazil	Northern District of California	Yes	No
Elizabeth D. Laporte	Northern District of California	Yes	Yes
David H. Coar	Northern District of Illinois	No	No
Geraldine Soat Brown	Northern District of Illinois	Yes	No
Wayne R. Andersen	Northern District of Illinois	Yes	No
Arlander Keys	Northern District of Illinois	Yes	Yes
James F. Holderman	Northern District of Illinois	Yes	Yes
Michael T. Mason	Northern District of Illinois	No	No
Morton Denlow	Northern District of Illinois	Yes	Yes
Sidney I. Schenkier	Northern District of Illinois	Yes	Yes
Jeff Kaplan	Northern District of Texas	Yes	Yes
Irma E. Gonzalez	Southern District of California	Yes	No
Ted E. Bandstra	Southern District of Florida	Yes	No
Donald G. Wilkerson	Southern District of Illinois	No	No
Michael J. Reagan	Southern District of Illinois	No	No
Michael H. Dolinger	Southern District of New York	Yes	No
Frank Maas	Southern District of New York	Yes	Yes
Henry Pitman	Southern District of New York	Yes	No
Kathleen A. Roberts	Southern District of New York	No	No
Theodore H. Katz	Southern District of New York	Yes	No
James “Jay” C. Francis IV	Southern District of New York	Yes	Yes
Vanessa D. Gilmore	Southern District of Texas	Yes	Yes
Nancy Johnson	Southern District of Texas	Yes	No