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**LUCK BE A LADY (JUSTICE?): TWO LEGAL
LOTTERIES FEATURED IN NOVEMBER 2021**

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No, this is not designed to encourage you to check the winning Powerball numbers (though law school, in general, makes me want to play MegaMillions!). In the month of November two—little discussed, if not relatively unknown—legal lotteries played a role in the news. Incredibly, both lotteries took place on the same day. On November 16, 2021, the Sixth Circuit “won” a lottery consolidating twelve jurisdictions’ challenges to the emergency temporary standard (ETS) regulations related to COVID-19 and vaccinations issued by the Occupational Safety and Health Administration (OSHA).² The same day, in a highly publicized and televised trial from Kenosha, Wisconsin, defendant Kyle Rittenhouse selected his jury via lottery.³ Both lotteries, designed to ensure

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² Andrea Hsu, [6th Circuit Court ‘Wins’ Lottery to Hear Lawsuits Against Biden’s Vaccine Rule](https://www.npr.org/2021/11/16/1056121842/biden-lawsuit-osha-vaccine-mandate-court-lottery), NPR (November 16, 2021, 4:07 PM), <https://www.npr.org/2021/11/16/1056121842/biden-lawsuit-osha-vaccine-mandate-court-lottery>.

³ David K. Li, [‘Piece of Theatre’: Legal Experts Weigh in on Kyle Rittenhouse’s Seating Jurors Deciding His Fate By Lottery](https://www.nbcnews.com/news/11-16-2021/1056121842/biden-lawsuit-osha-vaccine-mandate-court-lottery), NBC News (November 16, 2021, 5:10 PM),

fairness, provided for drama and headlines, but by leaving important work to chance, perhaps they failed to ensure public confidence in judicial proceedings.

On November 4, 2021, the Biden Administration released a brief detailing the Department of Labor's new OSHA requirement for employers with 100 or more employees.⁴ The regulation mandated covered employers ensure each worker be fully vaccinated or test negative weekly for COVID-19.⁵ The plan also required employers provide paid leave for employees to get vaccinated and mandated unvaccinated employees wear a mask in the workplace.⁶ Within a day and a half, the vaccine-or-test rule was blocked by a federal appeals court.⁷ More than 24 states, many businesses, and numerous religious organizations sued to block the alleged government overreach.⁸ OSHA and the Biden administration desired to defend the rule.⁹ To do so they asked the Multidistrict Litigation Panel (the "Panel") to consolidate the many separate actions against the rule.¹⁰

<https://www.nbcnews.com/news/us-news/piece-theater-legal-experts-weigh-kyle-rittenhouse-seating-jurors-deci-rcna5779>.

⁴ Press Release, The White House, Fact Sheet: Biden Administration Announces Details of Two Major Vaccination Policies, (November 4, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/04/fact-sheet-biden-administration-announces-details-of-two-major-vaccination-policies/>.

⁵ Id.

⁶ Id.

⁷ BST Holdings, L.L.C. v. OSHA, No. 21-60845, 2021 U.S. App. LEXIS 33698 (5th Cir. Nov. 12, 2021).

⁸ Jud. Panel on Multidistrict Litig., CM/ECF for JPML MCP, https://www.jpml.uscourts.gov/sites/jpml/files/Multicircuit_Petition_%28MCP%29_Docket_Report-11-17-2021.pdf (last visited December 9, 2021) (Listing 12 circuits involved, 34 petitions filed related to MCP No. 165).

⁹ Andrea Hsu, Blocked For Now, Biden's Vaccine-Or-Test Rule For Workers Faces Uncertain Future, NPR (November 8, 2021, 9:25 PM), <https://www.npr.org/2021/11/08/1053625789/blocked-for-now-bidens-vaccine-or-test-rule-for-workers-faces-uncertain-future>.

¹⁰ Andrea Hsu, A Lottery Could Determine the Fate of Biden's Vaccine Rule for 84 Million Workers, NPR (November 15, 2021, 7:58 AM), <https://www.npr.org/2021/11/15/1055194418/a-lottery->

The Multidistrict Litigation Panel was created in 1968 by an Act of Congress, 28 U.S.C. § 1407. The job of the Panel is twofold. First, the panel determines whether civil actions pending in different federal districts should be transferred to one federal district for consolidated proceedings.¹¹ Second, the Panel selects which judge or judges will conduct the consolidated proceedings. This consolidation/centralization avoids duplicitous discovery, inconsistent rulings, and conserves judicial resources.¹² Pretty typical stuff, right?

Section 1406(d) establishes that the Panel be comprised of seven circuit and district judges designated from time to time by the Chief Justice of the United States. No two can be from the same circuit.¹³ The concurrence of four members is necessary to authorize the Panel's actions. The current Chair of the Panel is Judge Sarah C. Vance of the Eastern District of Louisiana. The remaining members are Lewis A. Kaplan (S.D. New York), Ellen Segal Hovelle (D. District of Columbia), R. David Proctor (N.D. Alabama), Catherine D. Perry (E.D. Missouri), Karen K. Caldwell (E.D. Kentucky), and Nathaniel M. Gorton (D. Massachusetts).¹⁴

Under 28 U.S.C. § 2112(a)(3), if an agency's order receives two or more petitions for review within ten days of the order's issuance, the agency must notify the Judicial Panel on Multidistrict Litigation of the desire to consolidate per 28 U.S.C. § 1407. Rule 25.5 of the Judicial Panel on Multidistrict Litigation describes the process of selection by lottery. A drum contains an entry for each circuit where a petition for review on the issue is pending.¹⁵ Multiple petitions pending in a single circuit are

could-determine-the-fate-of-bidens-vaccine-rule-for-84-million-workers?live=1.

¹¹ Jud. Panel on Multidistrict Litig., <https://www.jpml.uscourts.gov/overview-panel-0> (last visited December 9, 2021).

¹² *Id.*

¹³ *Id.*

¹⁴ Jud. Panel on Multidistrict Litig., Judges Panel, <https://www.jpml.uscourts.gov/content/panel-judges> (last visited December 9, 2021).

¹⁵ Jud. Panel on Multidistrict Litig. Rule 25.5.

still allotted only one entry in the drum.¹⁶ A designated deputy, other than the random selector, oversees the selection.¹⁷ In other words, each circuit is placed on a lottery entry, put in a hopper, and drawn by a judicial clerk.¹⁸

And on November 16, 2021, that's exactly what happened.¹⁹ Court-watchers and those invested in the litigation surrounding COVID-19 and OSHA's vaccine requirement waited on pins and needles for the Panel to conduct the "secret" lottery.²⁰ The selector drew the Sixth Circuit Court of Appeal's single entry, and the Panel issued an order consolidating the petitions for review from twelve circuits into the Sixth Circuit. Now, the record is to be filed pursuant to Rules 16 and 17 of the Federal Rules of Appellate Procedure.²¹ In this case, the "winning circuit" not only won the right to hear legal challenges related to the vaccine rule but also inherited the Fifth Circuit stay issued just days before the lottery.²² The White House deadline of Dec 6, 2021, has come and gone while the 84 million workers potentially affected by the mandate wait for a

¹⁶ Id.

¹⁷ Id.

¹⁸ Id.

¹⁹ Consolidation Order, MCP No. 165 (available at: https://www.jpml.uscourts.gov/sites/jpml/files/MCP-165-Consolidation_Order-11-16-2021.pdf).

²⁰ Id. Of course, the lottery is not secret. But the revolution, and the lottery, will not be televised.

²¹ Id.

²² Id. See also BST Holdings, L.L.C. v. OSHA, No. 21-60845, 2021 U.S. App. LEXIS 33698 (5th Cir. Nov. 12, 2021).

Sixth Circuit opinion on the matter.²³ Ultimately, the case could end up before the Supreme Court.²⁴ Lucky you, Sixth Circuit!

On the same day the Panel conducted a lottery, a circuit court in Kenosha, Wisconsin took the spotlight as the Rittenhouse case closed.²⁵ The highly publicized trial that focused on self-defense, firearms, and summer protests featured explosive exchanges between Judge Bruce Schroeder and lead prosecutor Thomas Binger. But the case drew even more curious eyes as Judge Schroeder invited defendant Rittenhouse to stick his hand into a lottery hopper, filled with the names of 18 men and women who heard the two weeks of testimony.²⁶ Rittenhouse removed 6 numbers from the tumbler, leaving 12 to decide his fate.²⁷ A court official collected the papers and showed them to prosecutors.²⁸ The U.S. Constitution's Sixth Amendment entitles a criminal defendant to a jury of his peers, but perhaps this was the first time some had observed a defendant physically select his own panel. Wisconsin Statute 805.08(2) provides that additional jurors may be selected for a case. If, at the time the case is submitted, more jurors remain empaneled than needed, the court "determine[s] by lot which jurors shall not initially participate in

²³ Hsu, *supra* note 2. (Authors note: Since the drafting of this blog post in December 2021, the Sixth Circuit concluded the stay of the OSHA regulation was not justified. See Mass. Bldg. Trades Council v. United States DOL (In re MCP No. 165), Nos. 21-7000, 21-4027, 21-4028, 21-4031, 21-4032, 21-4033, 21-4080, 21-4082, 21-4083, 21-4084, 2021 U.S. App. LEXIS 37349 (6th Cir. Dec. 17, 2021). However, in January 2022 the Supreme Court of the United States disagreed and blocked the vaccine or test mandate for most large employers, but allowed the rule to remain for employees of medical facilities that accept Medicare or Medicaid funds. See Nat'l Fed'n of Indep. Bus. v. DOL, OSHA, 142 S. Ct. 661 (2022).

²⁴ Id. It did.

²⁵ *What Legal Experts Make of Judge's Order for Rittenhouse to Draw Jury By Lottery*, NBC Chicago (November 17, 2021, 5:01 AM), <https://www.nbcchicago.com/news/national-international/what-legal-experts-make-of-judges-order-for-rittenhouse-to-draw-his-own-jury-by-lottery/2686598/> (Hereinafter, "NBC Chicago").

²⁶ NBC Chicago, *supra* note 24.

²⁷ Id.

²⁸ Id.

deliberations.”²⁹ Two Wisconsin attorneys interviewed, noted that seeing a defendant selecting his own jury felt unusual, as most often a court clerk performs the task.³⁰ The law prescribes the lottery but is silent on who may draw the entries.

Perhaps this “drawing of lots” is common practice in Wisconsin, just as the Panel frequently selects a circuit for consolidation by lottery.³¹ But the common observer was likely struck on this November day at two controversial, publicized cases were left to a game of chance. In a profession and field of study often reduced to intricate rules (consider the Federal Rules of Evidence Exceptions to the Rule Against Hearsay), to see an outcome determined by a drum filled with entries, rotated, and selected at random is certainly novel. One cannot help considering if the fundamental goals of justice are met with a lottery selecting these important outcomes.

To be sure, lotteries, especially the ones described in this blog, are not unfair simply because they are random. Each circuit, and each juror, received one entry and was chosen at random. The results were certified by clerks of court. The public observed Rittenhouse select the entries. And yet, in popular culture at least, the thought of a lottery to select an outcome is often portrayed as unfair. Think of the “reaping” in *The Hunger Games* – a lottery to select representatives of each district to fight in a post-apocalyptic death match.³² One entry per person, placed in a drum and selected in a public setting. And yet, the process being indiscriminate, the sheer random chance of it all, seems to be what resonates with the public as “unfair.” Of course, the lotteries contemplated in this blog do not determine participants in a post-apocalyptic death match. But they still determined who decided the fate of a defendant facing a term of years in prison, and a vaccine mandate during a years-long pandemic in the face of another mutated variant as more businesses encourage employees to return to work.

²⁹ Wis. Stat. Ann. § 805.08(2).

³⁰ NBC Chicago, *supra* note 24.

³¹ The official JPML website indicates they’ve ruled on centralization in 2,750 dockets, 600,000 cases, and millions of claims therein. <https://www.jpml.uscourts.gov/overview-panel-0>.

³² Suzanne Collins, *The Hunger Games* (Scholastic 2008).

Important outcomes, determined by seemingly random chance.
Luck be a Lady Justice, indeed.