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IRREGULAR PANELS

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ABSTRACT

This Article explores a common but essentially unexplored feature of appellate decision making—decisions by irregular panels. Decisions in the federal courts of appeals are usually reached by panels of three statutorily authorized judges. But appellate panels are often irregular in practice, either because an authorized judge becomes unavailable or because an unauthorized judge is assigned as a panel member. The traditional approach, supported by both statute and case law, has been to accept the former while rejecting the latter. When considered functionally, however, decisions by quorum are at least as problematic as those by panels with unauthorized members. The absence of a third judge deprives a panel of important contributions that potentially affect the direction, content, or legitimacy of the final product. These contributions come at a cost, but not one as substantial as might be imagined. Moreover, the actual cost is likely to be smaller than the perceived cost to the other panel members, while the potential benefits are likely to be greater. For these reasons, the current approach of allowing panel members to decide when to proceed by quorum produces undesirable results. In its place, a firm requirement of regularity—that is, decision by three authorized judges—should be implemented.

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INTRODUCTION

Lawsuits stemming from the events of September 11, 2001 continue to work their way through the American courts. In April 2008, the United States Court of Appeals for the Second Circuit decided an interlocutory appeal in one such suit. *Benzman v. Whitman*[1] involved claims brought by a putative class against government officials who allegedly "misled the plaintiff class members by stating that the air quality in the period after the destruction of the World Trade Center towers was safe enough to permit return to homes, schools, and offices."[2] The district judge had denied motions to dismiss by government officials and agencies; the Second Circuit panel reversed and "remanded with directions to dismiss the Complaint."[3]

From a substantive perspective, *Benzman* raises interesting questions about the extent of constitutional and statutory obligations imposed on

1. 523 F.3d 119 (2d Cir. 2008).
2. *Id.* at 123.
3. *Id.* at 134.

governmental actors in the face of extreme emergency. But *Benzman* is also interesting for a procedural reason: the reversal was entered not by a traditional panel of three judges, but instead by a quorum of two. Senior Circuit Judge Wilfred Feinberg had been assigned to the appellate panel but recused himself before oral argument.[4] Rather than assign a replacement, the remaining two judges heard and decided the appeal on their own. This course of action is irregular, but not impermissible—28 U.S.C. § 46(d) specifically authorizes two judges of an appellate panel to act as a quorum, and most federal circuits have used local rules to confer broad discretion to exercise that authority in cases where an assigned judge is permanently absent from the decision-making process due to recusal, retirement, or death.[5] Under the prevailing approach, then, the remaining two judges might have sought a replacement for Judge Feinberg, but they were not compelled to do so.

Decision by quorum is an example of a tolerated form of panel irregularity in the federal appellate system. A competing form of irregularity, however, is plainly not tolerated. The Supreme Court has consistently found that only authorized judges may participate in the appellate decision-making process and that any deviation from this requirement is reversible error. Thus, in *Nguyen v. United States*,[6] the inclusion of an Article IV judge rendered a panel powerless to exercise judicial power, even though the two other judges were undeniably authorized and in agreement.[7] Although the analysis in *Nguyen* focused on statutory formation rules, the opinion's rhetoric echoes a broader principle appearing in cases dating back to the formation of the modern federal appellate courts: panels involving unauthorized judges are categorically problematic.[8]

Put together, the prevailing approach to panel formation and composition seems to be as follows. All appeals must be assigned in the first instance to a panel of three authorized judges. If an assigned judge becomes unavailable, the panel may decide with only two judges, subject to local rules that restrict the statutory authority to do so. Alternatively, the missing judge may be replaced, but the replacement judge must also be authorized. This Article describes, evaluates, and ultimately questions this pre-

4. It is unclear precisely when the recusal occurred. The opinion itself simply notes that Judge Feinberg "recused himself," while saying nothing about the timing of the recusal. *Id.* at 122 n.**. But the docket sheet indicates that the oral argument was heard by two judges, so the recusal seems to have occurred at some point prior to the scheduled oral argument. *See* Appellate Docket at 15, *Benzman*, 523 F.3d 119 (No. 06-1166).

5. In *Benzman*, the applicable local rule was 2D CIR. R. § 0.14(b). For further discussion of the local rules and practices relating to quorum decisions in the federal appellate courts, see *infra* Part III.A.

6. 539 U.S. 69 (2003).

7. *See id.* at 80.

8. *See* John F. Duffy, *Are Administrative Patent Judges Unconstitutional?*, 2007 PATENTLY-O PAT. L.J. 21, http://www.patentlyo.com/lawjournal/files/duffy.BPAI.pdf.

vailing approach. It does not challenge the statutory basis for the prevailing approach but argues that the patchwork of statutes, rules, and judicial practices governing cases of panel irregularity is flawed and in need of modification. In particular, the permissive attitude toward quorums is difficult to square with the categorically restrictive attitude toward panels with unauthorized members. In both cases, a decision is being reached by a panel that includes only two authorized members.

The proposed solution is harmonization—full, authorized panels in every case. In terms of practical effect, this means abandoning quorum decisions in the federal appellate courts. To arrive at this conclusion, Part I begins by more fully describing the current approach toward irregular panels, drawing from statutes and case law. Part II turns to the functional considerations implicated by irregular panels. Drawing on recent work by Frank Cross, Cass Sunstein and others on the nature of judicial deliberation, I suggest a variety of process-level benefits that accompany the participation of three judges in the appellate decision-making process. Even when two assigned judges agree, a third judge may make contributions along several dimensions. Most dramatically, the injection of a new voice may trigger shifts in the direction of the opinion reached. More commonly, the third judge may affect the terms and status of the opinion. For example, the third judge may write a dissent, prompting revisions to the majority opinion and affecting the way that the opinion is interpreted and applied in future cases. Alternatively, the third judge may use the threat of a dissent to extract modifications to the terms of the opinion, or may simply perform an error-correcting and nuance-enhancing role in the development of an opinion with which she generally agrees. In all cases, the presence of a full panel should produce additional benefits in terms of legitimacy and acceptance by the parties subject to the opinion.

While this menu of benefits does not come without costs, they should not be overstated. Preserving the ability for the institution to function, which is perhaps the most traditional rationale for quorum authority, is not compelling in the context of the modern federal appellate courts; the pool of judges from which to form complete panels is sufficiently large in every circuit that the set of cases for which a three-judge panel could not be convened is null. And arguments rooted in the futility of adding a third judge are convincing only if one accepts a static view of the decision-making process that is simplistic at best. Rather, the genuine costs come in terms of efficiency and expediency. Adding a third judge requires an expenditure of judicial resources and may slow the decision-making process. The judicial system—and, in some cases, perhaps the parties themselves—may be willing to make do without the benefits just described when these costs are particularly acute.

We might conclude from this that panel irregularities should be permitted when the gains in terms of expediency and efficiency outweigh the

losses in terms of the decisional dynamics described above. But Part III suggests that any attempt to perform this sort of balancing is problematic. In theory, at least, the current approach toward quorums permits calibration of this sort. Although two judges are permitted to proceed as a quorum in certain circumstances, they are never required to do so. Two judges could therefore decide to seek the assignment of a third judge in any case where the potential contribution of that judge would outweigh the cost and delay of securing that contribution. Theoretical possibilities aside, the current procedural mechanism is unlikely to accurately perform this kind of calibration in practice because judges who are themselves involved in the decision will systematically overestimate the expediency and efficiency costs and underestimate the process-level benefits.

To counter these biases, Part III examines three procedural modifications to the prevailing approach. The first two—enhanced self-assessment and external review—preserve the option of decision by irregular panel, while attempting to improve the selection of cases where that option is used. These two approaches roughly mirror competing improvements that have been suggested in the context of judicial recusal and misconduct. A third option, which has not been widely considered in those contexts, is to eliminate the decision altogether, instead requiring the participation of three valid judges in all cases. Removing discretion is ultimately the preferred approach to irregular panels, both because it produces a more desirable set of outcomes at a lower cost than the competing options and because it unifies the treatment of the competing categories of panel irregularity.

I. THE LAW OF IRREGULAR PANELS

The current approach toward irregular panels reflects the inputs of Congress, the Supreme Court, and the courts of appeals themselves. Congress has supplied the basic statutory framework for appellate panel composition, which combines a firm requirement that three judges must constitute a panel, with a permissive provision that authorizes two judges to act as a quorum of any panel.[9] The Supreme Court has repeatedly enforced the statutory restrictions on panel constitution and in doing so has declined to view the quorum provision as sufficiently broad to authorize actions by two judges who were not once part of a properly constituted panel.[10] But that is the only limit to the quorum provision at which the Court has hinted, and the courts of appeals have not been eager to impose any addi-

9. *See* 28 U.S.C. § 46 (2006); *see also infra* Part I.A.

10. *See Nguyen*, 539 U.S. at 80; William Cramp & Sons Ship & Engine Bldg. Co. v. Int'l Curtis Marine Turbine Co., 228 U.S. 645, 650–51 (1913); Am. Constr. Co. v. Jacksonville, T. & K.W. Ry. Co., 148 U.S. 372, 388 (1893); *see also infra* Part I.B.1.

tional limits as a matter of statutory command.[11] Instead, the appellate courts have consistently rebuffed challenges to quorum decisions by referencing the broad authority provided by statute. The end result is a technical approach that views the statutory requirements narrowly.[12]

A. Statutes

28 U.S.C. § 46 governs the composition of appellate panels. Section 46(b) provides: "In each circuit the court may authorize the hearing and determination of cases and controversies by separate panels, each consisting of three judges, at least a majority of whom shall be judges of that court . . . ."[13] Although this seems to embody a firm requirement that three judges are necessary to constitute a panel, two subsequent provisions soften that requirement substantially. Section 46(c), which primarily describes the en banc process for courts, begins by noting that "[c]ases and controversies shall be heard and determined by a court or panel of *not more than* three judges."[14] More importantly, § 46(d) allows that "[a] majority of the number of judges authorized to constitute a court or panel thereof, as provided in paragraph (c), shall constitute a quorum."[15]

Much of the language in § 46(b) was added as part of the Federal Courts Improvement Act of 1982,[16] and the Senate Report accompanying that Act is similarly equivocal about the necessity of three-judge panels. In two places, the report emphasizes the importance of deciding cases with three judges. For example, in the Explanation of the Bill, the Report provides:

> Current law seems to permit appellate courts to sit in panels of less than three judges, and some courts have used panels of two judges for motions and for disposition of cases in which no oral argument is permitted because the case is classified as insubstantial. In order for the Federal system to [preserve] both the appearance and the reality of justice, such a practice should not become

11. *See infra* Part I.B.2.

12. This does not mean that the courts of appeals have been completely unwilling to place limits on decisions by irregular panels. To the contrary, many have adopted local rules and procedures that authorize quorum decisions in a smaller class of cases than the statute would otherwise permit. Those local rules and procedures are discussed *infra* at Part III.A. The point here is that neither the Supreme Court nor the courts of appeals have imposed any restrictions on the basis of the statutory language of 28 U.S.C. § 46.

13. 28 U.S.C. § 46(b) (2006).

14. *Id.* § 46(c) (emphasis added).

15. *Id.* § 46(d).

16. *See* Pub. L. No. 97-164, §§ 103, 205, 96 Stat. 25, 25, 53 (1982).

> institutionalized. The disposition of an appeal should be the collective product of at least three minds.[17]

But the Act did not remove § 46(d)'s quorum provision, and that alone weakens the force of the Report's rhetoric.[18] That force is further diminished by the inclusion—merely two sentences after the excerpt just quoted—of the following sentence:

> The circuit courts could continue to adopt local rules permitting the disposition of an appeal in situations in which one of the three judges dies or becomes disabled and the remaining two agree on the disposition; but, in the first instance, all cases would be assigned to [a] panel of at least three judges.[19]

This concession, together with the existing presence of the quorum provision in the statutory framework, dramatically undercuts the earlier forceful language directed at § 46(b). The earlier language appears to embody a desire to introduce a firm decision rule that would require the involvement of three judges in the ultimate disposition of every appeal. The result instead is a formation rule that—notwithstanding the aspirations of the Act's title—merely reconfirms the prevailing view of the courts. In practice, the Act has produced no discernable shift in the judicial approach toward statutory panel requirements; as the next part demonstrates, that approach has consistently been to scrutinize initial composition of panels while brushing aside challenges to the decisional authority of two-judge quorums.

B. Cases

1. Supreme Court

When assessing challenges to panel composition, the Court has held that appellate panels must have authority to act as granted by statute. This requires at least that the appeal be assigned initially to a three-judge panel

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17. S. REP. NO. 97-275, at 10 (1981), *as reprinted in* 1982 U.S.C.C.A.N. 11, 19. Later, in the Section-By-Section Analysis, the Report repeats that initial refrain and adds:

> Because of apprehensions that decisions at the appellate level by fewer than three judges carry the risk of being less sound or less balanced, there is a widespread belief that every decision of an appeal should be the collective product of at least three minds. Subsection (b) of section 204 also amends 28 U.S.C. § 46(b) to require that all decisions be reached by at least three judges.

Id. at 27, *as reprinted in* 1982 U.S.C.C.A.N. 11, 37.

18. The 1982 Act did not simply ignore or overlook the quorum provision, however. Section 46(d) was amended slightly (replacing "division" with "panel") to bring its language in line with changes in other subsections. *See* Pub. L. No. 97-164, § 103, 96 Stat. 25, 25 (1982).

19. S. REP. NO. 97-275, at 9 (1981), *as reprinted in* 1982 U.S.C.C.A.N. 11, 19.

composed of "competent" judges. Most challenges to panel composition have been based on a failure to meet this initial requirement. The law here has essentially been settled for as long as the circuit courts have existed. Merely two years after their creation,[20] the Supreme Court in *American Construction Co. v. Jacksonville, Tampa & Key West Railway Co.*[21] considered the legitimacy of an appellate panel that included a judge who had heard part of the case below.[22] The Court returned the case and directed that a writ of certiorari would be granted for the purpose of quashing the decree of the appellate court in the event that the judge were not disqualified. Underlying that disposition was a conclusion that "the decree in which [the district judge] took part was unlawful, and perhaps absolutely void, and should certainly be set aside or quashed by any court having authority to review it by appeal, error or *certiorari*."[23] In short, if the panel was not properly constituted, it had no authority to act.[24]

Much more recently, the Court in *Nguyen v. United States*[25] considered the presence of a non-Article III judge on an appellate panel.[26] When the Ninth Circuit held a special session in Guam, it invited a district judge from the Northern Mariana Islands to sit by designation. Although he did not complain at the time, the criminal defendant, Nguyen, later noted that

20. *See* Circuit Court of Appeals (Evarts) Act of 1891, ch. 517, 26 Stat. 826 (1891) (current version in scattered sections of 28 U.S.C.).

21. 148 U.S. 372 (1893).

22. The appeal in *American Construction* stemmed from the reversal of the questionable judge's order by a different district judge. This arrangement conflicted rather plainly with § 3 of the Judiciary Act of 1891, which provided that no judge should sit on the appellate panel to review "a cause or question" that had been tried or heard before him at the trial level. *See id*. at 377.

23. *Id.* at 387.

24. This view was reaffirmed twenty years later in *William Cramp & Sons Ship & Engine Building Co. v. International Curtis Marine Turbine Co.*, 228 U.S. 645 (1913). There, as in *American Construction*, the judge who had been assigned the case below was also included in the appellate panel. Even so, the judge in *William Cramp* asserted that § 3 of the Judiciary Act was not implicated because the appellate panel was not reviewing any decision that he had made. This argument was possible only because the judge had not made *any* decisions with respect to the case; instead, he had declared himself too busy to examine its merits, and had entered a *pro forma* decree for the purpose of passing the case directly to the appellate court. *See id*. at 647–50. Unimpressed, the Court concluded that, notwithstanding "the sense of public duty which led the trial court virtually to decline to examine the merits of the case," *id.* at 648, an error had indeed been committed—namely, that "the Circuit Court of Appeals which passed upon the case, was virtually no court at all, because not organized in conformity to law," *id*. at 652.

25. 539 U.S. 69 (2003).

26. *Nguyen* was not the Court's first encounter with non-Article III judges in federal appellate decision making. Forty years earlier, the Court decided *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962), which challenged the authority of a three-judge Second Circuit panel that included a judge sitting by designation from the Court of Claims. Unlike *William Cramp* and *American Construction*, the challenge raised in *Glidden* was constitutional rather than statutory: petitioners claimed that the structural protections of Article III were lacking in their case because the Court of Claims judge had only Article I status. *See id.* at 532–34. In an excruciatingly long opinion, Justice Harlan concluded for the plurality of the Court that judges sitting on the Court of Claims have Article III status and that the panel was therefore constitutionally unproblematic. *See id.* at 584. In *Nguyen*, Justice Stevens explicitly declined to rest his opinion on the structural guarantees of the Constitution and instead focused on the panel's lack of statutory authority. 539 U.S. at 76 n.9.

the District Court for the Northern Mariana Islands is an Article IV territorial court, and he claimed that judges from that court are not permitted under 28 U.S.C. § 292(a) to sit by designation on appellate panels. As it turns out, no one involved in the case at the Supreme Court disputed that claim; all nine Justices—and even both parties—agreed that the Article IV judge was not statutorily authorized to sit.[27] A slim majority further agreed that *American Construction* and its progeny required the conclusion that the panel's lack of authority rendered it incompetent to act.[28]

Implicit in this approach to questions of panel legitimacy is that the existence of a competent quorum provides no defense to the improper constitution of an appellate panel. Indeed, *Nguyen* was explicit on this point. The remaining two judges on the Ninth Circuit panel had undeniable Article III status, and the government argued that those two judges could enter judgment as a quorum even though the third judge was concededly incompetent to sit. The Court rejected that argument outright. It first noted that it "has never doubted its power to vacate the judgment entered by an improperly constituted court of appeals, even when there was a quorum of judges competent to consider the appeal."[29] In this case, the panel was improperly constituted because 28 U.S.C. § 46(b) requires the presence of three competent judges "in the first instance."[30] Although "the two Article III judges who took part in the decision of petitioners' appeals would have constituted a quorum if the original panel had been properly created,"[31] they did not constitute a quorum of the panel in *Nguyen* because there was, in effect, no panel at all.

Thus, *Nguyen* concludes that the existence of the quorum statute is not enough to cure a deficiency in the panel's creation. But in the absence of such a deficiency, the Court had no problem describing as "settled law"

27. *See Nguyen*, 539 U.S. at 80–81 ("Even if the parties had *expressly* stipulated to the participation of a non-Article III judge in the consideration of their appeals, no matter how distinguished and well qualified the judge might be, such a stipulation would not have cured the plain defect in the composition of the panel."); *see also id.* at 84 (Rehnquist, C.J., dissenting) ("It was undoubtedly a mistake, for the reasons stated by the Court . . . for the appellate panel to include an Article IV judge.").

28. This question produced a bizarre 5–4 split in *Nguyen*. Justices Stevens, O'Connor, Kennedy, Souter, and Thomas followed the approach taken in *American Construction* and viewed the lack of authority as an error that rendered the panel incompetent to act. *See id.* at 83 n.17 (majority opinion). Chief Justice Rehnquist, along with Justices Scalia, Breyer, and Ginsburg, would have instead responded to the petitioner's failure to raise his challenge in the Ninth Circuit itself by applying a plain-error review under Federal Rule of Criminal Procedure 52(b), and thus would have affirmed the panel's unanimous decision despite the statutory infirmity. *See id.* at 83–84 (Rehnquist, C.J., dissenting).

Nguyen's split may suggest that the Court's view is in transition and that plain-error review will eventually carry the day. Indeed, the Supreme Court's more recent opinion in *Gonzales v. United States*, 128 S. Ct. 1765 (2008), supports this possibility. As it stands, however, statutory authority remains strictly necessary to provide an appellate panel with the power to act.

29. *Nguyen*, 539 U.S. at 82 (majority opinion).

30. *Id.*

31. *Id.* at 83.

that a quorum of two judges may "proceed to judgment when one member of the panel dies or is disqualified."[32] That view echoes the Court's earlier passing treatment of the quorum question in the slightly different context presented by *Ayrshire Collieries Corp. v. United States*.[33] *Ayrshire* held that a decision by two judges of a three-judge panel constituted under the Urgent Deficiencies Appropriation Act was invalid. To reach that result, the Court relied heavily on the language of the Act, which provided that interlocutory injunctions challenging orders by the Interstate Commerce Commission "'shall be heard and determined by three judges.'"[34] Although the same provision called for a majority voting rule, such that the vote of two judges was sufficient to grant the injunction, the Act contained no quorum provision that would permit only two judges to take part in the vote.[35] The absence of a quorum provision was read against the parallel statute dealing with three-judge circuit courts of appeals, where the Court noted that two judges "ordinarily constitute a statutory quorum for the hearing and determination of cases."[36]

2. The Courts of Appeals

The courts of appeals have echoed the Supreme Court's permissive attitude toward the power of two judges to render appellate judgments once the panel's initial authority has been established. Most opinions reached by two judges are explained and justified without any substantive discussion of the panel's status as a quorum. Instead, a footnote is included at the beginning of the opinion that simply cites to 28 U.S.C. § 46(d) or the court's local rule.[37] But even when a quorum addresses its status, the treatment is often quite cursory. For example, in *United States v. Allied*

32. *Id.* at 82.

33. 331 U.S. 132 (1947).

34. *Id.* at 137 (quoting the Urgent Deficiencies Appropriation Act, 1913, ch. 32, 38 Stat. 208, 220).

35. *See id.* at 138 ("It is significant that this Act makes no provision for a quorum of less than three judges.").

36. *Id.*

37. *See, e.g.*, O'Reilly v. U.S. Army Corps of Eng'rs, 477 F.3d 225, 227 (5th Cir. 2007); Glaster v. Enron Corp. (*In re* Enron Corp.), 475 F.3d 131, 132 (2d Cir. 2007); Able Sales Co. v. Compañía de Azúcar de P.R., 406 F.3d 56, 57 (1st Cir. 2005); United States v. Morris, 143 F. App'x 505, 505 (3d Cir. 2005); Picco v. Gen. Elec. Co., 114 F. App'x 227, 227 (7th Cir. 2004); Lewis v. Caterpillar, Inc., No. 94-5253, 1998 WL 416022 (6th Cir. July 9, 1998); Kulinski v. Medtronic Bio-Medicus, Inc., 108 F.3d 904, 905 (8th Cir. 1997), *vacated en banc*, 112 F.3d 368 (8th Cir. 1997) (upholding the substance of the initial appellate court's determination) (vacated on grounds unrelated to panel makeup); United States v. Wardwell, No. 94-1161, 1995 WL 330756, at *5 (10th Cir. May 25, 1995); Norfolk & W. Ry. Co. v. Roberson, 918 F.2d 1144, 1146 (4th Cir. 1990); United States v. Russo, 717 F.2d 545, 547 (11th Cir. 1983). Older cases instead attached a note at the end of the opinion, but to the same effect. *See, e.g.*, Hatch v. Morosco Holding Co., 19 F.2d 766, 769 (2d Cir. 1927) ("The late Circuit Judge Hough did not see this opinion. He dissented from the conclusion, and thought the order should be affirmed."), *aff'd sub nom.* Richle v. Margolies, 279 U.S. 218 (1929).

Stevedoring Corp.[38]—the case cited by *Nguyen* to establish the acceptability of quorum decisions as "settled law"[39]—Judge Hand noted that Judge Frank filed a memorandum of his conclusions with respect to the case two days before his death, and that those conclusions led him to "vote to affirm" despite "some doubt" as to one point.[40] He then rejected any challenge to the two-judge decision in just two sentences: "[E]ven when a judge has resigned after argument, or has died after expressing his dissent, a remaining majority has jurisdiction to dispose of the appeal. *A fortiori* is this true when one judge has died after expressing his concurrence in the disposal adopted by the majority."[41]

Since the passage of the Federal Courts Improvement Act of 1982, with its intermittent emphasis of the value of three-judge decision making,[42] various courts have had occasion to revisit (or visit for the first time) the propriety of two-judge decisions. Despite the legislative intervention, the result has been essentially unchanged: when challenged, courts have embraced a permissive attitude toward two-judge decisions justified largely by reference to the continuing existence of the quorum provision in 28 U.S.C. § 46(d).

In particular, the Second Circuit has issued a trilogy of opinions dealing with various permutations of quorum decision making, each defending the practice. In *Murray v. NBC,*[43] the court responded to a motion for rehearing filed when a panel member recused himself immediately preceding oral argument and the remaining two judges decided the case. While recognizing—and indeed referencing—the Senate Report accompanying the 1982 modifications, Judge Newman ultimately concluded that the modifications were intended only to ensure "that the appeal must be assigned 'in the first instance' to a panel of three judges."[44]

Two subsequent cases went farther. The first challenged the decision of a two-judge panel because the recused judge participated in oral argu-

38. 241 F.2d 925 (2d Cir. 1957).

39. *See* Nguyen v. United States, 539 U.S. 69, 82 (2003).

40. *Allied Stevedoring*, 241 F.2d at 927.

41. *Id.* More cursory still was the Fourth Circuit's response to a challenge raised by a litigant to a two-judge decision:

> [O]nly two judges heard the appeal because the third judge who was assigned to the case and had theretofore participated in one of the preliminary hearings—Judge Soper—was ill on the day of argument. He did not take part in the subsequent conferences on the case and died before its decision.

United States v. Mills, 317 F.2d 764, 766 (4th Cir. 1963). This is better characterized as a description of events than as a substantive legal argument.

42. For further discussion of the Federal Courts Improvement Act of 1982, see *supra* notes 16–19 and accompanying text.

43. 35 F.3d 45 (2d Cir. 1994).

44. *Id.* at 47 ("[T]he legislative history makes clear that the statute was not intended to preclude disposition by a panel of two judges in the event that one member of a three-judge panel to which the appeal is assigned becomes unable to participate.").

ment while one of the remaining two judges did not.[45] The court concluded that "[a] recused judge's participation in questioning during oral argument does not constitute the sort of participation in the deliberative process that might impair the validity of a judgment,"[46] and that a "judge's absence [from oral argument], at most, deprives the lawyers of the 'opportunity' to have the judge ask them questions, surely not a protected right."[47] Just months later, the court held that a two-judge panel consisting of one Second Circuit judge and one sitting by designation could decide an appeal by quorum.[48] This challenge to the panel's authority was rooted in the requirement, found in 28 U.S.C. § 46(b), that a panel must consist of three judges, "a majority of whom shall be judges of that court."[49] Appellants argued that when the "panel" was reduced to two judges, the effect of the provision was to require that the majority of the two remaining judges (i.e., both) be "members of the court."[50] As the Supreme Court would do five years later in *Nguyen*, the Second Circuit here emphasized the importance of initial composition, only this time to dispose of the challenge: the "of that court" language in 28 U.S.C. § 46(b) applies only to the original authority of a panel,[51] and once authorized, any majority constitutes a quorum under 28 U.S.C. § 46(d).[52]

45. *See* Whitehall Tenants Corp. v. Whitehall Realty Co., 136 F.3d 230 (2d Cir. 1998).

46. *Id.* at 232–33.

47. *Id.* at 233. Interestingly, in *Whitehall*—unlike in *Murray*—the two-judge quorum requested the appointment of a third judge for the purpose of considering the motion for rehearing (raising the challenge to the two-judge panel). *Id.* at 232 (citing the "nature of the issues presented by the rehearing petition").

48. *See* United States v. Desimone, 140 F.3d 457 (2d Cir. 1998). As in *Whitehall*, the third judge in *Desimone* became unavailable only after participating in oral argument, but that aspect of the quorum decision was not challenged. Also as in *Whitehall*, the two-judge quorum requested that a third judge be designated to help decide the motion for rehearing. On this occasion, Chief Judge Winter designated himself and then wrote the opinion supporting the quorum's authority.

49. *See* 28 U.S.C. § 46(b) (2006).

50. *Desimone*, 140 F.3d at 458.

51. *Id.* at 459 ("Section 46(b) requires only that a three-judge panel . . . have two members of the court on it when 'authorized.'").

52. *Id.* at 458–59 ("Section 46(d) . . . requires only that [the quorum] be a majority of a legally authorized panel."). The Second Circuit is not alone in going to great lengths to permit quorum decisions. The Court of Appeals for the Armed Forces has repeatedly upheld decisions reached by only two judges of a panel of the Court of Criminal Appeals, even though no clear statutory authority supports those decisions. Rather, 10 U.S.C. § 866(a) provides for the establishment of the Court of Criminal Appeals, "which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges." 10 U.S.C. § 866(a) (2006). Unlike 28 U.S.C. § 46(d) in the civilian context or 10 U.S.C. § 944 in the military context, no accompanying provision authorizes a quorum.

To overcome the absence of specific statutory authority, the Judge Advocates General used their authority to "prescribe uniform rules of procedure for Courts of Criminal Appeals," 10 U.S.C. § 866(f) (2006), to promulgate Local Rule 4(a), which provides that "a majority of the judges assigned to [a] panel constitutes a quorum for the purpose of hearing or determining any matter referred to the panel." A.F. CT. CRIM. APP. R. 4(a). On various occasions since 1955, the Court of Appeals for the Armed Forces has rejected challenges to decisions reached under that rule. *See* United States v. Lee, 54 M.J. 285, 288 (C.A.A.F. 2000); United States v. Parker, 47 C.M.R. 10, 12 (C.M.A. 1973); United States v. Hurt, 27 C.M.R. 3, 23 (C.M.A. 1958); United States v. Petroff-Tachomakoff, 19

II. A FUNCTIONAL ANALYSIS OF IRREGULAR PANELS

The technical approach to panel formation and composition described in Part I is defensible as a matter of statutory text. But it produces results that are questionable at a functional level. Consider, for example, the procedural development of two hypothetical appeals. In the first, only two judges are appointed to sit on the panel; in the second, three are appointed, but one dies immediately following the appointment. As a functional matter, these two cases are difficult to distinguish. If allowed to proceed, both will result in an appeal that is considered and decided by a panel of two judges rather than the traditional three. But because formation is all that is considered under the statutory framework, the slight difference between the appeals leads to dramatic differences in their treatment. The first fails to satisfy the 28 U.S.C. § 46(b) composition requirement, and *Nguyen* attaches to that failure a mandatory reversal of any action taken by the two-judge panel. As for the second, it clears the 28 U.S.C. § 46(b) hurdle, and 28 U.S.C. § 46(d) then kicks in to authorize all actions taken by the two-judge panel—up to and including decision and disposition of the appeal on the merits. One problem with the technical approach, therefore, is that it leads to dramatic distinctions based on functionally insignificant differences.

More importantly, it is questionable whether the technical approach accurately reflects the intuitions underlying the decisions reached. Take *Nguyen*. Although Justice Stevens repeatedly emphasized the statutory importance of initial assignment to a panel of three judges,[53] and although he explicitly concluded that the justification for automatic reversal is that the assignment failure left the panel without power to act,[54] those considerations alone do not neatly explain the result. To see this, we can think about the likely outcome in *Nguyen* had the Article IV judge been assigned to the panel only after the recusal of an original Article III judge. On these facts, the initial formation problem leaned on by Justice Stevens in *Nguyen*

C.M.R. 120, 127 (C.M.A. 1955). Most notably, the court in doing so has been willing to overlook what it concedes as "sound policy reasons for requiring three judges to participate in every decision" because no legal authority strictly requires the result. *Lee*, 54 M.J. at 287.

But not every two-judge decision has been upheld. In *United States v. Elliott*, 15 M.J. 347 (C.A.A.F. 1983), the court rejected a decision by a two-judge panel of the Navy Marine Corps Court of Military Review because the third judge "was absent on leave when he was detailed to the panel, had not been sworn in as an appellate military judge, and was still absent on leave when the case was decided." *Lee*, 54 M.J. at 287 (describing *Elliott*). Thus, even in the absence of statutory guidance, the court has created a parallel framework: initial formation of the panel must follow strict requirements, but decisions by less than the original number are permitted.

53. Nguyen v. United States, 539 U.S. 69, 82–83 (2003) ("[T]he statutory authority for courts of appeals to sit in panels, 28 U.S.C. § 46(b), requires the inclusion of at least three judges in the first instance.").

54. *Id.* at 78, 83.

itself is absent—a properly constituted panel was assigned the appeal, and a quorum of judges of that panel remained to decide it.

It is hard to imagine that these changed facts would trigger a changed result. *Nguyen* stops short of reaching the question explicitly, expressing only that it is "less clear whether the quorum statute offers post-judgment absolution for the participation of a judge who was not otherwise competent to be part of the panel under § 292(a)."[55] But the opinion contains multiple gestures in that direction. Justice Stevens discarded a defense based on the *de facto* officer doctrine by distinguishing between situations where the judge in question *could* have exercised authority if certain procedures had been followed,[56] and situations where an action "could never have been taken at all."[57] His descriptions of previous cases emphasized that the judges in question lacked the statutory authority to "tak[e] part in the *hearing and decision* of the appeal,"[58] and he repeatedly mentioned their lack of authority to "participate" in the appeal.[59] Finally, his conclusion about the seriousness of the error is based on an interpretation that Congress intended to "preserve the Article III character of the courts of appeals"[60] and that this intent reflects "'a strong policy concerning the proper administration of judicial business.'"[61]

Ultimately, one is left with a sense that in *Nguyen*—as in the other cases in the same line—the strict statutory defect is being used as an easy and technical route to justify a more complex and functional result. The real problem is less about assignment and initial authority and more about participation and the dynamics of judicial decision making. If that intuition is correct, it sets up an interesting tension when placed alongside the quorum cases: the presence of an unauthorized third judge is problematic, but the absence of a third judge altogether is not. This tension is not statutorily compelled[62] but instead reflects an implicit judgment about the relative dangers of the competing situations.

This part questions that implicit judgment. When viewed functionally, there is little reason to treat instances of absent third judges differently from instances of improper third judges. In the former situation, the con-

55. *Id.* at 83.

56. *See id.* at 77–79 (discussing McDowell v. United States, 159 U.S. 596, 601–02 (1895), and Ball v. United States, 140 U.S. 118, 128–29 (1891)).

57. *Id.* at 79.

58. *Id.* at 78 (emphasis added).

59. *See id.* at 69, 80.

60. *Id.* at 80.

61. *Id.* at 78, 81 (quoting Glidden Co. v. Zdanok, 370 U.S. 530, 536 (1962) (plurality opinion)). In *Gonzales v. United States*, 128 S. Ct. 1765 (2008), Justice Thomas alone concluded that the involvement of a magistrate judge in jury selection involved a similar intent and policy. *See id.* at 1782 (Thomas, J., dissenting).

62. The quorum provision might be read broadly to permit "postjudgment absolution" in cases where an unauthorized judge is present but the decision is supported by a valid quorum. *See Nguyen*, 539 U.S. at 83.

tribution of the proper third judge is missing; in the latter, that contribution is missing and is replaced with an invalid one. Perhaps at first glance this supports the intuition that cases involving improper judges are more troublesome. But the absence of a contribution may be more significant than the presence of an improper contribution in many cases, and, ultimately, it is difficult to make categorical conclusions. Instead, both deviations from the standard decision-making paradigm produce skewed decisional dynamics that are difficult to distinguish—and difficult to justify.

A. Decisional Dynamics and Irregular Panels

Decisions by full panels of three judges differ materially from those rendered by quorums of two or by panels with an improper third judge. In all three cases, the votes of two legitimate panel members are arguably enough to constitute a majority. But the appellate system is not designed merely to aggregate votes; rather, the design is to create a dynamic interaction of judicial views. Thus, while two votes are enough to decide an appeal, the context of those two votes is important. This part considers the various ways that departures from the standard practice produce changes at the level of decisional direction and content. Requiring the involvement of a proper third judge—even when two proper judges are involved and in agreement—may lead to shifts in the direction of the appeal's disposition in cases where persuasion by the third judge dislodges the tentatively held position of one or more existing panel members. More frequently, involvement by a proper third judge will generate modification in the terms of the final decision as well as improvement of its legitimacy.

1. Changing the Direction of the Opinion

Suppose that a third judge is added to an existing group of two and disagrees with the tentative disposition of the case. This judge—whom I will refer to here as a "doubtful judge"—might perform a very dramatic role: she may alter the direction of the final decision. Of course, given the majority voting rule, the doubtful judge cannot perform this role alone; if the other two judges continue to view the case differently, the direction of the vote will be unchanged. But in certain cases, at least, she might accomplish this result by persuading one or both of the other judges to reconsider their view.

Persuasion is possible in the appellate process because decisional norms allow judges to play the role of internal whistleblower.[63] In other decision-making contexts, majority viewholders can simply ignore the opposing views held by others, which greatly diminishes the persuasive

63. *See* FRANK B. CROSS, DECISION MAKING IN THE U.S. COURTS OF APPEALS 155 (2007).

capacity of minority viewholders.[64] But "[t]he social etiquette of the [appellate] court requires that the majority listen to the minority judge."[65] As a result of this "norm of attention," a doubtful third judge can make arguments that the other two judges must consider, and that consideration will occasionally lead to revision of opinion.[66] Ultimately, directional revision stemming from persuasion might occur when the doubtful judge corrects an error made by the other two judges or when the doubtful judge makes legal arguments to counter ideologically motivated conclusions reached by the other two judges.[67]

The possibility of persuasion highlights the potential for dynamics in the appellate decisional process. Static accounts of the process fail because the fact that two judges agree at time A is not determinative; one or both of those judges may vote differently at time B. There is plenty of anecdotal evidence that persuasion of this sort occurs with some frequency in appellate decision making. For example, Justice Ginsburg recently celebrated the value of dissent by noting:

> On rare occasions, a dissent will be so persuasive that it attracts the votes necessary to become the opinion of the Court. I had the heady experience once of writing a dissent for myself and just one other Justice that became the opinion of the Court from which only two of my colleagues, in the end, dissented.[68]

The dynamics of persuasion undermine both quorum decisions and decisions by irregular panels. In an irregular panel, the participation of an illegitimate third judge may result in a decision that is different in terms of

64. *See, e.g.*, Charles R. O'Kelley, Jr., *Filling Gaps in the Close Corporation Contract: A Transaction Cost Analysis*, 87 NW. U. L. REV. 216, 216–17 (1992) (describing the tendencies for majority shareholders to favor their own interests and ignore minority shareholders' concerns in closely held corporations); Emily White, *"Not Our Problem:" Construction Trade Unions and Hostile Environment Discrimination*, 10 N.Y. CITY L. REV. 245, 275 (2006) (describing workplace unions ignoring issues and concerns of the minority of their constituents in favor of the majority of their current members).

65. CROSS, *supra* note 63, at 154.

66. *Id.* ("The minority may expose the majority's underlying, unconscious biases and force the majority to confront the conflict and potentially resolve it in the minority's favor."). The norm of attention is connected with collegiality. *See* Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1645 (2003) ("[C]ollegiality plays an important part in mitigating the role of partisan politics and personal ideology by allowing judges of differing perspectives and philosophies to communicate with, listen to, and ultimately influence one another in constructive and law-abiding ways.") (emphasis omitted).

67. On this latter point, "panel minorities can use procedural legal arguments to counter the ideological motivated reasoning of the panel majority." CROSS, *supra* note 63, at 174.

68. Ruth Bader Ginsburg, Assoc. Justice, Supreme Court of the U.S., The 20th Annual Leo and Berry Eizenstat Memorial Lecture: The Role of Dissenting Opinions (Oct. 21, 2007), *available at* http://www.supremecourtus.gov/publicinfo/speeches/sp_10-21-07.html. *See generally*, Rick A. Swanson, *Judicial Perceptions of Voting Fluidity on State Supreme Courts*, 28 JUST. SYS. J. 199 (2007) (discussing survey results of state supreme courts as to how judges' opinions and case-outcome votes are influenced and affected by arguments and opinions of other judges).

direction than would be a decision reached by the same two judges alone or in concert with a legitimate third judge. That is, the undue influence of the illegitimate judge is not limited to the vote that she casts; it extends to the votes of the remaining judges as well. Thus, participation by an illegitimate judge cannot be cured merely by counting the votes of the putative quorum; once the illegitimate third judge is part of the process, the other votes become illegitimate as well. Similarly, when a quorum of two decides in the absence of a third judge, their votes fail to reflect the potential influence of a doubtful third judge. Indeed, it may well be that the difference between actual and prospective voting is greater in this latter context. A putative quorum may be influenced less by an improper third judge than by a newly added—and proper—third judge because the norm of attention may be stronger with respect to proper judges.[69] Put differently, what might be gained by replacing an absent third judge may be greater than what is lost by permitting an illegitimate third judge to participate.

2. Changing the Terms of the Opinion

The best persuasive efforts of a doubtful third judge will not be enough to generate a vote shift in most cases. But that does not mean that the effect of the third judge is reduced to zero in those cases. The outcome of an appeal is more than the simple direction of the vote reached; it is also the terms of the opinion written to justify that direction, and a third judge—doubtful or not—is likely to exercise some influence in that domain of the decisional process.

The most direct way to influence the terms of the opinion reached is for the doubtful judge to contribute a dissent. In some circumstances, the result of this external whistleblowing[70] may affect the outcome of the particular appeal at issue. This would occur if the existence of the dissent effectively triggered Supreme Court review, and if the Supreme Court

69. *See* Richard B. Saphire & Michael E. Solimine, *Diluting Justice on Appeal?: An Examination of the Use of District Court Judges Sitting by Designation on the United States Courts of Appeals*, 28 U. MICH. J.L. REFORM 351, 379 (1995) ("District judges are perceived by some to have lower status or prestige than circuit judges and typically will have less acumen regarding appellate practice. These factors suggest that district judges sitting by designation will have less influence and less independence of judgment.") (footnotes omitted); *see also* Paul M. Collins, Jr. & Wendy L. Martinek, *The Small Group Context: Designated District Court Judges in the United States Courts of Appeals* (Apr. 22, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120957. Of course, judges sitting by designation are proper judges under the statutory framework. *See* 28 U.S.C. § 292(a), (d) (2006). So the effects discussed here may be expected to be even greater when the third judge is not statutorily proper.

70. This nomenclature is not my own. Rather, Frank Cross and Emerson Tiller have characterized dissents as external whistleblowing. *See* Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2173–74 (1998) ("The presence of a politically opposed minority representative means that there is someone on the panel who can identify the majority's disobedience to doctrine.").

ultimately embraced the view expressed by the doubtful judge. As an empirical matter, the existence of a dissent makes Supreme Court review of an appellate decision more likely,[71] and so the proposition that the addition of the doubtful judge's dissent might make a difference in certiorari terms is not entirely far-fetched. Even so, this type of influence is almost certainly very rare because the likelihood of Supreme Court review remains quite small even when dissents are present.

Much more likely is that the doubtful judge's dissent will affect the future treatment of the case in precedential terms. This influence may take two forms. First, the dissent may weaken the case's precedential value by decreasing the willingness of future courts to cite it as support or by increasing the willingness of future courts to voice criticisms. Second, the dissent may lay the groundwork for a later reversal of the precedent by another panel or by the court as a whole. Again, a recent empirical study by Frank Cross provides some support for both forms of influence. Cross concludes that "cases with dissents are associated with a higher rate of negative treatment and much higher rate of reversals."[72] The finding with respect to the first form of influence is mitigated by a related finding that "opinions with dissents also had a significantly higher number of positive citations,"[73] a result likely explained by the fact that "dissents tend to occur in the most salient cases, those that are the most likely to produce future citations, whether positive or negative."[74] This mixed finding aside, the general result is that the existence of a dissent influences the treatment of an appeal as precedent. For present purposes, the precise contours of that influence are not important; what matters is that the third judge is performing a role that is meaningful and relevant despite its futility in strict directional terms.[75]

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71. *See* Andrew F. Daughety & Jennifer F. Reinganum, *Speaking Up: A Model of Judicial Dissent and Discretionary Review*, 14 SUP. CT. ECON. REV. 1 (2006) (discussing how dissenting opinions from the U.S. Courts of Appeals increase the likelihood for the U.S. Supreme Court to grant review).

72. CROSS, *supra* note 63, at 222.

73. *Id.* at 223.

74. *Id.*

75. *See* William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 430 (1986) ("In its most straightforward incarnation, the dissent demonstrates flaws the author perceives in the majority's legal analysis. . . . But the dissent is often more than just a plea; it safeguards the integrity of the judicial decision-making process by keeping the majority accountable for the rationale and consequences of its decision."); Robert G. Flanders, Jr., *The Utility of Separate Judicial Opinions in Appellate Courts of Last Resort: Why Dissents Are Valuable*, 4 ROGER WILLIAMS U. L. REV. 401, 406 (1999) ("First and foremost, a dissenting opinion serves the interests of the truth. If an appellate bench is not of one mind, then the filing of separate opinions by those judges who disagree with the majority point of view is the only truthful way to reflect the court's actual disparate opinions on the matters before it."); Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 143 (1990) ("Most immediately, when drafted and circulated among the judges, [dissents] may provoke clarifications, refinements, modifications in the court's opinion. . . . Separate opinions in intermediate appellate courts serve an alert function.") (footnote omitted); Meredith Kolsky, *Justice William Johnson and the History of the Supreme Court Dissent*, 83 GEO. L.J. 2069, 2082 (1995) ("Dissents serve a number of positive functions. They improve judicial decisions, guide future interpretation of the law,

The options available to a doubtful judge are not limited to shifting votes or filing dissents. The doubtful judge can also vote with the two other judges and extract changes to the terms of the opinion in exchange for that vote.[76] The remaining two judges will often agree to make changes in response to a threatened dissent because they want to be able to issue the opinion unanimously.[77] Unanimity may be valued either as a means of promoting the court's legitimacy by "preserving the image of the nonideological nature of decision making,"[78] or as a means of enhancing the future precedential value of the opinion. From the doubtful judge's perspective, a moderate change in the terms of a unanimous opinion may be preferable to a more disagreeable majority opinion accompanied by a dissent because the latter requires a significant investment of effort[79] and has uncertain long-term results.[80] As a result, the addition of the third judge will often lead to an opinion that reaches the same outcome, but by different terms.

Opinion modification of this sort is very likely the modal form of a doubtful judge's influence.[81] The expected direction of that influence

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and give substantive expression to the First Amendment ideal of free speech for disfavored groups and minorities."); Ginsburg, *supra* note 68 ("My experience teaches that there is nothing better than an impressive dissent to improve an opinion for the Court. A well reasoned dissent will lead the author of the majority opinion to refine and clarify her initial circulation.").

76. Similarly, changes in the terms of the controlling opinion may occur when the doubtful judge issues a dissent. Often the content of that dissent will provoke a response from the majority, which may either strengthen or weaken the position taken in the opinion. *See* Stephen J. Choi & G. Mitu Gulati, *Trading Votes for Reasoning: Covering in Judicial Opinions*, 81 S. CAL. L. REV. 735, 771 (2008); *see also* CROSS, *supra* note 63, at 158–59 ("When a group contains potential dissenters, or at least internal devil's advocates, the minority position can highlight the counterarguments to the majority position and its associated risks, thus moderating the majority.").

77. *See* CROSS, *supra* note 63, at 160 (suggesting that a norm of consensus may lead to "some degree of majority conciliation, giving the minority something of precedential value in the opinion, if not the actual desired outcome, to stave off a dissenting opinion"); Choi & Gulati, *supra* note 76, at 740.

78. CROSS, *supra* note 63, at 160; *see also* Burton M. Atkins & Justin J. Green, *Consensus on the United States Courts of Appeals: Illusion or Reality?*, 20 AM. J. POL. SCI. 735, 736 (1976).

79. *See* CROSS, *supra* note 63, at 161 ("Under the circumstances, it is unsurprising that circuit court judges seldom expend the resources to issue a dissenting opinion, even when they ideologically disagree with the majority's opinion.").

80. That is, the long-term result of issuing the dissent may be preferable to extracting the opinion modification if the dissent leads the case to be reversed by the Supreme Court or criticized or overturned by a later opinion of the circuit court. But if the dissent is essentially ignored and the majority opinion continues to be relied on as precedent within the circuit, the judge may have been better off with a weakened precedential opinion. At the time that the decision must be made, it is difficult for the judge to know which of these possibilities will occur.

81. Despite this, negotiating for opinion modifications is a form of disagreement that is not captured by studies of voting behavior. CROSS, *supra* note 63, at 164 ("The research here cannot fully capture possible panel effects because it considers only case outcomes. It is distinctly possible that panel minorities could influence the language of the judicial opinion, even when it does not alter the outcome, and that the opinion could be significant, but the data cannot capture this effect."). In large part because of this possibility, numerous commentators have noted that the rate of dissent may not be a satisfactory measure of the frequency of disagreement in appellate decision making because disagreement may lead to results other than dissent. Yet another form of disagreement is silent acquiescence motivated by an economic decision that the disagreement is not worth the candle. Both of these forms of disagreement have implications for the burgeoning study of panel effects. *See id.* at 161.

should be toward more accurate and moderate results. Almost by definition, the addition of a doubtful judge increases the panel's ideological diversity. Cass Sunstein, Frank Cross, and others have argued that ideologically diverse panels are desirable because they are more likely to identify the correct outcome in cases where one outcome is clearly preferable, and more likely to reach a moderate outcome in cases where no clearly preferable outcome exists.[82] Apart from the actual effect, the addition of the doubtful judge may also lead to improvement in the panel's self-perception of and commitment to the decision reached.[83] This may be an independently valuable result. Thus, the addition of a doubtful third judge may lead to an opinion that is not just different, but one that is normatively preferable along several dimensions.[84]

Modifying the terms of the appellate opinion is almost certainly also the modal form of an agreeable judge's influence. But the direction of that influence is harder to predict. A third judge who agrees wholeheartedly with the outcome supported by the initial two judges may still contribute nuance to the opinion, encourage the removal of problematic passages, and improve error correction. These effects are normatively desirable, if neutral in direction. But an undesirable effect is also possible: the addition of an agreeable third judge may contribute to ideological amplification and lead to a more extreme result. Ideological amplification,[85] or consensual

82. *See* CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT 184–86 (2003); Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 337–46 (2004). In cases where there is a clearly correct outcome, "[t]he existence of diversity on a three-judge panel is likely to bring that fact to light and to move the panel's decision in the direction of what the law actually requires. The existence of politically diverse judges, and of a potential dissenter-whistleblower, increases the chance that the law will be followed." SUNSTEIN, *supra*, at 185; *see also* Cross & Tiller, *supra* note 70, at 2172. In cases where the correct outcome is less clear, we might also benefit from ideological diversity, either because "through that route more (reasonable) opinions are likely to be heard," or because the varying viewpoints will have a "moderating effect" that is desirable in cases of genuine uncertainty. SUNSTEIN, *supra*, at 186; *see also* CROSS, *supra* note 63, at 155 ("The minority opinion could trigger the consideration in the group's analytical process of other alternatives that might provide a middle-ground answer.").

83. *See* CROSS, *supra* note 63, at 158–59; *see also* David M. Schweiger et al., *Group Approaches for Improving Strategic Decision Making: A Comparative Analysis of Dialectical Inquiry, Devil's Advocacy, and Consensus*, 29 ACAD. MGMT. J. 51, 51 ("The group process may also be important in gaining commitment to and acceptance of decisions among individuals who ultimately will be responsible for implementing such decisions.").

84. Many of these advantages will also be present if the doubtful third judge issues a dissent. Studies of Supreme Court decisions have demonstrated that majority opinions use more complex reasoning in cases involving a dissent. *See* Deborah H. Gruenfeld, *Status, Ideology, and Integrative Complexity on the U.S. Supreme Court: Rethinking the Politics of Political Decision Making,* 68 J. PERSONALITY & SOC. PSYCHOL. 5, 8 (1995) ("Membership in a majority, where dissent exists, should be associated with divergent thinking and greater integrative complexity than membership in either a unanimous group, in which divergent thinking is unlikely to occur, or a minority, in which convergent thinking is likely to dominate."). This may reflect the fact that the majority opinion must engage and think more carefully about a decision when disagreement is raised.

85. *See* SUNSTEIN, *supra* note 82, at 166–67; CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL?: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 9, 71, 75–76 (2006); Sunstein et al, *supra* note 82, at 340–44.

group polarization,[86] describes the process by which groups of like-minded individuals reinforce and amplify each other's judgments. When this occurs, the result of deliberation is that "groups end up adopting a more extreme version of their predeliberation tendencies."[87] Because it stems from the interaction of similar views, the incidence and severity of group polarization is sensitive to the number of decision makers involved.[88] Put differently, ideological amplification is more likely on a panel of three like-minded judges than on a panel of two such judges. For that reason, the addition of an agreeable judge to an existing panel of two may lead to shifts in the outcome that are unwelcome: the terms of the opinion may become more extreme and more focused on ideological preferences rather than legal requirements.[89]

In sum, a doubtful judge may moderate extreme outcomes by changing the terms of the opinion or by tempering its precedential value through dissent. An agreeable judge may improve error correction but may also contribute to more extreme results due to ideological amplification. Both of these sets of effects support the proposition that a decision by a regular panel of three valid judges is not functionally identical to either a decision by a quorum of two or a full panel with an irregular member.[90] This is true despite the fact that the votes of the same two judges may sustain the decision in all three situations. Put more generally, the selection of a procedural framework for reaching decisions entails the selection of a set of decisional dynamics generated by that framework (as well as decisional outcomes generated by those dynamics). In the appellate context, the

86. CROSS, *supra* note 63, at 157.

87. Sunstein et al., *supra* note 82, at 340; *see also* CROSS, *supra* note 63, at 158 ("Research on group decision making has found that when the deliberators hold similar biases, the deliberation process can exacerbate those biases rather than moderating them."). Sunstein suggests three explanations for the group polarization phenomenon: (1) people inclined to a position will have that position reinforced and head in a more extreme direction when all members of the group share a similar initial position; (2) members of a group seek the approval of the other members and will air their opinion in a way favorable to the other members of the group; and (3) the similarity of viewpoints in a group lends confidence to an individual member's ideas and therefore enables a more confident assertion of extreme ideas. Sunstein et al., *supra* note 82, at 341–43. Cross adds a fourth: "Each individual's particular doubts might be overcome by the others' confidence in the conclusion." CROSS, *supra* note 63, at 157.

88. *See* CROSS, *supra* note 63, at 157–58; SUNSTEIN, *supra* note 82, at 26–28.

89. The shift away from legal rationales and toward ideological ones stems from the application of the psychological phenomenon of the "risky shift" in the context of judicial decision making. Group decision making leads to riskier decisions because other members of the group can mitigate self-doubt and share responsibility for potential errors. *See* CROSS, *supra* note 63, at 158.

90. A decision reached by a quorum of two judges does not benefit from the moderating contributions that a doubtful third judge would add but may avoid the negative effects that an agreeable third judge might create. Conversely, a decision reached by an irregular panel may exhibit undue influences on the terms of the opinion introduced by the illegitimate third member. Moreover, in both cases the opinions may be expected to include more errors. In the quorum context, that is attributable to the total absence of a third check on the analysis; in the irregular panel context, that is attributable to deficiencies in the third check on the analysis due to decreased competence or—more likely—to a diminished norm of attention.

framework is decision by three judges, and that selection is at least implicitly premised on the conclusion that over the run of cases, the interaction of three views will deliver the preferred balance of accuracy and cost. Deviating from that framework produces deviations in the functional dynamics of the decision-making process that manifest in ways that may not be captured in the absolute direction of the final vote. For that reason, equivalent voting does not guarantee equivalent results.

3. Enhancing the Legitimacy of the Decision

In a final set of cases, the third judge will agree entirely with the direction and the terms of a proposed opinion reached by the remaining two judges, or will disagree but go along to avoid expending resources to voice the disagreement. In these cases, the contribution of the third judge appears strictly formal because the final resolution is identical to what would be reached without the judge's participation. At a superficial level, then, it is difficult to understand why it would matter whether this judge is legitimate, illegitimate, or absent.

But the reception of appellate decisions by parties and the public at large is not determined solely by their content. Acceptance and legitimacy are also responsive to process-level concerns that are independent of substantive content. For example, survey data suggest that appeals are often filed in response to perceived failures by the lower court to listen and respond to arguments made by one or both parties.[91] Numerous commentators have similarly argued that notions of legitimacy require that the judicial process be structured to ensure that parties sense that they were treated fairly and that their participation was regarded.[92]

It is in this domain that even a passive third judge adds value. Parties who file an appeal in the federal system do so with the knowledge and expectation that appeals are decided by panels consisting of three judges. Decisions rendered by only two judges or by a panel including an illegitimate member are likely to be viewed as aberrational. In terms of legitimacy, there is little reason to think that quorum decisions will be perceived differently than decisions by irregular panels. In either case, parties will naturally compare the decision to the standard practice and conclude on that basis that the process provided for their dispute was inadequate. Such

91. SCOTT BARCLAY, AN APPEALING ACT: WHY PEOPLE APPEAL IN CIVIL CASES 57–60, 89–90 (1999).

92. There is a deep and rich literature on this point. For a sampling, see Melvin Aron Eisenberg, *Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller,* 92 HARV. L. REV. 410, 413 (1978); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 388 (1978); Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 GEO. L.J. 1283, 1333–39 (2008); Christopher J. Peters, *Adjudication as Representation*, 97 COLUM. L. REV. 312, 347–60 (1997); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 277–81 (2004).

a conclusion will, in many cases, lead them to view the disposition as illegitimate or unsatisfactory.[93] Legitimacy effects for non-parties are also possible. Some non-parties are affected by the resolution of an appeal because it clarifies or discusses a relevant particular area of the law. The ability of interested non-parties to anticipate the effect of a particular resolution will decrease if the precedential value of a quorum or irregular panel decision differs from that of a full panel decision. On that basis, interested non-parties may also prefer a full-panel decision. Finally, even non-parties without such an interest may be sensitive to the overall perceived fairness of the system at some level and may react negatively to quorum decisions on that basis. In short, the presence of a regular third judge contributes to the appearance of justice, and maintaining that appearance may have significant value even if the judge makes no substantive contribution to the opinion.[94]

B. Countervailing Considerations

Even if decisions by irregular panels produce modifications in decisional dynamics, and even if those modifications are undesirable, they may nevertheless be warranted under certain conditions. Suboptimal decision making may be necessary if a decision by a regular panel is impossible. A full panel of three authorized judges may not be available in some cases, and a decision by two authorized judges or by two authorized judges plus an unauthorized third may be the only option for getting an appeal heard and decided. Arguments rooted in necessity are common in the context of

93. This is essentially the argument raised by the petitioner in *Nguyen v. United States*, 539 U.S. 69 (2003). Of course, *Nguyen* might reflect an opportunistic sense of legitimacy. But in other contexts, the influence of legitimacy considerations on procedural requirements of uniformity across cases seems clearer. For example, the Second Circuit's policy favoring oral argument in merits cases may reflect a judgment that parties will view a decision reached after oral argument as more legitimate. *See* Samuel P. Jordan, *Early Panel Announcement, Settlement, and Adjudication*, 2007 BYU L. REV. 55, 73 n.65 (2007).

94. Admittedly, the claims related to legitimacy effects, while consistent with the standard accounts of decisional legitimacy, are largely at the level of conjecture. But some of these effects may be measurable. For example, there may be evidence that parties do not consider quorum decisions as equally legitimate as full panel decisions. Unsatisfied parties have the option to file a motion for panel rehearing or for rehearing en banc, and parties whose appeals are decided by quorum might be expected to exercise this option at a higher rate. In terms of non-party effects, a finding that quorum decisions are cited with less frequency than full-panel decisions may indicate that other actors in the judicial system view quorums as less legitimate.

This latter finding would also be consistent with another explanation: quorum decisions are less likely to involve important or unsettled areas of the law. But that explanation is undercut by the existence of numerous examples of unsettled issues being addressed by a quorum. *See, e.g.*, Benzman v. Whitman, 523 F.3d 119 (2d Cir. 2008); Burt v. Gates, 502 F.3d 183 (2d Cir. 2007) (holding that federal funding to Yale Law School can be withheld if military recruiters are barred from campus); ITC Ltd. v. Punchgini, Inc., 482 F.3d 135 (2d Cir.) (holding that the "famous marks" doctrine has not been incorporated by Congress into federal trademark law, and certifying to the New York Court of Appeals the related question of whether the "famous marks" doctrine applies to state common law claims of unfair competition), *cert. denied*, 128 S. Ct. 288 (2007).

quorum decisions, and they played a role in the initial inclusion of a quorum provision for the federal appellate courts. But necessity is no longer a convincing explanation for permitting decisions by quorum or by illegitimate panels because the pool of authorized judges is large enough that genuine unavailability should never occur. Instead, justifications for decisions by irregular panels must now be rooted in efficiency, expediency, or futility. The first two such justifications have limited but legitimate appeal; the third is facially appealing but ultimately unconvincing.

1. Institutional Paralysis and Necessity

Quorum provisions ensure that an institution can function even when the full membership is not present, and in part for that reason, they are a standard feature of legislatures, committees, and corporate boards.[95] This core function of quorums stems from the reality that, even in the absence of strategic behavior by institutional members,[96] full attendance is often difficult or impossible to achieve. As a result, a requirement of full attendance before the institution can function would potentially lead to institutional paralysis.[97] The prospect of institutional paralysis is raised when

95. Necessity arguments have not been raised to justify the inclusion of an illegitimate panel member, and there is no unique argument to explain why the inclusion of illegitimate panel members would be necessary. Instead, the argument would be similar to the necessity argument for quorums: improper judges should be included because proper judges are not available. For clarity, the discussion here will be confined to the quorum context.

96. Admittedly, this is not a particularly realistic assumption; in truth, institutional members will often make themselves unavailable for strategic reasons, particularly when a supermajority quorum line allows for a minority to paralyze the institution by refusing to attend. The two-thirds quorum line in Texas has generated two infamous examples of this type of strategic behavior. *See* John Bryan Williams, *How to Survive a Terrorist Attack: The Constitution's Majority Quorum Requirement and the Continuity of Congress*, 48 WM. & MARY L. REV. 1025, 1036 (2006). The Framers of the Constitution were well aware of such a possibility when debating the quorum provision that eventually became Article I, Section Five of the Constitution. *Id.* at 1041–44. But the prospect of strategic behavior primarily affects the discussion regarding where to place the quorum line, rather than whether to have a line at all. *See* Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361, 407 (2004) ("[M]aximizing attendance is an implausible aim; some absences are strategic, but some are justified . . . ."). The likelihood of these justified absences (stemming in large part from geography and the difficulty of travel), and not just the desire to guard against strategic behavior, motivated the Framers to allow the legislative bodies to act by quorum. *See* Williams, *supra*, at 1038–39.

97. Of course, the need to allow the institution to operate at all must be balanced against the need to ensure that when the institution does operate, it does so in an acceptable manner. Because of this concern, a quorum requirement is often described as setting the level at which the group is "sufficiently represented at a meeting that its members present can speak for its entire membership." NAT'L CONFERENCE OF STATE LEGISLATURES, MASON'S MANUAL OF LEGISLATIVE PROCEDURE § 49 (rev. ed. 2000). Serious debates have been waged over time related to the question of where this level should be set. Perhaps most notably, the Constitution—after significant debate—sets a bare majority as the quorum line for both the House of Representatives and the Senate. *See* U.S. CONST. art. I, § 5; *see also* Williams, *supra* note 96, at 1037–51 (describing the Framers' debate concerning the quorum line). More recently, economists and political scientists have attempted to describe empirically where a quorum line should be drawn to ensure close correlation between the decisions of the quorum and the decisions of the full membership. *See generally* Dan S. Felsenthal, *Averting the Quorum Paradox*, 36

fixed membership is combined with barriers to substituting for absent members.[98] Consider the Supreme Court, with its fixed membership of nine. If one of those members resigns or dies, there is a process for replacement, but it is one not known for its ease or speed.[99] In the absence of a quorum provision, then, a Supreme Court in this situation would be temporarily paralyzed until the replacement is confirmed. If instead one of the Court's members were subject to recusal in a particular case, replacement would be impossible as the Court is now structured.[100] In the absence of a quorum provision (or a provision that would relax the fixed membership of the Court and permit substitution in instances of recusal),[101] this situation would leave the Court permanently paralyzed, at least as to deciding that case.[102]

Given the prospect of institutional paralysis, it makes sense as a matter of institutional design to include a quorum provision for the Supreme Court, and Congress has always done so. Congress has the power to dictate the size and composition of the Supreme Court, and since the Judiciary Act of 1789, its exercises of that power have included provisions to allow the Court to hear cases and issue decisions with less than the full number of authorized Justices.[103] As with legislative bodies and corporate

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BEHAV. SCI. 57 (1991).

98. The jury is an interesting example of a body characterized by fixed membership but relatively easy substitution. Particularly in the criminal context, where constitutional requirements dictate that quorum decision making is not permitted, we have developed the mechanism of alternate jurors to avoid the possibility of institutional paralysis. That is, a jury is typically empaneled with twelve members and some number of alternates who are authorized to step in and participate in the decision process if a regular member becomes unavailable.

99. *See, e.g.*, Michael J. Gerhardt, *Supreme Court Selection as War*, 50 DRAKE L. REV. 393, 394 (2002).

100. *See* Debra Lyn Bassett, *Recusal and the Supreme Court*, 56 HASTINGS L.J. 657, 686 (2005); Jeff Bleich & Kelly Klaus, *Deciding Whether to Decide*, FED. LAW., Feb. 2001, at 45, 48; John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 608–09 (1947) ("[U]nder existing law, there is no procedure for replacing a disqualified justice of the Supreme Court even when his non-participation deprives the litigants of the statutory quorum necessary for decision.").

101. For a discussion of possible approaches for dealing with the lack of a quorum in the Supreme Court, see Ross E. Davies, *A Certain Mongrel Court: Congress's Past Power and Present Potential to Reinforce the Supreme Court*, 90 MINN. L. REV. 678, 705–24 (2006); Caprice L. Roberts, *The Fox Guarding the Henhouse?: Recusal and the Procedural Void in the Court of Last Resort*, 57 RUTGERS L. REV. 107, 165–82 (2004).

102. The Supreme Court has two options when a quorum does not exist. For cases on direct appeal from a district court, the Chief Justice has the authority to send the case to the governing circuit court. *See* 28 U.S.C. § 2109 (2006). For other cases, the Court can defer a decision until the next term, but only "if a majority of the qualified justices" are of the opinion that a quorum would be available to decide it upon deferral. *See id.*; *see also* Bassett, *supra* note 100, at 684.

103. The Judiciary Act of 1789 states that "the supreme court of the United States shall consist of a chief justice and five associate justices, any four of whom shall be a quorum." Judiciary Act of 1789, ch. 20, § 1, 1 Stat. 73, 73 (1789) (current version at 28 U.S.C. § 1 (2006)). The current statute governing size and composition provides that the Supreme Court "shall consist of a Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum." 28 U.S.C. § 1 (2006).

The introduction of a quorum provision does not remove the possibility of institutional paralysis, but it makes that possibility far more remote. For the Supreme Court to be institutionally para-

boards, the inclusion of a quorum mechanism in the context of the Supreme Court is motivated by a desire to leave the Court in a position to fulfill its functions in those cases where full participation is not possible.[104]

Similar motivations played a part in the initial inclusion of a quorum provision for the federal courts of appeals. The formation of those courts in 1891 was not accompanied by the introduction of the now-familiar panel system.[105] Instead, the circuit courts were to consist of only two circuit judges, plus the Chief Justice or the Associate Justice of the Supreme Court assigned to each circuit.[106] In the event that a Supreme Court Justice failed to take his rightful seat on the circuit court,[107] the district judges within the circuit were made competent to round out the membership of the court.[108] Thus, the decision to allow district judges to sit on the circuit court was motivated by a desire to ensure "that the bench will always be well filled."[109] But empowering district judges to hear appeals was not

lyzed, four or more of its members must be unavailable at once. This is a situation that arises only in very rare circumstances. *See* Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589, 647 (1987) ("Seldom are at least two-thirds of the Justices not available to decide a case before them."). What's more, the Court has embraced the "rule of necessity," which spares itself from potential paralysis in some circumstances where a quorum would otherwise be unavailable. In its classic form, the rule of necessity is invoked when all of the Justices are subject to disqualification and "litigants would be denied their right to a forum." United States v. Will, 449 U.S. 200, 217 (1980). But some individual Justices have used similar logic to justify a decision not to recuse on the grounds that recusal deprives the Court "of the participation of one of its nine Members" and also increases the likelihood that the Court will be unable to resolve the case due to a tie. Microsoft Corp. v. United States, 530 U.S. 1301, 1303 (2000) (mem.) (Rehnquist, C.J.). On this latter point, see also Cheney v. U.S. Dist. Court, 541 U.S. 913, 915 (2004) (mem.) (Scalia, J.); Bassett, *supra* note 100, at 682–88 (criticizing the application of "rule of necessity" logic to justify individual recusal decisions).

104. As with quorums in other contexts, the desire to avoid the strategic creation of institutional paralysis almost certainly plays a role as well. But at least in the modern Court, this fear may be unfounded. For reasons owing primarily to behavioral norms rather than to a fixed procedure, there are no analogues of willful absences, such as those discussed *supra* note 103, by Justices of the Court.

105. For current panel requirements, see 28 U.S.C. § 46 (2006).

106. *See* Circuit Court of Appeals (Evarts) Act of 1891, ch. 517, § 3, 26 Stat. 826, 827 (1891). Furthermore, § 2 of the Evarts Act provided that each circuit court of appeals "shall consist of three judges, of whom two shall constitute a quorum." § 2, 26 Stat. at 826.

107. This was an event that occurred regularly. Almost from the moment the Act was passed, most Supreme Court Justices ceased the long-standing (and long disdained) practice of riding circuit. *See* Joshua Glick, Comment, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753, 1828 (2003).

108. *See* Circuit Court of Appeals (Evarts) Act of 1891, ch. 517, § 3, 26 Stat. 826, 827 (1891) (providing that district judges be designated to the circuit courts only "[i]n case the full court at any time shall not be made up by the attendance of the Chief-Justice or an associate justice of the Supreme Court and circuit judges").

109. 21 CONG. REC. 10,223 (1890) (statement of Sen. Evarts). In previous efforts to create intermediate courts of appeals, provisions that allowed district judges to sit were considered but rejected. The concerns underlying the rejection seem to have been two-fold. First, there was a desire, based on a mix of fears related to incompetence and ideology, to exclude district judges from performing appellate work. *See, e.g.*, 13 CONG. REC. 3,698 (1882) (statement of Sen. Jones) ("I do not think that it is wise to invest the district judges with the high appellate power proposed by the bill, because I think it is nothing but human nature for such judges after they once taste the exercise of higher authority to be, I will not say absolutely inefficient, but not as capable or as well inclined to perform their other functions as they would be outside of it."). Second, there was a resistance to the possibility of revolving composition in the appellate courts. *See, e.g.*, 13 CONG. REC. 3,464 (1882) (statement of Sen. Davis)

enough. A provision precluding circuit judges and district judges from hearing cases on appeal with which they were involved at the trial level, together with the acknowledged likelihood that Supreme Court Justices would not regularly attend, raised the very real possibility that a full court of three judges would not be found to hear a given appeal. An option to proceed by quorum was therefore viewed as necessary to ensure that the court could function in every circumstance.[110]

That option is no longer necessary. The substitution barriers that support quorum provisions in legislatures, corporate boards, and even the Supreme Court are not now present in the context of the federal appellate courts. The structure and composition of the federal appellate courts has changed significantly since 1891, and the concerns that motivated the initial inclusions of a quorum provision are no longer relevant. While the number of judges who hear any given appeal remains three, the pool of judges available to form that number has increased dramatically.[111] Most important to this change is the general growth in the total number of appellate judges authorized by Congress. Even the smallest circuit—the First—now has six authorized judges, and the mean number of judges per circuit is roughly fourteen.[112] The ongoing participation by senior circuit judges adds further to the number of judges available to hear appeals,[113] as does the contribution of district court judges sitting by designation.[114] De-

("[I]t is obvious that the opinions of a section would not command that moral weight and influence which those of the entire court have heretofore enjoyed and which have secured for it the merited confidence of the people."); 13 CONG. REC. 3,699 (1882) (statement of Sen. Jones) ("If we are going to have a court that will give confidence to the people and to the profession, I would . . . have a permanent tribunal and not a shifting one made up of one set of perambulating judges today and another set to-morrow.").

110. In response to questions raised by Senator Gray about the ability to designate district judges to perform appellate work, Senator Evarts was careful to note that although designation was possible, he did not "wish to disturb the competency of the quorum of two to discharge cases if they should undertake it . . . . There may be instances in which although three judges were in attendance, yet one of the circuit judges might be unable to sit in a particular case . . . ." 21 CONG. REC. 10,223 (1890) (statement of Sen. Evarts).

111. The availability of a large pool of judges from which to compose a decision-making panel distinguishes the current federal appellate structure not only from the structure originally created by the Evarts Act but also from the Supreme Court. *See* Bassett, *supra* note 100, at 686 (noting the potential for substitution in the courts of appeals as well as the inability to substitute in the Supreme Court).

112. There are a total of 179 authorized judgeships spread out over the thirteen federal circuits. 28 U.S.C. § 44(a) (2006). Of course, the actual number of active appellate judges regularly differs from the authorized number due to unfilled vacancies. But the prospect of vacancies is not enough to overcome the substantial increase in authorized positions, so the number of judges sitting in each circuit is now much higher than it was over a century ago. Moreover, the factors described in the remainder of the paragraph further support the proposition that the set of cases for which three judges may not be found is null.

113. *See* 28 U.S.C. § 371 (2006) (providing statutory authority for senior circuit judges to participate in appeals). For a discussion of this practice, see David R. Stras & Ryan W. Scott, *Are Senior Judges Unconstitutional?*, 92 CORNELL L. REV. 453, 460–61 (2007).

114. *See* 28 U.S.C. § 292(a), (d) (2006) (providing the statutory authority for district judges and senior district judges to participate in the resolution of federal appeals). For a discussion of the practice of judges sitting by designation in the federal courts of appeals, see generally Saphire & Solimine,

velopments in travel and technology also play a role. Substitution is now more practical because judges can travel to the location of the oral argument with greater speed and less expense, and because they can more easily participate in the decision-making process without traveling through mechanisms like electronic transmission of documents and audio review of oral arguments. The combined result of this proliferation is that a circumstance where three judges could not be found to decide an appeal is almost inconceivable.[115]

In the absence of substitution barriers, a necessity argument for a quorum provision is much harder to sustain. If easy substitution is possible, then a "full membership" requirement is realistic in every case. Although we still might adopt a policy permitting quorum decision making in this situation, the core reason for doing so would be a matter of institutional preference rather than necessity. And the question of whether that policy would be institutionally preferable would turn on an assessment of whether quorums improve decisional efficiency while still producing results that are acceptable. In short, traditional concerns sounding in necessity and institutional paralysis have no voice in the current appellate context and do not form an independent basis for maintaining the prevailing quorum practice.

2. Futility

Beyond necessity, perhaps the most obvious and facially compelling argument against adding a replacement judge when the remaining two judges agree is that the addition would be futile. The futility argument derives from the decision rule that applies in the federal appellate context: Given a regime of three-judge panels and majority voting, agreement by any two judges is all that is required to determine the outcome of an appeal. If two judges agree, then the decision rule is satisfied, and the addition of a third judge appears to be merely a matter of form. It might affect the result in a technical sense, by changing the vote from 2–0 to 3–0 or 2–1, but it would have no practical impact.

The futility argument is especially powerful because it eliminates any need to worry about competing interests. If there is no practical benefit to be achieved, why incur any costs? This logic is powerful, but it operates

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supra note 69.

115. Indeed, even in situations where every judge in a circuit has been recused, an appeal may still be heard under the current framework. *See, e.g.*, *In re* Nettles, 394 F.3d 1001, 1002–03 (7th Cir. 2005) (recusing all Seventh Circuit judges from hearing further appeals in case involving criminal defendant charged with plotting to bomb Chicago's federal courthouse); United States v. Nettles, 476 F.3d 508, 510 n.* (7th Cir. 2007) (composing a panel of three Sixth Circuit judges to hear the appeal). This outcome makes clear that the "rule of necessity" need not be invoked at the federal appellate level because of the potential for substitution. *See supra* note 103.

largely beneath the surface. Even when they explain themselves, two-judge panels do not tend to rely on futility. Such notions appear in none of the cases discussed in Part I.B. But the argument almost certainly informs the attitudes of courts toward quorum decision making, and a hint of it often lurks even in the very invocation of the quorum statute itself. As discussed shortly, many circuits have structured their local procedures to give a putative quorum the discretion to decide when they agree. By choosing to exercise this discretion, the judges convey two messages: (1) that they agree; and (2) that they do not consider it necessary to add a third judge. Those two messages are almost certainly connected—the addition of a third judge is not necessary precisely because the two judges agree, rendering any addition futile.

Its intuitive appeal notwithstanding, futility does not easily justify a policy of permitting quorum decisions. The pure futility argument is rooted in an assertion that the addition of a third judge simply makes no difference.[116] The voting rule applicable in the appellate context surely creates some pull in that direction, but in the end, the argument is convincing only under a static model of appellate decision making that views the final vote in a case as the aggregation of the fixed and independent vote of each judge on the panel. This view reflects the longstanding approach toward the study of judicial voting in multi-judge panels, which has focused on the individual views of each judge and has generally ignored the interaction between those views.[117] But as discussed at length in the previous part, this view is ultimately deficient because it fails to capture the various ways in which the final decision reached by three judges will vary in terms of direction, content, and reception from the one reached by a quorum of two. Once the dynamic nature of the appellate process is recognized, the pure futility argument becomes untenable. The addition of a third judge still may be undesirable, but it should not be described as futile.[118]

116. An argument that it is futile to add a third judge because any positive contribution they might make will be outweighed by some competing negative cost—delay, waste of scarce judicial resources, etc.—is not really a futility argument. Instead, it is an argument rooted in the assertion of cost.

117. *See, e.g.*, CROSS, *supra* note 63, at 148 ("In the conventional ideological attitudinal model of judicial decision making, judges are not amenable to persuasion. The judges of this model know their own preferences and can be straightforward in voting to implement those preferences.").

118. A final point: futility proves too much. If it really were futile to add a third judge to a group of two judges who agree, then it would make sense to consider seriously the prospect of appointing only two judges to appellate panels as a matter of course. Since most appellate opinions are unanimous, the expected outcome of this approach would be to produce quorums that could decide the appeal in most cases. Only when the two judges failed to agree would a third judge need to be involved as a tiebreaker.

Indeed, a similar system was suggested as a possible reform to the federal appellate system. *See* COMM'N ON STRUCTURAL ALTERNATIVES FOR THE FED. COURTS OF APPEALS: FINAL REPORT 62–64 (1998), *available at* http://www.library.unt.edu/gpo/csafca/final/appstruc.pdf. That proposal was never seriously considered by Congress. Instead, Congress has expressed a judgment that the outcome of appeals should be the product of three minds and that the presence of a third judge is not

3. Efficiency and the Conservation of Judicial Resources

At this point, arguments about relative costs and benefits remain to support the use of quorums. Even if decisions by irregular panels are not strictly necessary, and even if they are functionally inferior in some way, they may nevertheless be desirable if they serve some competing goal. One possibility along these lines is that decisions by irregular panels conserve judicial resources. For years, judges and academic commentators have noted with alarm the increasing strain on judicial resources in the federal system.[119] The federal appellate caseload has increased dramatically in the last fifty years, and the increase in the number of judges authorized to decide those cases has not come close to keeping pace.[120] As a result, the number of dispositions per judge has increased steadily over time, giving rise to concerns about the effect of judicial strain on the quality of justice delivered by the federal appellate system.[121] These concerns have motivated many actions by courts,[122] and even more proposals by

futile over the run of cases. *See supra* notes 16–19 and accompanying text (discussing the Federal Courts Improvement Act of 1982); *see also* United States v. Glover, 731 F.2d 41, 51 (D.C. Cir. 1984) (Mikva, J., dissenting) ("The touchstone for this pluralism [in the appellate process] is a belief that the more minds considering a matter, the better the ultimate resolution of the case is likely to be.").

119. *See, e.g.*, RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 59–93 (1985); Martha J. Dragich, *Once a Century: Time for a Structural Overhaul of the Federal Courts*, 1996 WIS. L. REV. 11, 25–28 (1996) (discussing federal caseload crisis); Tracey E. George & Albert H. Yoon, *Chief Judges: The Limits of Attitudinal Theory and Possible Paradox of Managerial Judging*, 61 VAND. L. REV. 1, 6–8 (2008) (same); Edith H. Jones, *Back to the Future for Federal Appeals Courts: Rationing Federal Justice by Recovering Limited Jurisdiction*, 73 TEX. L. REV. 1485, 1487–91 (1995) (reviewing THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS (1994)) (same); Sarang Vijay Damle, Note, *Specialize the Judge, Not the Court: A Lesson from the German Constitutional Court*, 91 VA. L. REV. 1267, 1275–76 (2005) (same); Dione Christopher Greene, Note, *The Federal Courts of Appeals, Unpublished Decisions, and the "No-Citation Rule,"* 81 IND. L.J. 1503, 1505–07 (2006) (same).

120. In just the thirteen years between 1992 and 2005, appellate case filings increased by just over 45% (from 47,013 to 68,473), while the number of authorized judgeships remained unchanged. *See* FEDERAL COURT MANAGEMENT STATISTICS (2005), http://www.uscourts.gov/cgi-bin/cmsa2005.pl (click on the "Generate" button) (detailing statistics for 2000–2005); FEDERAL COURT MANAGEMENT STATISTICS (1997), http://www.uscourts.gov/cgi-bin/cmsa.pl (click on the "Generate" button) (detailing statistics for 1992–1997).

121. *See, e.g.*, Christopher F. Carlton, *The Grinding Wheel of Justice Needs Some Grease: Designing the Federal Courts of the Twenty-First Century*, KAN. J.L. & PUB. POL'Y, Summer/Fall 1997, at 1, 2–3; George & Yoon, *supra* note 119, at 8–9; Stefanie A. Lindquist, *Bureaucratization and Balkanization: The Origins and Effects of Decision-Making Norms in the Federal Appellate Courts*, 41 U. RICH. L. REV. 659, 661 (2007) ("These caseload burdens have caused judges to implement reforms that deviate from the traditional or classic model of appellate adjudication . . . . As a consequence, only a small portion of cases appealed to the circuits receive the form of traditional appellate justice that conforms to the classic model. This development is seen as undermining the quality of the work produced by the circuits and as affecting the degree to which all litigants are treated equally.").

122. Every circuit has instituted alternative dispute resolution programs pursuant to Federal Rule of Appellate Procedure 33. ROBERT J. NIEMIC, MEDIATION & CONFERENCE PROGRAMS IN THE FEDERAL COURTS OF APPEALS 2–3 (1997). Appellate courts have also promoted arbitration as an alternative to litigation and have reviewed arbitration awards narrowly to ensure that that alternative does not become just another layer in the litigation process. *See, e.g.*, Cytyc Corp. v. DEKA Prods. Ltd. P'ship,

commentators,[123] designed to conserve judicial resources by improving the efficiency of the decision-making process.

In terms of judicial resources and efficiency, deciding cases with two Article III judges rather than three is attractive. Thus, both quorum decisions and decisions involving illegitimate panel members may be viewed as providing a mechanism to reduce judicial strain.[124] In that light, it is unsurprising that efficiency concerns figure prominently in the sole departure from simple assertions of statutory authority as a justification for decision by judicial quorum.[125] In *Murray*, the Second Circuit was forced to go beyond statutory authority because the appellant also raised a facially convincing argument based on the court's local rule.[126] To defeat that argument, Judge Newman concluded that an unnatural reading of the rule was warranted—and that conclusion was based explicitly on considerations of efficiency: "When a judge becomes aware of a ground of disqualifica-

439 F.3d 27, 32–33 (1st Cir. 2006). Most dramatically, courts have decided cases with less effort through unpublished opinions, which have increased from 11.2% of total opinions in 1981 to 81.6% in 2005. *See* LEONIDAS RALPH MECHAM, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2005 ANNUAL REPORT OF THE DIRECTOR 42 tbl.S-3 (2005), *available at* http://www.uscourts.gov/judbus2005/tables/s3.pdf; Michael Hannon, *A Closer Look at Unpublished Opinions in the United States Courts of Appeals*, 3 J. APP. PRAC. & PROCESS 199, 204 (2001); *see also* POSNER, *supra* note 119, at 120.

123. *See, e.g.*, Carlton, *supra* note 121, at 3–10 (suggesting increased use of technology, specialized subject-matter appellate courts, discretionary appellate review, more circuit judgeships, greater application of alternative dispute resolution, jumbo and/or unitary courts of appeals, and altered opinion writing as possible solutions to the caseload crisis); Lindquist, *supra* note 121, at 661; Greene, *supra* note 119, at 1506–09 (discussing responses to the caseload crisis).

124. If the effort required to decide an appeal were fixed and simply divided among the judges—however many—charged with reaching that decision, then deciding by quorum would not provide an efficiency benefit relative to a three-judge decision. But appellate decision making does not fit that description; instead, there is an intentional redundancy involved, so that the amount of effort required increases as does the number of judges. The primary source of this redundancy is independent preparation—each judge is expected to read the briefs and cases necessary to participate meaningfully in the decisional process. *See, e.g.*, United States v. Glover, 731 F.2d 41, 51 (D.C. Cir. 1984) (Mikva, J., dissenting) (describing the appellate process as "three judges separately considering the matter and a separate 'contemplative process' for the matter"); Robert A. Leflar, *The Multi-Judge Decisional Process*, 42 MD. L. REV. 722, 723–24 (1983). In this context, the addition of a third judge to an existing quorum of two entails an increase in the resources that must be allocated to reach a decision. Put conversely, deciding a case with only two judges enhances efficiency.

As for the inclusion of improper judges, the efficiency gain derives from the fact that some of the independent preparation is performed by a judge outside of the Article III pool. Of course, if the improper judge comes from a pool that is itself affected by resource strain, then the net result may simply be to transfer strain from the Article III pool to some different pool. Even in this situation, Article III judges may still be expected to choose this option because they will not internalize the strain imposed elsewhere. In any event, the effect for Article III judges is to reduce the amount of work that must be performed.

125. In a sense, the military cases discussed *supra* note 52, also involved the absence of statutory authority because no specific statute authorized quorum decisions. But the resolution of those cases was in fact based on a finding of statutory authority; the court concluded that the Judge Advocates General possessed proper authority to promulgate rules (including quorum rules) in the absence of a command to the contrary. *See, e.g.*, United States v. Petroff-Tachomakoff, 19 C.M.R. 120, 125 (C.M.A. 1955).

126. *See* Murray v. NBC, 35 F.3d 45, 47–48 (2d Cir. 1994). The argument based on federal statute was quickly and predictably dispatched by reference to 28 U.S.C. § 46(d) (1988). *Id.* at 47.

tion just prior to oral argument, replacement of the recused judge would impair the court's efficiency and burden the parties with a return visit to the court."[127] Although this represents one of the very few explicit acknowledgments of efficiency as a motivating consideration behind quorum decision making, it should not be viewed as an outlier. To the contrary, the desire to conserve judicial resources is almost certainly behind a great deal of the instances of quorum decision making that are issued without justification.

4. Expediency and the Interests of Litigants

In addition to being more efficient, decisions by irregular panels may also be more expedient.[128] The concern for expediency is reflected in current procedural rules and often underlies proposals for procedural reform. For example, Rule 1 of the Federal Rules of Civil Procedure states that the rules are to be "construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."[129] The Civil Justice Reform Act of 1990 (CJRA),[130] one of the most significant recent procedural reforms, was explicitly directed at improving expediency in the district courts. The Senate Report accompanying the bill lamented that "[h]igh costs, long delays and insufficient judicial resources all too often leave [the] time-honored promise [of Federal Rule of Civil Procedure 1] unfulfilled."[131] More recently, academic commentators and

127. *Id.* at 48. Judge Newman also makes a passing attempt at a statutory justification for his broad reading by suggesting that "a rigid application of the local rule would arguably place it in tension with the statutory authority of two judges to constitute a quorum." *Id.* (citing 28 U.S.C. § 46(d) (1988)). But that attempt is unconvincing. As Judge Newman acknowledges, the statute in question merely provides authority for a judicial quorum; it constitutes no mandate. For further discussion of this point, see *infra* text accompanying notes 173–78.

128. Expediency and efficiency are related but not identical concepts. The efficiency concerns discussed *supra* center around the desire to conserve judicial resources in order to minimize the strain on the judges who must decide the voluminous cases before them. Expediency is instead directed at rendering a decision quickly to vindicate the litigants' interest in having their dispute resolved in a timely manner. Put differently, efficiency is judge-focused while expediency is litigant-focused. In many circumstances, the two interests may be aligned. For example, introducing a mechanism to decide cases without a full opinion will both reduce strain on judges (thereby serving efficiency) and permit decisions to be reached faster (thereby serving expediency). But the alignment is not complete. The class-action device represents an example of divergence; consolidation of claims into a class action is justified in part based on efficiency across cases, but that often comes at a cost in expediency terms for individual claimants. Other procedural mechanisms affect one interest without affecting the other in either direction. For example, the Ninth Circuit practice of assigning bench memos to one judge on a panel is motivated by a desire to increase efficiency of case preparation, but the practice has no effect on the speed at which cases are ultimately decided.

129. FED. R. CIV. P. 1.

130. Pub. L. No. 101-650, 104 Stat. 5089 (1990) (codified at 28 U.S.C. §§ 471–482 (2006)).

131. S. REP. NO. 101-416, at 1 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 6802, 6804. For political accounts of the CJRA and its passage, see generally Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375 (1992); Lauren Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1447 (1994).

appellate courts have expressed concerns about the lack of expediency in the immigration system.[132] Finally, and most notably for present purposes, the appellate courts themselves have not escaped complaints about insufficient expediency in deciding appeals.[133]

Decisions by quorum will produce expediency gains in many cases. To participate meaningfully, a third judge will need time to get up to speed on the case and its issues, which will lengthen the time necessary to reach a decision. The later in the process the judge is added, the greater the delay the addition would cause. Deciding with only two judges, by contrast, should enhance expediency, not only because the delay just mentioned would be avoided, but also because two judges rather than three would be involved in the process. In many circumstances, reducing the manpower allocated to a task lengthens the time necessary for its completion, but the opposite is likely true for appellate decision making. The typical post-argument sequence for an appellate decision is an initial conference, followed by assignment of the opinion-writing task to one judge, followed by a period of modification based on feedback from the remaining judges.[134] When two judges are involved rather than three, the modification period should be shortened because the number of judges whose feedback must be incorporated and accommodated is smaller.

Expediency has not been specifically invoked to support quorum decision making,[135] but that is no reason to conclude that judges are unmoved

132. *See, e.g.*, Kambolli v. Gonzales, 449 F.3d 454, 458–60 (2d Cir. 2006); Ramirez-Alejandre v. Ashcroft, 319 F.3d 365, 377 (9th Cir. 2003). Immigration appeals for "long-time residents or asylum seekers . . . can last over a year or more." Barbara Hines, *An Overview of U.S. Immigration Law and Policy Since 9/11*, 12 TEX. HISP. J.L. & POL'Y 9, 18 (2006). Efforts to improve expediency have created other problems like inadequate attention to individual cases. *See* Benslimane v. Gonzales, 430 F.3d 828, 830 (7th Cir. 2005) (concluding that "the adjudication of [immigration] cases at the administrative level has fallen below the minimum standards of legal justice"); s*ee also* Won Kidane, *Revisiting the Rules of Procedure and Evidence Applicable in Adversarial Administrative Deportation Proceedings: Lessons from the Department of Labor Rules of Evidence*, 57 CATH. U. L. REV. 93, 97 (2007) ("Courts of appeals have repeatedly complained about inconsistent, incoherent, and even outright erroneous decisions.").

133. *See* JOHN A. MARTIN & ELIZABETH A. PRESCOTT, APPELLATE COURT DELAY: STRUCTURAL RESPONSES TO THE PROBLEMS OF VOLUME AND DELAY 1 (Michael J. Hudson ed. 1981); Irving R. Kaufman, *Reform for a System in Crisis: Alternative Dispute Resolution in the Federal Courts*, 59 FORDHAM L. REV. 1, 1 (1990) ("Faced with ever-burgeoning caseloads and essentially static resources, the nation's courts fall further and further behind the promise of the Federal Rules of Civil Procedure: 'the just, speedy, and inexpensive determination of every action.'" (quoting FED. R. CIV. P. 1)); Benjamin R. Civiletti, Comment, *Zeroing In on the Real Litigation Crisis: Irrational Justice, Needless Delays, Excessive Costs*, 46 MD. L. REV. 40, 44 (1986) ("No rational person can justify the incredible delays seen in this country's courts."); Carrie E. Johnson, Comment, *Rocket Dockets: Reducing Delay in Federal Civil Litigation*, 85 CAL. L. REV. 225, 227–32 (1997).

134. *See* Leflar, *supra* note 124, at 725–29.

135. The opinion in *Murray v. NBC*, 35 F.3d 45 (2d Cir. 1994), for example, is justified almost exclusively on the grounds of efficiency; expediency is largely ignored, even when it would be natural to acknowledge it. For example, although the opinion notes that adding a third judge might require the oral argument to be postponed, the purpose in doing so is not to lament the costs of the delay to the parties (except insofar as it would "burden [them] with a return visit to the court"), but instead to emphasize that the time and effort of the judges would be wasted, thus "impair[ing] the court's effi-

by it. To the contrary, judges frequently invoke expediency as a justification for judicial procedures, even when those procedures arguably exact a cost in terms of decisional accuracy. For example, Judge Boudin has criticized the federal practice of certifying state law questions on expediency grounds. While conceding that the practice may enhance accuracy,[136] Judge Boudin nevertheless expressed concern that certification unduly lengthens the time required to get cases decided.[137] It is easy to imagine similar logic being brought to bear in the context of irregular panels.

III. TOWARD A UNIFIED TREATMENT OF IRREGULAR PANELS

The standard requirement that an appeal be decided by three judges has a functional dimension and should not be relaxed lightly. Instead, departures from the standard requirement should be permitted only when the legitimate costs of adherence to the requirement outweigh the expected functional benefit. If judges could accurately identify and assess costs and benefits, some cases involving irregular panels should lead to substitution

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ciency." *Id.* at 48. The closest *Murray* comes to expediency is a passing remark that "[t]he [local] rule is obviously intended to permit the Court to conduct its business expeditiously despite the unanticipated unavailability of one member of a three-judge panel." *Id.* at 47. Even here, though, it is not clear that the interest of parties plays anything but a minor and supporting role relative to the interest in the court itself to function efficiently for its own sake.

136. This point has been made emphatically by Judge Calabresi, who defended his efforts to expand the certification practice in large part based on accuracy: "[I]n somewhere between a third and a half of the cases, the way our panel would have decided it turned out not to be the way New York and Connecticut [decided it]. . . . [T]he fact is that, at least in our circuit, the difference between what we would have said that law was and what they say is significant." Video: The Role of the Judge in the Twenty-first Century (Boston University School of Law 2006), http://www.bu.edu/law/events/audio-video/playback.html?instance=role&stream=role1-9.

137. "The work of judges is a tension between getting decisions right, in some hypothetical and probably not very realistic sense of right, and getting the world's work done. And the cost and delay of getting a slightly different decision in a particular unique case has seemed to us increasingly to completely outweigh the advantages of getting the [state court] to tell us what the rule is . . . . [M]y view is you get the case decided as best you can; what most lawyers and most clients want is an answer." *Id.* Judge Boudin is not the only First Circuit judge who has demonstrated skepticism of this sort. *See* Bruce M. Selya, *Certified Madness: Ask a Silly Question* . . ., 29 SUFFOLK U. L. REV. 677, 690 (1995) (arguing against certification in part because "litigants do not have an entitlement to something identifiable in the abstract as a 'right' answer").

Not all judges agree, of course. Judge Calabresi, for example, does not accept that parties are uninterested in accuracy: "[M]ost of these are cases which have been appealed all the way up to us, the people have spent a huge amount of money, have taken a very large amount of time, to get to us . . . . Do you really think that the parties would rather just get it done quickly and then find out six months later or a year later that New York doesn't really like it?" Video: The Role of the Judge in the Twenty-first Century (Boston University School of Law 2006), http://www.bu.edu/law/events/audio-video/playback.html?instance=role&stream=role1-9. For more on the (un)willingness of parties to trade process for efficiency, see David P. Currie, *The Federal Courts and the American Law Institute: Part II*, 36 U. CHI. L. REV. 268, 317 (1969) (describing the certification process as a tradeoff between costs, and delays and the avoidance of error); Ruth Bader Ginsburg, *Reflections on the Independence, Good Behavior, and Workload of Federal Judges*, 55 U. COLO. L. REV. 1, 10 (1983) (describing a local rule that promised an expedited decision in exchange for a disposition without opinion, and remarking, "I know of no case in which litigants have invoked the rule.").

and others should not. But judges rarely consider these costs and benefits explicitly, and they would not do a very good job of assessing them even if they did. In particular, the mechanism of self-assessment will lead judges to value illegitimate costs, to overvalue legitimate costs, and to undervalue functional benefits.

This part begins by describing local rules and procedures that courts have introduced to address decisions by irregular panels. On the whole, these rules restrict self-assessment in some cases, but leave the treatment of many others in the hands of the judges who make up the irregular panel. This part then proposes various ways that the approach to irregular panels might be improved. The weighing of costs and benefits might be improved, either by focusing the decision and requiring explicit consideration of process values or by shifting the decision to judges who are not themselves members of the irregular panel. Instead, the suggested solution is to replace self-assessment with a firm policy of replacement in all instances of judicial unavailability. Thus, a common rule ties together the treatment of irregular panels: resolution of an appeal should reflect the participation of three authorized judges.

A. Local Rules as Constraints

As described in Part I, the relevant statutory framework permits decision by quorum whenever a member of a properly constituted panel becomes unavailable, and no additional constraints have been imposed through court opinions. But there is another relevant source of authority that acts as a constraint in certain cases: most federal circuits have local rules or internal operating procedures that govern the unavailability of an assigned panel member. Although there is a predictable degree of similarity in these rules owing to their shared statutory foundation, there are also significant variations, ranging from the general approach in cases of unavailability to the very specific procedures that are followed when those instances arise.[138]

The most common limitation on quorum decisions is based on the timing of the unavailability. Among circuits that make such a distinction, the usual presumption is in favor of replacement in cases where the unavailability arises before oral argument or submission, and against replacement

138. To survey these variations, I sent letters to the court clerks of each of the thirteen federal circuits and received responses from eleven circuits that detail not only the local written procedure (if any) that is followed in each circuit but also the informal ways that instances of unavailability are handled. Most circuits have an operating procedure or local rule that addresses (at least in basic terms) the unavailability of a panel member. *See* 2D CIR. R. § 0.14; 3D CIR. INTERNAL OPERATING P. 11.1.3; 4TH CIR. INTERNAL OPERATING P. 36.2; 5TH CIR. PRACTITIONER'S GUIDE at p. 70; 8TH CIR. R. 47E; 9TH CIR. GENERAL ORDER 3.2(g); FED. CIR. INTERNAL OPERATING P. 5; FED. CIR. R. 47.11. But not all do—the Sixth, Seventh, Tenth and D.C. Circuits do not appear to have any local rules or procedures that address unavailability.

where it arises thereafter. For example, the Third Circuit has a formal procedure that governs situations where a judge becomes unavailable after the panel is assigned but before the case is argued and submitted.[139] No existing procedure covers unavailability that develops after the case is argued; instead, the court clerk notes that "the case law makes it clear that if the two remaining judges agree they can decide the case."[140] Similarly, the Sixth Circuit has a "back-up judge system" that functions to provide replacements for judges who become unavailable before argument.[141] If the unavailability arises after the argument, however, the back-up system is not invoked, and the two judges are instead permitted to decide the case if in agreement.

Minor variations aside, all circuits but one permit a panel of two judges to decide the merits of an appeal in certain circumstances. In the absence of an automatic replacement policy, the question of replacement is typically left to the remaining two panel judges.[142] Generally, a third judge must be assigned to replace an unavailable judge if the two remaining judges do not agree, and may be assigned if the two remaining judges agree but decline to exercise their discretion to decide the case by quorum. It is difficult to know, except anecdotally, how often these situations arise because the resulting opinion is typically issued without any notation that a third judge was appointed to substitute for an unavailable judge. But most circuits seem to adopt a permissive view toward deciding cases with only two judges, and third judges are appointed only in extreme circumstances. Indeed, in the case of the Eighth Circuit, that view was explicitly recognized by the court clerk, who described the court's local rule as "express[ing] the court's preference that the remaining two judges should de-

139. 3D CIR. INTERNAL OPERATING P. 11.1.3.

140. Letter from Marcia M. Waldron, Clerk, U.S. Court of Appeals for the Third Circuit, to author (Apr. 10, 2007) (on file with the Alabama Law Review). The Federal Circuit has a similar structure, but formal policies exist to address both pre- and post-argument unavailability. *See* FED. CIR. INTERNAL OPERATING P. 5.3 (requiring substitution for pre-argument unavailability and permitting decision by quorum for post-argument unavailability).

141. Letter from James A. Higgins, Circuit Executive, U.S. Court of Appeals for the Sixth Circuit, to author 1 (Apr. 13, 2007) (on file with the Alabama Law Review).

142. *See, e.g.*, E-mail from Patricia Connor, Clerk, U.S. Court of Appeals for the Fourth Circuit, to author para. 3 (on file with the Alabama Law Review) ("Assuming that the remaining two panel members are in agreement on the case, whether to decide the case by quorum is left to the discretion of the remaining panel members."); Letter from James A. Higgins, Circuit Executive, U.S. Court of Appeals for the Sixth Circuit, to author, *supra* note 141, at 1–2 ("The decision about whether or not to go forward as a panel of two is left to the remaining judges on the panel. If they are in agreement about the result in the case, they probably would go forward without a replacement judge."); Letter from Mark J. Langer, Clerk, U.S. Court of Appeals for D.C., to author (Apr. 10, 2007) (on file with the Alabama Law Review) ("Ordinarily, if the two remaining judges are in agreement as to the disposition of the appeal, no third judge will be assigned to the panel. This, however, as mentioned above is not a rule of the court and is left entirely to the discretion of the remaining panel members.").

cide the case if a judge on the three-judge panel dies or becomes disabled after the case is submitted."[143]

The exception to this general pattern is the Ninth Circuit, which alone has adopted a strong policy of replacement that extends to all instances of unavailability. Ninth Circuit General Order 3.2(h) provides that a third judge will be appointed to replace a judge who becomes unavailable before oral argument, even if the need to replace would require postponing the argument of the case to the next calendar.[144] Similarly, General Order 3.2(g) provides that a third judge will be drawn by lot if a panel member dies, becomes disabled, or leaves the court after the case has been submitted.[145] The clerk of the Ninth Circuit described the Court's policy as "strict in not deciding cases on the merits with only two judges. We will always draw a third judge."[146]

In sum, all circuits but the Ninth use local rules to impose limitations on the statutory ability to decide by quorum, particularly when the unavailability arises relatively early in the decisional process. At some level, this is an understandable approach that reflects an attempt to balance competing considerations of accuracy and efficiency. When a judge becomes unavailable after oral argument, a preliminary vote has already occurred and there is some sense of certainty about the outcome. Once those preliminary votes have occurred, judges' opinions about the resolution of the case may become relatively more fixed. In addition, replacement after oral argument should lead to a greater delay in the ultimate resolution of the appeal. Thus, the existing local rules may generally be seen as reflecting a reasonable preference for quorum decisions in circumstances where replacement would be particularly futile and inexpedient.

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143. Letter from Michael E. Gans, Clerk, U.S. Court of Appeals for the Eighth Circuit, to author 1 (Apr. 10, 2007) (on file with the Alabama Law Review). The general permissive attitude toward quorum decisions has even led some courts to ignore limits placed on those decisions by local rule. The opinion in *Murray v. NBC*, 35 F.3d 45 (2d Cir. 1994), provides an example: beyond the standard complaint about quorum decisions, *Murray* involved an additional challenge based on the court's local rule. As a textual matter, the challenge was a powerful one. The version of 2D CIR. R. § 0.14(b) then in force authorized a quorum decision only in cases of unavailability involving a panel "which has heard argument or taken under submission any appeal." *Id.* at 47 (quoting 2D CIR. R. § 0.14(b)). Because the third judge recused before the argument was heard, the local rule did not apply by its terms. Judge Newman conceded "the force of the argument based on the literal wording of the local rule," but rejected it even so based on his conclusion that "'any sacrifice of literalness for common sense does no violence' to the purpose of the rule." *Id.* (quoting Textile Mills Sec. Corp. v Comm'r, 314 U.S. 326, 334 (1941)). He might indeed be right that it makes little sense to distinguish based on whether a third judge sits through the argument or leaves just before. Still, that was the line clearly drawn by the rule, and the court's willingness to redraw it demonstrates an eagerness to authorize quorum decision making whenever possible.

144. 9TH CIR. GENERAL ORDER 3.2(h).

145. 9TH CIR. GENERAL ORDER 3.2(g).

146. E-mail from Cathy Catterson, Clerk, U.S. Court of Appeals for the Ninth Circuit, to author (Apr. 13, 2007, 12:34:43 EDT) (on file with the Alabama Law Review).

B. Weaknesses and Improvements

Although the local rules soften the effect of the statutory regime by favoring replacement in some subset of cases, weaknesses persist. As described in the previous part, local rules generally require replacement in cases of early unavailability but impose no restrictions when judicial unavailability occurs after an appeal is submitted.[147] But the interaction of views, which is an essential component of multi-judge decision making, often does not begin in earnest until submission, and the events occurring afterward—particularly the circulation of opinions and suggested revisions—are arguably those where the need for multiple opinions is greatest. Given a proper understanding of the dynamics discussed in Part II, replacement should produce significant value even when it occurs relatively late in the game.

In theory, the current approach leaves room for that value to be recognized. After all, local rules permit putative quorums to decline to exercise statutory authority and instead request the assignment of a third judge. Conversely, in cases where the added value would be minimal and would come at a cost of significant time and resources, the local rules would permit the quorum to bypass replacement in favor of a quick decision. But a system based on self-assessment is likely to do a poor job of accurately distinguishing between these two categories of cases. For reasons that will be taken up in the next part, the judges who constitute the quorum are likely to overvalue expediency and undervalue the prospective contributions of a new third member. To address that tendency, some modification in the current approach is desirable.

1. Enhanced Self-Assessment

The least dramatic route to improving the treatment of quorums is to bolster the consideration of process values by the judges who are charged with making the replacement decision. An improvement along these lines leaves authority to decide between seeking substitution and proceeding by quorum with the two remaining judges on a panel, at least in some class of cases.[148] At the same time, it recognizes that the authority to decide should be guided in an effort to avoid problematic outcomes that result when choice is unfettered.

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147. Indeed, some local rules seem to swing toward encouraging non-replacement in cases of late unavailability. *See supra* text accompanying note 143.

148. A choice would still need to be made between whether to leave the two remaining judges to that choice in all cases or to require substitution in some class of cases. It is not necessary to dwell on this choice, however, because I will ultimately conclude that neither is desirable.

Professor Bassett has suggested this type of improvement in the context of Supreme Court recusal.[149] Although she concludes that the current system—which places decision-making authority in the hands of each Justice—is deficient because Justices are likely to make decisional errors, her proposed solution is relatively modest: to leave the decision-making authority "where it essentially is now—resting with the conscience of each individual Justice,"[150] while adding new reporting requirements designed to "focus each Justice's attention on matters involving the potential for bias" and to "invigorate public confidence in the Court" by enhancing decisional transparency.[151] A proposal in this spirit might take various forms when applied to the quorum context. The two remaining judges might simply be instructed to consider explicitly such factors as whether the decisional process might benefit from the contributions of a third judge or whether the legitimacy of the outcome might be enhanced by the presence of a third judge, and might be required to write an opinion explaining the decision in those terms.[152] Or a rebuttable presumption in favor of replacing the missing judge could be added, either universally or in certain situations (e.g., where the unavailability occurs before an initial draft of the opinion has been circulated).[153]

Although occasional examples of judicial recognition of decisional dynamics provide some room for optimism,[154] there is reason to doubt the

149. *See* Bassett, *supra* note 100, at 693–97. Judicial recusal and quorum decision making share some key features. As with judicial quorums, the current recusal framework asks judges to make decisions based in part on a self-assessment of the process values implicated by their action and to do so in a largely unguided and unchecked manner. Critics have complained that that framework leads courts to narrow applicable standards "through interpretation to the point where they no longer serve the intended purpose," in large part because judges are unable or unwilling to accurately assess when the standards are met. Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531, 551 (2005).

150. Bassett, *supra* note 100, at 695. As should be plain from the title of her article and the quoted text, Professor Bassett's focus is on the Supreme Court rather than on the federal system as a whole. That distinction is important to her choice of approach because the inability to substitute at the Supreme Court level argues in favor of a "less-demanding recusal standard for Supreme Court Justices than for other federal judges." *Id.* at 697. But the distinction is less important here, as her approach is merely offered as an example of a process-bolstering modification.

151. *Id.* at 695–96.

152. *See* Toby J. Heytens, *Doctrine Formulation and Distrust*, 83 NOTRE DAME L. REV. 2045, 2063 (2008) (discussing a "duty of explanation" as a potential source of error reduction) (emphasis omitted). *But see* Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 2015–17 (2007) (criticizing the use of factors as tools for channeling discretion and recommending the use of "general principles" instead).

153. Some of the existing court procedures effectively include such presumptions. For example, some circuits require replacement when a judge becomes unavailable before oral argument is held. *See supra* Part III.A. Indeed, this approach is more restrictive than the establishment of a presumption because it removes the discretion of the two remaining judges altogether. As for the second possibility mentioned in the text, an effort to make distinctions along those lines would require the court to engage in a serious and potentially nettlesome consideration of the mechanics of the decisional process. For an example of such an attempt, see generally *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962).

154. In a variety of contexts, appellate courts have occasionally recognized the dynamic nature of the decision-making process and have concluded that applicable decisional rules must be structured in

overall effectiveness of this sort of approach. The primary cause for doubt is that the responsibility for assessing process values remains with those who are engaged in the decision. The problems associated with this arrangement are two-fold: self-assessment may be subject to bias that contributes to results that are actually unfair,[155] and it may be perceived as unfair or illegitimate even in the absence of actual bias.[156] Relative to the recusal context, where self-assessment has been roundly criticized on these

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light of that nature.

Jury decision making. The Fourth Circuit recently rejected a verdict reached by an eleven member jury after the twelfth juror had been erroneously removed before the start of deliberations and absent party stipulation. United States v. Curbelo, 343 F.3d 273, 278 (4th Cir. 2003). This conclusion was not constitutional in dimension. Instead, the majority concluded that the dismissal was inconsistent with the requirements of FED. R. CRIM. P. 23(b), *id.*, and they emphasized that they "simply [could not] know what affect [sic] a twelfth juror might have had on jury deliberations." *Id.* at 281. It is possible to view the *Curbelo* conclusion as a *Nguyen* equivalent because the majority concluded that an eleven-person jury in this situation had no authority to act. *Id.* at 283. But the basis for concluding that this lack of authority amounted to structural error seems to be that the jury decision-making-process is such that it is impossible to extrapolate from a decision of eleven jurors what a jury of twelve might decide. Harmless error review is therefore impossible because the "twelfth juror might, during the course of jury deliberations, have been able to raise persuasive points in Curbelo's defense; the juror may even have held out for acquittal on all counts." *Id.* at 288. Perhaps this result is explained by the unanimous voting rule that applies to jury decisions. Yet there is more than a hint here that the extra juror is important not only because of the vote that she will cast but also because of the influence she may have on the votes cast by others.

En banc voting. In 1978, the Fourth Circuit cast an initial conference vote of 4–3 after hearing an en banc oral argument. Mayor of Balt. v. Mathews (*Baltimore I*), 562 F.2d 914 (4th Cir. 1977). One of the judges in the majority then died, but the opinion issued with the original voting preserved. *Id.* at 918. On a motion for rehearing, the court later concluded that the vote of the deceased judge could not be counted; the vote then became 3–3 and the opinion of the lower court was affirmed rather than reversed. *See* Mayor of Balt. v. Mathews (*Baltimore II*), 571 F.2d 1273, 1276 (4th Cir. 1978). Although the deceased judge had tentatively voted at conference and had even approved the language of some of the proposed majority opinion, his vote was not legitimate because "[h]is death occurred . . . before the dissenting and concurring opinions were written and before the court's decision was announced." *Id.* at 1276. This outcome might be explained in terms of statutory power and nothing more. *See id.* (citing United States v. Am.-Foreign S.S. Corp., 363 U.S. 685, 685–86 (1960), for the proposition that judges who are not active when a case is decided lack the statutory authority to vote in an en banc proceeding). But the emphasis in *Mathews* on the failure of the deceased judge to view the concurring and dissenting opinions suggests something more—namely, that those unread opinions may have affected the judge's vote.

Motions practice. In the early 1980s, the local rule governing motions practice in the D.C. Circuit assigned three judges to weekly panels that heard and decided motions on all pending cases. But only two of the three assigned judges actually attended the motions meetings; the third judge was brought in only when the two attending judges disagreed. This procedure applied not only to routine motions, but also to motions for summary affirmance, which could potentially dispose of an appeal on the merits. In *United States v. Glover*, 731 F.2d 41 (D.C. Cir. 1984), the court upheld the use of the procedure in that latter manner, but did so over a vigorous dissent. Among other objections, Judge Mikva's dissent emphasized that the summary affirmance procedure eliminates "the pluralism that is the benchmark of the appellate process." *Id.* at 51 (Mikva, J., dissenting). That benchmark stems from a "belief that the more minds considering a matter, the better the ultimate resolution of the case is likely to be." *Id.* Because procedures that use two judges rather than three "substantially reduces this pluralism," they should be avoided, at least in situations where the motion being considered can "terminate an appeal . . . or otherwise directly affect the rights of the litigants." *Id.*

155. *See* Frost, *supra* note 149, at 585; *see also* Roberts, *supra* note 101, at 109.

156. *See* Frost, *supra* note 149, at 584.

grounds,[157] the perceived unfairness concern is perhaps diminished in the quorum context because the connection between unfairness and the failure to add a third judge is somewhat weaker.[158] But the potential for unconscious bias is undiminished, and this raises serious concerns about current approaches—and any modified approach—that place decision-making authority in the hands of the quorums themselves.

At least two categories of unconscious bias may affect the ability of potential quorums to make appropriate self-assessments. First, the remaining two judges are likely to exhibit some form of overconfidence bias. Overconfidence bias explains situations where individuals who are aware of the general likelihood of a negative (or positive) event nevertheless conclude that their particular likelihood is less (or greater) than average.[159] For example, litigants aware of the general likelihood that a claim like theirs will be rejected may nevertheless conclude that their particular claim is one of the outliers that will buck the trend. In the context of quorums, an overconfidence bias might manifest in two different ways: First, a judge might acknowledge that judges as a whole would benefit from the addition of a third judge, but may nevertheless conclude that he himself would not so benefit.[160] Alternatively, and perhaps more likely, a judge might acknowledge in the abstract that she herself would benefit from the addition of another judge in a certain set of cases, but might nevertheless be resistant to conclude that any particular case belongs in that set. Put in hypothetical numerical terms, Judge A exhibits the first form of overconfidence bias if he concludes that the addition of a third judge would make a difference in 50% of overall cases but only in 25% of cases involving him, and Judge B exhibits the second form of overconfidence bias if she concludes that she would benefit from the addition of a third judge in 50% of all cases involving her but chooses to add a third judge in only 25% of cases in practice.

This latter form of bias is related to overconfidence, but it stems from selection difficulties rather than from a categorical underestimation of like-

157. *See, e.g.*, *id.* ("Providing for an impartial decisionmaker on the question of recusal serves both to prevent actual injustice and the appearance of injustice. Ensuring that the decision is made by a neutral decisionmaker would protect the integrity of the challenged judge and the judiciary as a whole in those cases where disqualification is not justified.").

158. This is not to say that there is no connection at all. But the involvement of a biased judge in the decision-making process is strongly linked to unfairness, while the failure to add a third judge to a two-judge quorum is less so.

159. For a general discussion of the overconfidence bias and some implications for law, see Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1091–95 (2000).

160. There is a measurement problem associated with the overconfidence bias because it is at least plausible that a person might *accurately* conclude that some negative event is less likely to affect them than the population as a whole. In other words, because some people *are* better-than-average drivers, every instance of self-reporting that reflects a conclusion of that sort cannot be categorized as indicative of overconfidence bias. *See id.* at 1091.

lihoods. The essence of the problem is that when two judges in the midst of a decision both agree on how that decision should play out, they will not easily envision the decision going another way. There is a substantial lack of perspective that is created by involvement in the particulars of the decision. As a result, although they might agree in the abstract that certain cases may be subject to reconsideration or modification upon the infusion of another set of views, the two judges in practice are systematically prone to conclude that the case at issue is not one of those cases.[161] However categorized, the result of this tendency is that case-by-case decision making by those involved in the decision will, in practice, lead to the appointment of a third judge in a fewer than ideal number of cases.[162]

So far, these biases are unrelated to any underlying interest that a judge has in the decision or the decisional process. In contrast, a second category of bias is rooted precisely in such interests. Specifically, if the concern for efficiency and managing caseload is especially salient, the tendency to conclude that a particular case is not one that would benefit from the addition of a third judge will increase. This may be categorized as a form of self-serving or confirmatory bias in the sense that the information is unconsciously analyzed to serve the interests of the analyzer.[163] To be sure, judges also have interests in fairness and justice, and when they realize that fairness would not be served by proceeding as a quorum, they may well choose to place that interest above any interest in efficiency. But the operation of these biases might just mean that the judge is put to this choice less often than we would like because the interest in fairness is marginalized when judges conclude—whether consciously or subconsciously—that fairness is not implicated and that the interest in efficiency can be safely pursued.[164]

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161. This dynamic also has a flavor of status quo bias, with the status quo defined as the decision already reached by the two remaining judges. *See generally* Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193 (1991).

162. This is where the logic of futility plays an unwelcome role: it allows judges an easy route to conclude that a third judge would make no difference. *See* discussion *supra* Part II.B.2.

163. A related form of this bias may be based on conscious pursuit of interests. To justify that pursuit, judges may convince themselves that their interests and the interests of those affected by the decision are aligned. To the extent that his empirical claim is inaccurate, Judge Boudin's argument in opposition to certification may be an example of this phenomenon. *See supra* note 137.

164. A final source of distortion in the decision making of quorums is the present asymmetry of authority discussing the issue. Even when they have discretion to decide, judges may be guided by the examples of others who have gone before them, and precedent may therefore play an important function. As discussed in Part I.B, the body of precedent relating to quorum decision making is scant. But as with judicial recusal, that which exists is skewed because of an asymmetry of publication practices. *See* Frost, *supra* note 149, at 570–71; John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237, 244–45 (1987). When two judges decide to add a third judge, they almost always do so without comment, and indeed the decision is essentially invisible. Conversely, when two judges decline to add a third judge, the resulting opinion at least mentions the decision and the authority supporting it. And the few cases that have prompted courts to issue a written opinion defending a decision in the quorum context have been those where a third judge is not added. As a

All of this significantly undercuts the appeal of an approach that relies on self-assessment, even if "awareness-raising" modifications are introduced. Even if we could reach a consensus about the ideal point at which to switch from a policy of automatic replacement to a policy of quorum review of the replacement decision, serious difficulties remain when we rely on two judges who are invested in the decision and immediately affected by it to evaluate process values. Simply put, the result in *Mathews* and the dissent in *Glover* are likely to remain relatively rare outliers,[165] and neither increasing judicial awareness of the process values at stake nor introducing requirements to guide consideration of those values is likely to change that. Both modifications may yield improvement, but neither will result in accurate identification of cases where replacement would be desirable because the same biases that infect the free exercise of discretion will also infect its guided exercise.

2. External Review

The biases just discussed are intractable because two intertwined tasks—reaching a decision and assessing the process values of the decision reached—are assigned to the same individual or group. Task separation may help. Separation alleviates many of the problems associated with self-assessment and should lead to a more accurate assessment of process values. In the recusal context, both Debra Bassett and Amanda Frost have recently suggested modifications to the current approach that reflect this insight.[166] Rather than relying on judges to decide the recusal issue themselves, both would refer that decision to a "disinterested judge" or set of judges, at least in situations where the interested judge does not voluntarily recuse.

A similar modification might be made in the quorum context. Rather than relying on the two remaining panel members to assess the question of whether a third judge should be added, that question could instead be referred to a non-panel judge or group of judges. As with the recusal proposals, it makes sense to require the two remaining judges to make a self-

result, the published cases dealing with quorums constitute a list of justifications for proceeding as a quorum, while justifications for adding a third judge are essentially nonexistent. *See* Leubsdorf, *supra*, at 244–45 ("Published opinions . . . form an accumulating mound of reasons and precedents against withdrawal; meanwhile, some judges routinely and silently disqualify themselves in comparable cases.").

165. *See supra* note 154. *Curbelo* is slightly different in that it involves judicial evaluation of jury decision making; the self-assessment problem is therefore not present. For criticisms of the tendency by courts to treat jury decision making and judicial decision making differently, see generally Gary Solomon, *I Got the Post*-McKeiver *Blues*, 60 RUTGERS L. REV. 105 (2007) (discussing whether judges can really disregard inadmissible evidence in the context of conducting bench trials).

166. Bassett's proposal is limited to the federal appellate courts, *see* Debra Lyn Bassett, *Judicial Disqualification in the Federal Appellate Courts*, 87 IOWA L. REV. 1213 (2002), while Frost's proposal extends to all levels of the federal judiciary, s*ee* Frost, *supra* note 149, at 581–92.

assessment in the first instance. Self-assessment should lead to replacement in clear cases and should do so efficiently because the two judges will have to invest relatively few resources to make the assessment. But where self-assessment yields a conclusion that no replacement is necessary, that conclusion should not simply stand but should instead be reviewed by at least one disinterested judge. One source of review might be the chief judge of the circuit, provided that the chief judge was not already assigned to the original panel. Another possibility is review by a motions panel of the court.[167] For recusal, the suggestion is that disinterested judges should independently assess whether the judge's impartiality might reasonably be questioned; similarly, the disinterested judge or judges should independently assess whether the addition of a third judge would contribute substantive or procedural benefits that would justify a potential delay in the resolution of the appeal.

Adding a layer of external review of process values should better identify situations where a quorum decision is undesirable, but there are significant downsides. To begin, there is reason to question how extensive the accuracy gains associated with external review will be in practice. This is because the layer of review is not truly external, but is performed by other members of the same court who, although perhaps not invested in the particular decision being reviewed, are nevertheless invested in other ways. They are affected by the various interests implicated by the review and may therefore overvalue efficiency gains associated with allowing quorum decisions. Moreover, they are invested in the behavioral norms of the court more broadly, which may contribute to a reticence to second-guess decisions reached by other members. Concerns of this sort have been raised in other contexts, including recusal[168] and judicial misconduct.[169] The nature of the review—and of the reviewers—means that some bias in the consideration of the competing interests involved will remain.

The more significant problem with an external review approach relates to its resource costs. The approach entails the addition of new decision makers engaged in a new layer to the decisional process, and the result is a significant expense in terms of both time and judicial effort. Relative to recusal, this expense is less justifiable in the quorum context for several reasons. First, the different nature of the review means that the resource costs are likely to be larger in the quorum context. External review of

167. *See, e.g.*, Frost, *supra* note 149, at 584 ("[T]he laws governing judicial disqualification should require that motions to disqualify go to a disinterested judge unless the judge who is the target of the motion agrees to recuse himself.").

168. *Id.* at 585–86 (expressing concern that "judges might not be any more willing to disqualify their colleagues than they are to recuse themselves").

169. *See, e.g.*, David Barnhizer, *"On the Make": Campaign Funding and the Corrupting of the American Judiciary*, 50 CATH. U. L. REV. 361, 424 (2001) (describing flaws in the strategy of having judges sanction other judges for misbehavior).

recusal decisions assesses a judge's interest—real or perceived—in the outcome of a given case, and that assessment is essentially a satellite inquiry that is quite apart from the merits of the case. In most cases, the relevant questions are whether the judge had relationships with various parties or lawyers that raise the possibility that impartiality might be compromised. But in order to properly assess whether a third judge should be added to a potential quorum, external reviewers should be expected to familiarize themselves with the particulars of the case. The relevant questions are whether the issues involved in the case are such that the disposition of the appeal would materially benefit from the addition of a third judge and whether that benefit would be outweighed by its associated delay. Those questions do not necessitate a full-scale merits review, but they are markedly more connected with the substantive issues involved with the appeal, and an increase in the time and effort necessary to make the assessment should therefore be expected.

Second, and more importantly, the larger resource expenditures on external review are not necessary in the quorum context. Adding a layer of external review introduces a layer of resource expense that is devoted not to the ultimate decision but to a subsidiary question. That layer of expense is most easily justified in circumstances where the outcomes produced absent the expenditure are unsatisfactory. Recusal is arguably one such example: absent external review, the only viable approach is self-assessment, and if that approach is simply unacceptable, the expense associated with external review may be necessary. But in the context of quorums, there is a third option: automatic replacement. This option is not viable in the context of recusal because the triggering event for the replacement decision—a challenge to judicial impartiality—is within the control of the parties to the litigation.[170] As a result, a regime of automatic replacement would be subject to manipulation, and *some* form of review is therefore necessary to protect against that result. But the triggering event for the quorum decision—unavailability of an appellate panel member—is random and essentially outside party control. Automatic substitution is thus a viable approach, and the expenditure on external review mechanisms must also be justified in reference to that approach and not just to a

170. Even so, some examples of peremptory challenges in the judicial context exist. *See generally* LARRY C. BERKSON & SALLY DORFMANN, JUDICIAL SUBSTITUTION: AN EXAMINATION OF JUDICIAL PEREMPTORY CHALLENGES IN THE STATES (1986); Roger M. Baron, *A Proposal for the Use of a Judicial Peremptory Challenge System in Texas*, 40 BAYLOR L. REV. 49 (1988). Following these examples, some commentators have suggested a limited presumption in favor of recusal, such that a party's challenge to judicial impartiality would lead to automatic transfer to a different judge, but only if the party has not previously raised such a challenge in the given action. *See, e.g.*, Baron, *supra*; Helena Kempner Korbin, Comment, *Disqualification of Federal District Judges—Problems and Proposals*, 7 SETON HALL L. REV. 612, 633 (1976). Frost, however, rejects these suggestions, noting that they are "less efficient" and that they "injure the reputation of the judiciary" by "creat[ing] the public impression that more judges are biased." Frost, *supra* note 149, at 587.

competing approach of self-assessment. As the next part demonstrates, automatic substitution provides a superior mix of results and costs, and is therefore preferable to external review.

3. Automatic Replacement

Rather than guiding discretion or shifting discretion to a different decision maker, the best modification to the current approach may be to remove discretion altogether. In concrete terms, this would mean the adoption of a firm policy of replacement in all cases and the removal of authority for two judges to proceed by quorum. As with all firm rules, one of the key advantages of an automatic replacement approach is predictability and consistency. Judges and parties will know that the disposition of every appeal will be issued by a full panel of three judges, and thus when an instance of unavailability arises, there will be little confusion about how to proceed.

Of course, consistency is hardly a virtue if the approach leads to consistently undesirable results. But that outcome is not likely. Automatic replacement leads to error only in those cases where the expediency value of deciding the appeal with only two judges outweighs the gains associated with the participation of a third judge. Although such errors are possible, there is no reason to think that the error rate will be higher than that produced by any competing method. Self-assessment will lead to errors in the other direction—that is, failure to add a third judge where one would be useful—owing to the tendency to overvalue efficiency and undervalue the contributions of a hypothetical third panel member. Indeed, because the prevailing practice is to decide by quorum whenever the two judges constituting a potential quorum agree, the self-assessment model operates much as a firm policy of non-replacement would, and errors occur whenever the contributions of a third judge would in fact be worth the delay and expense triggered by the addition. If a perfectly accurate assessment of cases in circumstances where the two remaining judges disagree would add a third judge more than half of the time—an almost certain outcome given a proper understanding of the third judge's role—then the raw number of errors generated by self-assessment will exceed the number generated by automatic substitution.

Moreover, the errors produced by automatic substitution are less significant than those produced under any kind of self-assessment regime. The automatic substitution error adds a third judge unnecessarily, thus contributing to a more expensive and less expedient resolution of the appeal. This is waste, to be sure, but it is not otherwise lamentable. On the other hand, the failure to add a third judge leads to a disposition that is potentially less accurate, more ideological, and less likely to be viewed as legitimate by the parties to the appeal. In short, if some errors are un-

avoidable, it is better to err on the side of unnecessary replacement. Those are the only errors possible in a regime of automatic substitution.

Similar arguments about quality—and perhaps quantity—suggest that automatic substitution is also preferable to external review. External review should lead to accuracy gains, which may reduce the incidence of error to a level below that generated by automatic substitution. That is far from a guaranteed outcome, however, and depends on just how well an external review approach works in practice. Even if the quantity of errors were diminished substantially, the quality of those errors would remain problematic because errors in both directions should be expected. Again, automatic substitution is appealing because it confines errors to those that are least troubling.

Aside from the qualitative difference in the outcomes produced by the competing approaches, there is another reason to prefer automatic substitution over external review: it generates its errors at a much lower cost. External review requires the devotion of resources to the review process itself, whereas automatic substitution involves no such intermediate layer. Imagine that engaging in external review consumes ten units of judicial resources and that contributing to an appellate outcome (if the external review triggers the addition of a third judge) consumes twenty such units. Thus, in an external review regime, thirty total units of resources are consumed for those cases where a third judge is added, while ten units are consumed for all others. The difference between the external review regime and an automatic substitution regime, at least in terms of final outcomes, is defined by the class of cases for which the external review regime declines to add the third judge (the "all others" mentioned above). If there were ten such cases out of a pool of 100, the external review process would effectively add a judicial expenditure of 1,000 units (ten units for each of the 100 cases reviewed) in order to save 200 units. A similar argument can be made with respect to expediency because the process of engaging in external review creates an intermediate delay in every case and only spares the subsequent delay caused by substitution in those cases where the review authorizes decision by quorum. The magnitude of these inefficiencies are obviously dependent on consumption costs and case frequencies, but the general point is that the expenditure of resources on the external review process in every case means that the accuracy gains relative to an automatic substitution approach would have to be overwhelming to be justifiable.

As a final point, automatic substitution conveys a strong message about the importance of multi-judge decision making at the appellate level. That message is consistent with the procedural modifications introduced in the Federal Courts Improvement Act of 1982, and with the accompanying

Senate Report that repeatedly emphasized the need for appeals to be "the collective product of at least three minds."[171] Indeed, the lone current example of a firm substitution policy—the Ninth Circuit's—has its origins as a response to the clear goals of the 1982 Act.[172] Moreover, a policy of automatic replacement harmonizes the treatment of irregular panels. A policy of self-assessment or external review, even if it generates an identical outcome in a substantial percentage of cases, cannot match the symbolic value of a categorical rule, and for that reason too, automatic substitution is a preferable approach.

In terms of implementation, automatic replacement might be realized in one of two ways: the current statutory authority for quorum decisions might be removed through legislative action, or the exercise of statutory authority might be constrained through judicial action. Before considering whether one approach or the other is preferable, it is first necessary to consider whether courts have leeway to place restrictions on the exercise of legislatively provided authority. On at least two occasions, the possibility of a negative answer to that question has been offered as support for liberal acceptance of quorum decisions. First, in *Murray*, Judge Newman refused to interpret local rules to preclude quorum decisions in situations where statutory authority for those decisions exists in part because he was concerned that "a rigid application of the local rule would arguably place it in tension with the statutory authority of two judges to constitute a quorum."[173] The government's brief in *Nguyen* made a similar but significantly more forceful claim. After discussing *Ayrshire Collieries Corp v. United States*,[174] which required the use of three district judges in circumstances where no quorum provision was supplied by Congress, the brief asserted:

> *Ayrshire* thus stands for the proposition that, where Congress expressly says that "[a]ll three judges . . . must fully perform the judicial function," courts cannot permit less. By the same token, when Congress says that a majority—two judges—may act for a panel of three, courts cannot require more.[175]

These arguments, which suggest that legislative action is the only acceptable means of implementing a policy of automatic substitution, are

171. S. REP. NO. 97-275, at 9, 27 (1981), *as reprinted in* 1982 U.S.C.C.A.N. 11, 19, 37. For further discussion of the Act, see *supra* Part I.A.

172. *See* E-mail from Cathy Catterson, Clerk, U.S. Court of Appeals for the Ninth Circuit, to author (Apr. 16, 2007, 14:12 EDT) (on file with the Alabama Law Review).

173. Murray v. NBC, 35 F.3d 45, 48 (2d Cir. 1994). As should be clear from the tenor of the quote, Judge Newman's concern was at the level of dicta.

174. 331 U.S. 132 (1947). *Ayrshire* is discussed *supra* notes 33–36 and accompanying text.

175. Brief for the United States at 17–18, Nguyen v. United States, 539 U.S. 69 (2003) (Nos. 01-10873, 02-5034) (quoting *Ayrshire*, 331 U.S. at 138) (alteration in original).

misguided. Courts routinely enact local procedures that are more demanding than the baseline requirements established by statute,[176] and no serious arguments have been lodged against that practice. In fact, the practice appears to have been anticipated and indeed invited, at least in the quorum context.[177] Implicit in this formulation is the possibility that the circuit courts could also decline to do so, and the Ninth Circuit's response represents an exercise of that option. Perhaps the best interpretation of the government's argument in *Nguyen* (although not of *Murray*) is that the Supreme Court may not impose additional requirements on the lower courts. That argument, which calls into question the supervisory power of the Supreme Court, is a much closer one,[178] but even it stops short of imposing any restriction on the ability of the circuit courts to supervise themselves.

In short, both legislative and judicial modifications are viable. In terms of effect, there is little reason to prefer one over the other. Both accomplish the goal of requiring substitution in instances of judicial unavailability, and with roughly equal force. A statutory change would perhaps be less susceptible to erosion by judicial interpretation, but not appreciably so.[179] The biggest difference between the two is at the level of implementation: a judicial solution is somewhat easier to accomplish. The courts of appeals control local rulemaking and can modify existing rules and procedures as they apply to unavailability and quorums. Moreover, locating the source of the constraint at the judicial level preserves a greater degree of flexibility should the need for further modification arise.[180] The downsides here are a potential lack of consistency across circuits that stems from uncoordinated local action, as well as the potential resistance

176. One example is the Seventh Circuit's approach to judges sitting by designation. Even though the statute permits such judges to sit by designation, the Seventh Circuit started banning visiting judges in 1993 under then-Chief Judge Posner. *See* Lindquist, *supra* note 121, at 674 n.50. Under current Chief Judge Easterbrook, the Seventh Circuit's approach has recently changed again to permit district judges from within the circuit to sit by designation. *See* How Appealing, http://howappealing.law.com/022409.html#032732 (Feb. 24, 2009, 06:30 EST) (posting an email response from Judge Easterbrook describing the change and its purpose). For a recent discussion of the ability of appellate courts to introduce rules of appellate practice, see *Greenlaw v. United States*, 128 S. Ct. 2559, 2571–78 (2008) (Alito, J., dissenting).

177. The Senate Report to the Federal Courts Improvement Act of 1982 noted that "[t]he circuit courts *could* continue to adopt local rules permitting the disposition of an appeal in situations in which one of the three judges dies or becomes disabled and the remaining two agree on the disposition." S. REP. NO. 97-275, at 9 (1981), *as reprinted in* 1982 U.S.C.C.A.N. 11, 19 (emphasis added).

178. *See generally* Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324 (2006).

179. The willingness of the Second Circuit in *Murray* to circumvent an existing local rule through interpretation is an example of the susceptibility of local procedures to this type of erosion. It is uncertain, of course, whether the result in *Murray* would have been any different had the source of authority been statutory instead.

180. Even if no further need for modification is likely, maintaining the ability to modify may assuage the fears of some judges who remain convinced that certain circumstances may trigger the need to exercise the statutory authority for a quorum decision.

to an automatic substitution policy by judges who continue to embrace various rationales for widespread quorum practice. If courts are simply unwilling to consider a shift toward automatic substitution, then the legislative avenue may become preferable as a matter of necessity.

CONCLUSION

This is an area where the Ninth Circuit has it right. A categorical requirement that appellate panels be regular—that is, that three authorized judges decide every appeal—produces multiple benefits. It harmonizes the treatment of irregular panels and removes the curious distinction between the presence of an invalid third member and the absence of a third member altogether. It eliminates the need for judges to self-assess the costs and benefits associated with panel irregularities, and reduces the errors generated by that self-assessment. It is consistent with the view expressed in the Federal Courts Improvement Act of 1982 that the resolution of an appeal should reflect the input of three minds. Most importantly, it recognizes and supports the dynamic nature of appellate decision making.