"Author Meets Critics" panel on Wasby, *BORROWED JUDGES*
Southern Political Science Association, Austin TX, January 18, 2019
Statement by author

I want to thank Professors [Jeffrey] Budziak and [H.W.] Perry for their comments. I'll do my best to answer their questions. I would like to make some observations about the book. One relates to the reception given to some of what I had to say, another to *visited* judges' concerns, and the third relates to what has happened since the cut-off for the data that were discussed in the book.

I. The first comment mixes both elements. Visiting judges continue to decide key cases, in two senses: their vote, as part of a two-judge panel majority or as one of two non-regular judges, is determinative, and also when they write for the visited circuits three-judge panel. When a visiting judge does write for the panel in a case with substantive significance, it is difficult to persuade people that this has not been a "set-up." Most obvious is the instance, which I report in the book, in which Judge Jed Rakoff of Southern New York wrote for the Ninth Circuit to adopt a view of insider trading that (a) ran counter to the law of the Second Circuit, from which Judge Rakoff came and which he had criticized and (b) was then adopted by the Supreme Court because Judge Rakoff's Ninth Circuit's opinion had created an inter-circuit split.

Some –and most particularly a retired lawyer in the D.C. area who initiated correspondence with me– simply insist that "the fix was in," that the visitor was invited specifically to sit on that case and to do so in order to create that result. One way to react to this stance is to suggest that it is illustrative of how little practicing attorneys know of the workings of the courts before which they practice. Relatedly, they do not understand how visiting judges – or any judges, for that matter– are "matched" with cases and they will not accept that courts have bureaucratic procedures that operate as they would in any institution.

In this instance, the procedure works like this: Some staff persons in the Office of Clerk of Court group cases for oral argument calendars, both for "bulk," to make sure that a day's calendar does not contain only blockbusters nor that it have only "one-weight" cases (that should in any event go to screening panels), and perhaps for subject-matter, so that a panel might have several cases on the same subject on a given day, like criminal cases or immigration cases. Then some *other* Clerk's office staff put together the sets of three judges who will sit for a day (or perhaps several days or a week), with –at least in the Ninth Circuit, which has several places of hearing oral argument– identifying in which city a particular three-judge panel will sit. Only then are the packets of cases and the sets of judges brought together. Moreover, that a visitor will sit with a court at a given time is determined months in advance, so the visiting judge can plan work at the home court, and this is before the Clerk's office knows which cases will be ready for argument. (Sometimes a district judge sitting by designation is assigned to a panel closer to the time of argument to fill a hole left by illness or a late recusal, but this is not likely for judges visiting from another circuit.)

One hopes that, on realizing these internal mechanisms, someone would recognize the extreme difficulty –indeed, the nigh impossible task- involved in placing a particular visiting judge on a particular panel that would hear a specific case. But some can't be persuaded. They still think that Judge Rakoff's involvement in that case was "fixed" and they liken it to the best-known instance of panel-stacking, that involving the old Fifth Circuit and school desegregation cases, in which the Chief Judge kept an especially segregationist judge off panels dealing with school desegregation cases. And do you believe for one moment that if Judge Rakoff's participation in that case was a "put-up job" that someone within the Ninth Circuit would not have complained quite audibly? And, perhaps more obviously, if the two circuit judges on the panel with Judge Rakoff had not agreed with his view, wouldn't they have written separately? (Indeed, when in another 2017 Ninth Circuit case, Judge Frederick Block (of Eastern New York) wrote for the panel to hold that a FOIA requester was entitled to attorney's fees, each of the two circuit judges on the panel wrote separate opinions concurring only in the result. Note as well that during another visit to the Ninth Circuit, Judge Rakoff wrote for a panel to issue an order revoking approval, by this administration, of pesticides known to harm children. Does one really believe that Judge Rakoff gets a special ticket for such cases? Or that the Ninth Circuit saves its interesting cases for him?

Certainly, I would add, once the panel on which Judge Rakoff was to sit received the list of cases the panel was to hear, it would be little surprise that he, as a judge outspoken on insider-trading matters, would be assigned that case under the court's general custom in which the three judges on a panel divide their work under the presiding judge's direction but with the understanding that judges can select those cases of greater interest to themselves.

II. On the matter of the views held by judges of visited circuits about the presence of visiting judges, I would suggest that those views have not necessarily changed. One point, noted in the interviews reported in the book, is that visiting judges do not know the law of the visited court, especially in areas of law in which a visited court may specialize, such as the Ninth Circuit and immigration. At an early 2017 conference honoring the 40th anniversary of the passage of what we might call the Carter Judgeship Bill because it brought to many new judges to the Ninth Circuit, later appointee Judge Kim Wardlaw said that visiting judges did know immigration law, a position that the concern of the late Chief Judge Browning, stated when the court was trying to determine how to dispose of immigration appeals after the *Stevic* case, that all cases would be decided by panels which might include a visitor.

III. Any study is subject to being time-bound. So the question arises: Did the patterns that I portrayed continue or did use of visitors and district judges change in the period after the last data reported in the book? I extended examination from 2016 through May, 2018. By and large, patterns remained the same. Both the Ninth and Eleventh Circuits continued to make greatest use of visitors and district judges. Both made steady modest use of visiting circuit judges. The Eleventh Circuit made modest use of visiting district judges while their use in the Ninth Circuit was high (roughly 40 in cases with published opinions, well over 50 in cases with non-precedential dispositions). In 2018, there were visitors in 282 of 450 panel days, and in 2017, there were 130 individual visiting judges participating in over 2,000 cases, 650 of which they decided. In the Eleventh Circuit, where there was a slight decrease in use of district judges,

visitors appeared is 36-44% of the cases. In both circuits, there was greater such use in cases with published opinions than in non-precedential dispositions. This is a result of many non-precedential dispositions being issued by screening or non-argument calendar panels, which were composed only of circuit judges. Senior judges also play a larger role in screening because, when a vacancy occurs in a panel, active-status circuit judges move from screening panels to those merits panels and the senior judges fill in on screening panels. (Senior judges accounted for 37% of the court's decisions.)

Some circuits continued little or minimal use of visitors and district judges (the Third, Fourth, Fifth, Eighth, and Tenth Circuits). Both the Eighth and the Seventh Circuits had occasional non-trivial use of district judges, and the Second Circuit, while its only visitors continued to be judges from the nearby Court of International Trade, it continued to use many district judges, again from nearby Eastern New York and Southern New York (each not hearing many cases). Several circuits had an increase in the number of district judges they gave to other circuits.. The D.C. Circuit's use of its own senior judges remained high, even with the nuclear-option newcomers now fully integrated in the court's work.

But if there were circuits where the patterns remained pretty much the same, there were others where patterns did change:

- First Circuit decreased in district judges
- Sixth Circuit use of visitors dropped off to zero and of district judges to minimum, perhaps because the use of the court's own seniors increased
- Ninth Circuit use of visitors and of district judges increased in linear fashion in this extension period, while use of the court's own senior judges continued to be lower than earlier, but regularly higher in non-precedential dispositions than in cases decided with published opinions; they participated in between one-fifth and one-third of the cases.

What about the role of these non-regular judges in being the dispositive presence or casting the dispositive votes in the cases in which they participate? Most "dispositives" result simply from the presence of two senior judges or a combination of a senior judge and either a visitor or a district judge on the panel.

- In the First Circuit, these judges account for from 10% to 18% of the cases
- In the Sixth Circuit, they are the dispositive votes in one-eighth of the cases with published opinion but in non-published dispositions, their presence is dispositive in from 31% down to only 8.6%
- In the Eleventh Circuit, they are dispositive in one-sixth, then up to one-fourth, then up to 30% of the cases with published opinions in which they take part, but only in 3-4% of cases with "unpublished" dispositions
- The reverse of the Eleventh Circuit pattern is found in the Ninth Circuit, where non-regular judges' presence and votes is determinative in one-fifth of published-opinion cases but in non-precedential dispositions, the proportion is from one-fourth up to 38%.

It is important to note that there is a greater proportion of cases with borrowed judges as

determinative in published than in unpublished cases, because a higher proportion of cases with published opinions, which make the law of the circuit, are non-unanimous than is true of cases resulting in non-precedential rulings.