

# THE CURIOUSLY NONRANDOM ASSIGNMENT OF SIXTH CIRCUIT SENIOR JUDGES

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## I. INTRODUCTION

Federal judges occupy an odd position in our republic. On the one hand, these judges have an awesome responsibility to say what the law is. They enjoin presidential acts, strike down state laws, and divine the meaning of constitutional rights. On the other, our Constitution affords these legal elites life tenure, a length of service not granted either to legislators or the executive. This means that federal judges, whom the American people never elected, often will remain in office long after the president who nominated them leaves office. Strengthening the judiciary's independence, Congress cannot reduce judicial salaries and has long declined to impeach judges when they issue unpopular decisions.

Federal judges, to be sure, tend to agree with each other in the mine run of cases.<sup>2</sup> But the worry remains that—at least in the most politically divisive cases—these unelected and unremovable jurists will turn into “politicians in robes.”<sup>3</sup> Some judges recognize that their “only source of democratic legitimacy is the perception that [they] engage in principled decision-making.”<sup>4</sup> The contention that certain judges do not even follow agreed-upon procedural rules challenges this perception. After all, “[p]ublic confidence in th[e] court[s] . . . is premised on the certainty that the court follows the rules in every case, regardless of the question that a particular case presents.”<sup>5</sup>

This Essay, therefore, examines the assignment of judges in the U.S. Court of Appeals for the Sixth Circuit to see how its assignment rules play out in practice. The first step is a review of the rules themselves. The Sixth Circuit's history of procedural disputes—which came to a head with the publication of Judge Boggs's Procedural Appendix in *Grutter v. Bollinger*<sup>6</sup>—and research about the nonrandomness of judicial assignment provide insight into potential weaknesses in the assignment system. Next, this Essay continues with its chief contribution: an analysis of Sixth Circuit case assignments from 2012 through 2016, a five-year period when the composition of the court remained relatively consistent. This analysis suggests that, for whatever reason, the senior judge assignment system tends to enhance the perceived partisan preferences of senior judges. In other words, senior

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<sup>1</sup> I would like to thank my wife for providing comments on this Essay and the editors of the *Kentucky Law Journal Online* for their edits. All views expressed in this Essay are my own.

<sup>2</sup> See, e.g., Jeffrey S. Sutton, *A Review of Richard A. Posner, How Judges Think*, 108 MICH. L. REV. 859, 862–66 (2010) (noting the high rate of unanimity on the circuit courts of appeals).

<sup>3</sup> *Id.* at 860.

<sup>4</sup> *Grutter v. Bollinger*, 288 F.3d 732, 753 (6th Cir. 2002) (en banc) (Moore, J., concurring).

<sup>5</sup> *Id.* at 815 (Batchelder, J., dissenting).

<sup>6</sup> *Id.* at 810–14 (Boggs, J., dissenting). For a study of the controversy created by the allegedly nonrandom assignment of liberal Fifth Circuit judges to desegregation cases, see Jonathan L. Entin, *The Sign of 'the Four': Judicial Assignment & the Rule of Law*, 68 MISS. L.J. 369 (1998).

judges nominated by Democratic presidents tend to sit with other Democratic nominees, and senior judges nominated by Republican presidents tend to sit with other Republican nominees. This preference is most pronounced among Democratic-nominated senior judges and enhances the voting strength of Democratic judges, who are a minority among the active judges on the Sixth Circuit. This Essay considers potential non-nefarious explanations for these tendencies and concludes by weighing how this dynamic will impact the Sixth Circuit as several Republican-nominated judges have taken senior status during the Trump Administration.

## II. A HISTORY OF PROCEDURAL QUARRELS

Contrary to what one might expect, judicial assignment on the Sixth Circuit is not random, even if the circuit clerk follows the assignment rules. Nevertheless, the circuit clerk, under the direction of the chief judge, implements various procedures that should have the effect of approximating randomness. The Sixth Circuit “sits over two-week periods scheduled so as to afford all judges at least five weeks between sittings.”<sup>7</sup> “The clerk prepares the calendar for a session before the composition of panels” during these two weeks “is determined.”<sup>8</sup> To approximate randomness, “[t]he clerk balances the calendars by dividing the cases as evenly as possible among the panels according to case type and the district of origin.”<sup>9</sup> There is no wheel that churns out a randomly-assigned three-judge panel for each discrete case. After the circuit clerk divides the cases into groups, the judges are “assigned to panels during the sitting weeks using an automated routine which searches the court’s database to determine which active judges have the longest intervals between sitting pairing.”<sup>10</sup>

While not exactly random for each individual case, this common practice “attempts to equalize co-sits” and “is the functional equivalent of taking a coin and placing it on heads once, then placing it on tails once, and so on, instead of actually tossing it. That is, the practice uses a nonrandom process to create results that are meant to be consistent with randomness.”<sup>11</sup>

But there is a catch. Although “[a]ll active judges are scheduled to sit four consecutive days during one of the two sitting weeks,”<sup>12</sup> senior judges can pick and choose which sittings they attend. To earn his pay each year, a senior judge must perform work that “in the aggregate equals at least 3 months[?] work” of an active judge.<sup>13</sup> Senior judges in the Sixth Circuit have the discretion to work as much or as little as they want the other three quarters of the year. One senior judge may keep an almost full caseload while another teaches a law school class and visits grandchildren.<sup>14</sup> In several circuits, “[t]he calendar preferences of senior judges [a]re

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<sup>7</sup> 6th Cir. I.O.P. 34(a)(1).

<sup>8</sup> *Id.* I.O.P. 34(a)(2).

<sup>9</sup> *Id.* I.O.P. 34(a)(3).

<sup>10</sup> *Id.* I.O.P. 34(a)(1).

<sup>11</sup> Mark K. Levy, *Panel Assignments in the Federal Courts of Appeals*, 103 CORNELL L. REV. 65, 104 (2017).

<sup>12</sup> 6th Cir. I.O.P. 34(a)(1).

<sup>13</sup> 28 U.S.C. § 371(e)(3).

<sup>14</sup> See generally Frederic Block, *Senior Status: An ‘Active’ Senior Judge Corrects Some Common Misunderstandings*, 92 CORNELL L. REV. 533 (2007); Albert Yoon, *As You Like It: Senior Federal Judges & the Political Economy of Judicial Tenure*, 2 J. EMPIRICAL LEGAL STUD. 495 (2005).

given particular weight—a senior judge’s request to sit during a given week in a given month might be accommodated—to encourage those judges to provide as many days of service as possible.”<sup>15</sup> And on the Sixth Circuit, the automated assignment system assigns senior judges after active judges are already in place: “The automated program first pairs active judges based on intervals between pairings and then adds senior circuit judges and visiting judges to pairings, again determined by the longest interval between pairings with either judge in the assembled pairs.”<sup>16</sup>

Despite the best efforts of the assignment system, this process might produce nonrandom results if senior judges tend to sit more or less frequently during the same weeks as certain active judges. For example, a senior judge may enjoy sitting with a judge who is a former clerk or who comes from the senior judge’s own city. The senior judge could then build his sitting calendar around when his judicial friend is likely to hear cases as well.

Additional procedural quirks might add to the nonrandomness of merits case assignment. “In cases not yet assigned to a merits panel, substantive motions are assigned to randomly assembled panels drawn from among active and senior circuit judges and visiting judges designated to sit with the court.”<sup>17</sup> This mostly<sup>18</sup> random assignment system led to problems in *Grutter v. Bollinger*.<sup>19</sup> That case touched on a politically sensitive issue: affirmative action. “In August 1999,” a Sixth Circuit panel “consisting of Circuit Judges Daughtrey and Moore”—both Democratic appointees—and a visiting senior district court judge “decided an appeal concerning the rights of certain parties to intervene in the district court case underlying the [later *Grutter*] appeal, but did not address the merits of the case.”<sup>20</sup> When the cases returned to the Sixth Circuit, “a question could have arisen regarding whether these appeals, seeking review of cases already returned to the district court by a panel of this court, were ‘must panel’ cases” under 6th Cir. I.O.P. 34(b)(2).<sup>21</sup> This procedure allows “the original panel [to] determine to hear the appeal or whether it should be assigned to a panel at random.”<sup>22</sup> Under the current rules, “[w]here it is necessary to bring in a new judge to complete the panel,” such as when a panelist was a visiting judge or has retired, “the clerk will draw a name from among the active judges not already on the panel.”<sup>23</sup>

That is not what happened in *Grutter*. Instead, then-Chief Judge Martin—also a Democratic-nominated judge—decided to augment these panels “by the addition of”

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<sup>15</sup> Levy, *supra* note 11, at 68–69.

<sup>16</sup> 6th Cir. I.O.P. 34(b)(1).

<sup>17</sup> 6th Cir. I.O.P. 27(a)(1).

<sup>18</sup> As with merits panels, senior judges do not have to participate each quarter of the year in the motions panel process. And active judges can sometimes take a quarter off from motions panel service, so the pool of judges for the motions panels is not consistent.

<sup>19</sup> 288 F.3d 732 (6th Cir. 2002) (en banc).

<sup>20</sup> *Id.* at 811 (Boggs, J., dissenting).

<sup>21</sup> *Id.*

<sup>22</sup> 6th Cir. I.O.P. 34(b)(2).

<sup>23</sup> *Id.* I.O.P. 34(b)(3). Senior judges also remain assigned to all subsequent proceedings in death penalty cases that they previously participated in but can elect not to receive new death penalty case assignments. *Id.* I.O.P. 22(b)(1).

himself, “not a randomly chosen judge.”<sup>24</sup> This panel heard all further motions regarding these appeals and sat on an en banc petition, which the circuit clerk normally circulates after fourteen days to the entire court,<sup>25</sup> for five months.<sup>26</sup> During those five months, two Republican-appointed judges took senior status.<sup>27</sup> This delayed circulation of the en banc petition allowed the entirely Democratic-appointed panel to have the case heard before an en banc court that consisted of only three Republican-appointees, and the Democratic-appointed panel won out with a five to four en banc vote.<sup>28</sup> Judge Boggs, frustrated with the lack of procedural transparency, aired these dubious procedural moves by publishing a Procedural Appendix at the end of his dissent.<sup>29</sup> Otherwise, the public would never have learned about the procedural inconsistencies.

### III. THE PARAMETERS OF THE STUDY

This Essay, therefore, analyzes the assignment of all Sixth Circuit judges—both active and senior—in continuous service from 2012 through 2016 to query whether any procedural abnormalities are occurring behind the scenes. A previous study of all federal circuit courts from 2008 to 2012 found that the Sixth Circuit tended to pack Republican appointees onto three-Republican panels and that divided panels (consisting of both Democratic- and Republican-appointees) leaned Democratic more often than simulations would expect.<sup>30</sup> As former-Judge Posner explained using the opposite set of circumstances, this is what one would expect if a liberal chief judge wanted to waste Republican votes and maximize the effectiveness of Democratic votes.<sup>31</sup>

Although the previous analysis of all circuit courts did not produce statistically significant results for the Sixth Circuit,<sup>32</sup> this Essay uses an approach tailored to the Sixth Circuit. For starters, this Essay uses the political party identification of the president who initially *nominated* each judge as a proxy for ideology rather than the

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<sup>24</sup> *Grutter*, 288 F.3d at 811 (en banc).

<sup>25</sup> See 6th Cir. I.O.P. 35(d)(2).

<sup>26</sup> *Grutter*, 288 F.3d at 811–13.

<sup>27</sup> *Id.* Similar motions-panel shenanigans have occurred on the Seventh Circuit. See Alison Frankel, *At 7th Circuit, Unseen Judicial Mechanics Drive Decisions: New Paper*, REUTERS (Dec. 3, 2014), <http://blogs.reuters.com/alison-frankel/2014/12/03/at-7th-circuit-unseen-judicial-mechanics-drive-decisions-new-paper/> [https://perma.cc/X5DQ-2VFB] (“The merits case was not, however, randomly assigned to a new panel of appellate judges as it would be in most federal circuits. Posner, Kanne and Rovner – the same three judges who had previously dismissed Motorola’s case based just on motions briefing – opted to retain authority over Motorola’s merits appeal.”). And certain Sixth Circuit judges have misused their power to issue single-judge stays, see 6th Cir. I.O.P. 22(d), and avoided the normal merits panel process to undermine implementation of the death penalty. See Jonathan Adler, *Sedley Alley’s Last-Minute Stay*, VOLOKH CONSPIRACY (July 17, 2006), <http://volokh.com/posts/1153144938.shtml> [https://perma.cc/MLV8-GWUB] (recounting Democratic-appointee Judge Merritt’s single-judge stay on the eve of an execution and various en banc maneuverings).

<sup>28</sup> *Grutter*, 288 F.3d at 735.

<sup>29</sup> *Id.* at 810-14 (Boggs, J., dissenting).

<sup>30</sup> Adam S. Chilton & Marin K. Levy, *Challenging the Randomness of Panel Assignment in the Federal Courts of Appeals*, 101 CORNELL L. REV. 1, 39, 53 (2015).

<sup>31</sup> RICHARD A. POSNER, *DIVERGENT PATHS: THE ACADEMY & THE JUDICIARY* 243 (2016).

<sup>32</sup> See Chilton & Levy, *supra* note 30, at 41.

president under whose watch the judge was ultimately *appointed*.<sup>33</sup> This change reclassifies Judge White as Democratic and accurately reflects the political compromise between President George W. Bush and Senate Democrats that allowed Michigan Judges White and Kethledge to assume their seats on the Sixth Circuit.<sup>34</sup>

Next, this Essay uses the five years from 2012 through 2016 due to the stability of the Sixth Circuit during this timeframe. Fifteen active judges (six Democratic nominees and nine Republican nominees) and eight senior judges (four from each party) heard cases throughout the five-year period. One senior judge retired from judicial service in 2012, but she participated in only nineteen opinions that year that made their way onto Westlaw.<sup>35</sup> Judge Martin (the Chief Judge during *Grutter*) retired directly from active service in 2013 in the midst of an investigation into his travel expense reimbursements.<sup>36</sup> Nonetheless, his 517 cases are consistent with the findings of this Essay: active judges have a slight tendency to sit with active judges of the opposite party but a strong tendency to sit with senior judges of their own party.

That brings us to the last major deviation of this Essay from prior study. Unlike other studies, this Essay does not rely on oral argument information from calendar docket sheets.<sup>37</sup> Such an approach would have the weaknesses of failing to capture non-argument cases and potentially overstating the significance of a panel organized to hear arguments in a single must case.<sup>38</sup> Instead, this Essay looks to panel assignments in all Sixth Circuit opinions available on Westlaw.<sup>39</sup> This Essay determines the number of times each Sixth Circuit judge paired with another—a key consideration in the circuit’s assignment system—and then averages out the number of cases by ideological category and active/senior status. This approach accounts for random fluctuations among pairings and the fact that chief judges take a reduced caseload due to their administrative responsibilities. On the whole, Democratic active judges had about the same average cases per judge as Republican active judges: respectively, 887.17 and 891.67 cases per judge. Democratic senior judges

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<sup>33</sup> *Id.* at 4–5 (using the appointing president).

<sup>34</sup> See Neil A. Lewis, *Deadlock on Appeals Court Judges Ends*, N.Y. TIMES (June 13, 2008), [https://www.nytimes.com/2008/06/13/washington/13brfs-DEADLOCKONAP\\_BRF.html](https://www.nytimes.com/2008/06/13/washington/13brfs-DEADLOCKONAP_BRF.html) [<https://perma.cc/VHE8-5PU2>].

<sup>35</sup> Cf. *In re Vertrue Inc. Mktg. & Sales Practices Litig.*, 719 F.3d 474, 476 n.\*\* (6th Cir. 2013) (“Judge Kennedy participated in oral argument in this case but did not participate in this decision due to her retirement.”).

<sup>36</sup> See Debra Cassens Weiss, *6th Circuit Judge Retired Amid Probe of Travel Expenses; Allegations Referred to DOJ*, ABAJ (Jan. 21, 2014), [http://www.abajournal.com/news/article/6th\\_circuit\\_judge\\_retired\\_amid\\_probe\\_of\\_travel\\_expenses\\_allegations\\_referred/](http://www.abajournal.com/news/article/6th_circuit_judge_retired_amid_probe_of_travel_expenses_allegations_referred/) [<https://perma.cc/NZ5A-FWFM>].

<sup>37</sup> Chilton & Levy, *supra* note 30, at 24–25.

<sup>38</sup> *Id.* at 26–28.

<sup>39</sup> I searched all opinions available in Westlaw’s Sixth Circuit opinion archive using the Advanced Search’s Panel option to isolate which judges participated in deciding each case. This search does not include three-judge redistricting cases where the chief judge assigns a circuit court judge to lead a panel that includes two district court judges. The two most recent redistricting cases involved Democratic Sixth Circuit Judges Moore and Clay leading 2–1 Democratic panels in ruling against the Republican-created maps of, respectively, Ohio and Michigan. See *Ohio A. Philip Randolph Inst. v. Householder*, 2019 WL 1969585 (S.D. Ohio May 3, 2019); *League of Women Voters of Mich. v. Benson*, 2019 WL 1856625 (E.D. Mich. Apr. 25, 2019).

sat a tad more frequently and accounted for 53.65% of total case assignments to Republican senior judges' 46.35%.<sup>40</sup>

This approach adds a different viewpoint on case assignments but, of course, has its own weaknesses. En banc assignments count as a panel assignment for each judge on the en banc panel. This increases the number of cases for active judges across the board, however, and there appear to have been no more than twenty relevant en banc opinions during this period. Additionally, this approach might overstate the importance of cases with multiple iterations or orders or fail to include various unpublished decisions not on Westlaw. This approach, nevertheless, addresses the non-argument cases to a greater degree than an alternative docket-sheet approach. The Essay is not a comprehensive statistical study but provides insight into the most salient features of nonrandomness in Sixth Circuit case assignment.

#### IV. APPARENT NONRANDOMNESS OF SENIOR JUDGE ASSIGNMENT

This Essay finds that active judges pair in mostly random ways even though senior judges do not. Table 1 summarizes the statistics for active judges nominated by a Democratic president.

**Table 1: Active Democratic Nominee Statistics**

	<b>Total Cases</b>	<b>Pairings Per Active Democratic Judge</b>	<b>Pairings Per Active Republican Judge</b>	<b>Active Judge Average Difference</b>
<b>Judges</b>	<b>5,323</b>			
Cole	727	72.4	75.66666667	-3.266666667
Moore	936	99.2	96.22222222	2.977777778
Clay	958	91.8	86.22222222	5.577777778
White	937	88.2	98.33333333	-10.13333333
Stranch	916	91.6	99.66666667	-8.066666667
Donald	849	86.8	89.66666667	-2.866666667
<b>Averages</b>	<b>887.1666667</b>	<b>88.33333333</b>	<b>90.96296296</b>	<b>-2.62962963</b>

The second column ("Total Cases") counts every time a judge participated in an opinion. Chief Judge Cole, for example, participated in 727 opinions issued from 2012 through 2016. I then counted how many times the active judge participated in a case with each other active judge and aggregated the numbers by political party of the president nominating the other judges. Thus, Democratic active judges paired

<sup>40</sup> A few of the thousands of opinions misspelled the panelists' names, which affected how Westlaw listed the panelists. For 2012 through 2016, this Essay has identified three opinions that spelled "Daughtrey" as "Daughtery," one opinion that spelled "Daughtrey" as "Daughtry," and four opinions that spelled "Suhrheinrich" as "Surheinrich." This Essay correctly categorizes the pairings in these cases despite the obvious scrivener's errors.

with Chief Judge Cole 362 times while Republican active judges paired with him 681 times. This averages to 72.4 pairings per other Democratic active judge (the third column) and approximately 75.667 pairings per Republican active judge (the fourth column) for Chief Judge Cole. The fifth column (“Active Judge Average Difference”) is the difference between these two averages. To finish the example, Chief Judge Cole averaged about 3.267 more pairings per Republican active judge than he averaged with other Democratic active judges.

Table 1 demonstrates that Democratic active judges tend to sit slightly more often with Republican active judges than with other Democratic active judges, which is expected given that the average Republican sits slightly more frequently than the average Democrat. Democratic active judges average only 2.63 more pairings per Republican active judge than per Democratic judge. Using a hypothesis that ideology does not impact pairings in either direction and where  $p$  is significant when less than 0.05, a paired two-tailed  $t$ -test shows that the results are not statistically significant. The two-tailed  $p$ -value here is 0.338, well outside the realm of statistical significance.

Table 2 gives the equivalent information for active judges nominated by a Republican president but with negative active average differences showing a tendency to sit with Democratic active judges.

**Table 2: Active Republican Nominee Statistics**

	Total Cases	Pairings Per Active Republican Judge	Pairings Per Active Democratic Judge	Active Judge Average Difference
<b>Judges</b>	<b>8025</b>			
Boggs	927	88.625	100.1666667	-11.54166667
Batchelder	621	74.125	65.66666667	8.458333333
Gibbons	916	93.5	91.83333333	1.666666667
Rogers	957	93.5	97.83333333	-4.333333333
Sutton	989	106.75	104.3333333	2.416666667
Cook	915	90.25	92.16666667	-1.916666667
McKeague	916	90.75	90.83333333	-0.083333333
Griffin	883	89.375	88.16666667	1.208333333
Kethledge	901	85.625	87.66666667	-2.041666667
<b>Averages</b>	<b>891.6666667</b>	<b>90.27777778</b>	<b>90.96296296</b>	<b>-0.685185185</b>

Again, Republican active judges have the slightest of tendencies to sit with active judges of the opposite party. Out of all the pairings that result from an average of 891.67 cases per Republican active judge, a Republican active judge is likely to average only 0.69 more pairings per Democratic active judge than per other

Republican active judge. If  $p$  is significant when less than 0.05, the two-tailed  $p$ -value of 0.716 is not at all statistically significant.

The assignment system thus seems to work well for assigning active judges to sit with other active judges. A couple Democratic judges (Judges Moore and Clay) and several Republican judges (Judges Batchelder, Gibbons, Sutton, and Griffin) even bucked the overall trends for their sets.<sup>41</sup>

The same cannot be said for senior judges. Table 3 gives the statistics for the rates at which Democratic senior judges sit with active judges, with positive numbers representing tendencies to pair with other Democratic judges.

**Table 3: Senior Democratic Nominee Statistics**

	<b>Total Cases</b>	<b>Pairings Per Active Democratic Judge</b>	<b>Pairings Per Active Republican Judge</b>	<b>Active Judge Average Difference</b>
<b>Judges</b>	<b>1860</b>			
Daughtrey	504	74.83333333	52.44444444	22.38888889
Merritt	492	62.33333333	45.88888889	16.44444444
Gilman	412	54.5	42.44444444	12.05555556
Keith	452	52.83333333	48	4.83333333
<b>Averages</b>	<b>465</b>	<b>61.125</b>	<b>47.19444444</b>	<b>13.93055556</b>

Democratic senior judges are far more likely to pair with Democratic active judges than with Republican active judges. This effect is consistent for all four Democratic senior judges regardless of how many cases they participated in. For example, Judge Daughtrey, the Democratic senior judge with the most sittings, averaged only 52.444 pairings per Republican active judge despite averaging 74.833 pairings per Democratic active judge. If  $p$  is significant when less than 0.05, then these pairing differences were statistically significant with a two-tailed  $p$ -value of 0.033.

Peering into the panel assignments for Judge Daughtrey even further reveals the effect of this preference on panel ideological balances.<sup>42</sup> Excluding two en banc cases and one evenly split must panel that Daughtrey sat on, Table 4 gives the expected and actual ideological breakdown for Judge Daughtrey's 501 three-judge panels.<sup>43</sup>

<sup>41</sup> While most active judges tend to sit with judges nominated by presidents of the opposite party, these judges tended to sit more frequently with judges nominated by presidents of the same party.

<sup>42</sup> Judge Daughtrey sat infrequently with Judge Martin (16 times) and sat more frequently with visiting Republican Judges Zouhary (15 times), Cleland (11 times), and Maloney (14 times) than with visiting Democratic Judge Economus (6 times). And senior judges rarely sit with each other due to the assignment procedures; Judge Daughtrey did not sit with two of the three other Democratic senior judges (Judges Gilman and Keith) and one of the four Republican senior judges (Judge Norris) during this time period. These tendencies, if anything, should have tilted Judge Daughtrey's panels in a Republican direction.

<sup>43</sup> The % Total Active Cases and % Total Both Active and Senior Cases statistics include only active and senior judges on the Sixth Circuit during the entirety of 2012 through 2016. Thus, these figures do not include Judges Kennedy and Martin or the assorted judges who sat by designation on the Sixth Circuit.

**Table 4: Judge Daughtrey Three-Judge Panel Statistics**

Methodology	1 D	2 D	3 D	D Majority
<b>Expected</b>				
If Even (8 to 8)	125.25 (25%)	250.5 (50%)	125.25 (25%)	375.75 (75%)
Actual Active Judge Split (7 to 9) Until August 2013	158.5195313 (31.6406%)	246.5859375 (49.2188%)	95.89453125 (19.1406%)	342.4804688 (68.3594%)
Actual Active Judge Split (6 to 9) After August 2013	180.36 (36%)	240.48 (48%)	80.16 (16%)	320.64 (64%)
By % Total Active Cases	181.0903933 (36.1458%)	240.2353056 (47.9512%)	79.67430104 (15.9031%)	319.9096067 (63.8542%)
By % Total Both Active & Senior Cases	164.390581 (32.8125%)	245.186367 (48.9394%)	91.42305201 (18.2481%)	336.609419 (67.1875%)
<b>Actual</b>	<b>126</b> <b>(25.1497%)</b>	<b>281</b> <b>(56.0878%)</b>	<b>94</b> <b>(18.7625%)</b>	<b>375</b> <b>(74.8503%)</b>

Judge Daughtrey’s panels had a Democratic majority 74.85% of the time, which is roughly what we would expect if the Sixth Circuit had an even ideological balance. But Democratic nominees had a seven to nine minority among active judges until August 2013 and a six to nine minority after Judge Martin’s resignation. For Judge Daughtrey, the Sixth Circuit might as well have had at least one more active Democratic judge. Her pairings also maximized ideological sway with far more two-Democrat panels than we would expect even if the Sixth Circuit were evenly divided.

A chi-squared test for normality shows that Judge Daughtrey’s pairings were not consistent with a normal distribution. Such a test compares the actual sitting statistics with the expected sitting statistics and considers the likelihood that deviations are simply random. Here, the chi-squared  $p$ -values were 0.003159 if an even split is expected; 0.003164 compared to the 7–9 split; and 0.000003 compared to the 6–9 split. All of these  $p$ -values indicate that the pairings were not normally distributed.

Nevertheless, Judge Daughtrey’s odd pairings are not the result of, say, Chief Judge Cole assigning himself to sit with Judge Daughtrey in otherwise evenly divided panels to maximize her voting power. Since Chief Judge Cole became chief judge in August 2014 and through the end of 2018, all 45 of Chief Judge Cole and Judge Daughtrey’s non-en banc panels were three-Democrat panels. The opposite was true for other Democratic senior judges. From August 2014 through 2018, Judges Merritt (35 times), Gilman (35 times), and Keith (12 times) had a total of 82 pairings with Chief Judge Cole on three-judge panels. Three of the pairings resulted

in three-Democrat panels: two of these pairings came from a single must panel case,<sup>44</sup> and the third pairing was from a long-running death penalty case which Chief Judge Merritt was assigned to years earlier.<sup>45</sup> The remaining 79 pairings with Chief Judge Cole resulted in two-Democrat panels. Chief Judge Cole finally wound up on a three-Democrat panel with a senior judge other than Judge Daughtrey in March 2019 when Judges Keith and Clay joined Chief Judge Cole to deny a stay pending appeal for Gun Owners of America, Inc.’s challenge of the bump stock ban.<sup>46</sup>

Part of the misbalance for Judge Daughtrey comes from her pairing only sixteen times with Judge Batchelder and three times with Judge Boggs (two of which were en banc cases and one of which was a must panel originating from a 2004 decision). Judge Batchelder paired with Judge Daughtrey fewer times than with any other senior judge even though Judge Daughtrey had the second highest case total among senior judges. Since October 2007, during the time Judge Boggs was chief judge, it appears that Judges Boggs and Daughtrey have sat together for, at most, one Westlaw decision<sup>47</sup> that is not an en banc, death penalty, or must panel case—each of which is a category that the Sixth Circuit assignment procedures treat separately from the normal process. This lone 2009 decision, however, was in an appeal docketed in 2006 and argued in 2007. Unless there is a fluke in the automated assignment system or a highly improbable event is occurring, it appears someone is deliberately separating Judges Boggs and Daughtrey, possibly as part of the “avoiding acrimony” approach to assignment that some circuit judges have described.<sup>48</sup>

All four Republican senior judges also have an affinity for ideologically similar active judges as seen in Table 5, where positives indicate a Republican lean.

**Table 5: Senior Republican Nominee Statistics**

	<b>Total Cases</b>	<b>Pairings Per Active Republican Judge</b>	<b>Pairings Per Active Democratic Judge</b>	<b>Active Judge Average Difference</b>
<b>Judges</b>	<b>1607</b>			
Siler	677	82.55555556	66.66666667	15.88888889
Guy	338	43.22222222	35.66666667	7.55555556
Suhrheinrich	380	44.33333333	37.5	6.83333333
Norris	212	29.44444444	27.33333333	2.11111111
<b>Averages</b>	<b>401.75</b>	<b>49.88888889</b>	<b>41.79166667</b>	<b>8.09722222</b>

<sup>44</sup> Tackett v. M & G Polymers USA, LLC, 811 F.3d 204 (6th Cir. 2016) (Chief Judge Cole paired with both Judges Keith and Merritt).

<sup>45</sup> Issa v. Bradshaw, 904 F.3d 446 (6th Cir. 2018) (Chief Judge Cole and Judge Merritt joined Judge Moore).

<sup>46</sup> Gun Owners of America, Inc. v. Barr, 2019 WL 1395502 (6th Cir. Mar. 25, 2019).

<sup>47</sup> Ortiz v. Jordan, 316 F. App’x 449 (6th Cir. 2009) (ruling, over a Judge Daughtrey dissent, that prison officials were entitled to qualified immunity).

<sup>48</sup> Levy, *supra* note 11, at 90.

Accounting for the fact that Republican senior judges sat in fewer cases overall than Democratic senior judges (401.75 average cases to 465 average cases), Republican senior judges still had a smaller average difference in ideological pairings. The Republican senior judge pairing results had a two-tailed  $p$ -value of 0.066 and thus, unlike the Democratic senior judge results, were not statistically significant if statistical significance is where  $p$  is less than 0.05. The ideological pairing trend is stronger for Democratic senior judges than for Republicans.

Nevertheless, the pairing statistics still suggest that Republican senior judges tend to sit more frequently with Republican active judges. The two-tailed  $t$ -test assesses the hypothesis that pairings do not vary by ideology in *either* direction. A one-tailed  $t$ -test, in contrast, looks for a correlation in *one* direction. In other words, a one-tailed  $t$ -test assesses the hypothesis that judges tend to pair with ideologically similar judges. With such a one-tailed  $t$ -test, the results become statistically significant and produce a  $p$ -value of 0.033.

Interestingly, the Republican senior judge with the *largest* sample of cases (Judge Siler) had the *least* random assignments among Republicans while the Republican judge with the *smallest* sample of cases (Judge Norris) had the *most* random assignments among all senior judges. This runs counter to the intuition, if case assignment is truly random, that increasing the sample size would tend to decrease variances that would create the impression of nonrandomness.

#### V. LOOKING AHEAD TO THE FUTURE OF THE SIXTH CIRCUIT

The Sixth Circuit's apparent nonrandom assignment of senior judges may begin to favor Democratic-nominated judges less and less. Since the conclusion of the time period analyzed in this Essay, President Trump has appointed five active judges (Judges Bush, Larsen, Nalbandian, Readler, and Murphy) to replace five Republican Sixth Circuit judges who took senior status (Judges Boggs, Batchelder, Rogers, Cook, and McKeague) and one active judge (Judge Thapar) to fill Judge Martin's long-vacant seat. The death of senior Judge Keith, who tended to hear many cases with his former clerk Judge Clay, will further dilute the Democratic pool of judges. The effect of this transformation in the Sixth Circuit remains unseen and will depend on how often the newly senior judges choose to sit. But if the experience of 2012 through 2016 is any guide, the propensity of senior judges to sit with active judges nominated by a president of the same party might enhance the ideological influence of these Republican senior judges. Plus, Judge Daughtrey's tendency not to sit with Judges Boggs and Batchelder will become less of a factor in strengthening Judge Daughtrey's Democratic-pairing lean as new active judges—without any bad blood—have replaced Judges Boggs and Batchelder in the assignment process.