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# THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

## ARTICLES

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### EXTENDED VACANCIES, CRUSHING CASELOADS, AND EMERGENCY PANELS IN THE FEDERAL COURTS OF APPEALS

Andrew L. Adler\*

#### I. INTRODUCTION

At the end of 2013, the chief judge of the Eleventh Circuit declared a state of emergency, exempting the court from the requirement in 28 U.S.C. §46(b) that each of its panels include a majority of Eleventh Circuit judges.<sup>1</sup> As would later become clear, the emergency arose from multiple vacancies on the court, which exacerbated the effect of its heavy per-judge caseload. Throughout 2014, emergency panels consisting of one Eleventh

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1. United States Court of Appeals for the 11th Cir., Gen. Order No. 41 (Dec. 30, 2013) (indicating that under 28 U.S.C. § 46(b) the chief judge was certifying “that there is an emergency requiring that some cases and controversies before this Court be heard by three-judge panels consisting of fewer than two judges of this Court”) [hereinafter General Order 41]. A copy of General Order 41 is available at <http://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/GeneralOrder41.pdf>.

Circuit judge and two visiting judges resolved over one hundred appeals.

In a petition for rehearing filed in one such case, an unsuccessful appellant challenged the validity of the emergency panel.<sup>2</sup> Rather than resolving the petition summarily, the emergency panel instead published a precedential opinion upholding the certified emergency.<sup>3</sup> Although other circuits have certified section 46(b) emergencies based on the vacancy-caseload combination, the Eleventh Circuit's opinion is the first federal appellate decision addressing a challenge to such an emergency. Because extended vacancies and heavy caseloads are likely to persist, that opinion invites new scrutiny of the emergency exception to section 46(b)'s majority requirement. This article begins that undertaking.

Part II provides the broader context for discussion and analysis of this important issue. It summarizes the heavy, vacancy-exacerbated caseloads facing the federal courts of appeals, and their use of visiting judges as one tool to help manage those caseloads. It details the limitations that Congress has placed on the use of visiting judges, focusing on section 46(b)'s requirement that a majority of the panel be drawn from the presiding court, as well as the statutory exceptions to that requirement. And it briefly recounts prior instances in which circuits have invoked the statute's emergency exception based on extended vacancies and heavy caseloads.

Part III summarizes the dismal conditions in the Eleventh Circuit—four vacancies out of twelve authorized judgeships and the highest per-judge caseload of all the circuits—that understandably led it to declare an emergency in General Order 41. It then summarizes General Order 41, the emergency panels operating under it, Rodriguez's challenge to the validity of one such panel, and the *Rodriguez* opinion.

Part IV analyzes the central statutory issue—namely, whether multiple vacancies and a heavy caseload may constitute

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2. Appellant's Pet. for Reh'g, *United States v. Rodriguez*, No. 12-14629, at 8–14 (11th Cir. Mar. 25, 2014) [hereinafter *Rodriguez* Petition]. The Eleventh Circuit's initial panel decision appears at *United States v. Rodriguez*, 557 F. App'x 930 (11th Cir. 2014), cert. denied, \_\_\_ U.S. \_\_\_, 135 S. Ct. 390 (2014).

3. *United States v. Rodriguez*, 753 F.3d 1206, 1207 (11th Cir. 2014) (denying rehearing and holding that "General Order No. 41 declares an emergency clearly contemplated by Congress").

an emergency within the meaning of section 46(b)'s exception—and concludes that the statutory issue is more complicated than suggested by the sparse analytical treatment it has received thus far.

Part V concludes the article by defending the courts' broad interpretation of section 46(b)'s emergency exception. It nonetheless summarizes the concerns about the use of visiting judges and recasts the balance that Congress must ultimately maintain between difficult competing considerations. It predicts that, in this era of extended vacancies and heavy caseloads, the federal courts of appeals, now armed with a tested precedent in *Rodriguez*, are likely to continue certifying section 46(b) emergencies. It therefore recommends that this practice receive additional scrutiny in the context of the vacancy and caseload crises facing the federal courts of appeals.

## II. THE BROADER CONTEXT

The federal courts of appeals have long faced a “crisis in volume.”<sup>4</sup> Annual filings per circuit judge have mushroomed over the last sixty years—from seventy-three in 1950, to seventy-seven in 1964, to 137 in 1978, to 194 in 1984, to 237 in 1990, to 300 in 1997, to nearly 370 in 2008, and then approximately 330 in 2013.<sup>5</sup> “Strikingly, per-judge filings have more than quadrupled even as the number of regional courts of appeals judges has more than doubled—from 75 in 1950 . . . to 167 in 2010.”<sup>6</sup> “This surge has been attributed largely to a flurry of congressional activity in the 1960s, which led to new federal rights and mechanisms for obtaining them.”<sup>7</sup>

Extended judicial vacancies exacerbate the crisis of volume, and such vacancies have become commonplace in

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4. See, e.g., Marin K. Levy, *The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts*, 61 DUKE L.J. 315, 321 (2011) (“By the 1970s, the phrase ‘crisis in volume’ was coined to describe the workload of the courts of appeals.”).

5. Marin K. Levy, *Judicial Attention as a Scarce Resource: A Preliminary Defense of How Judges Allocate Time across Cases in the Federal Courts of Appeals*, 81 GEO. WASH. L. REV. 401, 402–03, 405 n.19, 407–09 (2013).

6. Levy, *supra* note 4, at 324 n.44 (citation omitted).

7. Levy, *supra* note 5, at 407–08 (internal quotation marks and citation omitted).

recent years.<sup>8</sup> For example, in the first five years of the Obama administration, the average time between vacancy and nomination for circuit judges was 310 days, and the average time between nomination and confirmation was 253 days.<sup>9</sup> In the most extreme cases, some circuit vacancies, including the D.C. Circuit seat that became vacant upon John G. Roberts's elevation to Chief Justice,<sup>10</sup> have lasted for over eight years.<sup>11</sup> For every vacant seat, there is a stack of appeals that must be re-distributed to judges who have already been confirmed;<sup>12</sup> and the longer the vacancy, the higher the stack. This increase in per-judge caseload predictably leads to delays, backlogs, and even sub-optimal work product. The administration of appellate justice suffers.<sup>13</sup>

8. See Carl Tobias, *Senate Gridlock and Federal Judicial Selection*, 88 NOTRE DAME L. REV. 2233, 2234–38 (2013) (summarizing the history of extended circuit vacancies).

9. Russell Wheeler, *Judicial Nominations and Confirmations: Fact and Fiction*, FixGov: Making Government Work (Dec. 30, 2013, 10:33 a.m.), <http://www.brookings.edu/blogs/fixgov/posts/2013/12/30-staffing-federal-judiciary-2013-no-breakthrough-year> (including tables 5 and 11, which show the average number of days from vacancy to nomination and the average number of days from nomination through hearing to confirmation in the Clinton, G.W. Bush, and Obama administrations) (accessed Feb. 2, 2015; copy on file with Journal of Appellate Practice and Process).

10. Administrative Office of the United States Courts, *Archive of Judicial Vacancies, Vacancy List as of Dec. 1, 2013*, <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/ArchiveOfJudicialVacancies.aspx> (accessed Feb. 4, 2015; copy on file with Journal of Appellate Practice and Process).

11. See Andrew L. Adler, *Eight Years and Counting: The Longest Current Judicial Vacancy and the Political Dynamic that Produced It*, 97 JUDICATURE 125 (Nov./Dec. 2013) (discussing the circumstances surrounding two such vacancies).

12. See Carl Tobias, *Filling the District of Arizona Vacancies*, 56 ARIZ. L. REV. SYL. 5, 6 (2014) (pointing out that “[t]he vacancy crisis places additional pressure on sitting judges”). The article is available at <http://www.arizonalawreview.org/2014/syllabus/tobias>; clicking “view PDF” at the bottom of the page on which it appears links to a copy bearing page numbers.

13. See, e.g., Thomas E. Baker, *Applied Freakonomics: Explaining the “Crisis of Volume”*, 8 J. APP. PRAC. & PROCESS 101, 114 (2006) (opining that, in response to the so-called crisis of volume, “we now take for granted what were once characterized as ‘emergency’ procedures,” that “[w]e have lowered our expectations for appellate procedure,” that “[w]e have defined down our appellate values,” and that “[w]e all have internalized the postmodern norms of the minimalist procedural paradigm”); William M. Richman, *An Argument on the Record for More Federal Judgeships*, 1 J. APP. PRAC. & PROCESS 37, 38 (1999) (opining that, as a consequence of the caseload crisis, “the overall quality of the work of the circuit courts has declined markedly,” the concomitant case-management techniques have created a system consisting of two “different tracks of justice for different cases and different litigants,” and the “reductions in oral argument deprive[d] litigants of the assurance that the judges have paid some personal attention to their cases”).

To ameliorate their heavy caseload, courts of appeals have employed controversial case-management techniques that include, for instance, granting oral argument in fewer cases, publishing fewer precedential opinions, and delegating increased responsibility to law clerks and staff attorneys.<sup>14</sup> “Despite these innovations, the regional courts of appeals continue to operate under stress because filings have, for the most part, continued to rise.”<sup>15</sup> And the stress persists despite the commendable contribution of senior judges, who have “little or no financial incentive” to “continue working well after they have reached the retirement age of most Americans.”<sup>16</sup> While some “have called for changes to the courts’ constraints—an increase in the numbers of judges or a decrease in the number of cases,” neither proposal “has gained political traction in the decades since they were first proposed.”<sup>17</sup>

It is therefore unsurprising that federal courts of appeals have also taken advantage of one option that Congress has long afforded them: visiting judges.<sup>18</sup> To manage their heavy caseloads,<sup>19</sup> many federal courts of appeals regularly use visiting

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14. See, e.g., Marin K. Levy, *Judging Justice on Appeal*, 123 YALE L.J. 2386, 2393–2402 (2014) (reviewing William M. Richman & William L. Reynolds, *INJUSTICE ON APPEAL: THE UNITED STATES COURTS OF APPEALS IN CRISIS* (Oxford Univ. Press 2013)).

15. Levy, *supra* note 4, at 324.

16. David R. Stras & Ryan W. Scott, *Are Senior Judges Unconstitutional?* 92 CORNELL L. REV. 453, 455 (2007) (“Without senior judges, some appellate courts would face a disastrous build-up of backlogs, severe problems administering justice in a timely fashion, or even a total breakdown in the trial of civil cases. Senior judges are indispensable, essential, inestimable, invaluable.”) (internal quotation marks, brackets, and citations omitted).

17. Levy, *supra* note 5, at 404; see Baker, *supra* note 13, at 112–13 (summarizing prior structural proposals to the federal appellate courts, and explaining that “more recently there seems to be no interest in them whatsoever on the part of the judges or the Congress, the officials with the power to implement them. . . . The powers-that-be apparently have opted for retaining the present structure, at least for the indefinite future.”).

18. See Jeffrey Budziak, *Fungible Justice: The Use of Visiting Judges in the United States Courts of Appeals*, at 11–15 (2011) (unpublished Ph.D. dissertation, Ohio State University) (tracing the history of visiting judges back to the mid-nineteenth and early twentieth centuries), available at [https://etd.ohiolink.edu/ap/10?0:NO:10:P10\\_ACCESSION\\_NUM:osu1312564916](https://etd.ohiolink.edu/ap/10?0:NO:10:P10_ACCESSION_NUM:osu1312564916) (accessed Feb. 3, 2015; copy on file with Journal of Appellate Practice and Process).

19. See Administrative Office of the United States Courts, *2011 Annual Report of the Director, Support to Judges, Visiting Judges*, [http://www.uscourts.gov/annualreport\\_2011/Support\\_To\\_Judges.aspx](http://www.uscourts.gov/annualreport_2011/Support_To_Judges.aspx) (“The Judiciary uses intercircuit and intracircuit assignments of Article III judges to provide short-term assistance to courts with overwhelming caseloads.”); Richard B. Saphire & Michael E. Solimine, *Diluting Justice on Appeal?: An*

judges from other Article III courts, who temporarily sit by designation.<sup>20</sup> Each year from 1997 to 2013, at least 300—and sometimes more than 400—different visiting judges have annually participated in approximately 3,700 to 5,400 appeals terminated on the merits, representing from approximately four to almost seven percent of all such appeals.<sup>21</sup> While this practice is not without potential inefficiencies,<sup>22</sup> visiting judges help relieve the pressure created by heavy caseloads. It has been reported, for example, that the consequences for one busy appellate court would have been “catastrophic were designated

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*Examination of the Use of District Court Judges Sitting by Designation on the United States Courts of Appeals*, 28 U. MICH. J.L. REF. 351, 362–63 (1995) (“Virtually all of the circuits . . . stated or implied that district judges were being used routinely to deal with heavy appellate work caused by numerous appeals or by unfilled vacancies.”).

20. See, e.g., Budziak, *supra* note 18, at 21 (table showing use of visiting judges among regional circuits from 1997 to 2010). One notable exception is the D.C. Circuit, which rarely uses visiting judges. Levy, *supra* note 4, at 384 n.414; James J. Brudney & Corey Distlear, *Designated Diffidence: District Court Judges on the Courts of Appeals*, 35 L. & SOC’Y REV. 565, 575 n.15 (2001).

21. The statistics mentioned in this sentence were derived by the author from official federal-courts data for the years 1997 through 2013. See, e.g., Administrative Office of the United States Courts, *Judicial Business 2013, Table V-2, U.S. Courts of Appeals—Services Provided by Visiting Judges in Appeals Terminated* (2013) (compiling statistics for 2013), *Table S-2, U.S. Courts of Appeals—Total Case Participations in Cases Terminated on the Merits After Oral Hearings or Submission on Briefs* (same); see also Budziak, *supra* note 18, at 19 (figure graphing the number of visiting judges against the number of total appeals from 1975 to 2010). For statistics on the use of visiting judges in the Ninth Circuit, for example, see Morgan Christen, *Introduction*, 43 GOLDEN GATE U. L. REV. 1, 3 (2013) (“Our circuit also receives considerable help from district judges and judges visiting from other parts of the country. In the year ending June 30, 2012, these judges participated in 4.9% of the appeals our circuit resolved on the merits.”); Susan P. Graber, *Introduction*, 42 GOLDEN GATE U. L. REV. 1, 2 (2011) (“This past year, visiting judges participated in more than 1,100 cases that were decided on the merits.”); Marsha S. Berzon, *Introduction*, 41 GOLDEN GATE U. L. REV. 287, 287 n.1 (2011) (noting that the Ninth Circuit “had 185 visiting judges—district judges from the Ninth Circuit and district and circuit judges from elsewhere—helping us out by sitting on panels” in 2010).

22. See, e.g., Administrative Office of the United States Courts, *Committee Answers Courts’ Calls for Help*, THIRD BRANCH, Dec. 2010, at 10, 10 (noting that Chair of Judicial Conference Committee on Intercircuit Assignments suggested that, when compared to in-circuit visiting judges, out-of-circuit visiting judges may not know the law of the circuit, may not know the quality of the work of the assigned judge, and may incur greater travel costs); Sara C. Benesh, *The Contribution of “Extra” Judges*, 48 ARIZ. L. REV. 301, 302–03 (2006) (summarizing inefficiencies with regard to visiting district judges—namely, they may be unfamiliar with appellate practice and the operation of the federal courts of appeals; they often require assistance; their top priority remains their busy docket back home, leading to delays in turn-around time; and they are often assigned lighter cases while the circuit judges on the panel are assigned the more difficult cases).

judges not available to sit,” and one circuit judge has remarked that his court “could not have functioned without” visiting district judges.<sup>23</sup>

Nonetheless, visiting judges are not a panacea, and Congress has prescribed procedures and standards that must be followed before visiting judges may be designated to sit temporarily on the federal courts of appeals. These procedures and standards vary based on the status of the visiting judge, reflecting the fact that Congress has carefully considered the use of visiting judges and does not regard federal judges as fully fungible.<sup>24</sup> First, the Chief Justice may, “in the public interest,” designate out-of-circuit circuit judges “upon request by the chief judge or circuit justice” for that circuit.<sup>25</sup> Second, the Chief Judge of the circuit may designate in-circuit district judges “whenever the business of that court so requires.”<sup>26</sup> And, third, the Chief Justice may designate out-of-circuit district judges “upon presentation of a certification of necessity by the chief judge or circuit justice of the circuit wherein the need arises.”<sup>27</sup> While, in practice, these procedures and standards do not pose substantial obstacles, they reflect Congress’s unwillingness to allow the unfettered use of visiting judges.

That unwillingness is most evident in a critical limitation in the Federal Courts Improvement Act of 1982.<sup>28</sup> The accompanying Senate Report observed that, under then-current law, “a three-judge appellate panel may be composed of any combination of active, senior, designated, or district court federal judges.”<sup>29</sup> As a result, it was not “infrequent that there [would] be only one circuit judge on a panel or that the presiding judge [would] be a senior judge or a judge from another

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23. Benesh, *supra* note 22, at 304 (quotation marks and citations omitted).

24. *Cf. Glidden v. Co. v. Zdanok*, 370 U.S. 530, 604 (1962) (Douglas, J., dissenting) (“My view is that we subtly undermine the constitutional system when we treat federal judges as fungible.”).

25. 28 U.S.C. § 291(a).

26. *Id.* § 292(a).

27. *Id.* § 292(d).

28. Pub. L. No. 97-164, § 103(b)(2), 96 Stat. 25, 25–26 (1982) (providing that “at least a majority” of the judges sitting on a panel in a federal court of appeals “shall be judges of that court, unless such judges cannot sit because recused or disqualified, or unless the chief judge of that court certifies that there is an emergency”).

29. S. Rep. No. 97-275, at 26, *reprinted in* 1982 U.S.C.A.N. 11, 36 [hereinafter *1982 Senate Report*].



circuit.”<sup>30</sup> Congress believed that “such situations [would] lead to doctrinal instability and unpredictability in the law of the circuit because district court and court of appeals judges from outside the circuit may not know or may not feel bound by the law of that circuit.”<sup>31</sup> Congress therefore drew the line at one visiting judge per panel, revising section 46(b) to require that panels consist of “three judges, at least a majority of whom shall be judges of that court.”<sup>32</sup> Congress believed that, as visiting judges became more frequently utilized,<sup>33</sup> this majority requirement would “discourage[ ] any unnecessary borrowing of judges”<sup>34</sup> and “provide greater stability and predictability in the law being applied in any given area of the country.”<sup>35</sup> In short, section 46(b), as amended, reflects a strong Congressional preference that appellate panels be composed of at least two judges of the presiding court.

Significantly, however, Congress also codified exceptions in two “unless” clauses. Specifically, section 46(b) provides that appeals may be resolved by

panels, each consisting of three judges, at least a majority of whom shall be judges of that court, *unless* such judges cannot sit because recused or disqualified, or *unless* the chief judge of that court certifies that there is an emergency including, but not limited to, the unavailability of a judge of the court because of illness.<sup>36</sup>

Thus, Congress included one exception for recusals or disqualifications, and one for emergencies. For present purposes, the key statutory issue is whether the emergency exception—“an emergency including, but not limited to, the unavailability of a judge of the court because of illness”—encompasses situations

30. *Id.* at 9, reprinted in 1982 U.S.C.C.A.N. at 19.

31. *Id.*

32. 28 U.S.C. § 46(b).

33. 1982 *Senate Report*, *supra* note 29, at 9, reprinted in 1982 U.S.C.C.A.N. at 19 (acknowledging that “a substantial number of judges from outside the circuit sit[ ] by designation” and that “district judges sit[ ] regularly on the courts of appeals”).

34. *Id.*

35. *Id.* at 26, reprinted in 1982 U.S.C.C.A.N. at 36; see *In re Bongiorno*, 694 F.2d 917, 918 n.1 (2d Cir. 1982) (“Congress’s purpose in enacting [§ 46(b)] was to prevent the instability and unpredictability in the law of a circuit that could result if many panels were composed principally of judges from ‘outside’ the circuit.”) (citations omitted).

36. 28 U.S.C. § 46(b) (emphasis added).

in which extended vacancies exacerbate the burden that a court's heavy caseload poses for the other judges.

At least a handful of courts of appeals have resolved that issue affirmatively, certifying an emergency under section 46(b) based on the vacancy-caseload combination. For example, the Fifth Circuit has done so at least twice, once in 1991 and again in 1999. In each case, the chief judge's certification order described the court's heavy caseload, the number of vacancies, and the uncertain status of filling those vacancies.<sup>37</sup> Notably, in the 1991 order, Chief Judge Charles Clark criticized the executive for failing to make nominations to fill the vacancies, despite the court's pleas for help.<sup>38</sup>

Other courts have also certified section 46(b) emergencies based on vacancies and caseload. For example, the Second Circuit certified a section 46(b) emergency in 1998 "when five out of thirteen judicial positions on the circuit had become vacant—and were left unfilled by a Senate hostile to the President's nominees."<sup>39</sup> That court ultimately resolved over fifty appeals with emergency panels.<sup>40</sup> The Tenth Circuit reportedly certified a section 46(b) emergency based on vacancies and caseload in 1994.<sup>41</sup> And, as mentioned at the

37. See Order Declaring an Emergency Under 28 U.S.C. § 46(b) (5th Cir. Sept. 28, 1999) (Carolyn Dineen King, C.J.) ("In sum, the three judicial vacancies, the injury to an active judge and the sustained high level of case filings have created a judicial emergency in the court."); Order Declaring an Emergency under 28 U.S.C. § 46(b) (5th Cir. Oct. 28, 1991) (Charles Clark, C.J.) ("This court is authorized to have 17 judges in regular active service. Today, the number of judges so serving is 13. Only one nomination has been sent to the Senate for its advice and consent. It is now pending in the Senate. The circuit is experiencing increases in appellate filings greater than those experienced in any other United States court of appeals.") [hereinafter Clark Emergency Order].

38. Clark Emergency Order, *supra* note 37; see also A. Leo Levin, *Beyond Techniques of Case Management: The Challenge of the Civil Justice Reform Act of 1990*, 67 ST. JOHN'S L. REV. 877, 883 n.36 (1993) (quoting Clark Emergency Order and, echoing Congress's concern underlying the majority requirement, noting that panels composed of multiple visiting judges would have a "significant impact on the precedential value of the decisions rendered as well as on litigant satisfaction").

39. Bert I. Huang, *Lightened Scrutiny*, 124 HARV. L. REV. 1109, 1126 (2011).

40. These cases are identifiable by an asterisk footnote. See, e.g., *United States v. Truscello*, 168 F.3d 61, 62 n.\*\*\* (2d Cir. 1999) ("Pursuant to 28 U.S.C. § 46(b) and an order of the Chief Judge of this Court certifying a judicial emergency, this case was heard by an emergency panel consisting of one judge from this Court and two judges from the United States District Court sitting by designation.").

41. Gordon Bermant, Jeffrey A. Hennemuth & A. Fletcher Mangum, *Judicial Vacancies: An Examination of the Problem and Possible Solutions*, 14 MISS. C. L. REV.

beginning of this article, the Eleventh Circuit recently did so in General Order 41.<sup>42</sup>

Thus, several circuits have, understandably, taken the position that judicial vacancies and a heavy caseload can give rise to an emergency for purposes of section 46(b). That position is reinforced by the Administrative Office of the United States Courts, which compiles a list of vacancies that it considers “judicial emergencies” in urgent need of filling.<sup>43</sup> For the federal courts of appeals, it determines judicial emergencies based on the duration of vacancies and the number of filings per panel in a circuit, with the weight of filings adjusted based on the type of case.<sup>44</sup> While these judicial emergencies have no legal relationship to section 46(b), they indicate that the federal judiciary, as an institution,<sup>45</sup> believes that extended vacancies

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319, 319 n.2 (1994) (noting that the Tenth Circuit declared an emergency under § 46(b) “because of persistent vacancies and increasing workload,” citing Chief Judge’s Order Declaring an Emergency under 28 U.S.C. § 46(b) (10th Cir. Mar. 29, 1994)).

42. Other examples may exist, but unfortunately they are difficult to identify. With the exception of General Order 41, emergency certification orders are generally not available on courts’ websites or legal databases, and opinions issued in cases decided by irregular panels often do not explain the reason for their composition. For example, the Eighth Circuit certified a section 46(b) emergency in 2000, resolving at least seventeen appeals with emergency panels, but the opinions did not specify the nature of the emergency. *See, e.g., United States v. Gallardo-Marquez*, 253 F.3d 1121, 1122 n.3 (8th Cir. 2001) (“Pursuant to 28 U.S.C. § 46(b), the Chief Judge certified the existence of a judicial emergency necessitating the designation of a panel consisting of fewer than two members of the Court of Appeals.”). The Fourth Circuit resolved at least fifteen cases with panels consisting of two visiting judges from 1990 to 1994, but the opinions did not reference section 46(b). *See Saphire & Solimine, supra* note 19, at 382 & n.134 (citing cases). And the same is true of at least one Eleventh Circuit case decided before General Order 41. *See Gulf Power Co. v. FCC*, 226 F.3d 1220, 1223 (11th Cir. 2000) (Carnes, J., concerning the denial of rehearing en banc) (citing *Parris v. The Miami Herald Publ’g Co.*, 216 F.3d 1298, 1299 (11th Cir. 2000)).

43. United States Courts, *Judges & Judgeships, Judicial Vacancies, Judicial Emergencies*, <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/JudicialEmergencies.aspx> (characterizing thirteen vacancies, one of which had existed for 3,322 days as of early February 2015, as judicial emergencies) (accessed Feb. 4, 2015; copy on file with Journal of Appellate Practice and Process).

44. *See id.* (defining “judicial emergency” for federal courts of appeals as “any vacancy in a court of appeals where adjusted filings per panel are in excess of 700; or any vacancy in existence more than 18 months where adjusted filings are between 500 to 700 per panel”); *see also* Arthur D. Hellman, *Assessing Judgeship Needs in the Federal Courts of Appeals: Policy Choices and Process Concerns*, 5 J. APP. PRAC. & PROCESS 239, 244–52 (2003) (discussing the adjusted-filing metric in the context of requests for additional judgeships).

45. The Administrative Office of the United States Courts operates under the

and a heavy caseload can give rise to an “emergency.”

More surprising is that section 46(b) emergency certifications went unchallenged in court.<sup>46</sup> Indeed, emergency panels have resolved numerous appeals over the years, which likely produced dissatisfied litigants, and there *have* been challenges to the composition of other irregular panels in the past.<sup>47</sup> While some of those challenges involved section 46(b) and related issues, none challenged the certification of a section 46(b) emergency, let alone one based on the vacancy-caseload combination. The Eleventh Circuit recently confronted and addressed the first such challenge.

### III. THE DISMAL CONDITIONS IN THE ELEVENTH CIRCUIT, GENERAL ORDER NO. 41, AND THE *RODRIGUEZ* CASE

#### *A. Conditions in the Eleventh Circuit*

At the time the Eleventh Circuit split off from the Fifth Circuit in 1981, it “was a court of twelve judges and 2,556

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“supervision and direction of the Judicial Conference of the United States,” 28 U.S.C. § 604(a), which is charged with, *inter alia*, “mak[ing] a comprehensive survey of the condition of business in the courts of the United States and prepar[ing] plans for assignment of judges to or from circuits or districts where necessary.” 28 U.S.C. § 331.

46. Or, at least, any such challenges went unaddressed by the courts and thus went unreported.

47. *See, e.g.*, *Nguyen v. United States*, 539 U.S. 69 (2003) (holding that a Ninth Circuit panel consisting of two Article III judges and one Article IV judge lacked authority to decide petitioners’ appeals); *United States v. Desimone*, 140 F.3d 457 (2d Cir. 1998) (concluding that the majority requirement of § 46(b) was not violated when a circuit judge on a panel died after oral argument, and the decision was rendered by one circuit judge and one visiting judge); *Murray v. Nat’l Broadcasting Co., Inc.*, 35 F.3d 45, 46 (2d Cir. 1994) (concluding that a “case may be validly adjudicated by a panel of two circuit judges under circumstances where one of the three judges originally assigned to hear the appeal recused himself immediately before oral argument”); *Cone Corp. v. Hillsborough Cnty.*, 995 F.2d 185, 185–86 (11th Cir. 1993) (en banc) (holding that a senior judge was a “judge of that court” for purposes of § 46(b)’s majority requirement); *United States v. Claiborne*, 870 F.2d 1463, 1466–67 (9th Cir. 1989) (rejecting argument that chief judge of the Ninth Circuit should have polled the other circuit judges of the Ninth Circuit before certifying the need for out-of-circuit circuit judges under 28 U.S.C. § 291(a)); *Bongiorno*, 694 F.2d at 918 n.1 (concluding, *sua sponte*, that senior judges constituted “judges of that court” for purposes of § 46(b)’s majority requirement); *Bessemer & Lake Erie R. Co. v. I.C.C.*, 691 F.2d 1104, 1117 (3d Cir. 1982) (upholding the validity of a panel composed of one active circuit judge and two district judges, because all of the other circuit judges had disqualified themselves or were otherwise ineligible to hear the case).

filings.”<sup>48</sup> From 2012 to 2014, over thirty years later, filings ranged from approximately 6,000 to almost 6,500, ranking it third among the circuits in total appeals filed.<sup>49</sup> Despite this substantial increase in volume, the Eleventh Circuit still has only twelve authorized judgeships. That is by request. In 2003, the Judicial Conference of the United States submitted recommendations to Congress for additional circuit judgeships; based on the adjusted-filing caseload metric used, the Eleventh Circuit would have been justified in requesting at least ten new judgeships.<sup>50</sup> Seeking to remain as small as possible, however, the court declined to request a single new judgeship, citing concerns about the coherence and stability of circuit precedent, as well as collegiality.<sup>51</sup>

The result is that the Eleventh Circuit is one of the busiest federal appellate courts in the country. In 2013, the Eleventh Circuit had the most total appeals filed and total appeals terminated when those numbers were divided by the number of authorized panels.<sup>52</sup> Moreover, the Eleventh Circuit issued 325 written opinions per active judge; the next closest circuit issued only 234, and only one other circuit issued over 200.<sup>53</sup> The Eleventh Circuit terminated 913 actions on the merits per active judge; the next closest circuit terminated 745, and only one other circuit terminated more than 700.<sup>54</sup> And the Eleventh Circuit

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48. Hellman, *supra* note 44, at 254.

49. Administrative Office of the United States Courts, *Statistics, Federal Judicial Caseload Statistics, Caseload Statistics 2014, Table B-1* (showing 6,047 new cases commenced in the Eleventh Circuit); Administrative Office of the United States Courts, *Statistics, Federal Judicial Caseload Statistics, Caseload Statistics 2013, Table B-1* (showing 6,226 new cases commenced in the Eleventh Circuit); Administrative Office of the United States Courts, *Statistics, Federal Judicial Caseload Statistics, Caseload Statistics 2012, Table B-1* (showing 6,446 new cases commenced in the Eleventh Circuit).

50. Hellman, *supra* note 44, at 253 & n.49, 255 n.54.

51. *Id.* at 255; *see id.* at 254–60 (questioning the Eleventh Circuit’s decision not to request additional judgeships despite a significant rise in caseload).

52. Administrative Office of the United States Courts, Federal Court Management Statistics Archive, Appeals Summary Pages, *U.S. Court of Appeals Summary—12-Month Period Ending December 31, 2013* [hereinafter December 2013 Summary]. An electronic copy of the Summary is available at <http://www.uscourts.gov/viewer.aspx?doc=/uscourts/Statistics/FederalCourtManagementStatistics/2013/appeals-fcms-summary-pages-december-2013.pdf>.

53. *Id.*

54. *Id.*

issued 243 procedural terminations per active judge; the next closest circuit had 139, and no other circuit had more than 100.<sup>55</sup>

Similar numbers existed in 2012 and 2011. In 2012, the Eleventh Circuit was comfortably first in total appeals filed and total appeals terminated per panel.<sup>56</sup> Likewise, the court led the way with 291 written opinions per active judge and 214 procedural terminations per active judge (more than double the next circuit); and it was second in terminations on the merits per active judge.<sup>57</sup> In 2011, the Eleventh Circuit again led in total appeals filed and total appeals terminated per panel.<sup>58</sup> And the court was first in procedural terminations per active judge, and only slightly trailed the Fourth Circuit in both written opinions per active judge and terminations on the merits per active judge.<sup>59</sup>

Given the historical increase in filings but static number of judgeships, the Eleventh Circuit can ill afford extended judicial vacancies. Yet in 2013, the Eleventh Circuit ranked second among the circuits with 29.2 months as the total number of months with vacant judgeships.<sup>60</sup> In 2012, it ranked fourth with nineteen months.<sup>61</sup> And, in 2011, it again endured 19.1 total months.<sup>62</sup> Because the Eleventh Circuit has one of the highest

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55. *Id.*

56. Administrative Office of the United States Courts, Federal Court Management Statistics Archive, Appeals Summary Pages, *U.S. Court of Appeals Summary—12-Month Period Ending December 31, 2012* [hereinafter December 2012 Summary]. An electronic copy of the Summary is available at <http://www.uscourts.gov/viewer.aspx?doc=/uscourts/Statistics/FederalCourtManagementStatistics/2012/appeals-fcms-summary-pages-december-2012.pdf>.

57. *Id.*

58. Administrative Office of the United States Courts, Federal Court Management Statistics Archive, Appeals Summary Pages, *U.S. Court of Appeals Summary—12-Month Period Ending December 31, 2011* [hereinafter December 2011 Summary]. An electronic copy of the Summary is available at [http://www.uscourts.gov/viewer.aspx?doc=/uscourts/Statistics/FederalCourtManagementStatistics/2011/Appeals\\_FCMS\\_Summary\\_Pages\\_December\\_2011.pdf](http://www.uscourts.gov/viewer.aspx?doc=/uscourts/Statistics/FederalCourtManagementStatistics/2011/Appeals_FCMS_Summary_Pages_December_2011.pdf).

59. *Id.*

60. See December 2013 Summary, *supra* note 52, at *Explanation of Selected Terms* (providing that “[v]acant judgeship months are the total number of months that vacancies occurred in any judgeship position in a circuit or district”).

61. December 2012 Summary, *supra* note 56.

62. December 2011 Summary, *supra* note 58.

per-judge caseloads even when all of its judgeships are filled,<sup>63</sup> these vacancies greatly exacerbated the difficulties caused by that heavy caseload.

Four of these vacancies existed as of December 30, 2013, when the court declared its emergency.<sup>64</sup> The first vacancy arose with the retirement of Judge Stanley F. Birch, Jr., in August 2010.<sup>65</sup> The second vacancy arose in July 2012, when Judge J.L. Edmondson took senior status after serving for over twenty-five years on the court.<sup>66</sup> The third vacancy arose on September 30, 2013, when Judge Rosemary Barkett retired after serving for nearly twenty years on the court.<sup>67</sup> The final vacancy arose on October 26, 2013, when Judge Joel F. Dubina took senior status after serving for over twenty years on the court.<sup>68</sup> Notably, even before Judge Barkett announced her retirement,<sup>69</sup> Judge Dubina had selflessly decided to delay taking senior status for several

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63. For example, the court had no vacancies in 2008, yet still had the most appeals filed and terminated per panel, the most terminations on the merits per judge, and the most procedural terminations per judge. Administrative Office of the United States Courts, Federal Court Management Statistics Archive, Appeals Summary Pages, *U.S. Court of Appeals—Judicial Caseload Profile* (comparing the circuits). An electronic copy of the Profile is available at <http://www.uscourts.gov/viewer.aspx?doc=/cgi-bin/cmsa2008.pl>. And, in 2002, the court had only one vacancy, yet still had the highest adjusted filings per panel of any circuit. See Hellman, *supra* note 44, at 253 (recounting that adjusted filings per panel were 1,120 in the Eleventh Circuit, whereas that figure ranged from 583 to 870 for four circuits requesting additional judgeships).

64. There was another vacancy on the court from February 2011, when Judge Susan H. Black took senior status, to February 2012, when Judge Adalberto J. Jordan was confirmed to fill the vacancy. Federal Judicial Center, *Biographical Directory of Federal Judges*, <http://www.fjc.gov/history/home.nsf/page/judges.html> (type “Jordan” in search box, click “Go,” then click “Jordan, Adalberto Jose”) (indicating that Judge Jordan was nominated on August 2, 2012, and commissioned on February 17, 2012); *id.* (type “Black” in search box, click “Go,” then click “Black, Susan Harrell”) (indicating that Judge Black took senior status on February 25, 2011) (both accessed Feb. 6, 2015; copies on file with Journal of Appellate Practice and Process).

65. *Id.* (type “Birch” in search box, click “Go,” then click “Birch, Stanley F. Jr.”) (accessed Feb. 6, 2015; copy on file with Journal of Appellate Practice and Process).

66. *Id.* (type “Edmondson” in search box, click “Go,” then click “Edmondson, James Larry”) (accessed Feb. 6, 2015; copy on file with Journal of Appellate Practice and Process).

67. *Id.* (type “Barkett” in search box, click “Go,” then click “Barkett, Rosemary”) (accessed Feb. 6, 2015; copy on file with Journal of Appellate Practice and Process).

68. *Id.* (type “Dubina” in search box, click “Go,” then click “Dubina, Joel Fredrick”) (accessed Feb. 6, 2015; copy on file with Journal of Appellate Practice and Process).

69. Bill Rankin, *Barkett to Leave Appeals Court*, Atlanta J.-Constitution, Aug. 19, 2013, at 5B.

months due to the court's pending vacancies and heavy caseload,<sup>70</sup> explaining that "[l]eaving the Court with three vacancies is just an intolerable situation for my colleagues."<sup>71</sup>

In sum: Filings have more than doubled in the Eleventh Circuit since its creation; the number of authorized judgeships has nonetheless remained the same; four of the court's twelve authorized judgeships were vacant at the time of the certified emergency; one seat had been vacant for over three years, and another seat had been vacant for well over a year; the Administrative Office of the United States Courts considered all four vacancies judicial emergencies;<sup>72</sup> and the Eleventh Circuit led the circuits in per-judge caseload in 2013. If extended vacancies and a heavy per-judge caseload can constitute an emergency within the meaning of section 46(b), then it would be difficult to dispute that the conditions in the Eleventh Circuit rose to that level in late 2013.

### *B. General Order 41*

On December 30, 2013, about two months after the fourth vacancy arose, the Eleventh Circuit issued General Order 41.<sup>73</sup> Writing "for the Court,"<sup>74</sup> Chief Judge Carnes, after quoting the relevant portions of section 46(b), "certif[ied] that there is an emergency requiring some cases and controversies before this Court to be heard and determined by three-judge panels consisting of fewer than two judges of this Court."<sup>75</sup> The Order was to "remain in effect until [Chief Judge Carnes] or another judge duly authorized to act as Chief Judge formally declare[d]

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70. Bill Rankin, *Chief Judge May Wait before Taking Senior Status*, AJC.com (Feb. 4, 2013, 6:31 p.m.), <http://www.ajc.com/news/news/local/chief-judge-may-wait-before-taking-senior-status/nWFtj/> (accessed Feb. 6, 2015; copy on file with Journal of Appellate Practice and Process).

71. *Id.*

72. Administrative Office of the United States Courts, *Archive of Judicial Vacancies, Judicial Emergencies as of Dec. 1, 2013*, <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/ArchiveOfJudicialVacancies.aspx> (accessed Feb. 9, 2015; copy on file with Journal of Appellate Practice and Process).

73. General Order 41, *supra* note 1.

74. *Id.* at 2.

75. *Id.* at 1.



that a 28 U.S.C. § 46(b) emergency no longer exists.”<sup>76</sup> Although General Order 41 did not specify the nature of the emergency, Chief Judge Carnes gave an interview shortly after it was issued, confirming that the emergency arose from the court’s four vacancies and heavy caseload.<sup>77</sup>

Shortly after General Order 41 was issued, emergency panels began presiding over oral arguments in non-capital cases scheduled for oral argument. While such cases account for only approximately ten percent of the court’s cases,<sup>78</sup> they are often the most difficult; hence their placement on the oral argument calendar. As of February 26, 2015, emergency panels had resolved 113 Eleventh Circuit appeals. The composition of the emergency panels varied, and included the following combinations: one active Eleventh Circuit judge and two in-circuit district judges;<sup>79</sup> one active Eleventh Circuit judge and two out-of-circuit district judges;<sup>80</sup> one senior Eleventh Circuit judge and two in-circuit district judges;<sup>81</sup> one active Eleventh Circuit judge, one in-circuit district judge, and one out-of-circuit district judge;<sup>82</sup> one active Eleventh Circuit judge, one out-of-

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76. *Id.* at 1–2.

77. Alyson M. Palmer, *Expect to See More Visiting Judges at 11th Circuit: Vacancies Lead Chief Judge to Temporarily Allow More Than One Visiting Judge Per Panel*, DAILY REP., Jan. 13, 2014, at 1. Chief Judge Carnes opined in the interview that section 46(b)’s majority requirement was “a rule for a good reason,” but explained that he could not “ask our active judges [to do] any more. We’re all just so darn busy.” *Id.* Addressing the implications of General Order 41 in an interview with the same reporter, Judge Birch commented that “in his experience visiting judges do not defer on legal matters to the Eleventh Circuit judges with which they sit,” but that “it’s possible [that] having panels with two visiting judges will cause the court to take up a few more cases as a whole court sitting en banc,” since the Eleventh Circuit judges may be “more attuned to looking at panel opinions where there’s only one circuit judge on there.” *Id.* Addressing a related matter in the same interview, Chief Judge Carnes recounted how the court had “resisted increasing the size of the court” to avoid “dilut[ing] the court’s collegiality or prestige or mak[ing] it more difficult to preserve the stability and cohesiveness of the court’s precedent.” *Id.* The latter concerns would presumably also arise by using more visiting judges.

78. In the twelve-month period ending September 30, 2013, 11.3 percent of the appeals terminated on the merits in the Eleventh Circuit received oral argument. Administrative Office of the United States Courts, *Table S-1, U.S. Court of Appeals—Appeals Terminated on the Merits After Oral Hearings or Submission of the Briefs* (2013).

79. *E.g.*, *United States v. Charlton*, 559 F. App’x 845 (11th Cir. Mar. 14, 2014).

80. *E.g.*, *Travelers Prop. Cas. Co. of Am. v. Moore*, 763 F.3d 1265 (11th Cir. 2014).

81. *E.g.*, *Metcalfe v. Postmaster Gen.*, 556 F. App’x 909 (11th Cir. Mar. 3, 2014).

82. *E.g.*, *United States v. Kaba*, 568 F. App’x 882 (11th Cir. June 16, 2014).

circuit circuit judge, and one in-circuit district judge;<sup>83</sup> one active Eleventh Circuit judge, one judge of the United States Court of International Trade, and one in-circuit district judge;<sup>84</sup> and one active Eleventh Circuit judge, one judge of the United States Court of International Trade, and one out-of-circuit district judge.<sup>85</sup>

Of the 113 opinions issued under General Order 41 thus far,<sup>86</sup> fifty have been precedential and sixty-three have been non-precedential.<sup>87</sup> Visiting trial judges (both district judges and judges from the Court of International Trade) have played a crucial role on these emergency panels. Panels that included two visiting trial judges have heard forty-two of the fifty precedential opinions and fifty-one of the sixty-three non-precedential opinions.<sup>88</sup> At least one trial judge has participated in the remaining cases.<sup>89</sup> Moreover, of the fifty precedential opinions issued under General Order 41, twenty-four have been authored by visiting judges, twenty of those by trial judges.<sup>90</sup> Not only have visiting trial judges authored precedential<sup>91</sup> (and non-precedential<sup>92</sup>) majority opinions, but they have done so over dissents,<sup>93</sup> and they themselves have written separately.<sup>94</sup> Visiting circuit judges have likewise authored precedential and

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83. *E.g.*, *United States v. Peluffo*, 558 F. App'x 853 (11th Cir. Mar. 5, 2014).

84. *E.g.*, *Caldwell v. Warden, FCI Talladega*, 748 F.3d 1090 (11th Cir. 2014).

85. *E.g.*, *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254 (11th Cir. 2014).

86. It is possible that some other decisions will be issued by General Order 41 panels, as there may at the time of this writing still be cases in which oral arguments have been held before Order 41 panels, but opinions have not yet been issued. *See infra* n.162 and accompanying text.

87. Andrew L. Adler, *Emergency Panels in the Eleventh Circuit after December 30, 2013* (Sept. 12, 2014; updated Feb. 26, 2015) (unpublished compendium on file with author) (containing information on cases compiled by searching "sitting by designation" and the relevant time period in the Eleventh Circuit database on WestLaw).

88. *Id.*

89. *Id.*

90. *Id.*

91. *E.g.*, *In re Scantling*, 754 F.3d 1323, 1325 n.\*\* (11th Cir. 2014) (characterizing Judge Schlesinger as sitting by designation).

92. *E.g.*, *United States v. Vinales*, 565 F. App'x 518 (11th Cir. 2014).

93. *E.g.*, *West v. Davis*, 767 F.3d 1063, 1065 (11th Cir. Sept. 8, 2014) (Bartle, J.); *id.* at 1073 (Benavides, J., dissenting in part).

94. *E.g.*, *Wetherington v. AmeriPath, Inc.*, 566 F. App'x 850, 852 \*2 (11th Cir. 2014) (Ungaro, J., concurring in part and dissenting in part).

dissenting opinions of their own.<sup>95</sup> In short, visiting judges, particularly trial judges, had a noticeable impact on the Circuit's precedent in 2014.

### C. Rodriguez on Rehearing

*Rodriguez* was decided by an emergency panel composed of a senior Eleventh Circuit judge and two visiting in-circuit district judges, and it rejected Rodriguez's appeal in a short unpublished opinion.<sup>96</sup> Rodriguez filed a petition for rehearing, challenging, *inter alia*, General Order 41 and the validity of the emergency panel's composition.<sup>97</sup>

Observing that the issue appeared to be one of first impression,<sup>98</sup> Rodriguez made the following arguments:

- General Order 41 impermissibly failed to identify the nature of the emergency, thereby precluding effective review.<sup>99</sup>
- Section 46(b)'s emergency exception might modify the requirement that there be three judges on a panel rather than the requirement that a majority of the judges on a panel be "judges of that court."<sup>100</sup>
- Section 46(b)'s emergency exception applies only to "uncontrollable event[s] affecting a discrete set of circumstances," a specific judge, or a particular category of cases, because the statutory example of illness refers to an "unexpected, temporary, and

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95. *E.g.*, *West*, 767 F.3d at 1073 (Benavides, J., dissenting in part); *Osorio v. State Farm Bank*, F.S.B., 746 F.3d 1242, 1246 n.\* (11th Cir. 2014) (indicating that Judge Gilman, who wrote for the court in *Osorio*, is a senior Sixth Circuit judge).

96. *Rodriguez*, 557 F. App'x 930.

97. *Rodriguez* Petition, *supra* note 2.

98. *Id.* at 10–11 (asserting that "[t]he statute is capable of more than one reading, and it is possible that the emergency provision of [the] statute is meant to apply only to the three-judge requirement," and taking the position that, "[b]ecause this is an issue of first impression in this Court, it should be addressed by the Court"), 14 (asserting that "it is at least subject to serious question whether an emergency within the meaning of § 46(b) exists," and characterizing that question as an additional "first impression issue").

99. *Id.* at 12–13.

100. *Id.* at 10–11.

dramatic event . . . meeting the ordinary understanding of the term ‘emergency.’”<sup>101</sup>

Rather than summarily denying Rodriguez’s petition, the emergency panel addressed the issue in a four-page precedential opinion.<sup>102</sup>

### 1. *An Unaddressed Threshold Issue*

As an initial matter, it is procedurally interesting that Rodriguez filed his petition for rehearing with the panel he claimed to have been invalid, and the panel accepted the invitation to adjudicate its own validity. Although the *Rodriguez* situation has apparently never been considered by another court, a decision by an emergency panel upholding its own validity may not seem to possess the hallmarks of neutrality.

The Second Circuit’s decision in *Desimone*, for example, is instructive on this point. There, the court denied a petition for rehearing that challenged the validity of a two-judge panel composed of one Second Circuit judge and one visiting judge when the third judge, a Second Circuit judge, died after oral argument.<sup>103</sup> However, the Chief Judge designated himself to the panel to resolve the rehearing petition (and authored the resulting opinion) after one of the two quorum judges opined that it “would not be appropriate for a two-judge panel with only one member of this court to resolve this particular claim.”<sup>104</sup>

Moreover, the *Rodriguez* panel, consisting of a senior Eleventh Circuit judge and two visiting judges, could have even questioned whether it had the authority to invalidate—or even to consider invalidating—General Order 41, an order entered “for the Court” by the Chief Judge. Conversely, had the panel found

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101. *Id.* at 11–13. Giving effect to an indefinite suspension would be particularly inappropriate, Rodriguez argued, when the asserted emergency “relates to a perception that Congress has intentionally or otherwise acted so as not to replace retiring judges,” because this would “intrude on the Congressional authority to determine the membership needs of a particular court.” *Id.* at 11.

102. *United States v. Rodriguez*, 753 F.3d 1206 (11th Cir. 2014) (per curiam).

103. 140 F.3d at 458–59 (pointing out that “[s]ection 46(d) embodies no requirement that the quorum contain a majority of judges who are members of the court; it requires only that it be a majority of a legally authorized panel”).

104. *Id.* at 458.

itself to have been invalidly constituted, such a finding would have raised the circuitous issue of whether that decision would itself have been valid. That quandary would have been far from academic, because such a decision would have threatened the legitimacy of all emergency panels authorized by General Order 41, and would thus have had a significant administrative impact.

These concerns might have been mitigated had the full court resolved Rodriguez's challenge. To be fair, his petition was addressed only to the original panel, and en banc review would have required substantial judicial resources that were particularly scarce at the time.<sup>105</sup> But General Order 41 was issued by the chief judge on behalf of the court, and thus the full court was best suited to adjudicate its validity. And a decision declaring it invalid would have had circuit-wide implications, both with regard to appeals already adjudicated by emergency panels and with regard to the prospective use of such panels. In this respect, the situation can be analogized to other issues of circuit-wide administration that the Eleventh Circuit has considered en banc in the past, including whether its own senior circuit judges are "judges of that court" for purposes of section 46(b)'s majority requirement,<sup>106</sup> whether a recess appointment confers full authority to act as a federal judge,<sup>107</sup> and whether

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105. Although it would have been unusual for the full court to have reheard the case on its own motion, it might have done so if its members had been made aware of the grounds for Rodriguez's motion. See 11th Cir. R. 35, I.O.P. 6 ("Any active Eleventh Circuit judge may request that the court be polled on whether rehearing en banc should be granted whether or not a petition for rehearing en banc has been filed by a party."). Despite various revisions to the Eleventh Circuit's rules over the past few years, this version of the Rule 35 IOP was in effect during the spring and summer of 2014, when Rodriguez's motion for rehearing was filed and the Eleventh Circuit's decision on rehearing came down. See, e.g., United States Court of Appeals for the Eleventh Circuit, *Rules & Procedures, Previous Revisions to 11th Circuit Rules and IOP (12 Months)*, <http://www.ca11.uscourts.gov/rules/previous-revisions> (accessed Feb. 10, 2015; copies of relevant pages on file with Journal of Appellate Practice and Process).

106. *Cone Corp.*, 995 F.2d at 185–86 (holding that senior judges are among the "judges of that court" referred to in §46(b)). Two years earlier, the court, in General Order Number 11, had suspended one of its local rules requiring that two active Eleventh Circuit judges sit on every panel; instead, the Order required that two Eleventh Circuit judges sit on every panel, but that only one of those judges had to be an active judge. United States Court of Appeals, Eleventh Circuit, General Order No. 11 (Apr. 30, 1991). A copy of General Order 11 is available at <http://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/GeneralOrder11.pdf>.

107. *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004) (en banc) (upholding Judge William H. Pryor's recess appointment to the court). *Evans* presented a somewhat

the decisions of the former Fifth Circuit should be adopted as binding precedent.<sup>108</sup> As in those cases, an en banc resolution in *Rodriguez* would have resoundingly settled the issue.

## 2. *The Opinion*

The *Rodriguez* panel deserves praise for explicitly recognizing the importance of the issue raised by the petition and for publishing its opinion.<sup>109</sup> Indeed, in denying the petition, the panel began by observing that, although its underlying decision was unpublished, the validity of the panel's composition was an issue of such significance that the opinion on rehearing "warrant[ed] publication."<sup>110</sup> Furthermore, the court noted that *Rodriguez* had waived the issue by failing to raise it earlier, as the composition of the panel was revealed two weeks before oral argument.<sup>111</sup> "However," the court continued, "the significance of the issue for the effective operation of the judicial functions of this court prompts us to nevertheless address the issue in an alternative holding."<sup>112</sup> The easiest course of action would have been to issue the customary summary denial, particularly given the court's finding that *Rodriguez* had

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analogous dilemma in that members of the court disagreed about whether it was appropriate for them to adjudicate the constitutionality of their own colleague's appointment. The majority found no impediment and noted that no recusal request had been lodged. *See id.* at 1228 n.14. One dissenting judge, however, believed it was "nearly anathema for circuit court judges to review a colleague's legitimacy to sit as a member of their court," and that doing so would call into question the court's impartiality and thus "imperil[ ] public confidence in the Court." *Id.* at 1239–40 (Wilson, J., dissenting).

108. *Bonner v. City of Pritchard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc). Readers interested in a more detailed consideration of this issue may consult Andrew L. Adler, *Benefitting from Bonner: The Enduring Significance of Former Fifth Circuit Decisions in Eleventh Circuit Jurisprudence*, RECORD: J. OF FLA. BAR APP. PRAC. SECTION 1 (Summer 2012).

109. *Cf. Murray*, 35 F.3d 45. Denying a petition for rehearing in *Murray*, a panel of two Second Circuit judges held itself to be a quorum authorized to resolve the underlying appeal when the third judge recused himself shortly before the oral argument. *Id.* at 46–47. Although the two-judge quorum found it appropriate to resolve the petition without adding a third judge, *id.* at 48, they acknowledged that the petition "raise[d] an institutional issue of court procedure that merit[ed] a brief opinion," *id.* at 46, and "[b]ecause this opinion concerns, in part, an administrative matter," announced that "the opinion ha[d] been circulated to all of the active judges of this Court prior to filing," *id.* at 48 n.1.

110. *Rodriguez*, 753 F.3d at 1206.

111. *Id.* at n.1.

112. *Id.*

waived the issue. But had the panel opted for that course, the emergency underlying General Order 41 would have remained officially unexplained, the statutory issues would have gone unexplored, and Rodriguez's ability to seek Supreme Court review would have therefore been effectively curtailed.<sup>113</sup>

The panel's core statutory analysis was contained in three short paragraphs. After referencing General Order 41 and quoting section 46(b), the court first confirmed that the certified emergency did indeed arise from the court's vacancies and heavy caseload. The court, taking judicial notice, explained that "[i]t was a well-known and indisputable fact" that only eight of its authorized twelve judgeships were occupied both at the time of General Order 41 and at the time of oral argument, that "the Circuit has experienced several vacancies for an extended time, and that, even with a full complement of the Circuit's authorized judges, the Circuit has a heavy case load per-judge."<sup>114</sup>

Rather than detail the vacancies or the heavy per-judge caseload, the court instead began a new paragraph by "hold[ing] that Chief Judge's General Order No. 41 declares an emergency clearly contemplated by Congress in § 46(b)."<sup>115</sup> The court emphasized that "[t]he statute contemplate[d] the possibility of such an emergency even in the event of an extended illness of a single judge."<sup>116</sup> Although the word "extended" is not contained in section 46(b), the court opined that "the illness example must refer to an extended illness, because a sudden, temporary illness of a judge after originally [being] designated to serve on a

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113. Cf. Richard M. Re, *Should Lower Courts Facilitate Supreme Court Review?* Re's Judicata (Oct. 16, 2014, 3:31PM), <http://richardresjudicata.wordpress.com/2014/10/16/should-lower-courts-facilitate-supreme-court-review/> (considering whether there is a duty to facilitate such review) (accessed Feb. 10, 2015; copy on file with Journal of Appellate Practice and Process). Following the denial of rehearing, Rodriguez unsuccessfully sought certiorari, in which he largely reiterated the arguments from his rehearing petition. Pet. for Writ of Certiorari, *Rodriguez v. United States*, No. 14-288, 2014 WL 4477706 (Aug. 27, 2014); see 135 S. Ct. 390 (2014) (denying certiorari). While the denial of certiorari in *Rodriguez* is unsurprising given the absence of a circuit split, the Supreme Court has periodically reviewed challenges to the composition of lower courts. See, e.g., Samuel P. Jordan, *Irregular Panels*, 60 ALA. L. REV. 547, 553-56 (2009) (summarizing such Supreme Court cases).

114. *Rodriguez*, 753 F.3d at 1207.

115. *Id.*

116. *Id.* (citing 28 U.S.C. § 46(b)).

particular panel is otherwise provided for in § 46(d),”<sup>117</sup> which provides that “[a] majority of the number of judges authorized to constitute . . . a panel . . . shall constitute a quorum.”<sup>118</sup> Therefore, the court reasoned, “[i]t follows *a fortiori* that the extended shortage of judges caused by the vacancies here, together with the heavy per-judge caseload of this Circuit, qualifies as an emergency contemplated by Congress.”<sup>119</sup>

The court then “readily reject[ed]” Rodriguez’s argument that the two “unless” clauses of the statute modified the requirement that there be three judges instead of the requirement that a majority of those judges be judges “of that court.”<sup>120</sup> Rather, the court held

that the two “unless” clauses modify, and provide an exception from, the more immediate of the two preceding phrases. That is, we hold that the two “unless” clauses provide an exception to the requirement that a majority of the three judges on the panel be judges of that court.<sup>121</sup>

For support, the court cited a footnote in a Second Circuit decision indicating that the two exceptions “probably modify” the majority requirement.<sup>122</sup> The court left open the possibility that—but declined to address whether—the exceptions also modified the requirement that there be three judges on a

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117. *Id.* at 1207 n.3.

118. 28 U.S.C. § 46(d).

119. *Rodriguez*, 753 F.3d at 1207.

120. *Id.* at 1207 n.4.

121. *Id.*

122. *Id.* (citing *Whitehall Tenants Corp. v. Whitehall Realty Co.*, 136 F.3d 230 (2d Cir. 1998)). In *Whitehall*, the Second Circuit denied a petition for rehearing that challenged the validity of a decision rendered by a quorum of two in-circuit judges when the third in-circuit judge on the panel recused after participating in oral argument, and one of the other judges listened to a recording of the argument instead of attending in person. 136 F.2d at 231–33. Although the “unless clauses” in § 46(b) were only “arguably relevant” to the matters at issue there, the *Whitehall* court considered whether they modified the requirement that there be three judges on a panel or the requirement that a majority of the panel’s judges be members of the court hearing the case. *Id.* at 232 n.3. While the *Whitehall* court found the issue to be “unclear,” it stated that “[t]he structure and juxtaposition of the two ‘unless’ clauses suggest that they are exceptions to the same requirement,” and concluded that they “probably modify” the majority requirement. *Id.* The *Whitehall* court hypothesized that, if the “unless” clauses modified the “requirement that a panel consist of three judges, the requirement that two of the judges must be members ‘of that court’ would be a parenthetical aside.” *Id.*



panel.<sup>123</sup> Observing that there was “very little precedent bearing on this issue,”<sup>124</sup> the *Rodriguez* court also cited the Fifth Circuit’s 1991 and 1999 emergency-certification orders as supporting authority,<sup>125</sup> noting as to each the number of vacancies and the heavy caseload that the Fifth Circuit used to justify its certifications of emergency conditions.<sup>126</sup>

#### IV. THE UNCERTAIN SCOPE OF SECTION 46(B)’S EMERGENCY EXCEPTION

##### *A. What Do the Statutory Exceptions Mean?*

Before addressing the scope of the emergency exception, it is first necessary to address the threshold argument that section 46(b)’s “unless” clauses are exceptions to the requirement that panels consist of three judges, not the requirement that a majority of those judges be judges “of that court.”<sup>127</sup> If so, then visiting judges could presumably never form the majority of a validly constituted panel, because there would be no exceptions to the majority requirement. The *Rodriguez* court “readily reject[ed]” that argument, relying on *Whitehall*.<sup>128</sup>

That appears to be the better view. As a textual matter, the exceptions could grammatically modify both the three-judge requirement and the majority requirement, or the majority requirement alone, but they could not modify only the three-judge requirement. The exceptions follow immediately from the majority requirement, and it is therefore difficult to read the exceptions as modifying only the three-judge requirement. Supporting that interpretation is the *1982 Senate Report*, which

123. *Rodriguez*, 753 F.3d at 1207 n.4.

124. *Id.* at 1207.

125. *Id.* at 1207–08.

126. *Id.* Perhaps because its opinion had already referred to conditions in the Eleventh Circuit, see *supra* note 114 and accompanying text, the *Rodriguez* court did not explicitly compare the emergency conditions that prompted the Fifth Circuit’s certifications to the conditions then existing in the Eleventh Circuit. It did, however, refer again to *Whitehall*, which itself cited the Fifth Circuit’s 1991 order. *Id.* at 1208 (citing *Whitehall*, 136 F.3d at 232 n.3).

127. See, e.g., *Rodriguez* Petition, *supra* note 2, at 10–11 (11th Cir. Mar. 25, 2014).

128. *Rodriguez*, 753 F.3d at 1207 n.4.

discusses section 46(b)'s two exceptions in connection with the majority requirement but not the three-judge requirement.<sup>129</sup> Furthermore, the *Report* states that, while two judges may constitute a quorum if the third judge becomes unavailable, "in the first instance, *all cases* would be assigned to a panel of at least three judges."<sup>130</sup> In that case, the exceptions could apply to the three-judgment requirement only after a panel was constituted, which would seem to be an arbitrary temporal limitation. Nonetheless, the text and purpose of the statute do not exclude the possibility that the exceptions could modify the three-judgment requirement in addition to the majority requirement, but that issue is unclear and ultimately need not be resolved here.

Given that the emergency exception modifies at least the majority requirement, the central statutory issue—whether judicial vacancies, coupled with a heavy caseload, can trigger the emergency exception—must be addressed. While, as explained above, several circuits have resolved that issue affirmatively, their conclusion is far from the single clear choice. To foster some doubt, one need only consider that, when Congress revised section 46(b) in 1982 to include both the majority requirement and the exceptions, extended judicial vacancies were nowhere near as prevalent as they are today,<sup>131</sup>

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129. 1982 *Senate Report*, *supra* note 29, at 26–27, *reprinted in* 1982 U.S.C.C.A.N. 11, 36–37.

130. *Id.* at 9, *reprinted in* 1982 U.S.C.C.A.N. at 19 (emphasis added); *see Nguyen*, 539 U.S. at 82 (“[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.”); *Jordan*, *supra* note 113, at 549 (“[T]he 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.”).

131. *See, e.g., Barry J. McMillion, President Obama’s First-Term U.S. Circuit and District Court Nominations: An Analysis and Comparison with Presidents Since Reagan*, at Summary (Cong. Res. Serv. May 2, 2013) (“The average number of days elapsed from nomination to confirmation for circuit court nominees confirmed during a President’s first term ranged from 45.5 during President Reagan’s first term to 277 days during President G.W. Bush’s. . . . The median number of days from nomination to confirmation for circuit court nominees confirmed during a President’s first term ranged from 28 days (Reagan) to 225.5 days (Obama).”); *Barry J. McMillion, Length of Time from Nomination to Confirmation for “Uncontroversial” U.S. Circuit and District Nominees: Detailed Analysis*, at Summary (Cong. Res. Serv. Sept. 18, 2012) (“For uncontroversial circuit court nominees, the mean and median number of days from nomination to confirmation ranged

and the caseload crisis facing the federal courts of appeals was only beginning to develop.<sup>132</sup> Thus, as a practical matter, it would seem unlikely that Congress had in mind extended vacancies, coupled with a heavy per-judge caseload, as a form of emergency when it revised section 46(b) in 1982.

Rather than acknowledging the dramatically different state of the federal judiciary during the era of section 46(b)'s amendment, both Rodriguez and the emergency panel instead sought to build their analyses around the one statutory example of emergency—"including, but not limited to, the unavailability of a judge of the court because of illness."<sup>133</sup> The panel's analysis consisted of two components:

- The illness exemplified in the statute referred to an extended illness, not a sudden, temporary illness; and
- If the extended illness of a single judge constituted an emergency, then so too must the extended shortage of judges due to vacancies, coupled with the court's heavy per-judge caseload.<sup>134</sup>

As for the first component, the *Rodriguez* court opined that the exemplified illness must be an extended illness, because "a sudden, temporary illness of a judge after originally designated to serve on a particular panel is otherwise provided for in § 46(d),"<sup>135</sup> which authorizes a quorum of two judges in the event the third judge becomes unavailable.<sup>136</sup> This interpretation is persuasive, though it is not the only possible reading. As one commentator has pointed out, Congress may have instead contemplated a sudden, temporary illness in order to immunize a two-judge quorum with one visiting judge from violating section

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from a low of 64.5 and 44.0 days, respectively, during the Reagan presidency to a high of 227.3 and 218.0 days, respectively, during the Obama presidency.").

132. See *supra* notes 4–6 and accompanying text.

133. 28 U.S.C. § 46(b).

134. *Rodriguez*, 753 F.3d at 1207 & 1207 n.3.

135. *Id.* at 1207 n. 3.

136. 28 U.S.C. § 46(d).

46(b)'s majority requirement.<sup>137</sup> Lending some credence to that view, the Third Circuit has previously certified an emergency under such circumstances (though in the case of death rather than illness).<sup>138</sup> On the other hand, the Second Circuit would not require a certificate of emergency in that situation, because it analyzes compliance with section 46(b)'s majority requirement at the time of panel formation, not at the time of decision.<sup>139</sup> If that view were adopted, then the *Rodriguez* panel would appear to be correct in determining that the illness must refer to an extended illness, because, in that case, the exception would be unnecessary to ensure compliance by a two-judge quorum with one visiting judge following the sudden illness of the third judge on the panel.

Potentially more problematic, however, is the second component of the panel's reasoning—that if the extended unavailability of a single ill judge could constitute an emergency, then so too must multiple extended vacancies coupled with a heavy caseload.<sup>140</sup> The difficulty is that the unavailability exemplified in the statute arose “because of illness,” indicating that the reason for the unavailability qualifies the scope of the exception; and vacancies may be qualitatively different from illnesses (and, for that matter, recusals and disqualifications). As *Rodriguez* argued in his petition, an illness, like a recusal or disqualification, represents an “unexpected, temporary, and dramatic event,” whereas extended vacancies arise from the political branches' inability or

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137. Will Baude, *Is the Eleventh Circuit in an “Emergency” State?* WASHINGTON POST, Volokh Conspiracy (June 12, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/06/12/is-the-eleventh-circuit-in-an-emergency-state/> (concluding that “the exception to 46(b) is needed even in the case of ‘a sudden temporary illness’”) (accessed Feb. 10, 2015; copy on file with Journal of Appellate Practice and Process).

138. *United States v. Thompson*, 70 F.3d 279, 280 n.\*\* (3d Cir. 1995) (referring to certification of a section 46(b) emergency to allow a Third Circuit judge and a visiting district judge to resolve an appeal as a quorum after the death of the second Third Circuit judge originally on the panel).

139. *Desimone*, 140 F.3d at 458–59.

140. See *Rodriguez*, 753 F.3d at 1207 (“The statute contemplates the possibility of such emergency even in the event of an extended illness of a single judge. . . . It follows *a fortiori* that the extended shortage of judges caused by the vacancies here, together with the heavy per judge caseload of this Circuit, qualifies as an emergency contemplated by Congress.”) (internal citation and footnote omitted).

unwillingness to fill vacant seats.<sup>141</sup> One commentator has similarly questioned whether Congress meant to include as the source of an emergency the inaction of one of its own branches, in addition to external factors beyond its control.<sup>142</sup> Because Congress itself, through the Senate, helps fill vacancies by confirming nominees, extended vacancies are in a sense self-imposed, provided that the President has made nominations.

Complicating matters further, the recusal/disqualification exception applies only when “such judges [i.e., a majority from the presiding court] cannot sit.”<sup>143</sup> This language—“cannot sit”—suggests something like an impossibility standard. If so, the question arises whether it governs only the recusal/disqualification exception or both exceptions. The absence of this language from the emergency exception would appear to suggest the former under the canon of *expressio unius est exclusio alterius*. Moreover, it is unclear how “the unavailability of a [single] judge because of illness” could ever make it impossible to empanel a majority of judges of the presiding court. The unavailability of a single circuit judge might delay the formation of a section 46(b)-compliant panel, but its formation would only be truly impossible if there were a total of two judges on the circuit, which does not describe any federal court of appeals. By contrast, the recusal/disqualification exception does not speak in terms of a single judge.

However, it is not readily apparent why the recusal/disqualification exception would apply only when it was impossible to comply with the majority requirement, while the emergency exception would be governed by some lesser standard. In this regard, the 1982 *Senate Report*, referring generally to both exceptions, rather than just the recusal/disqualification exception, states that they apply “when it is impossible to constitute a panel of a court of appeals composed of a majority of judges of that court.”<sup>144</sup> As an

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141. *Rodriguez* Petition, *supra* note 2, at 11–14.

142. Baude, *supra* note 137 (“A branch of Congress is in charge of confirming judicial nominees, [and] I doubt that the President and the Senate’s joint decision not to appoint a judge is an emergency in the sense Congress meant. Rather, I would have thought that an emergency is something outside of the hands of Congress and the President—whether because of timing or circumstances.”).

143. 28 U.S.C. § 46(b).

144. 1982 *Senate Report*, *supra* note 29, at 27, reprinted in 1982 U.S.C.C.A.N. 11, 37.

example, the *Report* refers to the situation in which an entire court was recused or disqualified;<sup>145</sup> while this situation would fall under the first exception, the *Report*'s discussion does not state that the impossibility standard would apply only to that exception.<sup>146</sup>

A Ninth Circuit panel, however, has suggested that necessity, not impossibility, is the applicable standard for the emergency exception.<sup>147</sup> Hearing a post-conviction motion in a procedurally complicated case in which the defendant was himself a federal judge, that panel rejected the argument that the panel assigned to the direct appeal<sup>148</sup> violated section 46(b)'s majority requirement.<sup>149</sup> The court reasoned that "the chief judge retains a great deal of discretion in deciding when out-of-circuit judges are needed," and concluded that he "effectively certified an emergency for the purposes of section 46(b) when he certified a necessity under § 291(a)."<sup>150</sup> Under this reading, a circuit's chief judge has broad discretion to invoke the emergency exception whenever he or she determines there to be

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145. See, e.g., *United States v. Moody*, 977 F.2d 1420, 1423 (11th Cir. 1992) (decision rendered by three visiting judges after "all judges of this court entered an order recusing themselves 'from participating in this case and in any other cases relating to the investigation of the murder of the Honorable Robert S. Vance,'" an Eleventh Circuit judge).

146. 1982 *Senate Report*, *supra* note 29, at 27, reprinted in 1982 U.S.C.C.A.N. 11, 37.

147. *United States v. Claiborne*, 870 F.2d 1463 (9th Cir. 1989).

148. The panel at issue in *Claiborne* consisted of three out-of-circuit circuit judges seated after the chief judge submitted a "certificate of necessity" to the Chief Justice. See 28 U.S.C. § 291(a). Congress amended § 291(a) after *Claiborne*, and a certificate of necessity is no longer required to designate an out-of-circuit judge; rather, the circuit's chief judge or the circuit justice need only make a request, and the Chief Justice need only find the designation to be "in the public interest." Federal Courts Administration Act of 1992, Pub. L. No. 102-572, tit. I, § 104, 106 Stat. 4506. Congress amended this provision in order to "allow[ ] judges of the courts of appeals a regular opportunity to sit on other courts of appeals from time to time, on an exchange basis, as a means of promoting education in court administration." S. Rep. No. 102-342, at 27 (1992) ("Such a program would represent a cost-effective means of familiarizing judges of the courts of appeals with management and administrative techniques that appear to work effectively in other courts, and thus allow them to consider those techniques for adaption and possible adoption in their own courts."); see *Levy*, *supra* note 4, at 383–85 (discussing the use of visiting judges as a means of "information sharing"). A certificate of necessity remains required before the Chief Justice may designate an out-of-circuit district judge to serve on a court of appeals. 28 U.S.C. § 292(d).

149. *Claiborne*, 870 F.2d at 1466 n.2; see also *id.* at 1464–67 (discussing appellants' interrelated statutory claims).

150. *Claiborne*, 870 F.2d at 1466.

a “need” for visiting judges. Federal courts of appeals would seemingly have little difficulty meeting that standard when confronted with multiple vacancies and a heavy per-judge caseload.<sup>151</sup>

Nonetheless, there is reason to question *Claiborne’s* equation of section 291(a)’s certificate of necessity with section 46(b)’s certificate of emergency. Necessity and emergency are distinct concepts,<sup>152</sup> and it should be assumed that Congress deliberately required different certificates for different situations.<sup>153</sup> And the threshold to designate an out-of-circuit judge (“necessity”) would appropriately appear to be less stringent than the threshold to designate multiple visiting judges and dispense with section 46(b)’s majority requirement (“emergency”). Thus, section 46(b)’s emergency exception arguably requires something more than necessity.

Supporting that argument, the *1982 Senate Report* generally describes both section 46(b) exceptions as “the most unusual circumstances”<sup>154</sup> or “exigent circumstances.”<sup>155</sup> While it gives no indication about what circumstances aside from illness would constitute or give rise to an emergency, these descriptors arguably indicate that section 46(b)’s exceptions were intended to be narrow in scope. Nonetheless, one might argue that the 1982 Congress would consider the extended

151. The certificate of necessity appears to be a standardized form that does not require an explanation of the necessity. See Nicholle Stahl-Reisdorff, *The Use of Visiting Judges in the Federal District Courts* 49 (Fed. Judicial Ctr. 2001 update 2006) (including sample certificate of necessity).

152. See, e.g., BLACK’S LAW DICTIONARY 636, 1193 (Bryan A. Garner ed., 10th ed. 2014) (defining “emergency” as either “[a] sudden and serious event or an unforeseen change in circumstances that calls for immediate action to avert, control, or remedy harm” or “[a]n urgent need for relief or help”; and defining “necessity” in several ways, including as “[s]omething that must be done or accomplished for any one of various reasons, ranging from the continuation of life itself to a legal requirement of some kind to an intense personal desire” or “[p]hysical or moral compulsion; the pressure of circumstance,” and noting further that “[c]ontext normally supplies a sense of the degree of urgency,” while recognizing that necessity may supply “a defense for a person who acts in an emergency”).

153. See, e.g., *Bailey v. United States*, 516 U.S. 137, 146 (1995) (“We assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning.”); cf. *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 461–62 (2002) (recognizing longstanding rule that “courts must presume that a legislature says in a statute what it means and means in a statute what it says there”) (internal citations and quotation marks omitted).

154. *1982 Senate Report*, *supra* note 29, at 26, *reprinted in* 1982 U.S.C.C.A.N. 11, 36.

155. *Id.* at 9, *reprinted in* 1982 U.S.C.C.A.N. at 19.

vacancies and crushing caseloads of today to be “most unusual” and “exigent.” Moreover, the statutory example of a single judge’s illness arguably broadens the word “emergency” beyond its everyday connotation. Without that example, one might not otherwise be inclined to consider an increased per-judge caseload (due to extended vacancies) as rising to the level of an emergency, particularly if the court declines to request additional judgeships or modify its case-management techniques.

*B. When Does an Emergency Arise?  
And When Does It End?*

Compounding the uncertainty, two questions of degree arise even assuming that extended vacancies coupled with heavy caseloads can trigger section 46(b)’s emergency exception. First, at what point does an emergency arise? Clearly the Eleventh Circuit was in a perilous situation in late 2013, with four judicial emergencies, one third of its judgeships vacant, and the heaviest per-judge caseload of any circuit. But what if a court was to certify an emergency with, say, only one vacancy and a comparatively moderate per-judge caseload? What if the court experienced no vacancies at all but experienced a substantial increase in filings? While mathematical cutoffs may not be necessary, the adjusted-filing caseload methodology employed by the Administrative Office of the United States Courts to determine judicial emergencies is one that Senators often invoke,<sup>156</sup> and it may also be useful in determining whether a section 46(b) emergency exists.

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156. See, e.g., Patrick J. Leahy, Chairman, Sen. Judiciary Comm., Press Release, *Statement on Judicial Nominations*, <http://www.leahy.senate.gov/press/statement-of-senator-patrick-leahy-d-vt-chairman-senate-judiciary-committee-on-judicial-nominations13> (July 31, 2014) (“Since the beginning of this year, we have reduced the vacancies on our Federal courts by over a third, from 92 to 57, and reduced the number of judicial emergency vacancies by nearly half, from 37 to 19.”); John McCain, U.S. Sen., Press Release, *Sen. McCain on Arizona Judicial Nominees*, <http://www.mccain.senate.gov/public/index.cfm/press-releases?ID=f43ecf45-c34c-434b-a417-c0c8e3bb07c6> (May 14, 2014) (“Of the 13 authorized judgeships for this court, 6 are currently vacant. This, together with the large caseload, led the District of Arizona to be declared a ‘judicial emergency’ in 2011.”) (both accessed Feb. 12, 2015; copies on file with Journal of Appellate Practice and Process).



Second, and relatedly, how long should an emergency last? General Order 41 purported to be of indefinite duration, and Chief Judge Carnes explained in an interview that “he [didn’t] have in mind a specific number of active judges the court must have before he would lift the order,” but that “there would be no more need for the emergency measure” once “the court actually had all 12 of its spots filled.”<sup>157</sup> Ultimately it did not last that long. Judge Barkett’s vacant seat was filled in May 2014,<sup>158</sup> Judge Edmondson’s vacant seat was filled in July 2014,<sup>159</sup> and Judge Birch’s vacant seat was filled in September 2014.<sup>160</sup> The following month, with one vacancy remaining, Chief Judge Carnes issued a new general order declaring an end to the emergency.<sup>161</sup> General Order 42 explained that “[t]he circumstances that led to the issuance of General Order No. 41 have changed enough so that no more panels will be composed of fewer than two judges of this Court,” but indicated that it would have an impact only “as far as future panels are concerned.”<sup>162</sup>

There are two ways to think about the duration issue. One might argue that courts should certify an emergency as soon as the requisite conditions exist and de-certify the emergency as soon as those same conditions evaporate. That symmetry would eliminate any confusion about what the requisite conditions were, and discourage declared emergencies from dragging on too long.<sup>163</sup> At the same time, certifying an emergency is not

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157. Palmer, *supra* note 77, at 1.

158. John Pacenti, *Robin Rosenbaum Unanimously Confirmed for Federal Appellate Court*, DAILY BUS. REV., May 12, 2014, at A1.

159. R. Robin McDonald, *Senate Confirms Julie Carnes to Eleventh Circuit by 94-0 Vote*, DAILY REP., July 21, 2014.

160. R. Robin McDonald, *Senate Confirms Jill Pryor to Eleventh Circuit*, DAILY REP., Sept. 8, 2014.

161. United States Court of Appeals, Eleventh Circuit, General Order No. 42 (Oct. 17, 2014) [hereinafter General Order 42]; Alyson M. Palmer, *Eleventh Circuit Chief Declares End to Emergency*, DAILY REP., Oct. 21, 2014. A copy of General Order 42 is available at <http://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/GeneralOrder42.pdf> (accessed Feb. 12, 2015; copy on file with Journal of Appellate Practice and Process).

162. *General Order 42*, *supra* note 161, at 1. In order to “conserve judicial resources, avoid inefficiencies, and prevent unnecessary delay,” the Order allowed emergency panels to resolve and administer any cases that had already been argued or submitted. *Id.* at 1–2.

163. Cf. Gregory Korte, *Special Report: America’s Perpetual State of Emergency*, USA Today (Oct. 23, 2014 9:11 AM), <http://www.usatoday.com/story/news/politics/2014/10/22/president-obama-states-of-emergency/16851775/> (“U.S. presidents have declared 52 states

necessarily a quantifiable matter of mathematics. Moreover, courts should have the discretion, and should perhaps be encouraged, to wait as long as possible, even beyond the onset of an emergency, before certifying one, with the hope that conditions will improve and render invocation of section 46(b) unnecessary. That restraint would limit the exception to true emergencies and maintain it as a last resort. But, in that case, courts would not necessarily be required to de-certify an emergency immediately following an improvement in conditions. For example, the Eleventh Circuit, given its heavy per-judge case load (even when all of its judgeships are filled), may have considered itself to be in a state of emergency after, say, the second vacancy, but may have exercised restraint by waiting to certify the emergency until after the fourth vacancy. That might explain why it declared an end to the emergency after only three of the four vacancies were filled.

#### V. CONCLUSION: GOING FORWARD AFTER *RODRIGUEZ*

Various circuits have concluded that judicial vacancies, coupled with a heavy caseload, can trigger section 46(b)'s emergency exception to the majority requirement. Although the statutory issue is debatable, the federal courts of appeals should not be criticized for reaching that conclusion when confronted with extended vacancies and crushing caseloads. To the contrary, by enlisting additional visiting judges, they are maximizing available resources in order to administer justice under difficult and trying circumstances. And, in their estimation, the benefits to designating more visiting judges outweigh the costs. That judgment, forged in the trenches, should be afforded deference.

Nonetheless, Congress, not the courts, is ultimately responsible for regulating the use of visiting judges, and it has

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of emergency since Congress passed the National Emergencies Act in 1976. Thirty are still in effect.”) (accessed Feb. 12, 2015; copy on file with Journal of Appellate Practice and Process). The longest section 46(b) emergency appears to have occurred in the Fifth Circuit, which did not declare an end to its 1999 emergency until 2007. Order Vacating Declaration of a Judicial Emergency Under 28 U.S. Code, Section 46(b), 2007 WL 43971 (Jan. 8, 2007); Order Declaring an Emergency Under 28 U.S.C. § 46(b) (5th Cir. Sept. 28, 1999).

previously expressed concerns about their use. Congress enacted section 46(b)'s majority requirement because it believed that allowing visiting judges to predominate on appellate panels would have an adverse impact on the stability and predictability of circuit precedent.<sup>164</sup> Others have similarly expressed concern that visiting judges, even when they do not form a panel majority, are more likely to destabilize the law of the circuit; and some have echoed Judge Birch's concern that opinions by visiting judges are more likely to result in en banc review.<sup>165</sup>

The use of district judges in particular has engendered substantial criticism,<sup>166</sup> and they sit by designation the most.<sup>167</sup> Some have expressed concern that visiting district judges "exercise a function that they presumably were not nominated, confirmed, or appointed to perform," thereby "ignor[ing] . . . important distinctions between the trial and appellate functions and between the kinds of persons who are likely to be best suited to perform these functions."<sup>168</sup> Some have suggested that opinions authored by district judges sitting by designation carry an "unavoidable asterisk."<sup>169</sup> And some have also suggested that

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164. 1982 Senate Report, *supra* note 29, at 9, 26, reprinted in 1982 U.S.C.A.N. 11, 19, 36.

165. Benesh, *supra* note 22, at 305. A recent example: On September 3 and 4, 2014, the Eleventh Circuit granted rehearing in two cases, each of which was originally decided by a panel that included a visiting judge. See *United States v. Davis*, 754 F.3d 1205 (11th Cir. 2014), rehearing *en banc* granted 573 F. App'x 925 (11th Cir. 2014); *United States v. Roy*, 761 F.3d 1285 (11th Cir. 2014), rehearing *en banc* granted 580 F. App'x 715 (11th Cir. 2014). In *Davis*, a visiting judge authored the panel opinion, 754 F.3d at 1208 n.\* (referring to Judge Sentelle of the D.C. Circuit), and in *Roy*, a visiting judge cast the deciding vote, 761 F.3d at 1286, 1298 (indicating that Judge Wilson of the Eleventh Circuit wrote the panel opinion, that Chief Judge Carnes of the Eleventh Circuit filed a dissent, and that Judge Dalton of the United States District Court for the Middle District of Florida was the third member of the panel).

166. See, e.g., Benesh, *supra* note 22, at 302–03, 305–08, 313–14 (summarizing criticisms).

167. See Budziak, *supra* note 18, at 22–23 (including table charting use of visiting judges by type from 1975 to 2010, and noting that "district court judges, both senior and active, provide more service as visitors than their appellate brethren, with active district court judges playing the largest role"); see also Brudney & Distlear, *supra* note 20, at 565–66 ("[D]esignated trial court visitors have helped decide more than 75,000 court of appeals cases since 1980.").

168. Saphire & Solimine, *supra* note 19, at 358–59.

169. Benesh, *supra* note 22, at 305 (citation omitted). Indeed, during a recent oral argument in the United States Supreme Court, former Solicitor General Paul Clement suggested that opinions written by district judges sitting by designation are entitled to less weight than those written by circuit judges:

visiting district judges tend to view themselves as subordinate to circuit judges, deferring too much and exhibiting a reluctance to dissent.<sup>170</sup>

Structurally too, there remains an inherent awkwardness to judicial mobility, with judges appointed to one court deciding cases in another. Mobility can also raise representational concerns. Before Congress authorized visiting judges, there was an aversion “driven largely by fears of unfamiliar judges imposing foreign legal interpretations on local communities.”<sup>171</sup> Those fears may still have some resonance today for out-of-circuit visiting judges, who were not screened by senators or nominating commissions from the circuits they visit, and, in that sense, may be considered less accountable to, or representative

MR. CLEMENT: Well, a couple of things, Justice Sotomayor. I went back to the *Tropiano* case because it is sort of the pro genitor [sic] of this whole line of Second Circuit cases, and I noticed two things. One, I noticed it was written by a district judge sitting by designation. So I mean, I—I don’t mean anything by that other than this is not *Marbury*. Second, I would say that the second thing I noticed is that the debt—

JUSTICE SOTOMAYOR: Oh, I think when I sat as a district court judge, I would have been insulted by that.

(Laughter).

MR. CLEMENT: Well, it’s not—it’s a good thing you’re no longer sitting in that capacity, Your Honor—

JUSTICE SOTOMAYOR: Okay. It’s [sic] really is, for you.

MR. CLEMENT: —because I— I certainly mean you no offense. You could write *Marbury* here.

Supreme Court of the United States, *Oral Argument Transcripts—October Term 2013*, No. 12-357 *Sekhar v. United States* 61, <http://www.supremecourt.gov/search.aspx?Search=12-357&type=Site> (2013) (accessed Feb. 13, 2015; copies on file with Journal of Appellate Practice and Process); see also Josh Blackmon, *Paul Clement Disses Judges Sitting By Designation, Sotomayor Shoots Back*, Josh Blackman’s Blog (Apr. 23, 2013), <http://joshblackman.com/blog/2013/04/23/paul-clement-disses-judges-sitting-by-designation-sotomay-or-shoots-back/> (Apr. 23, 2013) (quoting Clement/Sotomayor exchange from *Sekhar* transcript and noting that, in Blackman’s “clerking experiences, it was not unheard of to give less weight to an opinion written by a visiting judge. You just weren’t suppose[d] to acknowledge it . . . to a judge who sat by designation . . . who now sits on the Supreme Court”) (accessed Feb. 13, 2015; copy on file with Journal of Appellate Practice and Process).

170. Benesh, *supra* note 22, at 306–07, 313–14; Brudney & Distlear, *supra* note 20, at 597–98, 599; see also Saphire & Solimine, *supra* note 19, at 380 (“One district judge, dissenting from a Sixth Circuit panel decision, ‘spoke of the temerity required of a district judge in dissenting from the opinion of an appellate panel on which he sits by designation.’”) (citation omitted).

171. Budziak, *supra* note 18, at 11.

of, the populace subject to their decisions. And, aggravating those fears, some have speculated that “visiting judges create the opportunity for appellate judges to pursue policy goals” by “alter[ing] the[ ] ideological composition of the decision-making group.”<sup>172</sup>

Whether these concerns are warranted or exaggerated remains subject to debate,<sup>173</sup> as the impact of visiting judges is an area ripe for further empirical research.<sup>174</sup> But Congress must continue to evaluate these concerns, as it is charged with maintaining a delicate balance between difficult competing considerations. On the one hand, limiting already overburdened circuits to one visiting judge per panel poses risks to the administration of appellate justice in the face of vacancy-exacerbated caseloads. On the other hand, the liberal use of visiting judges to form panel majorities poses potential risks to both circuit precedent and the judiciary as an institution.

The current statutory balance allows for the regular, periodic use of visiting judges when they do not form a panel majority, but strictly circumscribes their use beyond that. Congress may need to revisit that original calibration now that *Rodriguez* has solidified the judiciary’s broad interpretation of section 46(b)’s emergency exception. Or it may not. The federal courts of appeals have certified emergencies since the early 1990s, and Congress has not seen fit to revise section 46(b) in response, arguably sending a tacit signal of approval.

Even if Congress takes no action, certifications based on the vacancy-caseload combination should receive greater

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172. *Id.* at 24.

173. Resolving this debate is beyond the scope of this article. Thus, in summarizing the concerns about the use of visiting judges, the author does not purport to suggest that they are ultimately persuasive.

174. See Levy, *supra* note 14, at 2415–17 (discussing court practices in relation to visiting judges, and observing that visiting judges are “not widely discussed in the literature,” and “the reliance on visitors is clearly one promising area for research”); Budziak, *supra* note 18, at 4, 162–63 (purporting, in 2011, “to provide the first thorough, systematic study of the visiting judge process” and suggesting avenues for future research); Benesh, *supra* note 22, at 315 (“In short, we (political scientists especially) know woefully little about these [visiting] judges . . . It is about time we started paying attention to them and to their peculiar characteristics that may well affect how they decide cases.”) (footnote omitted). Of particular relevance for section 46(b) would be a study comparing the impact of visiting judges in cases in which they formed a panel majority and cases in which they did not.

scrutiny. Dispensing with section 46(b)'s majority requirement based on the vacancy-caseload combination is gradually, but quietly, becoming institutionalized. Furthermore, extended circuit vacancies and heavy caseloads are likely to persist for the foreseeable future, and the federal courts of appeals can now rely on *Rodriguez* as a precedent that withstood legal challenge.<sup>175</sup> Thus, as a practical matter, the federal courts of appeals are likely to continue certifying section 46(b) emergencies when they are inevitably confronted with multiple vacancies and a heavy per-judge caseload. Again, that practice is unsurprising and defensible. But an emergency procedure should become normalized only after receiving due discussion.

Not only would such dialogue be healthy for its own sake, it may even help spur progress. After all, “[t]he judicial vacancy crisis must end,”<sup>176</sup> as must the crisis in volume. Statistics documenting extended vacancies and the heavy per-judge caseloads they exacerbate have failed to trigger meaningful reform thus far. Nor have the controversial case-management techniques to which the courts have been forced to resort as a result.<sup>177</sup> But perhaps emergency panels, if they continue as predicted, and if they garner increased attention, may help bring those crises to their tipping point.



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175. However, the precedential value of *Rodriguez* may be somewhat diminished given the emergency panel's own stake in the issue. See *supra* § III(C)(1).

176. Tobias, *supra* note 12, at 6.

177. See *supra* notes 13–15 and accompanying text.