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Delivered via e-mail

January 10, 2022

Dear Chairmen Nadler and Johnson and Ranking Members Jordan and Issa:

As the Committee considers legislation to "modernize the judiciary's ethics, disclosure and transparency rules," we ask that you examine the process by which federal judges are assigned to cases outside their own circuits to ensure that the process is as fair and as transparent as possible.

As you know, intercircuit assignments occur primarily when a district or circuit needs extra help due to caseload issues or when an entire district or circuit is recused due to conflicts of interest. The assignment process is authorized by 28 U.S.C. §294(d), which states that the Chief Justice of the United States will choose one judge or three judges (depending on the stage of the case) from a "roster" of judges "willing and able to undertake special judicial duties from time to time outside their own circuit."

There are also regulations promulgated by the Chief Justice that add substance,[1] noting that a Committee of Intercircuit Assignment of the Judicial Conference of the U.S. may "assist the Chief Justice in discharging this responsibility," and for which "the Director of the Administrative Office of the U.S. Courts" may provide "support" in recommending judges.

The next section of the law, §295, requires that all intercircuit "designations and assignments […] be filed with the clerks and entered on the minutes of the courts from and to which made," which we read to mean on the public docket, available via PACER, and at the time of the assignment.

Currently, though, this process is taking place in the dark and statutory directives are not being followed. The public does not know who sits on the Intercircuit Assignment Committee, nor does it know which judges comprise the "roster" described in §294(d). The identities of the out-of-circuit judge or panel are rarely, if ever, revealed contemporaneously on the docket. Even in the unique cases where the names of the assigned judges are disclosed, there remains a complete lack of transparency over the selection process.

To give an example, the entire Fourth Circuit is recused (see Apr. 8, 2021, order) in 21-1346, *Roe v. U.S.*, *et al*., in which a former assistant federal defender is suing her superiors and federal judiciary officials for harassment, discrimination and retaliation. Despite the statutory directive requiring public disclosure of all intercircuit assignment orders, months passed following the blanket recusal notice, with the identity of the panel still unknown. On Oct. 29 attorneys for Roe filed a "motion to disclose all designation and assignment orders for [its] appeal." Three days later, the docket contained an order with the names of the three judges as well as the paperwork — dated May 7 — from the Chief Justice and signed by the Supreme Court's deputy clerk for case management.

[1] We obtained these regulations, dated Feb. 16, 2012, not from a judiciary website but from the appendix of a 2013 Ninth Circuit opinion, *In re: Motor Fuel Temperature Sales Practices Litigation*, 711 F.3d 1050 (link).

Prior to the Court's order, Roe did not know whether the intercircuit assignment had occurred nor the identities of the judges presiding over her case. It's unjustifiable that Roe had to wait nearly six months and file a proactive motion to learn this basic material information.[2]

As concerning as the unnecessary delay is the fact that the judiciary subsequently refused to disclose the process by which it selected the panel of judges in Roe's case — a process that's ripe for abuse since the judiciary defendants have a role in the assignment process. On Nov. 8, Roe filed a motion to "request clarification regarding the steps taken to ensure the basic fairness of the intercircuit assignment process," but the court swiftly denied it without explanation or further discussion. Participation by parties in selecting judges is a conflict of interest, of course, but the public to this day has not been informed as to how this conflict was avoided. This scenario might play out anytime someone sues a judge or a judicial administrator and a blanket recusal follows.

Given that the mere appearance of impropriety is enough to raise ethical concerns, the process calls out for greater transparency. As leaders of the Committee and Subcommittee responsible for ensuring the integrity and fairness of the federal judiciary, we implore you to utilize your oversight powers to require the judiciary to clarify and refine the process for assigning judges in cases like Roe's. We ask you to consider a range of solutions, including:

- Requiring the judiciary to identify the roster of available judges and their current and previous intercircuit assignments;
- Clearly establishing that contemporaneous public filing on the docket of both the blanket recusal notice and the names of the designated judge or judges is required;
- Requiring clarification about the intercircuit assignment process, especially where parties to the case at hand might be involved in selection; and/or
- Identifying and publishing online the most recently approved and currently operative Guidelines for the Intercircuit Assignment of Article III Judges from the Chief Justice of the United States.

Such steps could be taken via the introduction of new legislation, by questioning relevant judicial officers at a hearing or by requiring clarification through questions for the record. We trust there are other solutions that an examination into the assignment practice would suggest, and we look forward to working with you to assist in this effort in any manner that would be appropriate. Thank you for considering this request.

Sincerely,

Gabe Roth	Ally Coll
Executive Director	President
Fix the Court	Purple Campaign

[2] It's not just Roe's case. Her Oct. 29 motion notes that in two other recent appeals involving circuit-wide recusal, "the intercircuit-assignment orders also were not entered on the public docket. See, e.g., United States v. Keiber, 798 F. App'x 756, No. 17-7537 (4th Cir. 2020); DeMasters v. Carilion Clinic, 796 F.3d 409, No. 13-2278 (4th Cir. 2015)" — an assertion that we have verified.