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The Sign of The Four": Judicial Assignment and the Rule of Law

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THE SIGN OF "THE FOUR": JUDICIAL ASSIGNMENT AND THE RULE OF LAW

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On July 30, 1963, Judge Benjamin Franklin Cameron threw the United States Court of Appeals for the Fifth Circuit into turmoil, charging Chief Judge Elbert P. Tuttle with manipulating the composition of panels in civil rights and desegregation cases so as to influence their outcome.[1] Specifically, he accused his colleague Tuttle of packing panels with liberal judges who consistently supported the claims of civil rights activists.[2] The liberal jurists, whom he derisively characterized as "The Four," were Tuttle, Richard T. Rives, John Minor Wisdom, and John R. Brown.[3] According to Judge Cameron, at least two of The Four sat in twenty-two of the twenty-five civil rights cases that the Fifth Circuit had heard during the preceding two years.[4] In the aggregate, The Four sat fifty-five times in these cases while the other five members of the court sat only twelve times. Moreover, one of The Four wrote the opinion in twenty-three of the twenty-five cases.[5]

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[1] Armstrong v. Board of Educ., 323 F.2d 333, 358-59 (5th Cir. 1963).

[2] *Armstrong*, 323 F.2d at 353 n.1.

[3] *Id.*

[4] *Id.* at 358.

[5] *Id.* Cameron listed the cases and the panel membership in an appendix, and two weeks later added four more cases that he had previously overlooked. *Id.* at 359-61. The Four constituted at least a majority of the panel in three of those cases. *Id.* at 360-61.

Cameron further complained that he, a Mississippian, was excluded from three-judge district courts in Mississippi civil rights cases despite what he characterized as a previously "universal practice" in the Fifth Circuit and elsewhere of appointing the circuit judge resident in the state to three-judge courts. *Id.* at 358-

Cameron's sensational charges provoked a storm of controversy.[6] The suggestion of improper judicial assignment is always "troubling,"[7] but especially under these circumstances. Cameron had raised the specter of case rigging in the nation's most sensitive field and its most volatile region: race relations in the Deep South. Moreover, he had done so in the aftermath of the violence accompanying the desegregation of the University of Mississippi the previous year; contempt proceedings against the governor and lieutenant governor for their defiance in that matter were still pending in the Fifth Circuit.[8]

Although Cameron's figures appear at first glance to be persuasive, there are several possible responses to his charge of manipulation. One is that his data were inaccurate in certain respects.[9] Jack Bass, a journalist who chronicled the work of The Four, took this approach. Bass pointed out that Cameron omitted several cases from his analysis and skewed the numbers by separately counting every phase of some cases (particularly the University of Mississippi dispute) that came before the Fifth Circuit more than once, thereby exaggerating the number of decisions involving The Four.[10] Similarly, Bass found that the irate judge would have obtained less striking results if his study had covered a slightly longer time peri-

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59. Instead, members of The Four were selected to hear these cases. *Id.*

[6] *See* JACK BASS, UNLIKELY HEROES 235–40 (1981); FRANK T. READ & LUCY S. MCGOUGH, LET THEM BE JUDGED: THE JUDICIAL INTEGRATION OF THE DEEP SOUTH 268–72, 274–75 (1978); *see also* HARVEY C. COUCH, A HISTORY OF THE FIFTH CIRCUIT, 1891–1981, 120–21 (1984).

[7] Cruz v. Abbate, 812 F.2d 571, 574 (9th Cir. 1987).

[8] *See generally* READ & MCGOUGH, *supra* note 6, at 254–65. There is a substantial literature on the desegregation of Ole Miss. For the perspective of the man who broke the color line, see JAMES MEREDITH, THREE YEARS IN MISSISSIPPI (1966). For chronicles by faculty members, see RUSSELL H. BARRETT, INTEGRATION AT OLE MISS (1965), and JAMES W. SILVER, MISSISSIPPI: THE CLOSED SOCIETY 107-40 (1964). For more recent accounts, see NADINE COHADAS, THE BAND PLAYED DIXIE 57-106 (1997), and DAVID G. SANSING, MAKING HASTE SLOWLY 156-95 (1990).

[9] Cameron unquestionably was wrong in one respect: Judge Brown rather than Chief Judge Tuttle made the assignments. READ & MCGOUGH, *supra* note 6, at 272.

[10] BASS, *supra* note 6, at 241, 243-45.

od.[11] Moreover, Bass noted, several of Cameron's cases involved issues that had already been settled by the Supreme Court, so the composition of the panel should not have affected those results.[12] Finally, according to Bass, civil rights claimants actually lost several cases in which some combination of The Four constituted a majority of the panel.[13]

However, Bass's approach misses an important aspect of the criticism. The issue Cameron raised implicated not only the outcome of the cases, but the process by which the panels were selected.[14] From this perspective, his complaint was not only that panels were chosen with an eye toward influencing decisions, but also that assignments were not random.[15] An alternative explanation that responds to this concern focuses on the scheduling constraints arising from the preferences of individual judges.[16] There is some evidence for this explanation. For example, Cameron himself asked not to be assigned to any panels that included Chief Judge Tuttle due to their disagreement over civil rights; another judge did not want to sit with Cameron because of his insistence on late afternoon conferences after morning arguments; and a third judge had serious health problems that prevented him from sitting at all for most of the two years covered by Cameron's study.[17] Only

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[11] *Id.* at 244.

[12] *Id.*

[13] *Id.*

[14] *See* Burke Marshall, *Southern Judges in the Desegregation Struggle*, 95 HARV. L. REV. 1509, 1514 (1982) (book review).

[15] Armstrong v. Board of Educ., 323 F.2d 333, 358-59 (5th Cir. 1963). Cameron's objection to being excluded from three-judge district courts in Mississippi civil rights cases in the face of a tradition of appointing the resident circuit judge to three-judge courts in cases arising in his state suggests that he did not necessarily favor strictly random assignment in every case. *Armstrong*, 323 F.2d at 358-59.

[16] READ & MCGOUGH, *supra* note 6, at 273.

[17] *Id.* Moreover, two other members of the court who had interim appointments were not assigned to civil rights cases for several months in order to avoid antagonizing powerful segregationists in the Senate who could have blocked their confirmation. *Id.*; *see* BASS, *supra* note 6, at 240–41; COUCH, *supra* note 6, at 122. The propriety of insulating interim judges from hostile senators in this fashion is beyond the scope of this article. So is the constitutionality of interim judicial appointments, although the courts have upheld this practice. *See* United States v.

three members of the Fifth Circuit—all of them part of The Four—were available to sit with every one of their colleagues.[18] Against this background, it seems reasonable that they would have participated in a disproportionate number of cases of all types.[19] There is some evidence for this hypothesis, although it is far from conclusive.[20]

At this point, we can say that Cameron's data provide less support for his provocative charge of ideologically motivated assignments than he seemed to believe. There are benign explanations for at least some of his complaints, and his study is hardly a model of methodological rigor.

We shall return to Judge Cameron's charges later. Let us assume for now, though, that he was correct is asserting that judges in the Fifth Circuit's civil rights cases were not randomly assigned to panels. Exactly what is wrong with that? This is hardly a frivolous question. The relevant federal statutes do not require any particular method of judicial assignment to cases. In the courts of appeals, three-judge panels are composed and cases are assigned "as the court directs."[21] In

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Woodley, 751 F.2d 1008 (9th Cir. 1985) (en banc); United States v. Allocco, 305 F.2d 704, 709-12 (2d Cir. 1962). Suffice it to say that these arrangements raise questions about the independence of persons exercising judicial power under Article III of the Constitution. *Cf. Woodley*, 751 F.2d at 1014-33 (Norris, J., dissenting); Note, *Recess Appointments to the Supreme Court—Constitutional But Unwise?*, 10 STAN. L. REV. 124 (1957); *Members of Faculty Question Wisdom of Earl Warren's Recess Appointment*, HARV. L. SCH. REC., Oct. 8, 1953, at 1; Henry M. Hart, Jr., Letter, HARV. L. SCH. REC., Oct. 8, 1953, at 2. But the two Fifth Circuit judges were not unique. Among others who first took the bench under interim appointments were Chief Justice Warren and Justices Brennan and Stewart. *See* HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS 257-58, 266, 272-73 (3d ed. 1992).

[18] BASS, *supra* note 6, at 241.

[19] *Id.*

[20] *Id.* From January to October 1961, a period that includes only part of Cameron's study, "some combination of The Four sat on 159 of the 191 nonrace cases heard by Fifth Circuit panels." *Id.*

[21] 28 U.S.C. § 46(b) (1994). This provision directs the Federal Circuit to adopt "a procedure for the rotation of judges from panel to panel to ensure that all of the judges sit on a representative cross section of the cases heard." *Id.* No such language appears in this statute with respect to any other court of appeals. Another difference between the Federal Circuit and the geographically based circuits is that the former may sit in panels having more than three members, whereas

district courts containing more than one judge, cases are to be "divided among the judges as provided by the rules and orders of the court."[22] And in the now infrequently constituted three-judge district courts, the chief judge of the circuit designates two of the members; except for the requirement that at least one of these must be a circuit judge, the statute does not otherwise specify how these judges are to be chosen.[23] Some courts have adopted rules or internal operating procedures governing judicial assignment, but many others (at both the federal and the state level) appear to have no written policy on the subject.[24]

Nevertheless, claims of assignment manipulation clearly strike a raw nerve. Judges are sensitive to the appearance of impropriety that might be inferred from unusual assignment procedures.[25] Moreover, the perception that judicial assignments matter is supported by the continuing contentiousness over judicial appointments.[26] There are also well-documented efforts to evade customary procedures for assigning cases to judges. People have gone to jail[27] and lawyers have been severely disciplined[28] for trying to circumvent the assignment system.

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the latter may not. 28 U.S.C. § 46(c) (1994).

[22] 28 U.S.C. § 137 (1994).

[23] 28 U.S.C. § 2284(b)(1) (1994). The third judge must be the district judge to whom the case, with its request for the convening of a three-judge court, was initially assigned. *Id.*

[24] *See infra* notes 67-73 and accompanying text.

[25] BASS, *supra* note 6, at 237-40. Many Fifth Circuit judges were apoplectic over Cameron's allegations, and Chief Judge Tuttle convened an emergency meeting to try to clear the air. *Id.*; READ & MCGOUGH, *supra* note 6, at 269–71. *Cf.* Rappaport v. VV Publ'g Corp., 637 N.Y.S.2d 109 (App. Div. 1996) (upholding dismissal of judge's libel suit on grounds that statements in article that judge was receiving disproportionate share of certain cases were not defamatory as matter of law).

[26] Chief Justice Rehnquist expressed concern over delays in confirming federal judges, a phenomenon apparently due to political differences between the White House and the Senate. William H. Rehnquist, *The 1997 Year-End Report of the Federal Judiciary*, THE THIRD BRANCH, Jan. 1998, at 1, 3.

[27] *See, e.g.*, United States v. August, 745 F.2d 400 (6th Cir. 1984); State v. Jurek, 556 N.E.2d 1191 (Ohio Ct. App. 1989); State v. McCool, 544 N.E.2d 933 (Ohio Ct. App. 1988).

[28] *See, e.g.*, Grievance Adm'r v. August, 475 N.W.2d 256 (Mich. 1991) (suspen-

There is a surprisingly large body of case law on judicial assignment. Most of that case law has arisen in lower-profile disputes than civil rights and desegregation. The bulk of them involve judicial assignment at the trial court level, although the analysis in those cases presumably should apply to analogous situations at the appellate level. Some claims in this area invoke the Constitution, while others rely on various theories under state law or court rules and procedures. Whatever the basis for these claims, they rarely succeed even when the facts suggest that judges were assigned in non-random fashion.

This article will examine the issues of judicial assignment. Then the article will return to the Cameron situation in an effort to put that controversy into broader perspective. Finally, the article will consider state procedures that, for practical purposes, authorize litigants to make peremptory challenges to judges in certain circumstances. Those procedures have implications for the discussion of random assignments and for the way we think about Judge Cameron's charges.

I. THE CONSTITUTION AND JUDICIAL ASSIGNMENT

Manipulation of judicial assignments can deprive litigants of their right to a fair hearing and contravene basic principles of due process. As the Supreme Court has put it, due process "clearly requires a 'fair trial in a fair tribunal.'"[29] However, the federal courts, as well as most state courts, have generally been unreceptive to constitutional challenges to judicial assignment.

An often-cited case that rejects the argument that the Constitution requires random assignment is *United States v. Keane*.[30] *Keane* involved the prosecution of a powerful member of the Chicago city council for mail fraud and conspira-

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sion); Cleveland Bar Ass'n v. Jurek, 581 N.E.2d 1356 (Ohio 1991) (disbarment); Office of Disciplinary Counsel v. Melamed, 580 N.E.2d 1077 (Ohio 1991) (disbarment); *In re* Bennett, 960 S.W.2d 35 (Tex. 1997) ($10,000 sanction).

[29] Bracy v. Gramley, 117 S. Ct. 1793, 1797 (1997) (quoting Withrow v. Larkin, 421 U.S. 35, 46 (1975)).

[30] 375 F. Supp. 1201, 1204 (N.D. Ill. 1974), *aff'd in part and rev'd in part on other grounds*, 522 F.2d 534 (7th Cir. 1975).

cy.[31] By local rule, the district court ordinarily assigned cases randomly.[32] In "protracted, difficult or widely publicized" cases, however, the rule authorized the chief judge to bypass the random assignment process and, in consultation with the court's executive committee, to assign the matter to a particular judge.[33] The defendant claimed that this procedure violated his due process rights, but the executive committee disagreed.[34] The judges explained that due process does not give a party "the right to determine the manner in which his case is assigned to a judge."[35] Assignment rules promulgated by district courts pursuant to the governing federal statutes are designed "to promote efficiency . . . and the court has a large measure of discretion in applying them."[36]

The *Keane* court's characterization of the defendant's claim might not have been entirely accurate. He was not asserting a constitutional right to "determine the manner in which his case [should be] assigned"; rather, he argued that he had a constitutional right to random assignment.[37] Several circuit courts have explicitly rejected such an argument.[38] One of those rulings cites *Keane* for this proposition,[39] which seems to be a fair reading of the logic if not the language of that decision.

Not all courts have rejected due process claims out of hand, however. A prominent example is *Tyson v. Trigg*,[40] a

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[31] *Keane*, 375 F. Supp. at 1205.

[32] *Id.* at 1203.

[33] *Id.* at 1203–04.

[34] *Id.* at 1204-05.

[35] *Id.* at 1204.

[36] *Id.* at 1204–05. The court also rejected the defendant's claim that he was constitutionally entitled to a hearing on the chief judge's determination that his case promised to be "protracted, difficult and widely publicized." *Id.* at 1205.

[37] *Id.* at 1204-05.

[38] *See, e.g.*, Sinito v. United States, 750 F.2d 512, 515 (6th Cir. 1984); United States v. Simmons, 476 F.2d 33, 35 (9th Cir. 1973). *Accord* People v. Hattery, 539 N.E.2d 368, 379–80 (Ill. App. Ct. 1989). One state court has characterized such a due process claim as "frivolous." Dancer v. State, 715 P.2d 1174, 1176-77 n.1 (Alaska Ct. App. 1986).

[39] *Sinito*, 750 F.2d at 515.

[40] 50 F.3d 436 (7th Cir. 1995).

case involving the former heavyweight boxing champion who served several years in prison following a rape conviction and has had other legal difficulties.[41] Mike Tyson argued that the method for assigning the trial judge in his Indiana rape trial effectively allowed the prosecutor to choose the judge, which violated his due process rights.[42] Under that system, a prosecutor who sought an indictment could choose the grand jury before which to present evidence.[43] Because each judge in the criminal division supervised only one grand jury and presided at all trials resulting from that grand jury's indictments, the prosecutor's selection of a specific grand jury effectively amounted to choosing the trial judge.[44] Chief Judge Posner of the United States Court of Appeals for the Seventh Circuit recognized that, despite the general assumption that judges are impartial, a litigant who can choose her judge "may be able to obtain a subtle advantage over the other."[45] Nevertheless, he rejected Tyson's claim, in part due to the procedural rigors of habeas corpus law[46] and in part for lack of evidence that the prosecutor actually selected a particular grand jury to get the trial assigned to a particular judge.[47]

Some state courts also have expressed a measure of sympathy for constitutional arguments in this context. For example, a Florida appellate court suggested that a policy that eliminated random assignment in about half of a trial court's criminal cases might be unconstitutional,[48] but ultimately in-

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[41] *See* Brian Mooar & Fern Shen, *Two Motorists May File Charges Against Tyson After Md. Crash*, WASH. POST, Sept. 2, 1998, at A8 (summarizing Tyson's various legal problems).

[42] *Tyson*, 50 F.3d at 438.

[43] *Id.*

[44] *Id.* at 438-39.

[45] *Id.* at 439. Judge Posner also noted that, partly due to criticism of the procedure in the wake of Tyson's trial, the state adopted a new procedure that prevents a prosecutor from effectively dictating judicial assignments in criminal cases. *Id.*

[46] *Id.* at 439–40.

[47] *Id.* at 441–42.

[48] State *ex rel.* Zuberi v. Brinker, 323 So. 2d 623, 625 n.5 (Fla. Dist. Ct. App. 1975) (implying that assignment system that treats some criminal cases differently than others violates equal protection guarantees).

validated that policy because it was adopted in violation of applicable state procedural requirements.[49] The Louisiana Supreme Court went even further in *State v. Simpson*,[50] holding that due process requires that felony cases be assigned randomly or under an alternative mechanism that prevents the prosecutor from controlling judicial assignments.[51] Although the *Simpson* court did not explain the details of the assignment system that it found unconstitutional, the trial court apparently gave the prosecutor's office the power to determine which judge would hear each criminal case, and that the prosecutor intentionally used that power to select its preferred judges in many instances. Meanwhile, the same trial court randomly assigned all civil cases.[52]

The evidence that the prosecutor deliberately sought to use the power to match cases with preferred judges makes *Simpson* a much stronger case for finding a due process violation than *Tyson*. Under the circumstances, it is not surprising that the *Simpson* court called for random assignment or something substantially equivalent. However, the difficulties of enforcing the right have undermined the vitality of any such constitutional rule. Courts have required a litigant to show prejudice from a non-random or otherwise improper judicial assignment.[53] Even in post-*Simpson* Louisiana, the courts have rejected numerous claims on harmless error grounds because the aggrieved party could not show how the defective assignment prejudiced the case.[54]

Judicial reluctance to endorse a constitutional right to random assignment might reflect the difficulty of implementing a sweeping general rule. First, cases are not equivalent.

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[49] *Brinker*, 323 So. 2d at 625-26. The new policy was not submitted to the state supreme court for approval as required by applicable rules. *Id.*

[50] 551 So. 2d 1303 (La. 1984) (per curiam).

[51] *Simpson*, 551 So. 2d at 1304.

[52] State v. Romero, 552 So. 2d 45, 47-48 (La. Ct. App. 1989) (describing prosecutor's approach to judicial selection in same trial court as that in *Simpson*).

[53] *See, e.g.*, Sinito v. United States, 750 F.2d 512, 515 (6th Cir. 1984); United States v. Simmons, 476 F.2d 33, 35 (9th Cir. 1973).

[54] *See, e.g.*, State v. Huls, 676 So. 2d 160, 167 (La. Ct. App. 1996); *Romero*, 552 So. 2d at 49.

Some are easy and some are hard. Some will go to trial, while most will not (and of those that do not go to trial, some will settle, whereas others will terminate by a ruling on a dispositive motion). Some will attract widespread public attention, but the vast majority will proceed in obscurity. Because "[a] case is not a standard measurement,"[55] it is inappropriate to require completely random assignment. Second, some cases are related—by issue or parties—to other cases. Assigning related cases to the same judge or panel often makes sense on efficiency grounds. Third, some difficult or sensitive cases might be better handled by more experienced judges. Fourth, judges sometimes recuse themselves from cases in which they have a conflict of interest or their impartiality might be called into question. Fifth, some cases appear in a court more than once. This phenomenon occurs, for instance, when a reviewing court remands a case with instructions for further proceedings. Often, although not necessarily in every case, returning the matter to the same judge or panel that heard it before conserves judicial resources.

These are not insurmountable difficulties, but they might be viewed mainly as administrative challenges that do not implicate due process concerns.[56] At least the judiciary seems to think so. Therefore, reliance upon constitutional arguments as a basis for random assignment seems an unpromising strategy. Courts are generally skeptical of such arguments. Even those courts that have been rhetorically sensitive to such claims have required proponents to meet high evidentiary standards.[57] Instead, the law relating to judicial assignments

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[55] RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 64 (1996).

[56] A useful illustration comes from the Fifth Circuit. Faced with widespread recusals that made it difficult to assign energy regulation cases to regular panels, for more than two decades the court has had a special panel that hears such cases. A new panel is drawn each year from the pool of judges who are not disqualified. Its members are selected randomly from the pool. *See generally* DAVID E. PIERCE & JONATHAN L. ENTIN, EVALUATING THE INSTITUTIONAL IMPACT OF THE SPECIAL OIL AND GAS PANEL OF THE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT (Federal Judicial Center working paper, 1993).

[57] *See Sinito*, 750 F.2d at 515; *Huls*, 676 So. 2d at 167.

has arisen primarily from "the professional standards of the bench and bar,"[58] particularly from court policies and rules.

II. OTHER APPROACHES TO JUDICIAL ASSIGNMENT

A. Assignment Rules and Policies

In addition to the flexibility of judicial assignment apparently afforded by the Constitution, federal law does not mandate any particular approach to judicial assignment. As previously discussed, the statutes governing the courts of appeals and the district courts leave that process to those tribunals.[59] Neither the Federal Rules of Appellate Procedure nor the Federal Rules of Civil Procedure address this subject.

At the circuit level, only one court, the Ninth Circuit, has adopted rules generally calling for random assignment.[60] The Ninth Circuit also has promulgated rules calling for random assignment in certain complex cases.[61] A few other appellate courts have adopted policies that generally provide for random assignment.[62] Those circuits that have no explicit rule or policy appear to assign cases more or less randomly.[63] In allocating cases to panels, all circuits take account of the complexity of the case and other factors that make it unrealistic to treat every filed appeal as equally demanding of judicial time and energy.

Many multi-member district courts have adopted explicit rules or policies generally calling for random assignment of cases.[64] Those systems frequently contain express exceptions

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[58] Bracy v. Gramley, 117 S. Ct. 1793, 1797 (1997).

[59] *See supra* notes 21-24 and accompanying text.

[60] *See* 9TH CIR. R. Introduction § E(2).

[61] *Id.* R. 22-1(b), 22-3(b) (death penalty); R. 35-3 (limited en banc rehearings involving chief judge and ten other randomly selected judges).

[62] *See* 3D CIR. INT. OP. PROC. 1.1; 4TH CIR. INT. OP. PROC. 34.1; 6TH CIR. INT. OP. PROC. 19.1–19.2.

[63] *See, e.g.,* 7TH CIR. INT. OP. PROC. 6(b) (noting that in successive appeal, original panel may opt to decide subsequent appeal or "return the case for reassignment at random"). Some circuits also make a specific provision for random assignments in attorney discipline cases. *See, e.g.,* 4TH CIR. R. 46(g)(8); 10TH CIR. R. ADD. III, § 4.3.

[64] *See, e.g.,* M.D. ALA. R. 40.1; D. ARIZ. R. 1.2(c); S.D. CAL. R. 40.1(a); S.D.

or authorize departures from strictly random assignment to promote efficiency.[65] A similar pattern appears at the state level. Court rules generally govern assignment and typically involve some form of random procedure, subject to efficiency or practicability exceptions.[66] Statutory provisions on this topic are unusual, but they also embody a preference for randomness.[67]

B. Enforcing Assignment Rules and Policies

Challenges to arbitrary judicial assignments must surmount both procedural and substantive hurdles. On the procedural side, there are questions of timing and reviewability. On the substantive side, the challenger usually must show that some prejudice resulted from the irregular assignment.

1. Procedural Issues

A party who believes that a court has improperly assigned a judge to the case can challenge the assignment at the outset of the proceedings.[68] If this fails, it is not clear whether an interlocutory appeal or an action in mandamus or prohibition will lie. Although one court has granted a writ of mandamus compelling reassignment before trial,[69] others have refused relief because the challenged action is either discretionary or reviewable on direct appeal from a final judgment on the mer-

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FLA. R. 3.4(A); S.D.N.Y. R. 1; E.D. WIS. R. 4.01–4.02.

[65] *See, e.g.*, D. COLO. R. 40.1(A); D.D.C. R. 403; N.D. ILL. R. 2.00; N.D. OHIO R. 57.9.

[66] *See, e.g.*, CAL. CT. APP. 1ST DIST. INT. OP. PROC. 21(a), 26; ILL. APP. CT. 1ST DIST. R. 2(c); MICH. CT. R. 8.111(B); N.Y. CT. R. 200.11(b), (c), 202.3(b), (c); OHIO SUP. CT. R. 36(B)(1)(c). One state court declares that it does not make assignments "on a random or arbitrary basis," but does not explain how it does handle this task. OR. CT. APP. INT. PRAC. Introduction n.*.

[67] *See, e.g.*, LA. CODE CIV. PROC. ANN. art. 253.1 (West Supp. 1998); UTAH CODE ANN. § 78-2a-2(2) (1986).

[68] *See, e.g.*, Utah-Idaho Sugar Co. v. Ritter, 461 F.2d 1100 (10th Cir. 1972); United States v. Keane, 375 F. Supp. 1201 (N.D. Ill. 1974), *aff'd in part and rev'd in part on other grounds*, 522 F.2d 534 (7th Cir. 1975); People v. Bell, 659 N.Y.S.2d 713 (Sup. Ct. 1997).

[69] Margold v. Eighth Jud. Dist. Ct., 858 P.2d 33 (Nev. 1993).

its.[70]

2. Substantive Issues

On at least two occasions, federal courts of appeals have overturned judicial assignments in situations of apparent overreaching by chief judges in multi-member federal district courts. The relevant statute leaves judicial assignments in such courts to local rules, with the chief judge retaining responsibility for their proper implementation.[71] In *Utah-Idaho Sugar Co. v. Ritter*,[72] the Tenth Circuit issued a writ of mandamus to overturn a chief judge's reassignment of a case that should have gone to one of his colleagues.[73] More recently, in *In re McBryde*,[74] the Fifth Circuit set aside another chief judge's assertion of authority over cases that had been on one of his colleagues' docket.[75] Both cases arose in highly unusual circumstances.

Ritter was part of a long-running judicial feud in the United States District Court for the District of Utah. Because the two judges of that court were unable to agree on the allocation of business, the Tenth Circuit judicial council imposed its own assignment system (essentially a random scheme in most respects).[76] When the second judge took senior status almost fifteen years later, the chief judge reassigned some cases on

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[70] Coastal Oil N.Y., Inc. v. Newton, 660 N.Y.S.2d 428 (App. Div. 1997); State *ex rel.* Berger v. McMonagle, 451 N.E.2d 225 (Ohio 1983).

[71] The statute provides for division of business among district judges:

> The business of a court having more than one judge shall be divided among the judges as provided by the rules and orders of the court.
>
> The chief judge of the district court shall be responsible for the observance of such rules and orders, and shall divide the business and assign the cases so far as such rules and orders do not otherwise prescribe.

28 U.S.C. § 137 (1994).

[72] 461 F.2d 1100 (10th Cir. 1972).

[73] *Ritter*, 461 F.2d at 1104.

[74] 117 F.3d 208 (5th Cir. 1997).

[75] *McBryde*, 117 F.3d at 230.

[76] *Ritter*, 461 F.2d at 1102.

that judge's docket to himself rather than leaving them for the replacement judge, who was sworn in on the day his predecessor went senior.[77] The Tenth Circuit held the chief judge's actions void because the relevant statute precluded unilateral assignments by the chief judge, and because the circuit judicial council's assignment order remained in force despite changes in the composition of the district court.[78]

McBryde arose in somewhat less contentious circumstances, but there is reason to suspect the existence of a difficult personal relationship between the judges involved. The chief judge reassigned himself two cases that had been on the other judge's docket after controversy arose about the first judge's handling of those cases.[79] In one case, the judge had held an assistant United States attorney in contempt for her conduct in a criminal case.[80] In the other case, the judge harshly criticized the clerk of the court for failing to invest the settlement proceeds in a wrongful death action in an interest-bearing account, a failure that apparently cost the decedent's minor daughter a substantial amount of money.[81] According to the court of appeals, the facts suggested that the chief judge took over the cases because he disagreed with the other judge's handling of those matters.[82] Although the chief judge has broad administrative authority to "reassign cases in situations involving the recusal, death, disability, or new appointment of a judge,"[83] the Fifth Circuit reasoned that allowing reassignment motivated only by disapproval of another judge's actions is "antithetical to and incompatible with the structure of the federal judicial system."[84]

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[77] *Id.*

[78] *Id.* at 1103–04.

[79] *McBryde*, 117 F.3d at 208.

[80] *Id.* at 212-13.

[81] *Id.* at 214-15.

[82] *Id.* at 228-29.

[83] *Id.* at 225.

[84] *Id.* Before reaching its conclusion on the merits, the court of appeals had to grapple with some difficult jurisdictional questions. The major problem was that the Fifth Circuit's judicial council had previously approved the chief judge's actions. *Id.* at 217. The effect of that approval, the panel's appellate jurisdiction

It is understandable that reviewing courts would intervene to ameliorate the effects of interpersonal judicial conflicts. But courts otherwise have been decidedly reluctant to overturn assignments, even when they disapprove of the way a case was assigned.[85] Moreover, courts have tended to defer to decisions to bypass the customary assignment system for matters that might be related to other cases in the same court, for dispositions on remand, or for other successive proceedings in the same case.[86]

Judicial reluctance to intercede in assignments is reflected in the widespread requirement that a litigant establish prejudice from any improper judicial assignment. Mere departure from a random assignment procedure is insufficient to overturn a decision.[87] The standard explanation for the prejudice requirement is that assignment rules are essentially "internal housekeeping rules" designed to promote judicial efficiency, so courts have wide discretion in this field.[88]

For example, a court may adopt a random assignment plan that makes only some of its members eligible for selec-

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over the council's order, and the council's authority to issue the order received extensive attention in the opinion. *Id.* at 219–21, 226–30. The difficulty of the question of jurisdiction over the judicial council's order may be indicated by the fact that the other two members of the panel declined to join that part of the opinion, which those judges viewed as unnecessary to resolution of the case. *Id.* at 231 (Garza, J., specially concurring); *id.* (Dennis, J., specially concurring).

In the most recent chapter of this controversy, the Fifth Circuit has ordered Judge McBryde to recuse himself from two unrelated criminal cases because defense counsel in those cases had testified against him in the judicial council proceedings. *See* United States v. Anderson, No. 97-11205, 1998 WL 781240 (5th Cir. 1998); United States v. Avilez-Reyes, No. 97-11392, 1998 WL 781243 (5th Cir. 1998).

[85] *See, e.g.,* United States v. Osum, 943 F.2d 1394 (5th Cir. 1991); United States v. Flynt, 756 F.2d 1352, 1355 n.2 (9th Cir. 1985); Okereke v. Kane, 470 N.Y.S.2d 222, 223 (App. Div. 1983).

[86] *See, e.g., Osum*, 943 F.2d at 1398.

[87] *See, e.g., id.* at 1399–400; United States v. Gray, 876 F.2d 1411, 1415 (9th Cir. 1989); United States v. Allen, 675 F.2d 1373, 1385 (9th Cir. 1980); *In re* Marriage of Kenik, 536 N.E.2d 982, 985 (Ill. App. Ct. 1989).

[88] Sinito v. United States, 750 F.2d 512, 515 (6th Cir. 1984). *See, e.g., Osum*, 943 F.2d 1394, 1400-01 n.3 (5th Cir. 1991); United States v. Torbert, 496 F.2d 154, 157 (9th Cir. 1974); Kruckenberg v. Powell, 422 So. 2d 994, 996 (Fla. Dist. Ct. App. 1982); Blair v. Mackoff, 672 N.E.2d 895, 899 (Ill. App. Ct. 1996).

tion in certain classes of cases.[89] Also, courts may assign cases involving the same or similar issues outside the customary assignment process,[90] although such assignment is not required.[91] One problem with this is that reasonable persons can disagree as to what constitutes a "related" case.[92] Similarly, a court does not have to reassign a case following a mistrial[93] or on remand from a higher court.[94] After some remands, however, reassignment is ordered.[95] Whether reassignment on remand is required depends on the extent to which the original judge could be expected "to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous;" the need "to preserve the appearance of justice;" and a balancing of the "waste and duplication" caused by reassignment against the benefits gained.[96]

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[89] Several courts have approved the practice of limiting the pool of eligible judges in death penalty cases. *See, e.g.,* People v. Hattery, 539 N.E.2d 368, 380-81 (Ill. App. Ct. 1989); People v. Hale, 661 N.Y.S.2d 457, 469–70 (Sup. Ct. 1997); People v. Bell, 659 N.Y.S.2d 713, 715 (Sup. Ct. 1997). *Cf.* United States v. Keane, 375 F. Supp. 1201, 1205-06 (N.D. Ill. 1974) (upholding plan limiting pool of judges eligible to hear "protracted, difficult or widely publicized" cases), *aff'd in part and rev'd in part on other grounds*, 522 F.2d 534 (7th Cir. 1975); *see supra* notes 23-27 and accompanying text.

[90] *See, e.g.,* Civil Aeronautics Bd. v. Carefree Travel, Inc., 513 F.2d 375, 383–84 (2d Cir. 1975); Wayne County Prosecutor v. Parole Bd., 532 N.W.2d 899, 902-03 (Mich. Ct. App. 1995) (per curiam). *Cf.* Stinchcomb v. State, 383 S.E.2d 609 (Ga. Ct. App. 1989) (finding no reversible error in non-random assignment based on mistaken belief that case was related to another case assigned to same judge).

[91] *See, e.g.,* Tokars v. Superior Ct., 442 S.E.2d 454 (Ga. 1994) (upholding random assignment in death penalty case despite local rule favoring assignment of co-defendants to same judge).

[92] *See, e.g.,* Morfesis v. Wilk, 525 N.Y.S.2d 599 (App. Div. 1988) (concluding unanimously that related cases may be assigned non-randomly, but dividing 3–2 on whether particular cases were in fact related).

[93] *See* United States v. Beech-Nut Nutrition Corp., 925 F.2d 604, 608–09 (2d Cir. 1991).

[94] *See, e.g.,* Brown v. Baden, 815 F.2d 575, 576 (9th Cir. 1987) (per curiam).

[95] *See, e.g.,* United States v. Sears, Roebuck & Co., 785 F.2d 777, 781 (9th Cir. 1986) (per curiam); United States v. Alverson, 666 F.2d 341, 349–50 (9th Cir. 1982). *Cf.* Ash v. Georgia-Pacific Corp., 957 F.2d 432, 435 (7th Cir. 1992) (allowing parties to agree to have case heard on remand by original trial judge despite court of appeals' order that case be randomly assigned for further proceedings).

[96] United States v. Robin, 553 F.2d 8, 10 (2d Cir. 1977) (per curiam). *See also*

In sum, there seems to be no hard and fast rule requiring random assignment of judges to cases. Courts apparently enjoy broad latitude in administering their dockets. Although challenges to the implementation of assignment plans are not as difficult to sustain as are constitutional claims, they present formidable hurdles for most litigants. However, none of the cases mentioned above involved allegations of bias or partiality against judges. That was what Judge Cameron asserted in his attack on The Four.

III. JUDGE CAMERON REDUX

If Judge Cameron was correct that the panels in civil rights and desegregation cases were manipulated to influence substantive decisions, his charges raised profound issues of both constitutionality and propriety.[97] As explained above, there is reason to doubt that assignments were actually made for that dubious purpose.[98]

But we should not lose signt of a fundamentally important fact: some judges—and Cameron was among the most notorious in this respect—simply refuse to accept the legitimacy of *Brown v. Board of Education*[99] and other Supreme Court rulings against racial discrimination.[100] In particular,

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Alverson, 666 F.2d at 349; United States v. Ferguson, 624 F.2d 81, 83–84 (9th Cir. 1980).

[97] Tyson v. Trigg, 50 F.3d 436, 438 (7th Cir. 1995); *see* Marshall, *supra* note 14, at 1514.

[98] *See supra* notes 15-20 and accompanying text.

[99] 347 U.S. 483 (1954).

[100] Cameron consistently voted against African-American litigants during his tenure on the Fifth Circuit. *See* Bailey v. Patterson, 323 F.2d 201, 208 (5th Cir. 1963) (Cameron, J., dissenting); Davis v. Board of Sch. Comm'rs, 322 F.2d 356, 362 (5th Cir. 1963) (Cameron, J., dissenting); Alabama v. United States, 304 F.2d 583, 594 (5th Cir. 1963) (Cameron, J., dissenting), *aff'd*, 371 U.S. 37 (1962); United States v. Wood, 295 F.2d 772, 785 (5th Cir. 1961) (Cameron, J., dissenting); Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 159 (5th Cir. 1961) (Cameron, J., dissenting); Boman v. Birmingham Transit Co., 292 F.2d 4, 4 (5th Cir. 1961) (Cameron, J., dissenting); Boson v. Rippy, 275 F.2d 850, 853 (5th Cir. 1960) (Cameron, J., dissenting); Reddix v. Lucky, 252 F.2d 930, 938 (5th Cir. 1958) (Cameron, J., dissenting); Sharp v. Lucky, 252 F.2d 910, 913 (5th Cir. 1958) (Cameron, J., dissenting); Avery v. Wichita Falls Indep. Sch. Dist., 241 F.2d

Cameron's performance in connection with the desegregation of the University of Mississippi raises serious questions about his fitness to sit in other civil rights cases. In that controversy, a panel of the Fifth Circuit (two of whom were among The Four) directed the district judge to order the African-American plaintiff, James Meredith, admitted to the University.[101] The day after the mandate issued, Cameron, who was not a member of the panel, issued a stay (to permit the State to file a petition for certiorari in the Supreme Court, he said).[102] The panel vacated Cameron's stay, reasoning that it was too late to recall the mandate and that the Supreme Court could stay the injunction if that were appropriate.[103] The next day, Cameron entered another order reinstating his stay.[104] The panel vacated Cameron's second stay the same day it was issued.[105] Three days later, Cameron entered his third stay.[106] The panel once more vacated his action.[107] Undaunted, Cameron entered his fourth stay two days later.[108] After consulting with his colleagues, Justice Black finally ended this circus by declaring all of Cameron's orders void and refusing to issue a stay of the desegregation order.[109]

The Fifth Circuit, largely through the work of The Four, sought to overcome defiance, delay, and recalcitrance by way

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230, 235 (5th Cir. 1957) (Cameron, J., dissenting). The only exception located is a grudging concurrence in United States v. Atkins, 323 F.2d 733, 745 (5th Cir. 1963) (Cameron, J., concurring specially in the result).

[101] Meredith v. Fair, 305 F.2d 343 (5th Cir. June 25, 1962).

[102] Meredith v. Fair, 7 Race Rel. L. Rep. 741 (5th Cir. July 18, 1962) (Cameron, J.).

[103] Meredith v. Fair, 306 F.2d 374 (5th Cir. July 27, 1962).

[104] Meredith v. Fair, 7 Race Rel. L. Rep. 742 (5th Cir. July 28, 1962) (Cameron, J.).

[105] Meredith v. Fair, No. 19475 (5th Cir. July 28, 1962) (unreported).

[106] Meredith v. Fair, 7 Race Rel. L. Rep. 743 (5th Cir. July 31, 1962) (Cameron, J.).

[107] Meredith v. Fair, 7 Race Rel. L. Rep. 743 (5th Cir. Aug. 4, 1962) (per curiam).

[108] Meredith v. Fair, 7 Race Rel. L. Rep. 744 (5th Cir. Aug. 6, 1962) (Cameron, J.).

[109] Meredith v. Fair, 83 S. Ct. 10 (Sept. 10, 1962).

of procedural and doctrinal innovations.[110] Commentators have lionized their efforts in this regard.[111] At the same time, those efforts have prompted some sympathetic lawyers and scholars to raise questions about the wisdom and desirability of some of their innovations.[112] Devising a method to exclude the Camerons of the world from hearing cases in which they plainly would not follow the law is easy to justify.[113] It is more difficult to swallow an effort to marginalize cautious or hesitant judges.[114] However, that does not seem to be what happened in the Fifth Circuit. The most that can be said about Cameron's charges is that they were not proven.[115]

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[110] *See* READ & MCGOUGH, *supra* note 6, at 272–73.

[111] *See generally* BASS, *supra* note 6.

[112] *See, e.g.,* Marshall, *supra* note 14, at 1512, 1514.

[113] Cameron's indefensible conduct might explain why the Fifth Circuit never adopted a policy of hearing desegregation cases en banc, as the Fourth Circuit did. *See* Tracey E. George, *Developing a Positive Theory of Decisionmaking on U.S. Courts of Appeals*, 58 OHIO ST. L.J. 1635, 1672 (1998). Cameron would have been eligible to sit in en banc proceedings. Although some members of the Fourth Circuit were exceedingly cautious in civil rights cases, none was as recalcitrant as he was. *See* Jonathan L. Entin, *The Confirmation Process and the Quality of Political Debate*, 11 YALE L. & POL'Y REV. 407, 412–14 (1993) (discussing civil rights record of Judge Clement Haynsworth, whose nomination to Supreme Court was defeated partly on this basis).

[114] There is one last question to consider, a question that goes beyond the intricacies of legal doctrine: how much difference did the judiciary make in desegregation? This is a large and difficult subject that has generated a substantial literature. The basic facts are now well known. During the first decade after *Brown*, when almost the only sustained federal implementation activities were those of the district courts and the courts of appeals, public school desegregation in the Deep South was negligible. *See, e.g.,* J.W. PELTASON, FIFTY-EIGHT LONELY MEN (1961). The situation changed dramatically when the executive and legislative branches took a larger role. The passage of Title VI of the Civil Rights Act of 1964, which prohibited federal funding of racially discriminatory programs, and the Elementary and Secondary Education Act of 1965, which made available unprecedented amounts of federal school assistance, promoted substantial desegregation within a few years. *See* GARY ORFIELD, THE RECONSTRUCTION OF SOUTHERN EDUCATION (1969); GERALD N. ROSENBERG, THE HOLLOW HOPE 47–54 (1991). Similarly, the adoption of the Voting Rights Act of 1965 provided powerful leverage against discriminatory practices that had effectively excluded African Americans from the political process and led to the registration of millions of new voters. *See, e.g.,* STEVEN F. LAWSON, BLACK BALLOTS 329-52 (1976); ROSENBERG, *supra*, at 59–63.

[115] This is not to say that Cameron's charges have been forgotten. One judge

IV. JUDICIAL PEREMPTORIES AND RANDOM ASSIGNMENT

Cameron raised disturbing questions in a highly sensitive context. Those questions implicate important general features of our judicial system. At this more general level, the difficulty of successfully challenging non-random judicial assignments reflects the difficulty of proving anything more than a symbolic or procedural injury. We should not exaggerate the importance of a judge's identity or personal characteristics,[116] but a party who has a favorable judge "may be able to obtain a subtle advantage over the . . . [adversary because the judge could be] more likely to resolve close questions in that party's favor."[117]

Some states have embodied that intuition in statutes and policies that effectively allow litigants to exercise a limited form of peremptory challenge against a judge assigned to their case. These measures go beyond for-cause disqualification statutes that require a showing of bias or an appearance of impropriety.[118] Rather, they demand, at most, the timely filing of a good-faith request for substitution of a judge while strictly limiting the number of such requests.[119]

Moreover, although federal law currently does not provide

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who joined the Fifth Circuit long after that episode referred to it in an interview about the court's special panel for energy regulation cases. *See generally* PIERCE & ENTIN, *supra* note 56.

[116] *See* Gregory C. Sisk et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377 (1998).

[117] Tyson v. Trigg, 50 F.3d 436, 439 (7th Cir. 1995).

[118] *See, e.g.*, 28 U.S.C. §§ 144, 455 (1994).

[119] *See, e.g.*, ALASKA STAT. § 22.20.022 (Michie 1996); 735 ILL. COMP. STAT. ANN. § 5/2-1001 (West 1992); ILL. COMP. STAT. ANN. 5/114-5 (West 1992); IND. CODE ANN. § 35-36-5-1 (West 1998); MONT. CODE ANN. § 3-1-804 (1997); N.M. STAT. ANN. § 38-3-9 (Michie Supp. 1997); N.D. CENT. CODE § 29-15-21 (Michie Supp. 1997); WIS. STAT. ANN. § 801.58 (West 1994); WIS. STAT. ANN. § 971.20 (West Supp. 1997). For a comprehensive discussion of these and other statutes, and of judicial rulings and commentary, see State v. Holmes, 315 N.W.2d 703, 705-26 (Wis. 1982); *see also* Hornaday v. Rowland, 674 P.2d 1333, 1341–44 (Alaska 1983); People *ex rel.* Baricevic v. Wharton, 556 N.E.2d 253, 255-61 (Ill. 1990); People v. Walker, 519 N.E.2d 890, 891-97 (Ill. 1988); Traynor v. Leclerc, 561 N.W.2d 644, 647-50 (N.D. 1997); State *ex rel.* Ray Wells, Inc. v. Hargreaves, 761 P.2d 1306, 1306-10 (Or. 1988).

for peremptory challenges of judges, such a procedure has its advocates. For example, the original version of the proposed Judicial Reform Act of 1997 contained language authorizing parties to federal civil actions to obtain one substitution of judge as a matter of right.[120]

Although these devices for peremptory challenges against judges are not available in most states or in federal court, and are strictly limited in those jurisdictions that permit them, their very existence implies an ambivalence about random assignment of judges. This ambivalence resembles our difficulty in thinking clearly about race- and gender-based peremptory challenges of prospective jurors: at one level we want to believe that race and gender are irrelevant to juror decisionmaking, but at another level we recognize that these factors can make a difference.[121] As long as we remain ambivalent about how much a particular judge matters, our legal system will not require a strictly random assignment of judges. At the same time, it will properly condemn deliberate efforts to influence case outcomes, however subtly, by manipulating judicial assignments.

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[120] H.R. 1252, 105th Cong., § 4 (1997).

[121] For a sophisticated analysis of these issues, see Eric L. Muller, *Solving the* Batson *Paradox: Harmless Error, Jury Representation, and the Sixth Amendment*, 106 YALE L.J. 93 (1996).