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CIRCUIT PERSONALITIES

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The U.S. Courts of Appeals do not behave as one; they have developed circuit-specific practices that are passed down from one generation of judges to the next. These different norms and traditions (some written down, others not) exist on a variety of levels: rules governing oral argument and the publishing of opinions, en banc practices, social customs, case discussion norms, law clerk dynamics, and even self-imposed circuit nicknames. In this Article, we describe these varying "circuit personalities" and then argue that they are necessary to the very survival of the federal courts of appeals. Circuit-specific norms and traditions foster collegiality and other rule-of-law values and, in so doing, serve as a critical counterweight to the pernicious nationalization and partisan politics of federal judicial appointments.

Making use of both empirical measures and interviews conducted with eighteen U.S. Court of Appeals judges, this Article shows how same-circuit appeals judges forge a unique and consequential bond with each other. This is true of Democrat and Republican appointees; it is true of

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a just-appointed judge or a senior-status judge. By mitigating national partisan forces, "circuit personalities" facilitate the very model of judging employed by the U.S. Courts of Appeals—one that assumes any random panel of three can deliberate and deliver a correct result for the court as a whole. This model of judging simply does not work if the judges fall prey to "my team / your team" impulses—forces which are growing steadily as a byproduct of the new nationalization of judicial appointments. To be sure, judges are ideologically divided, and partisan divisions among them are sometimes inevitable. But the best way to prevent those divisions from overtaking appellate courts altogether is for judges to invest in the ties that bind them—to celebrate the local and resist growing calls that they become "partisan warriors" in a national war.

INTRODUCTION

The arena for judicial appointment battles today is national: the nominees are largely picked from lists created by national organizations, the tradition of deferring to home-state senators is vanishing, and the people selected as federal judges are increasingly those with national connections not regional ones.[1] Ironically, though, the judges who go on to the U.S. Courts of Appeals inherit surprisingly local jobs. Although typically lumped together, the thirteen federal appellate courts do not behave as one; they have developed distinct local rules and customs that tend to endure over time.

These circuit-specific practices (some written down, others not) exist on multiple dimensions. Some relate to managing the docket: the frequency of oral argument, the rate of published opinions, and the regularity of en banc sittings.[2] Other unique customs are not formalized. Judges on the U.S. Court of Appeals for the Fourth Circuit, for example, descend from the bench after every argument and shake the hands of the lawyers. Ninth Circuit judges and Fifth Circuit judges share bench memos written by pools of law clerks. The Seventh Circuit circulates some panel

[1] For observations along these lines, see Lawrence Baum & Neal Devins, Federalist Court, Slate (Jan. 31, 2017, 10:12 AM), https://slate.com/news-and-politics/2017/01/how-the-federalist-society-became-the-de-facto-selector-of-republican-supreme-court-justices.html [https://perma.cc/JH3R-4UD3]; Carl Hulse, After Success in Seating Federal Judges, Biden Hits Resistance, N.Y. Times (Dec. 5, 2021), https://www.nytimes.com/2021/12/05/us/politics/biden-judges-senate-confirmation.html [https://perma.cc/2JAW-VLRD] (noting the role of "liberal interest groups" in influencing Biden's judicial picks and demise of the blue slip custom of deferring to home-state senators when confirming federal appellate judges); Adam Liptak, White House Announces Slate of 11 Judicial Nominees, N.Y. Times (June 7, 2017), https://www.nytimes.com/2017/06/07/us/politics/trump-judicial-nominations.html [https://perma.cc/3M5R-HATV] ("Many of the nominees are well known in the conservative legal movement."); see also infra Part III (delineating the rise of centralized national policies in the appointment of judges).

[2] Other scholars—most notably Marin Levy and Stephanie Lindquist—have done a lot of valuable work describing some of these differences in case management. See, e.g., Marin K. Levy & Jon O. Newman, The Office of Chief Circuit Judge, 169 U. Pa. L. Rev. 2425, 2441–44 (2021); Marin K. Levy, The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts, 61 Duke L.J. 315, 325 (2011); Stefanie A. Lindquist, Bureaucratization and Balkanization: The Origins and Effects of Decision-making Norms in the Federal Appellate Courts, 41 U. Rich. L. Rev. 659, 662–63 (2007); see also Virginia A. Hettinger, Stefanie A. Lindquist & Wendy L. Martinek, Judging on a Collegial Court 39–41 (2006) (describing institutional influences on rates of dissent among appellate judges, including informal norms and overall workload). We build on their efforts by updating and adding detail to the variation and then making a new argument for the increased importance of these local practices today.

opinions among all members of their court before publication in a "paper en banc" and accommodates suggestions from judges who are not on the panel. The Sixth Circuit has a "joviality committee" responsible for, among other things, arranging river boat cruises. And the Third Circuit even bears a self-imposed nickname—"the Mighty Third"—which one can imagine is stitched on the back of their judicial softball jerseys.[3]

These local norms and traditions are sticky over time and form what we refer to here as "circuit personalities"—customs and rules that are not uniform nationally but loom large in framing the identity and daily life of a federal appellate judge. Our goal in this Article is to describe these unique circuit personality traits and then to argue that they are critically important to buttressing collegiality and rule-of-law norms in this political moment of historic partisan polarization.

We conducted interviews with eighteen federal appellate judges—at least one sitting on each circuit and at least one appointed by every President from Joe Biden to Gerald Ford. Those interviews taught us that the circuits operate very differently from one another, and that these organically grown rules and traditions are highly valued by judges, even judges that come from widely different backgrounds and with diverging ideologies.

To understand the significance of circuit personalities, it is important to remember that a federal appeals judge is unique in our judicial system.[4] Unlike district court judges or Supreme Court Justices (the latter of whom have a growing habit of separate writings and reaching almost celebrity status for their individual views),[5] federal appellate judges are never lone actors and rarely speak only for themselves. As Judge Wood of the Seventh Circuit puts it, unlike the district court judge, who is "solo in the

[3] All of these observations come from our interviews, the notes of which have been inspected by the journal editors. As in other qualitative studies of judicial behavior, we assured each judge we interviewed that we would not quote them by name without explicit permission, and that is why our interviews are described anonymously. See Levy, supra note 2, at 326–27 (describing the same practice for her study).

[4] Harry T. Edwards, Collegial Decision-Making in the US Courts of Appeals, *in* Collective Judging in Comparative Perspective 57, 61 (Birke Häcker & Wolfgang Ernst eds., 2020) ("The collegial operations and internal decision-making processes of the Supreme Court and the Courts of Appeals are strikingly different.").

[5] Richard L. Hasen, Celebrity Justice: Supreme Court Edition, 19 Green Bag 2d 157, 158 (2016); Suzanna Sherry, Our Kardashian Court (and How to Fix It), 106 Iowa L. Rev. 181, 182 (2020) ("Television appearances, books, movies, stump speeches, and separate opinions aimed at the Justices' polarized fan bases have created cults of personality around individual Justices.").

courtroom, mistress of all she surveys," a court of appeals judge "cannot hope to get anything done without persuading at least one fellow judge to agree with her."[6]

Indeed, the design structure of the federal courts of appeals requires decisions in randomly assigned panels of three, and this means appellate judges are supposed to be faceless and anonymous.[7] For this system to work, the judges need to buy into a particular model of judging: that any panel of three can deliver a legitimate decision for the circuit as a whole. Correspondingly, en banc reconsiderations are disfavored.[8] The emphasis is on the court and not the individual, and collegiality among the decision makers is prized.[9]

Circuit personalities are integral to this model of judicial behavior. Much like entrenched family traditions and social gatherings can help bond a bickering family, so too do local norms and rules link circuit judges and help them work together. Of course, the relevant rules and traditions can change over time—and we identify instances where specific circuits affirmatively sought to change their personality traits to improve their decision making. Important to our argument, however, is the fact that (like family traditions) the rules and norms come from within the circuit and not from a national centralized source. In fact, the very process of choosing circuit rules and traditions brings appeals judges together in ways that reinforce their bonds to each other and to the court itself. Likewise, the power of circuit judges to embrace new norms and

[6] Diane P. Wood, When to Hold, When to Fold, and When to Reshuffle: The Art of Decisionmaking on a Multi-Member Court, 100 Calif. L. Rev. 1445, 1446 (2012).

[7] This design of three-judge-panel decision making on the Courts of Appeals is set forth in 28 U.S.C. § 46(b), (c). By statute, cases are decided on appeal by panels of three judges, unless a majority of the judges in regular active service vote to hear the case all together or "en banc." Id. § 46(c). It is typically understood that judges are randomly assigned to panels; however, this is not strictly required by the statute and recent studies have questioned whether panels are truly randomly assigned in every circuit. See Adam S. Chilton & Marin K. Levy, Challenging the Randomness of Panel Assignment in the Federal Courts of Appeals, 101 Cornell L. Rev. 1, 3–4, 9 (2015) (finding evidence of non-randomness in panel selection).

[8] Neal Devins & Allison Orr Larsen, Weaponizing En Banc, 96 N.Y.U. L. Rev. 1373, 1376 (2021).

[9] As Judge Harris of the Fourth Circuit explains (in an article celebrating Judge Edwards of the D.C. Circuit), "Getting it right, it turns out, is not only about the work ethic and the analytic rigor. For Judge Edwards, it also is about the engagement with his colleagues, a collective process in which judges reason their way together to the right answer." Pamela Harris, A Model of Collegiality: Judge Harry T. Edwards, 105 Judicature 76, 77–78 (2021), https://judicature.duke.edu/articles/a-model-of-collegiality-judge-harry-t-edwards [https://perma.cc/WEV7-EHD4].

traditions in order to facilitate orderly, collegial decision making makes clear that circuit personalities can simultaneously advance rule-of-law values and mitigate partisan fighting.

Part of our normative claim is thus quite intuitive: human contact and communal traditions are critical ingredients in healthy collective judicial decision making. Decisions are more efficiently handed down, consensus is more likely, and fractured discord is prevented when the judges feel a connection to one another.[10] More than that, the desire to be liked and respected by your colleagues is a basic psychological motivation.[11] Indeed, life under the recent pandemic has truly brought this reality home. Several of the judges we spoke to noted that without the regular face time and social gatherings with their colleagues (cancelled due to COVID) they have noticed less consensus on cases and sharper tones in dissents.[12] The present moment, therefore, affords a unique opportunity to identify and revalue traditions that were suspended during the pandemic.

Our claim goes beyond improving the daily lives of federal judges, however. Because federal appellate judges are increasingly identified with national groups as opposed to state actors, and since judicial selectors increasingly prioritize demonstrated allegiance to national movements with ideological ties, we are facing something new and worrisome: a model of judicial decision making that falls prey to the "my team / your team" partisan impulses that plague the entire country.[13]

[10] We take these values as a given for healthy judicial decision making. It is of course possible to believe good judging rejects consensus-building and embraces sharp disagreements. Those readers should still find our descriptive findings of interest—even if they are not persuaded by the rest of our argument.

[11] See Lawrence Baum, Judges and Their Audiences 25 (2006).

[12] See Interview with 4th Cir. Judge (Feb. 8, 2021) (notes on file with editors); Interview with 11th Cir. Judge (Apr. 1, 2021) (notes on file with editors); see also Frank Green, Judges and Observers of Powerful Court of Appeals Express Concern on Partisanship, Rich. Times-Dispatch (Sept. 3, 2021), https://richmond.com/news/state-and-regional/judges-and-observers-of-powerful-federal-appeals-court-express-concern-on-partisanship/article_9981c9ed-c39c-5f46-8df1-4246cf4ad790.html [https://perma.cc/4G6B-RRWV] (noting the sharp tone between Judge Wynn and Judge Wilkinson on dissents from denial in the Fourth Circuit). There of course could be other factors aggravating this discord besides a lack of personal contact, but the increased isolation certainly does not help foster collegiality.

[13] See supra note 1; see also John M. Burman, Should Federal Judges Belong to or Openly Support Organizations that Promote a Particular Ideology?, 13 Wyo. L. Rev. 189, 195 (2013) ("One issue that has arisen is that with increasing frequency, judges are selected or not selected, at least in part, because they belong to or openly support certain groups—groups that openly profess adherence to certain ideological goals—and continue to belong to or openly support those groups after assuming the bench. . . . Whatever the merits of either society, the

Given this new reality, local circuit personalities are more important now than ever before because they push back on troubling signs of partisanship in judicial behavior.

And the warning signs of judicial partisanship are growing. *The New York Times* reported in 2020 that judges appointed by President Trump were less likely to concur with their Democratic-appointed counterparts than were other Republican-appointed judges.[14] Zalman Rothschild documented a partisan correlation in recent judicial decisions on Free Exercise challenges during COVID.[15] And our own study about en banc decision making in the Courts of Appeals indicates a post-2018 spike in partisan behavior in en banc decisions—a spike that bucks a sixty-year trend in the opposite direction.[16]

No doubt, federal appeals judges have ideological commitments and partisan divisions are thus sometimes inevitable. We do not argue that circuit personalities are a panacea to cure all divisions on the bench; that train has left the station. Our target, instead, is the integrity of the decision making by federal courts of appeals. Federal appeals judges should try to preserve the consensus-driven decision-making model that is the hallmark of their courts. Correspondingly, they should try to steer clear of gratuitous separate opinions, partisan en banc review, and other attention-seeking behavior.[17] Partisan divisions may be inevitable, but they need not become the norm.

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mere fact that a federal judge belongs to or openly supports one society or the other is tantamount to wearing a banner that says 'conservative' or 'liberal.'").

[14] Rebecca R. Ruiz, Robert Gebeloff, Steve Eder & Ben Protess, A Conservative Agenda Unleashed on the Federal Courts, N.Y. Times (Mar. 16, 2020), https://www.nytimes.com/2020/03/14/us/trump-appeals-court-judges.html [https://perma.cc/CB4M-CDF5].

[15] Zalman Rothschild, Free Exercise Partisanship, 107 Cornell L. Rev. (forthcoming 2022) (manuscript at 12) ("In the last five years, judicial partisanship in free exercise cases has crescendoed. And when the pandemic struck, resulting in widespread lockdowns of religious houses of worship, the unprecedented number of constitutional free exercise cases brought in such a condensed span of time forced that partisanship into sharp relief.").

[16] Devins & Larsen, supra note 8, at 1380. For additional discussion of our en banc study, see Adam Liptak, On Federal Appeals Courts, a Spike in Partisanship, N.Y. Times (Feb. 22, 2021), https://nytimes.com/2021/02/22/us/politics/courts-partisanship.html [https://perma.cc/FQ6R-P744]. For a discussion of how Trump appointees to the Ninth Circuit are increasingly dissenting from denials of petitions for en banc rehearings, see Andrew Wallender & Madison Alder, Ninth Circuit Conservatives Use Muscle to Signal Supreme Court, Bloomberg L.: US L. Week (Dec. 8, 2021, 4:45 AM), https://news.bloomberglaw.com/us-law-week/ninth-circuit-conservatives-use-muscle-to-signal-supreme-court [https://perma.cc/48YS-EL4V].

[17] By prioritizing that which is politically salient, moreover, appeals judges effectively limit the right to appeal. En banc and separate opinions are time-consuming to write, and,

The best way forward, we argue, is for federal appeals judges to double down on the local ties that bind. By investing in circuit personalities (what unites them), these judges avoid collateral costs that come with acting as "partisan warriors" on a national stage.[18] As we describe below, with partisan fighting comes more dissents, less consensus, more screened-out cases, less deliberation, more divisive headlines, and less anonymous collective reasoning. The stakes, therefore, are enormously high: at risk is the very model of appellate decision making we know.

In this Article, we will both highlight the pervasiveness of nationalization and explain why it is that membership in a collegial circuit mitigates the partisan pressure felt by federal judges in today's polarized environment. Local norms and traditions inculcate a loyalty to a smaller group—separate from a national allegiance felt by the judges to, for example, the Federalist Society or the American Constitution Society. These unique traditions foster bipartisan relationships and a joint commitment to the rule of law. Circuit personalities, in other words, are an important counterweight to growing partisanship and nationalization. This makes circuit personalities critically important to study and imperative to secure.

This Article proceeds in three parts. Part I describes what we learned from our judicial interviews and other research about the unique rules and customs that vary from circuit to circuit. Mapping out these circuit personalities is useful to both scholars of judicial decision making and members of the judiciary themselves—many of whom, we learned, know little about, and are curious to learn how, their sister circuits operate. Part II explains why these differences are uniquely important to the job of a federal appellate judge. Part III explains the centralizing partisan forces that are threatening the more localized model of federal appellate judging. This Article then concludes by explaining why circuit personalities are important mitigating forces against growing national partisanship and identifying some traits that are particularly desirable.

consequently, attention-seeking appeals judges will have less time to hear argument and write precedential published opinions.

[18] We borrow this phrase from Judge Wilkinson on the Fourth Circuit in connection with a warning. See In re Trump, 958 F.3d 274, 292 (4th Cir. 2020) (Wilkinson, J., dissenting).

I. MAPPING OUT THE DIFFERENT CIRCUIT PERSONALITIES

The judges we interviewed were diverse in every way—age, gender, race, politics, personal and professional backgrounds, years on the bench, you name it. Notwithstanding all their differences, a consistent thread in the interviews we conducted is the acknowledgment that the thirteen circuits of the U.S. Courts of Appeals operate quite differently from one another.[19] Indeed, these differences are sometimes opaque not just to outsiders but to insiders as well.[20] Several of the judges we interviewed joked that there is no user's manual to appellate judging and that the only way to really learn the ropes is through trial and error after one is sworn in and on the job.

Some of these varying practices are enshrined in internal operating procedures that exist for each circuit, but many other important rules and traditions are only passed down orally from judge to judge. We examine both sorts of practices here in an attempt to map out circuit personality traits. We first discuss differences in case management—rules that are simply required to run the business of courts. We then turn to the other sort of variance that is harder to pin down—circuit-specific practices and traditions related to the interpersonal dynamics of appellate judging. Finally, we explore interesting episodes of personality changes, in which a circuit identified a problem and changed its rules or practices to address it.

A. Differences in Case Management

Although the Federal Rules of Appellate Procedure govern all U.S. Courts of Appeals, the Rules leave room for variation in how the various dockets are managed. Or, in the words of the Federal Judicial Center (the entity charged with improving judicial administration in all of the federal courts), a "variety of practices and procedures . . . can comfortably co-exist under the umbrella of the Federal Rules."[21] Varying practices in case

[19] Michael E. Solimine, Judicial Stratification and the Reputations of the United States Courts of Appeals, 32 Fla. St. U. L. Rev. 1331, 1352 (2005) ("Over time, circuits appear to implicitly develop cultures that manifest themselves in various ways.").

[20] For similar observations, see Levy, supra note 2, at 318 ("Even within the judiciary, a void in knowledge exists. Judges themselves acknowledge that they are unacquainted with the case-management practices of courts outside their own.").

[21] Judith A. McKenna, Laura L. Hooper & Mary Clark, Fed. Jud. Ctr., Case Management Procedures in the Federal Courts of Appeals, at ix (2000).

management include those that govern oral argument, published/unpublished opinions, and going en banc.[22]

1. Oral Argument

A very obvious and well-documented difference among the circuits lies in the frequency of oral argument. All of the circuits adopt a "one judge rule"—any one judge can demand oral argument in any case.[23] But the circuits vary tremendously in the rate they grant argument and also in the process through which they make that decision.

Marin Levy and Stefanie Lindquist have each documented the rates of oral argument using data from the Administrative Office of U.S. Courts.[24] According to Lindquist's 2007 research, the First, Seventh, Second, and D.C. Circuits are the courts that hear the most oral argument (based off of percentage of all appeals terminated on the merits).[25] Indeed the Second Circuit rather famously grants argument in almost every case—even pro se appeals—except for immigration cases, which have had their own non-argument calendar since shortly after 9/11.[26] And the Seventh Circuit, "with very minor exceptions," grants arguments in every case that has a lawyer on both sides.[27] In terms of personality traits, that would make the Second, Seventh, and D.C. Circuits "oral argument-heavy joint[s]."[28]

[22] Some of this variation, of course, is just a reflection of the different conditions under which the circuits operate—such as differences in the number of judges or the size of the docket. Those conditions perhaps explain the origin of some of the rules and traditions we describe below.

[23] Fed. R. App. P. 34(a)(2) (oral argument is allowed unless a panel of three judges unanimously decides it "unnecessary"). The circuits have all adopted a "one judge veto" rule to implement this. See, e.g., 4th Cir. Internal Operating Proc. 34.2; 11th Cir. R. 34-3(b)(3).

[24] Levy, supra note 2, at 319; Lindquist, supra note 2, at 664; see also Marin K. Levy & Jon O. Newman, The Internal Operations and Practice of the Federal Courts of Appeals (manuscript at 1–2, 11) (draft on file with author) (considering updated oral argument statistics).

[25] Lindquist, supra note 2, at 671.

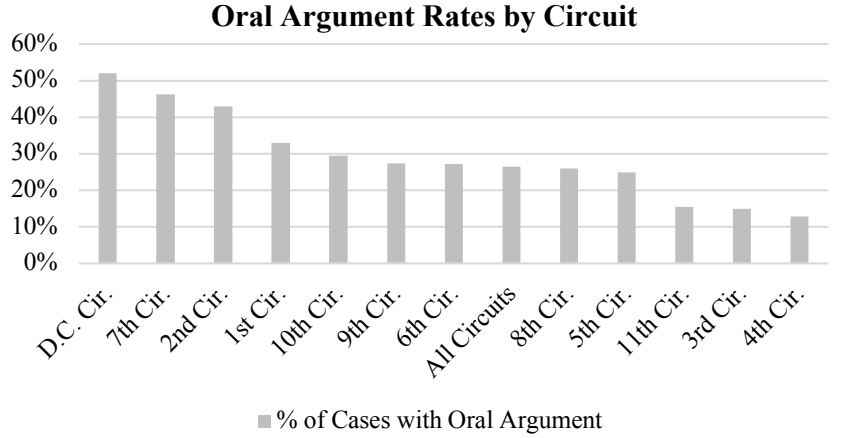
[26] Levy, supra note 2, at 336–37; see also Oral Argument, U.S. Ct. of Appeals for the 2d Cir., https://www.ca2.uscourts.gov/clerk/case_filing/appealing_a_case/agency_case/oral_argument.html [https://perma.cc/9DBG-MXDB] (last visited Jan. 3, 2022) (detailing the immigration cases which are assigned to the non-argument calendar). For a fascinating look at the collateral effects of a separate immigration calendar in the Second Circuit, see Bert I. Huang, Lightened Scrutiny, 124 Harv. L. Rev. 1109, 1123 (2011).

[27] Diane P. Wood, Tribute, Missing Judge Tinder, 49 Ind. L. Rev. 903, 903 (2016).

[28] Kent Streseman, Federal Court Practitioner Guides on Oral Argument, App. Advoc. Blog (Sept. 4, 2019), https://lawprofessors.typepad.com/appellate_advocacy/2019/09/federal-court-practitioner-guides-on-oral-argument.html [https://perma.cc/BX89-ANCG].

The other end of the spectrum—light on oral argument—finds the Third, Fourth, and Eleventh Circuits.[29] Levy's recent research—based on 2020 data from the Administrative Office of the U.S. Courts—found that the Fourth Circuit held the fewest arguments (only eight percent), followed by the Eleventh and the Third Circuits (both at eleven percent).[30]

We took our own look at the data over recent five-year increments and observed that this specific feature of circuit personalities (heavy/light on oral argument) seems both quite varied and also very sticky, meaning the practices persist over time.[31] Consistent with both Lindquist and Levy, we found that the D.C., Seventh, and Second Circuits heard the most oral arguments, and the Eleventh, Third, and Fourth Circuits heard the least.



Not only does the bottom-line rate of oral argument differ from circuit to circuit, but the screening process itself varies significantly. No circuit grants oral argument in every case. All thirteen have some sort of process in place to decide which cases go to argument and which do not. But the exact point of entry for the staff attorney's office and their specific charges vary quite a bit from circuit to circuit: some circuits have decided

[29] Lindquist, supra note 2, at 671; Levy & Newman, supra note 24, at 1–2 tbl.1.

[30] See Levy & Newman, supra note 24, at 2.

[31] To determine oral argument rates, we extracted data for 2005, 2010, 2015 and 2020 from Federal Court Cases: FJC Integrated Database (IDB) 1970 to Present, Fed. Jud. Ctr., https://www.fjc.gov/research/idb [https://perma.cc/FCW9-X327] (last visited Jan. 12, 2022). We identified cases with and without oral argument using the DISP field.

"screening is a key way to save judicial time and is an appropriate task for trained staff," while others think the decision needs to rest squarely with an Article III judge.[32]

In the Third and Tenth Circuits, for example, the judges largely perform the screening function themselves. A case in the Third Circuit gets screened for jurisdictional defects by a staff attorney, but the actual decision to grant oral argument is made by the judges after full briefing is complete.[33] Similarly, when a case comes in the door at the Tenth Circuit, it goes to a single judge first, and that judge is the one that separates (1) easy cases that can be decided quickly (colloquially called "screeners"), (2) cases that should go to the staff attorney's office because they have a big factual record, and (3) cases that should be argued.[34] The judges on the Tenth Circuit are asked to do this screening job first as a sort of "triage"—it is considered their most urgent task.[35]

In other circuits—like the Fourth,[36] the First, and the Fifth—the first stop for a case that comes in the door is the staff attorney's office.[37] In those circuits the decision on whether to grant oral argument is ultimately made by judges, but only after the decision is primed with a memo from the staff attorney's office and a short opinion written by staff attorneys for the judges to approve.[38]

Indeed, sometimes the staff attorney's office runs quite a sophisticated shop; it not only screens cases but also assigns weight to reflect the

[32] Levy, supra note 2, at 339; see also 3d Cir. Internal Operating Procs. 2.1 ("The panel determines whether there will be oral argument and the amount of time allocated. There is oral argument if it is requested by at least one judge. Each judge communicates his or her views to the other panel members.").

[33] Levy, supra note 2, at 337.

[34] See Interview with 10th Cir. Judge (Feb. 24, 2021) (notes on file with editors).

[35] Id.

[36] To be precise, the first stop in the Fourth Circuit is actually the Clerk's Office, which looks for cases that will certainly need argument. The rest of the cases then go to the Office of Staff Counsel before making it to the judges' desks. Interview with 4th Cir. Judge (Jan. 14, 2022) (notes on file with editors).

[37] See Interview with 1st Cir. Judge (Mar. 12, 2021) (notes on file with editors); Interview with 5th Cir. Judge (Mar. 26, 2021) (notes on file with editors). That means that in these circuits "staff attorneys are heavily involved in the screening process, determining which cases will go on to oral argument and which cases will not." Levy, supra note 2, at 339. As Merritt McAlister notes in her skeptical take on the reliance on staff attorneys, such personnel "rarely have any face time with the judges." Merritt E. McAlister, "Downright Indifference": Examining Unpublished Decisions in the Federal Courts of Appeals, 118 Mich. L. Rev. 533, 548 (2020).

[38] Levy, supra note 2, at 334–35 (explaining how the D.C. Circuit screens cases); 5th Cir. Internal Operating Proc.: Screening; 1st Cir. Internal Operating Proc. VII.

relative difficulty of a case.[39] The staff attorney's office in San Francisco servicing the Ninth Circuit, for example, houses eighty lawyers. They execute an elaborate point system, assigning each case a number of points depending on the complexity of the issues presented.[40] The idea is to distribute workload fairly among the judges, and they also use this process to send the cases with a smaller point value to a "screening calendar" likely not destined for oral argument. In the same vein, the staff attorney's office for the Fifth Circuit (numbering over fifty lawyers) has developed subject matter expertise and not only screens cases but also circulates subject-matter-specific memos used by law clerks in chambers.[41]

Oral argument practices within a circuit come with bragging rights. It seems once a circuit has a reputation for being "an oral argument-heavy joint," the judges in that circuit come to cherish that reputation and wear it as a badge of honor.[42] Several of the judges we interviewed spoke of a "tradition" and a "pride" that comes with arguing more cases than their sister circuits, and another judge perceived criticism from judges outside the circuit who thought hearing lots of argument was "indulgent."[43]

2. Published / Unpublished Opinions

Another discernable difference between the circuits is the rate at which they issue published versus unpublished opinions. "Unpublished

[39] Levy, supra note 2, at 333.

[40] 9th Cir. Gen. Order 3.3(b) ("Cases ready for submission to a panel shall be screened by case management attorneys, who shall designate issues, identify cases with similar issues, and assign a numerical weight to each case. Drawing upon a computerized file of such cases, the Clerk's Office generates a prospective case list using a computer application that takes into account, to the extent possible, the priorities set forth in [3.3(c)]."). Against the background principle of selection according to the order of submission, Ninth Circuit General Order 3.3(c) enumerates certain cases that have special priority, such as capital cases, direct criminal appeals, civil appeals with statutory priority, and cases given priority by Ninth Circuit Rule 34-3. 9th Cir. Gen. Order 3.3(c).

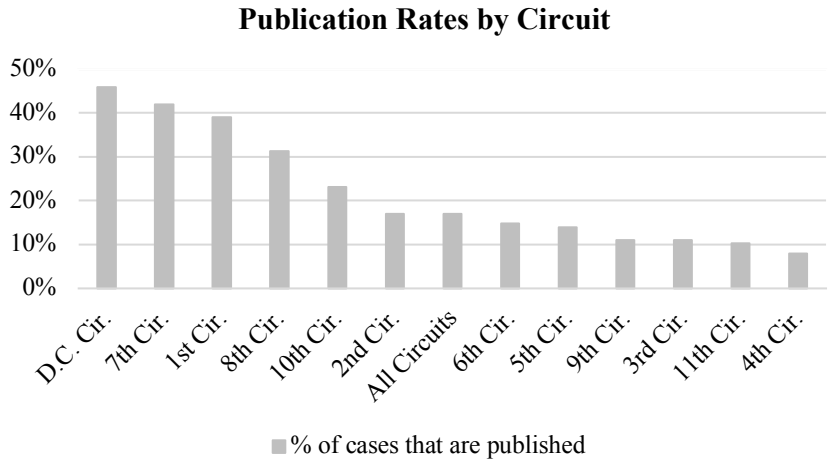
[41] See Interview with 5th Cir. Judge (Mar. 26, 2021) (notes on file with editors).

[42] Streseman, supra note 28. For an example of judges bragging about their rate of oral argument, see, e.g., Wilfred Feinberg, Unique Customs and Practices of the Second Circuit, 14 Hofstra L. Rev. 297, 303 (1986) ("Another unusual, and perhaps unique, Second Circuit practice is that, with few exceptions, we allow and encourage oral argument of all appeals and substantive motions, going so far in some instances as to *refuse* permission to submit an appeal on the briefs alone.").

[43] Interview with 8th Cir. Judge (Mar. 12, 2021) (notes on file with editors) (noting "tradition"); Interview with Fed. Cir. Judge (May 13, 2021) (notes on file with editors) (noting "pride"); Interview with 2d Cir. Judge (Feb. 4, 2021) (notes on file with editors) (noting criticisms of "indulgent" behavior).

opinions," of course, is a bit of a misnomer because virtually all federal opinions are publicly accessible.[44] But not all decisions of the courts of appeals are given precedential weight, and often those non-precedential decisions are called "unpublished."

On this dimension we again see a variety from circuit to circuit as reflected in the chart below,[45] although—as Merritt McAlister persuasively documents—all circuits have seen a dramatic rise in the use of unpublished opinions over time.[46]



Through interviews we learned of some unwritten norms that govern the decision to write a published or an unpublished opinion. In the Third Circuit, there is an unwritten rule against pursuing en banc review for a decision with an unpublished opinion, and there is also a tradition of not reversing a trial court in a decision made without first hearing oral argument.[47] The norm is slightly different in the Tenth, Fifth, and Seventh

[44] For valuable discussion on the history and debate around unpublished opinions see McAlister, supra note 37, at 533, 535 (arguing that the rise of unpublished decisions in federal appellate courts unfairly denies indigent litigants access to the appeals process).

[45] To determine publication rates, we extracted data for 2005, 2010, 2015 and 2020 from Federal Court Cases: FJC Integrated Database (IDB) 1970 to Present, Fed. Jud. Ctr., https://www.fjc.gov/research/idb [https://perma.cc/FCW9-X327] (last visited Jan. 12, 2022). We determined publication status using the PUBSTAT field.

[46] McAlister, supra note 37, at 549–50.

[47] Interview with 3d Cir. Judge (Feb. 8, 2021) (notes on file with editors).

Circuits; in those circuits the strong presumption is that argued cases result in published opinions.[48] In most circuits, however, there seems to be a norm towards deferring to the wishes of the authoring judge as to whether to publish or not, and this also appears to be a place for negotiation ("I'll join you but only if [it is] unpublished").[49]

3. En Banc Practices

Our final case management distinction to highlight is actually the one that drew our attention to circuit variation in the first place. All circuits are subject to the same rule about when to go en banc (Federal Rule of Appellate Procedure 35), but not all circuits go en banc at the same rate or have the same internal practices for working around en bancs.[50]

In a prior article, we tracked en banc decisions for twelve circuits over five decades.[51] Although we were looking for partisan behavior (which we analyzed and discussed in that article), we also noticed a significant variation among the circuits. Below is a chart depicting variation in rates of en banc decisions by circuit (adjusted for circuit size).[52] Our data reflects en banc decisions (more than 950) from the following years: 1966–1968, 1976–1978, 1986–1988, 1996–1998, 2006–2008, and 2016–2020.[53]

[48] In the Fifth Circuit at least this norm has been written down. See 5th Cir. R. 47.5.2. ("An opinion will be published unless each member of the panel deciding the case determines that its publication is neither required nor justified under the criteria for publication. If any judge of the court or any party so requests the panel will reconsider its decision not to publish an opinion.").

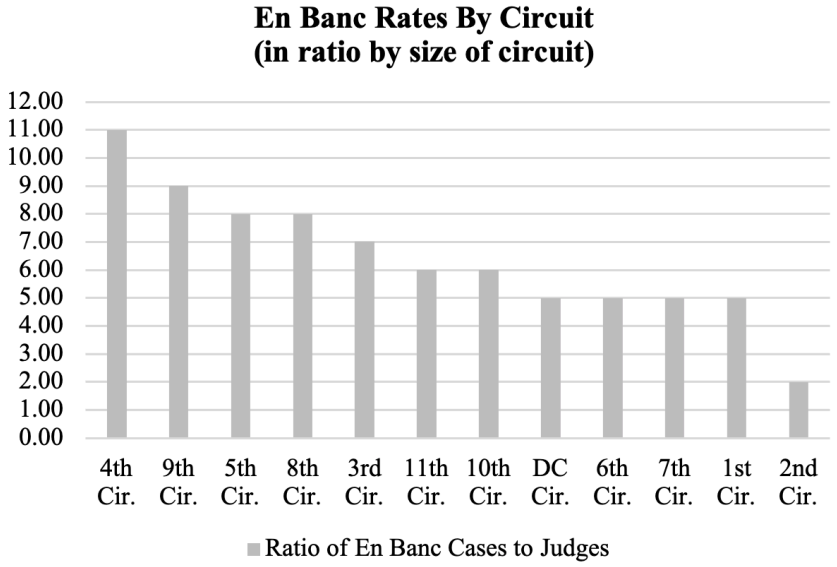
[49] Interview with 4th Cir. Judge (Feb. 8, 2021) (notes on file with editors).

[50] Rule 35 explains that en banc review is "not favored" but is allowed in two limited circumstances: when "(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a).

[51] See Devins & Larsen, supra note 8, at 1378–79. We omitted the Federal Circuit from that study.

[52] We wanted to account for differences in circuit size when comparing en banc rates. For each circuit, we calculated the ratio in this chart by dividing the total number of en banc opinions in our study by the average number of judges in that circuit. We obtained the number of judges from Jon O. Newman, History of the Article III Appellate Courts, 1789–2021, at 19–24 (2021), https://www.fjc.gov/sites/default/files/materials/31/Appellate%20Court%20History%2012-14-21.pdf [https://perma.cc/WC2V-SYQB]. For each year in our study, we counted the number of judges as of January 1st, then averaged the number of judges across all years in our study.

[53] For more on our methodology in that prior study, see Devins & Larsen, supra note 8, at 1405–07.



It is important to remember that en banc is always a rare procedure, so it is unwise to put too much stock into variations among rare, rarer, and rarest. But a few interesting variations do stand out. The Second, First, and Seventh Circuits historically seem the most reluctant to go en banc, and this falls right in line with the norms and traditions they foster (and brag about). The Fourth Circuit goes en banc the most frequently, followed by the Ninth and Fifth Circuits.[54] This variation also falls in line with the stories we learned in our interviews. Some circuits (like the Fifth) have dedicated en banc sittings and are not shy about calendaring and expecting them, but others (like the Second) seem more hesitant to go en banc.[55]

Beyond just a range in terms of reluctance, en banc personality traits are also developed through the en banc work-arounds that various circuits

[54] Due to its size, the Ninth Circuit rarely sits all together; rather, its en banc courts consist of the Chief Judge and ten non-recused judges who are randomly drawn, and that procedure is what is reflected in our chart here. See 9th Cir. R. 35-3.

[55] Compare Interview with 8th Cir. Judge (Mar. 12, 2021) (reporting only two to three en bancs per year), and Interview with 1st Cir. Judge (Mar. 12, 2021) (reporting that smaller circuits, like the First, do not go en banc as often as other circuits), with Interview with 4th Cir. Judge (Feb. 8, 2021) (reporting no en banc limit and a recent increase in en banc frequency), and Interview with 5th Cir. Judge (Apr. 30, 2021) (reporting that the Fifth Circuit is not "en banc shy").

have implemented.[56] The Seventh Circuit, for example, has adopted something called a "Local Rule 40(e) circulation."[57] Under this rule, if one panel thinks an earlier panel should be overruled or the panel decision is going to create a conflict with another circuit, then the entire court votes on whether to issue it. One judge we interviewed referred to this process as a "paper en banc," and explained that it is done entirely behind the scenes, not at the behest of a party.[58] A consequence of the paper en banc is to limit the number of actual en bancs, a goal that seems accomplished in the Seventh Circuit (as reflected in the chart above).

Other circuits—but certainly not all of them—circulate panel opinions more generally. In the D.C. Circuit every opinion—published and unpublished—gets circulated to the whole court.[59] The same is true in the Tenth Circuit, although the time between circulation and publication is not long, and thus, it does not typically generate discussion.[60] In the Fourth Circuit, every opinion gets circulated to the full court, and indeed every published opinion requires acknowledgment of receipt from every active judge before it can be posted.[61]

We also learned of a practice—in the First Circuit, among others—of circulating a panel opinion that is in tension with a prior opinion and then dropping a footnote to indicate that all judges on the circuit were aware of the conflict. This, we were told, has the purpose and effect of stopping an en banc petition in its tracks.[62] Similarly, the "mini en banc"—

[56] Although all circuits agree en banc should be rare, the local rules vary a little bit in the language use describing just *how* rare it should be. The Fifth, Sixth, and Tenth Circuits all have a local rule that alters the Federal Rule slightly to state that en banc review should be "extraordinary." Alexandra Sadinsky, Note, Redefining En Banc Review in the Federal Courts of Appeals, 82 Fordham L. Rev. 2001, 2018 (2014). The First, Second, Fourth, Seventh, Eighth, and D.C. Circuits do not amend or elaborate on the Federal Rule, and the Ninth Circuit has its own unique process. Id. at 2019. Ninth Circuit en banc courts consist of the chief judge and ten non-recused judges who are randomly drawn. 9th Cir. R. 35-3.

[57] Interview with 7th Cir. Judge (Mar. 1, 2021) (notes on file with editors); see 7th Cir. R. 40(e).

[58] Interview with 7th Cir. Judge (Mar. 1, 2021) (notes on file with editors).

[59] D.C. Cir. Handbook of Practice and Internal Procedures 55 (2021) ("Final drafts of all opinions to be published also are circulated to all judges on the Court. Following circulation of the drafts to the panel and the Court, the opinion is printed in house.").

[60] Interview with 10th Cir. Judge (Feb. 24, 2021) (notes on file with editors).

[61] See Interview with 4th Cir. Judge (Jan. 14, 2022) (notes on file with editors).

[62] Interview with 1st Cir. Judge (Mar. 12, 2021) (notes on file with editors) (explaining the First Circuit's practice of circulating panel opinions that are inconsistent with prior decisions and noting that this practice is a way to indicate to the bar "that a petition to en banc would be futile").

pioneered by the Second Circuit but later adopted by others—even allows for overruling a precedent without a full en banc review if a majority of the active judges agree behind the scenes.[63] By one count, this mini en banc process has been invoked more than seventy times in the past fifty years.[64]

Of course, these en banc work-arounds (like the mini en banc) do have the effect of channeling judicial disagreement into avenues the public cannot see. We acknowledge these transparency costs, but we believe the collegiality benefits outweigh them. There was a consensus among the judges we interviewed that going en banc quickly gets nasty. Phrases used to describe en banc include "always fraught" and "a mess."[65] One judge we spoke to helpfully described a reason why. He explained that sitting en banc means a judge approaches the case knowing there is already a divide. This has a real effect on thinking, attitudes, and approaches to consensus-building.[66] There is thus a significant benefit to catching judicial disagreement early and privately, while there is still time to iron out differences, as opposed to initiating a public showdown where the battle lines are already drawn.

Judge Sutton of the Sixth Circuit has publicly lamented a robust en banc practice for a slightly different reason:

> The judges of a circuit not only share the same title, pay and terms of office, but they also agree to follow the same judicial oath, making them all equally susceptible to error and making it odd to think of the

[63] See Martin Flumenbaum & Brad S. Karp, The Rarity of En Banc Review in the Second Circuit, N.Y.L.J. (Aug. 24, 2016), https://www.paulweiss.com/media/3679578/24august2016flumenbaumkarp.pdf [https://perma.cc/33FM-7B42] ("The Second Circuit has generally adopted the mini en banc procedure where consideration by the full court is statutorily available but deemed unnecessary, such as when a panel concludes that intervening Supreme Court authority has impliedly overruled Second Circuit precedent. Aside from the Seventh Circuit (which has issued more than 270 mini en banc rulings), the Second Circuit has issued more than twice as many mini en banc decisions as any of its sister circuits." (footnotes omitted)). For a description of the mini en banc process, see Steven M. Witzel & Samuel P. Groner, Mini-En Banc Review in the Second Circuit, N.Y.L.J. (Jan. 7, 2016), https://www.friedfrank.com/siteFiles/Publications/070011608%20Fried.pdf [https://perma.cc/U8YD-M56Q].

[64] Witzel & Groner, supra note 63.

[65] Interview with 4th Cir. Judge (Feb. 8, 2021) (notes on file with editors); Interview with 10th Cir. Judge (Feb. 24, 2021) (notes on file with editors).

[66] Interview with 1st Cir. Judge (Mar. 12, 2021) (notes on file with editors).

> delegation of decisionmaking authority to panels of three as nothing more than an audition.[67]

Perhaps for these reasons, circuits with lower en banc rates wear that fact proudly.[68] And circuits where en banc is on the rise are subjected to criticism that judicial bonds of collegiality are fraying.[69] Fourth Circuit Judge Keenan, for example, fretted publicly that the inflammatory language used in en banc dissents in her circuit was endangering their "cherished tradition of civility."[70]

Interestingly, we heard from several judges (appointed by Presidents of different parties) that individual attitudes about going en banc change over time regardless of ideology: judges new to the bench are more eager to have an en banc sitting, and judges with more experience are reluctant to go en banc.[71] Time on the bench matters—or, as one judge put it, newer judges are more likely to "have more fire" and time mellows out that instinct regardless of ideological priors.[72] This is a view widely shared by the judges we interviewed who had been on the bench for a while, and perhaps it indicates that en banc battle wounds are slow to heal.

B. Unique Interpersonal Customs

Putting aside case management differences among the circuits, our interviews revealed other unique traits of the thirteen courts of appeals

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[67] John Ferroli, Sixth Circuit En Banc Decisions—2010, Mich. Bar J., June 2011, at 16, https://www.sixthcircuitappellateblog.com/wp-content/uploads/sites/11/MI%20Bar%20Journal.pdf [https://perma.cc/YBA5-68QV] (quoting Mitts v. Bagley, 626 F.3d 366, 370 (6th Cir. 2010) (Sutton, J., concurring)).

[68] A well-known champion of this view is former Chief Judge of the D.C. Circuit Harry Edwards, who made it a mission to change the culture of the court he inherited as Chief Judge. See infra Section I.C; see also Ben Protess, As Wall Street Fights Regulation, It Has Backup on the Bench, N.Y. Times, Sept. 25, 2012, at F2 (connecting Chief Judge Edwards's approach to collegiality with fewer en banc sittings).

[69] See, e.g., Patrick M. Kane, Denial of Emergency Motion Spawns Four Opinions from the Fourth Circuit, N.C. App. Prac. Blog (Oct. 21, 2020), https://ncapb.foxrothschild.com/2020/10/21/denial-of-emergency-motion-spawns-four-opinions-from-the-fourth-circuit/# [https://perma.cc/RC3G-4N2N] ("If you follow the Fourth Circuit, you know that there has been a noticeable increase in the number of en banc cases that the Court has taken, and in those cases there has been some sharp disagreement between the Judges.").

[70] Manning v. Caldwell, 930 F.3d 264, 286 (4th Cir. 2019) (en banc) (Keenan, J., concurring); see also Green, supra note 12 (connecting increased en banc activity on the Fourth Circuit to growing partisanship and discord).

[71] Interview with 6th Cir. Judge (Apr. 20, 2021) (notes on file with editors); Interview with 11th Cir. Judge (Apr. 1, 2021) (notes on file with editors).

[72] Interview with 11th Cir. Judge (Apr. 1, 2021) (notes on file with editors).

that relate more to the interpersonal component of appellate judging. Variation in interpersonal customs (including and especially how often—if ever—judges travel to hear oral argument) is perhaps the most significant difference affecting the daily lives of federal appellate judges. We focus on two customs—face-to-face communication and opinion writing.

1. Face-to-Face Communication

Conducting our interviews during the COVID pandemic led to some interesting observations: the judges who sit in circuits with traditions of dinners out and organized events really missed these practices in 2020. This seemed particularly true of the judges who sit in circuits where they must travel to hear argument.[73] The Eleventh Circuit, for example, has a history of all-judges dinners during the week they travel for Court Week.[74] And, because they don't always sit in the same city to hear arguments, there is a fun tradition of exploring new restaurants and parts of a city or going back to tried and true haunts like one does on vacation. The Fourth Circuit has a similar custom of dining out during court weeks in Richmond—the judges have lunch with their co-panelists every day, and they dine with other chambers (including the law clerks) many evenings at regular spots they cherish.[75]

By contrast, judges on the D.C. Circuit lamented that they may be less connected with one another since they all sit in the same city where they live and thus the socializing traditions in other circuits do not happen without effort (although several chief judges, as discussed below, have made this effort).[76] And similarly, we learned that because judges on the Seventh Circuit all commute to Chicago these days, their old tradition of lunch after argument has fallen out of favor in order to ease the commutes—a loss that the judges feel acutely because of a real need to have regular "non-case-related personal chats" with colleagues.[77]

[73] See infra note 164 and accompanying text.

[74] Interview with 11th Cir. Judge (Jan. 27, 2021) (notes on file with editors) (describing all-judges lunches and dinners during court week as a "tradition" that is "engrained in the culture but not formalized").

[75] Interview with 4th Cir. Judge (Feb. 8, 2021) (notes on file with editors).

[76] Interview with D.C. Cir. Judge (Feb. 3, 2021) (notes on file with editors); Interview with D.C. Cir. Judge (Mar. 17, 2021) (notes on file with editors); Interview with D.C. Cir. Judge (Apr. 19, 2021) (notes on file with editors); see infra notes 114–22 and accompanying text.

[77] Interview with 7th Cir. Judge (Mar. 1, 2021) (notes on file with editors).

In fact, a strong norm in most socializing traditions, we learned, is "no case talk."[78] The goal instead, as one judge put it, is to learn to see one's colleagues as human beings, and not as opponents "in combat."[79] For this reason, many of the judges seem to put a premium on exploring fun locations together as friends. This was particularly true of judges who tend to sit in vacation destinations; a few locations that came up in our conversations were: Miami (Eleventh Circuit), New Orleans (Fifth Circuit), Santa Fe (Tenth Circuit) and San Juan (First Circuit).[80] Indeed, Judge Costa on the Fifth Circuit recently joked on a podcast that "I got a lot of good advice on how to be a Fifth Circuit judge, but the advice they were most passionate about was which restaurants to eat at in New Orleans."[81] And another judge explained to us he has learned over the years that "[b]reaking bread and cocktails adds to affection."[82] In a 2016 speech at the University of Chicago Law School, Judge Harris, of the Fourth Circuit, observed that lunches and dinners are "a key ritual of collegiality making manifest that the disagreements about cases have no consequences for our personal interactions."[83]

It is important to emphasize that the value of this socializing is not just to make life nicer for the judges (although that is certainly true). Collegiality, as D.C. Circuit Judge Edwards explains, "is a process that helps to create the conditions for principled agreement."[84] Several judges specifically tied these customs of dining out with the act of effective

[78] Interview with D.C. Cir. Judge (Apr. 19, 2021) (notes on file with editors).

[79] Interview with D.C. Cir. Judge (Mar. 17, 2021) (notes on file with editors) (reporting that efforts to increase collegiality helped judges see one another as "human beings"); Interview with 4th Cir. Judge (Feb. 8, 2021) (notes on file with editors) (reporting that the decrease in collegial events due to COVID has made everything feel like "combat").

[80] See, e.g., Interview with 5th Cir. Judge (Mar. 26, 2021) (notes on file with editors) (New Orleans); Interview with 10th Cir. Judge (Feb. 24, 2021) (notes on file with editors) (Santa Fe).

[81] D. Todd Smith, A Peek Into Life on the Fifth Circuit Bench: Judge Gregg Costa, Tex. App. L. Podcast, at 23:38 (Oct. 8, 2020), https://www.butlersnow.com/2020/10/a-peek-into-life-on-the-fifth-circuit-bench-judge-gregg-costa/ [https://perma.cc/65KF-E3GQ]. Another Fifth Circuit judge told us that the practice of inviting visiting judges from other circuits to sit on Fifth Circuit cases was suspended, in part, because of the number of out-of-circuit judges interested in turning their sitting into a vacation. See Interview with 5th Cir. Judge (Mar. 26, 2021) (notes on file with editors).

[82] Interview with 11th Cir. Judge (Apr. 1, 2021) (notes on file with editors).

[83] Maura Levine, Inside the Fourth Circuit Court of Appeals: How Collegiality Works, Univ. Chi. L. Sch. (May 19, 2016), https://www.law.uchicago.edu/news/inside-fourth-circuit-court-appeals-how-collegiality-works [https://perma.cc/X3H7-V9KZ].

[84] Edwards, supra note 4, at 84.

judicial decision making.[85] One judge lamented the loss of this collegiality as COVID took its toll on the socializing which resulted in "nastier" discourse.[86] "Knowing each other as people," that judge explained, "is necessary to collegial collective decision making."[87] It can even make one more likely to dissent because "[d]issent happens in part because you know you will all be friends later."[88] Another judge emphasized that he does not "believe in fighting for collegiality for collegiality's sake."[89] Instead, he explained, liking one's colleagues makes it easier "to find common ground, to listen to each other, to respect precedent"—at bottom, it just makes for "better decisions" at the end of the day.[90]

In her 2016 speech Judge Harris put it this way:

> For me, collegiality means embracing, not chafing at, the collective nature of appellate decision-making. It's "leaning in" to making decisions in active engagement with your colleagues: Knowing each other; really listening to and respecting each other's views; being willing to be persuaded and also to persuade, to be part of that dialogue. This is a genuine choice . . . [and] [a] very substantive conception of the role of an appellate judge, in which reaching decisions through interaction is central to the job.[91]

There are other important unique interpersonal norms in the circuits that are meant to build collegiality but do not involve eating out. In some circuits—like the Seventh or First—the small size makes it possible for

[85] See Interview with 4th Cir. Judge (Feb. 8, 2021) (notes on file with editors) ("Knowing each other as people is necessary to collegial collective decision making."); Interview with 2d Cir. Judge (Feb. 4, 2021) (notes on file with editors) (talking about dinners with colleagues during which they discussed history and traditions of the court); Interview with Fed. Cir. Judge (May 13, 2021) (notes on file with editors) (explaining how a court's tradition of collegiality may mitigate aggressively toned opinions).

[86] Interview with 4th Cir. Judge (Feb. 8, 2021) (notes on file with editors).

[87] Id.

[88] Id.

[89] Interview with 6th Cir. Judge (Apr. 30, 2021) (notes on file with editors).

[90] Id. For similar sentiments from a variety of judges, see Statements from the Court about the Passing of Judge Stephen F. Williams, U.S. Ct. of Appeals for the D.C. Cir., https://www.cadc.uscourts.gov/internet/home.nsf/Content/Announcement+-+Statement+from+the+Court+about+the+Passing+of+Judge+Stephen+F.+Williams [https://perma.cc/4TBQ-6VRH] (last visited Jan. 3, 2021) (including Judge Tatel's view that "[c]ollegiality is critical to effective appellate judging").

[91] Edwards, supra note 4, at 76 (alterations in original) (quoting Judge Harris).

every judge to sit an equal number of times with every other judge.[92] This is a norm specifically designed to combat fractions, cliques, and group think. The D.C. Circuit, under Judge Edwards's leadership, also made this a formal rule: "[E]very judge must sit with every other active judge on the court at least four times in a term."[93] Repetitive active engagement with judges appointed by a different President seems critical to establishing rapport.

We also found a significant divergence in the nature of that rapport—particularly as it relates to case discussion. The Eighth, Fourth, and D.C. Circuits favor a more formal method of discussing cases—they circulate memos and do not discuss the cases before argument (indeed Eighth Circuit judges, we discovered, rarely even email each other, opting instead to exchange written memos).[94] Judges in other circuits described this formal exchange of views as a little old-fashioned and indicated that the trend was changing in favor of more informal discussions of cases before argument.[95] In fact, one judge praised this new development because it helps to "promote agreement," "issue spot," and "narrow disagreement."[96]

2. Opinion Writing

Judges on several circuits flagged strong norms in the editing process: specifically, a recognition that judges should not call attention to differences in one another's choice of legal reasoning or writing styles. For example, judges on the Third, Fourth, and D.C. Circuits mentioned to us that there is a long-standing custom of using a light editing touch and giving discretion to the authoring judge in terms of structure and style on how the opinion should be written.[97] As an extreme example of this

[92] Indeed, the Seventh Circuit guarantees that sort of random panel assignment with an algorithm that ensures every judge sits with every other judge an equal number of times. See interview with 7th Cir. Judge (Mar. 1, 2021) (notes on file with editors).

[93] Edwards, supra note 4, at 85.

[94] Interview with 8th Cir. Judge (Mar. 12, 2021) (notes on file with editors); Interview with 4th Cir. Judge (Feb. 8, 2021) (notes on file with editors); Interview with D.C. Cir. Judge (Feb. 3, 2021) (notes on file with editors).

[95] Interview with 1st Cir. Judge (Mar. 12, 2021) (notes on file with editors); Interview with 3d Cir. Judge (Feb. 8, 2021) (notes on file with editors).

[96] Interview with 3d Cir. Judge (Feb. 8, 2021) (notes on file with editors).

[97] Interview with 3d Cir. Judge (Feb. 8, 2021) (notes on file with editors); Interview with 4th Cir. Judge (Feb. 8, 2021) (notes on file with editors); Interview with D.C. Cir. Judge (Feb. 3, 2021) (notes on file with editors).

deference, Fourth Circuit judges apparently used to be discouraged from saying anything more than "affirm" or "reverse" in conference, leaving the rest of the reasoning in the hands of the assigned author.[98] Even today, we were told, all communications about draft opinions contain a "diplomatic politeness," with praise to the author and use of a passive voice to offer a constructive solution to any conflict. It is frowned upon in most circuits to use "flashy," "testy" language or words that "[make] us sound like we are at war."[99] Even red-lining a draft is seen by some as too aggressive. These editing norms, we were told, are critical to limiting moments for tension or flare-ups of disagreement.[100]

Similarly, several circuits have developed their own rules and timelines about when they must circulate their drafts and (perhaps more importantly) respond to other drafts. Judge Edwards is perhaps most famous for instituting this rule in the D.C. Circuit.[101] Along with Judge Wald, he set mandatory deadlines for when the judges were required to respond to each other, which "had a tremendous effect on improving interactions among the members of the court."[102] Several circuits also circulate a list every month of opinions not yet released, indicating who is waiting on whom to write a separate opinion or cast their vote so the decision can be released.[103] Judges we spoke to were uniformly afraid of being named on that list. The Tenth Circuit actually rewards timeliness in completion of work in an amusing way: judges who get their work done on time are happily assigned to a sitting over the summer in Santa Fe.[104]

Most judges seemed to agree that morale is higher when circuit productivity is up.[105] Another way to think of it is that a judge gets grumpy or resentful when forced to wait on another judge for months before

[98] Interview with 4th Cir. Judge (Jan. 14, 2022) (notes on file with editors); Interview with 3d Cir. Judge (Feb. 8, 2021) (notes on file with editors).

[99] Interview with 3d Cir. Judge (Feb. 8, 2021) (notes on file with editors); Interview with 9th Cir. Judge (Apr. 28, 2021) (notes on file with editors); Interview with D.C. Cir. Judge (Mar. 17, 2021) (notes on file with editors).

[100] Interview with 3d Cir. Judge (Feb. 8, 2021) (notes on file with editors); Interview with 4th Cir. Judge (Jan. 14, 2022) (notes on file with editors).

[101] Edwards, supra note 4, at 85–86.

[102] Id.

[103] See, e.g., Interview with 10th Cir. Judge (Feb. 24, 2021) (notes on file with editors) (every month a list of outstanding opinions and assignments is circulated); Interview with 2d Cir. Judge (Feb. 4, 2021) (notes on file with editors) (four times a year, a list is circulated with case status and assignments).

[104] Interview with 10th Cir. Judge (Feb. 24, 2021) (notes on file with editors).

[105] See, e.g., id.

getting their work done. Eliminating that intersection of disagreement is one way to smooth the path for collegial interaction.

Finally, law clerk dynamics seem to vary from circuit to circuit. Some courts (like the D.C. Circuit) have a tradition of a law clerk network—where law clerks serve as almost ambassadors from chambers to chambers.[106] Other courts frown on this channel of communication. The Ninth and the Fifth Circuits—likely due to their large sizes—have a role for law clerks that we did not find in other circuits. Law clerks in those jurisdictions author bench memos that are shared, or "pooled," among the various chambers.[107] The presiding judge then makes bench memo assignments before argument, and the memos are circulated to the other judges on the panel. At least one judge we spoke to did not favor this tradition of "forced pooling" but shared that he did it because he was highly discouraged by other judges from breaking tradition.[108]

An interesting question is where these norms and traditions come from, as many of them are not enshrined in the operating procedures. We learned from our interviews that the only way for new judges to figure out how their court really operated was to ask a colleague who was more senior. There is a "cultural transfer," in the words of one judge, that happens from one generation to the next.[109] Stories are shared of older judges from "our Court," and even the courthouse design becomes a talking point and a shared treasure.[110] This transmission of norms and traditions is understandably easier with smaller-sized circuits. Because the smaller circuits have continuous and repetitive interactions with each other, the emphasis on collegiality has real social consequences. In the words of one judge (on the First Circuit), "it is easy to have a virtuous circle when small."[111]

And while norms certainly evolve over time, several judges that are newer to the bench expressed to us that they were specifically advised upon arrival not to rock the boat.[112] One amusing anecdote we heard

[106] Interview with D.C. Cir. Judge (Apr. 19, 2021) (notes on file with editors).

[107] Interview with 9th Cir. Judge (Apr. 28, 2021) (notes on file with editors); Interview with 5th Cir. Judge (Apr. 30, 2021) (notes on file with editors).

[108] Interview with 5th Cir. Judge (Apr. 30, 2021) (notes on file with editors).

[109] Interview with 2d Cir. Judge (Feb. 4, 2021) (notes on file with editors).

[110] Interview with 3d Cir. Judge (Feb. 8, 2021) (notes on file with editors); Interview with 5th Cir. Judge (Mar. 26, 2021) (notes on file with editors).

[111] Interview with 1st Cir. Judge (Mar. 12, 2021) (notes on file with editors).

[112] Interview with 5th Cir. Judge (Apr. 30, 2021) (notes on file with editors); Interview with 4th Cir. Judge (Jan. 14, 2022) (notes on file with editors).

involved a new judge suggesting gently that maybe Word Perfect was not the best processing system to use nowadays. This judge apparently caused a firestorm over such a bold suggestion and concluded that one does not want to be the new judge who arrives to a circuit armed with suggestions about how things ought to be done.[113]

C. Instances of Circuit Personality Changes

Perhaps the best way to demonstrate the existence and effect of circuit personalities is to describe moments in time where a circuit seems to affirmatively act to change its personality. Our research unearthed two such instances: the D.C. Circuit in the mid-1990s and the Sixth Circuit in the early 2000s. In both cases, judges who had previously been at loggerheads with each other found a path to overcome (typically) ideological rifts by embracing their circuit identity.

1. D.C. Circuit

Virtually everyone agrees that the D.C. Circuit change is largely attributable to one man: Judge Edwards, who was appointed to the D.C. Circuit in 1980 and became Chief Judge of the court in 1994.[114] Judge Edwards has written about his early days on the bench of what he calls a "broken [circuit] for want of collegiality."[115] He recalls:

> During my first day as a member of the court, I was greeted by one of the senior members of the court who, after saying 'hello,' asked, 'Can I count on your vote?' I was floored by the question. I responded that he could count on my vote only on those occasions when we agreed on how a case should be decided. I came to understand, however, that—in

[113] Interview with 4th Cir. Judge (Jan. 14, 2022) (notes on file with editors) (recounting this story about a colleague from another circuit).

[114] Harris, supra note 9, at 78 ("Restoring a sense of community and collegiality was very important to Judge Edwards, especially when he became chief judge in 1994. Most observers rightly credit Judge Edwards with helping to restore a more cooperative and collegial culture on the D.C. Circuit, and he has gone on to write and speak extensively about the importance of judicial collegiality."). See generally United States Court of Appeals for the District of Columbia, Harry T. Edwards, https://www.cadc.uscourts.gov/internet/home.nsf/content/VL+-+Judges+-+HTE [https://perma.cc/V77Y-MK7F] (providing a short biography of Judge Edwards).

[115] Edwards, supra note 4, at 84. For an account of the bitter lines of division among liberal and conservative judges on the D.C. Circuit in the early 1970s (including the refusal of liberals and conservatives to sit with one another over lunch), see Joseph C. Goulden, The Benchwarmers: The Private World of Powerful Federal Judges 250–90 (1974).

> those days—the DC Circuit was ideologically divided on many issues . . . . Judges of similar political persuasions too often sided with one another (say, on petitions for *en banc* review) largely out of partisan loyalty. We dissented more, and we were more inclined to rehear cases *en banc* . . . [and were] distrustful of one another's motivations.[116]

Judge Edwards was convinced that the lack of collegiality and nastiness he witnessed on his court was simply no way to run a railroad. Importantly, he was not just worried about the daily toll that accompanies conflict. Instead, he said that without collegiality, the actual outputs of a court suffer: when judges hate each other they are "less receptive to ideas about pending cases and to comments on circulating opinions; and they stubbornly cling to their first impressions of an issue, often readily dismissing suggestions that would produce a stronger opinion or a better result."[117] The toxic atmosphere that Judge Edwards inherited when he joined the D.C. Circuit, in other words, inhibited their ability to "get[] the law right."[118]

And so, once Judge Edwards became chief judge in 1994, he decided to make some changes—both to the written rules and to the unwritten norms governing the circuit. First, as alluded to above, he championed a change to the case-assignment system so that every active judge sat with every other active judge on the court at least four times a term. Second, he convinced the rest of the court to all but eliminate reliance on visiting judges (except in an emergency) so as to maximize the time active judges spent with each other. And third, he instituted time limits for when the judges had to respond to one another's draft opinions. Together, these rule changes helped "structure the paths" to collaboration and had a "tremendous effect on improving interactions among the members of the court."[119]

The judges we interviewed on the D.C. Circuit all agreed that these changes made a great difference, but they also credited more subtle moves by Judge Edwards that changed the culture of the court. Judge Edwards initiated a champagne toast at the end of the year, for example, and he

[116] Edwards, supra note 4, at 84–85.
[117] Id. at 85.
[118] Harry T. Edwards, A Conversation with Judge Harry T. Edwards, 16 Wash. U. J.L. & Pol'y 61, 63 (2004).
[119] Edwards, supra note 4, at 85–86.

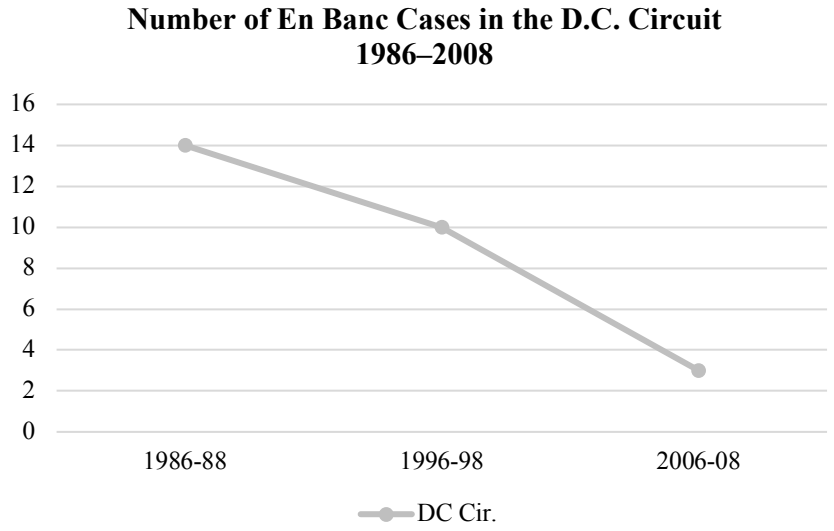
purchased birthday gifts and delivered them to each judge annually.[120] With rule adjustments, deliberate acts of kindness, and purposeful socializing, Judge Edwards managed a circuit personality change at the D.C. Circuit.

This story was repeated to us by many different judges (both on and off the D.C. Circuit), but we were also able to also see it borne out in data. Although admittedly not a perfect proxy for collegiality, one measurable feature of potential discord among circuit court judges is the number of times they sit en banc. As described above, going en banc is a fraught process, so much so that several circuits have designed ways to affirmatively avoid it.[121] If one looks at the number of times the D.C. Circuit went en banc before and after Judge Edwards' efforts were implemented, a striking pattern emerges.[122]

[120] Interview with D.C. Cir. Judge (Mar. 17, 2021) (notes on file with editors); Interview with D.C. Cir. Judge (Apr. 19, 2021) (notes on file with editors); see also Edwards, supra note 4, at 89 ("[T]he judges in a number of circuits arrange events that allow members of the court to engage with one another in settings outside of the courtroom."). For example, professionals are often invited to have relaxed lunches with the judges on the D.C. Circuit. At the end of each term, the chief judge will host a gathering with champagne. Id.

[121] See supra Subsection I.A.3.

[122] This data was collected as part of a separate project in which we examined approximately 950 en banc decisions over six decades, looking for evidence of "weaponizing" en banc in partisan ways. For a detailed discussion of the methodology and data collection, see Devins & Larsen, supra note 8, at 1405.



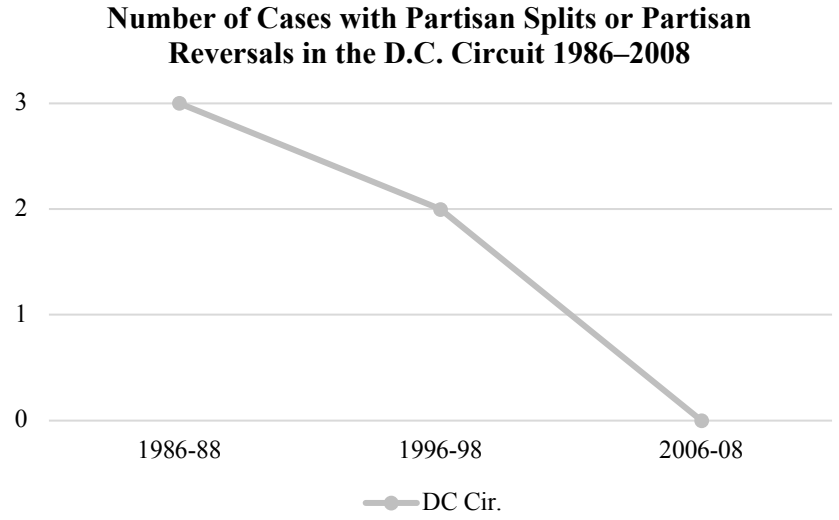
As the above figure demonstrates, the number of en banc sittings decreased rather significantly after Judge Edwards became chief judge in 1994 (and with a little time for his rule changes and norm changes to sink in).

To be sure, there are many reasons en banc decisions could decline—docket changes, or personnel changes for example. We were able, however, to parse these en banc decisions closely looking for signs of discord. We coded which of these en banc decisions could be labeled "partisan" either because the decision splits along lines of appointing President or because the circuit went en banc to course-correct for a renegade panel composed of judges appointed by the minority party.[123]

As the next figure demonstrates, this partisan behavior in D.C. Circuit en banc decisions also decreased around the same time Judge Edwards attempted to change circuit personality. In fact, from 2006–2008—once

[123] As explained in our earlier paper, we defined a "partisan split" as divided en banc decisions where at least ninety percent of the judges voted in line with other judges appointed by Presidents of the same political party and against those nominated by the other party. Id. at 1379. We separately identified a "partisan reversal" if "four conditions were met: (1) the panel opinion is reversed, (2) most judges in the panel majority opinion are from the minority party (the party that is not dominant in the circuit at the time), (3) most majority party judges vote to reverse the panel en banc, and (4) most minority party judges dissent en banc." Id. at 1407. For an in-depth discussion on how this data was collected, see *id.* at 1405.

the personality change was complete—the number of cases that we labeled partisan in the D.C. Circuit dropped to zero.



2. Sixth Circuit

A similar personality change can be seen at the Sixth Circuit in the early 2000s. The narrative begins with the highly contentious affirmative action cases from the University of Michigan that culminated in the *Grutter v. Bollinger* and *Gratz v. Bollinger* decisions (decided in the Sixth Circuit in 2002 and the U.S. Supreme Court in 2003).[124] The disagreement between the judges extended far beyond the merits of the cases and included claims of judicial misconduct and shenanigans involving opinion assignment and the timing of en banc review.[125]

[124] Grutter v. Bollinger, 539 U.S. 306 (2003) (holding that University of Michigan Law School's affirmative action policy did not violate the Equal Protection Clause); Gratz v. Bollinger, 539 U.S. 244 (2003) (holding that the University of Michigan's affirmative action admissions policy for first-year students violated the Equal Protection Clause).

[125] Sixth Circuitry, Wall St. J. (May 17, 2002, 12:01 AM), https://www.wsj.com/articles/SB1021591705602440320 [https://perma.cc/5MYP-3HXG] ("According to Judge Boggs's account, corroborated by another judge, Judge Martin assigned himself to the three-judge panel that was considering *Grutter*, bypassing the usual random-selection process. He then delayed telling the court, which then had 11 active members, that the [party] had petitioned for a full-court or *en banc* review. Instead, he waited until two Republican-appointed judges

Whether the affirmative action fights were the cause of the nastiness or just a symptom of a preexisting dynamic, the contentiousness of this episode spilled over to infect the rest of the Sixth Circuit and led to such a tremendous dip in collegiality that the judges were said not to be able to sit in the same room with one another.[126] Indeed, in the words of *New York Times* reporter Adam Liptak, the Sixth Circuit was "surely the most dysfunctional federal appeals court in the nation . . . [and] relations among the judges on the Sixth Circuit [had] been marred by venomous discord for at least a decade, mostly along ideological lines."[127]

Today, twenty years later, the Sixth Circuit has gone through some significant personnel changes, and they have also instituted some new traditions. For one thing, like the D.C. Circuit in the 1990s, the Sixth Circuit has changed some rules. Bothered that for years they were the circuit with the slowest pace of case disposition, they decided to speed things up. They altered the way cases were assigned, and they delegated the decision whether to have oral argument to the three-judge panel (under the old rule, the judges heard oral argument in every counseled case).[128]

The changes worked. The median interval from notice of appeal to final disposition on the Sixth Circuit dropped from 14.2 months in 2008 to 8.3 months in 2018.[129] And the rule change did more than just alter the Sixth Circuit's reputation as a slow mover. Just like Judge Edwards discovered on the D.C. Circuit, streamlining the pace of case disposition brings real collegiality benefits—it limits the potential strain that arises when one judge is waiting on another to get his opinions out. Perhaps unavoidable ideological conflict is aggravated when judicial colleagues believe their work is being held up by a dissent.

The Sixth Circuit also instituted a "joviality committee" and some new social traditions: happy hour once a week, an annual riverboat tour, and a

had taken senior status, thereby losing the right to sit in an *en banc* hearing. It's not unusual for judges to time their move to senior status so that they can participate in cases that interest them and it's reasonable to assume that *Grutter*, which dealt with one of the most contentious legal issues of the day, would have been such a case.").

[126] See interview with 10th Cir. Judge (Feb. 24, 2021) (notes on file with editors).

[127] Adam Liptak, Weighing the Place of a Judge in a Club of 600 White Men, N.Y. Times (May 16, 2011), https://www.nytimes.com/2011/05/17/us/17bar.html [https://perma.cc/8UQT-YZNW].

[128] See Interview with 6th Cir. Judge (Apr. 30, 2021) (notes on file with editors).

[129] We obtained this figure by comparing data from 2008 and 2018 found in Caseload Statistics Data Tables, Admin. Office of the U.S. Courts tbl.B-4A, https://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables [https://perma.cc/L3S7-JUM4] (last visited Jan. 13, 2022). The years reflect the twelve-month periods ending September 30.

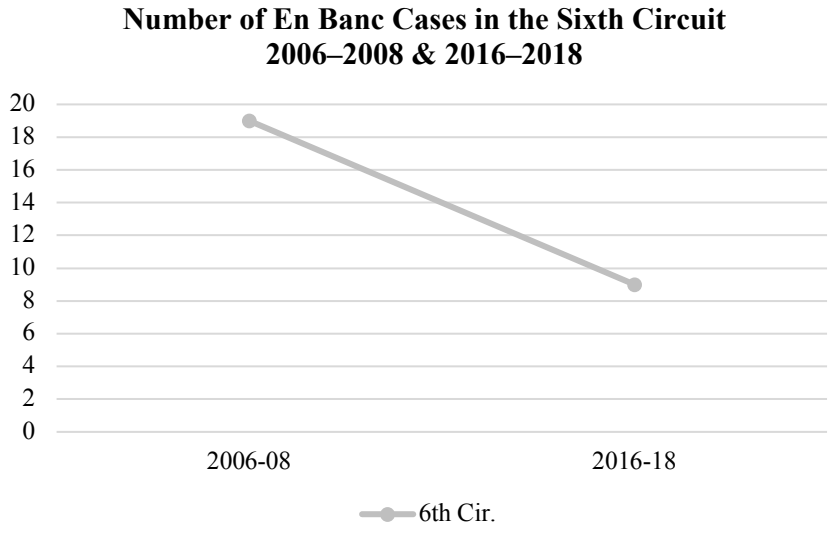
Reds baseball game (with staff).[130] From all accounts, these changes (and likely the personnel changes that occurred as well) seem to work towards improving life on the Sixth Circuit. Indeed, very recently the judges on the Sixth Circuit nominated their colleague Judge Cole (chief judge from 2014–2021) to receive the prestigious American Inns of Court Professionalism Award. According to Judge Griffin, who wrote the nomination letter, Judge Cole deserved praise for "reviving the court's collegiality."[131]

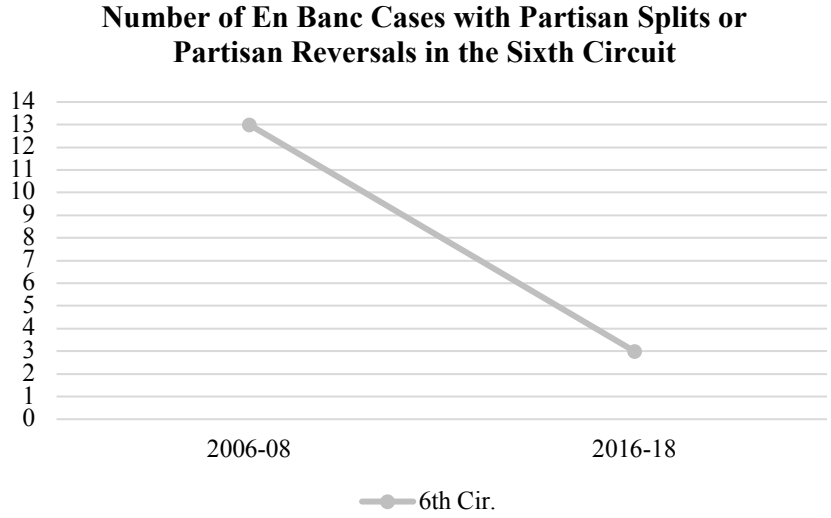
Once again, the en banc data we collected reinforces this story of personality change in the Sixth Circuit. In 2016–2018 the Sixth Circuit went en banc far less frequently than it had ten years earlier (indeed the number of en bancs dropped in half).[132] And perhaps even more importantly, those ten years also saw a dramatic drop in the number of partisan splits/partisan reversals in Sixth Circuit en bancs. The number fell from thirteen in 2006–2008 to three in 2016–2018.

[130] See interview with 6th Cir. Judge (Apr. 30, 2021) (notes on file with editors).

[131] Press Release, Am. Inns of Ct., Judge R. Guy Cole Jr. to receive the 2021 American Inns of Court Professionalism Award for the Sixth Circuit (Sept. 27, 2021), https://www.businesswire.com/news/home/20210927005026/en/ [https://perma.cc/X9U6-RBVA]. Keeping with this trend of bipartisan nominations of colleagues, in 2021 Judge Julia Gibbons of the Sixth Circuit won the Devitt Award—the highest award in the federal judiciary—after having been nominated by all of her Sixth Circuit colleagues. Press Release, The Dwight D. Opperman Found., American Judiciary's Highest Honor Bestowed on Judge Julia Smith Gibbons, (Oct. 07, 2021, 6:00 ET), https://www.prnewswire.com/news-releases/american-judiciarys-highest-honor-bestowed-on-judge-julia-smith-gibbons-301394559.html [https://perma.cc/7LJB-SYBS].

[132] This data depicted in these two charts was collected for our previous article, Weaponizing En Banc, supra note 8. For an in-depth discussion on the methodology used to collect these en banc decisions, see *id.* at 1405–07.





Of course, as with the personality of an individual, circuit personalities are influenced by a multitude of factors that can change over time. These include the size of a circuit, the amount of time the judges have served on the bench, dockets that present divisive or non-ideological cases, and, of course, judicial temperament. By describing the personality features we discovered about the circuits we do not mean to imply they are static or

impervious to change by the specific people that join the flock. Our point is simply that these circuit-specific norms and rules do considerable work in influencing the daily life and motivations of an individual federal appeals judge—and this holds true regardless of the President appointing that judge.

II. WHY CIRCUIT PERSONALITIES MATTER

What is the significance of these circuit personalities beyond entertaining behind-the-scenes storytelling? It is to that question that we now turn. In Part III and the Conclusion, we will examine the rise of nationalization and how circuit personalities mitigate ideological polarization. Before turning to those matters, we have other important work to do. We need to provide richer accounts both of judging on the federal courts of appeals and why it is that federal appeals judges care so much about their status before legal audiences. Circuit personalities matter, put simply, because they foster a unique model of deciding cases, and because they facilitate a community for judges who care deeply about their reputations for honoring the rule of law.

A. Unique Model of Judging on the Courts of Appeals

Federal courts of appeals judges are often lumped together with U.S. Supreme Court Justices particularly when it comes time to evaluate politics in judging.[133] President Donald Trump's staggering fifty-four appointees to the federal courts of appeals, for example, have been called a group of "battle-tested conservatives" who—along with the three Trump-appointed Justices—are on the bench to "advance a 'particular agenda.'"[134]

Whatever the merits of these warnings, they overlook a very important fact: the model of decision making in the courts of appeals is different from the model featured prominently in the U.S. Supreme Court. To be sure, appellate judges and Supreme Court Justices are all engaged in

[133] Debbie Stabenow, Chuck Schumer & Sheldon Whitehouse, Captured Courts: The GOP's Big Money Assault on The Constitution, Our Independent Judiciary and the Rule of Law 1, 3 (2020); see also Edwards, supra note 4, at 61 ("Too often scholars, members of the media, and other interested persons mistakenly think that the work of the Courts of Appeals can be measured by reference to the decision-making practices of the Supreme Court.").

[134] Ruiz et al., supra note 14.

collective decision making, but there are features of this collective process in the lower courts that stand apart.

First and most obviously, federal appellate judges hear cases in randomly assigned panels of three that continuously shuffle. This makes them different from any other type of federal judge—certainly the district court judge who speaks alone, but also the Supreme Court Justice who always tangles with the same eight people. Appeals judges, by contrast, rarely speak for themselves, and their partners in decision making vary from week to week. This model of judging assumes that any panel of three people can deliver a legitimate decision for the circuit as a whole.

Further, because judges deliberate cases together in different combinations throughout the year, a dissenter on today's panel may need a vote from the same judge to make a majority tomorrow. And this sort of "across the aisle" consensus is quite possible in the federal appellate courts. Unlike the Supreme Court docket where most of the cases, almost by definition, defy an easy answer, the dockets in the courts of appeals contain far fewer cases that inevitably divide by ideology.[135] Consensus and compromise, in other words, are within reach and are part and parcel of the appellate court decision-making model.[136] More than that, there is real pressure to decide cases in a timely manner. Dissents and concurrences take time and, as such, present challenges to court administration as well as collegial decision making. As we were told by several judges, consensus goes hand-in-hand with avoiding the pinch of a crowded docket.[137]

For this model to work the judges must foster relationships with colleagues. They must confront the reality that they are no longer committed soldiers dedicated to national causes. Instead, they face pressure to adopt a new sort of loyalty—a circuit loyalty—simply in order to get their work done. As Judge Edwards put it, federal appellate judges "respect the work and abilities of their colleagues with whom they share equal authority and a common commitment to 'getting the law right.'"[138]

[135] This means, in the words of Judge Edwards, "[t]he majority of the cases in the circuit courts admit of a right or a best answer," regardless of ideological differences. Edwards, supra note 4, at 61.

[136] See id.

[137] See Interview with 3d Cir. Judge (Feb. 8, 2021) (notes on file with editors) (explaining that a judge authoring too many dissents or requesting too many en bancs risks alienating others); see also Interview with D.C. Cir. Judge (Feb. 3, 2021) (notes on files with editors) (noting that dissents are seen as extra work and the court values consensus).

[138] Edwards, supra note 4, at 65.

Of course, none of this means that appellate judges lose their ideological priors when donning the robe (the priors that, in part, got them the job to begin with), but it does mean these judges must start to see themselves as adopted into a new family of sorts. This requires the judges to buy into a "whole is more than the sum of its parts" mentality. And they largely do. In the words of Judge Katzmann (who tragically passed away during the writing of this article):

> We come from all different kinds of backgrounds, but we're playing off the same score. Musicians are part of an orchestra; there's a common language. Were judges to become involved in partisan disputes, we would devalue the institution we serve, and we are very careful to avoid that kind of language and rhetoric.[139]

Another unique feature of federal appellate decision making (compared to the Supreme Court) is that decisions are made with relative anonymity. Federal appellate judges are not often recognized on the street, they are unlikely to be household names (even among lawyers), and they do not generally boast nicknames, go on book tours, or inspire internet memes, bobbleheads, or jewelry.[140] There is freedom that comes from this obscurity. An appeals judge is less likely than a Supreme Court Justice to face pressure in terms of needing to stay consistent in individual views over time (what one of us has called a "self stare decisis").[141] They can perhaps afford to meet a colleague in the middle, or on a narrower ground without facing scathing criticism about being a traitor to a cause.[142] And, because the docket of cases a federal appeals judge faces is more constrained by precedent than a typical Supreme Court case, and more open in terms of preserved issues available to resolve the case, there are

[139] Jesse Wegman, Opinion, A Humane Judge, Gone Too Soon, N.Y. Times (June 11, 2021), https://www.nytimes.com/2021/06/11/opinion/Robert-Katzmann-judge-dead.amp.html [https://perma.cc/3PZC-FHBG].

[140] For discussion of this phenomenon, see Hasen, supra note 5 (chronicling the ebbs and flows of Supreme Court Justice celebrity).

[141] Allison Orr Larsen, Perpetual Dissents, 15 Geo. Mason L. Rev. 447, 469 (2008).

[142] For an example of this latter dynamic at the Supreme Court, consider the reaction from social conservatives when Justice Gorsuch wrote the majority opinion in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), finding "sex discrimination" in Title VII to incorporate employment discrimination based on gender identity or sexual orientation. See Jane Coaston, Social Conservatives Feel Betrayed by the Supreme Court—and the GOP that Appointed it, Vox (July 1, 2020), https://www.vox.com/2020/7/1/21293370/supreme-court-conservatism-bostock-lgbtq-republicans [https://perma.cc/K8XM-LB8A].

more moves for a federal appellate judge to make in order to generate consensus.

This is where collegiality and circuit personalities really do work in terms of the decisions that are rendered at the end of the day. In Judge Edwards's words:

> [J]udges have a common interest . . . in getting the law right, and that, as a result, we are willing to listen, persuade, and be persuaded, all in an atmosphere of civility and respect. Collegiality is a *process* that helps to create the conditions for *principled* agreement, by allowing all points of view to be aired and considered.[143]

Similarly, Judge Harris underscores this value of collegiality when talking about Judge Edwards (for whom she clerked):

> Judge Edwards always makes clear that by "collegiality," he has in mind something more than friendly and civil relationships among judges. There is overlap, of course; Judge Edwards treasures his friendships with his colleagues and understands that civility in disagreement is a precondition of any healthy collaboration. But when Judge Edwards talks about collegiality, he is describing a very substantive conception of the role of an appellate judge, in which reaching decisions through interaction is central to the job. [144]

This interaction—that which Judge Harris says is central to the job—is exactly what makes circuit personalities so critical. The model of judging in the courts of appeals assumes that decisions are better when deliberated and that deliberation is better when collegial. Because successful appellate judging depends on repeat interactions with people who may not always see the law the same way, loyalty to the group and dedication to the enterprise is key.

B. Motivations of Federal Appellate Judges

We have just described a model of judging on the federal courts of appeals that is uniquely collegial, a model in which circuit personalities reinforce critical collegial bonds. But why do we think that federal appeals judges are committed to this model of judging? In today's hyper

[143] Harry T. Edwards, The Effects of Collegiality on Judicial Decision Making, 151 U. Pa. L. Rev. 1639, 1645 (2003).

[144] Harris, supra note 9, at 78.

polarized world, why would appellate judges not see themselves as ideological warriors willing, if need be, to repudiate collegiality in order to advance favored legal policy positions?[145] Indeed, political scientists have long argued that legal policy goals are paramount in judicial decision making.[146] The dominant political science models see randomly assigned panels and the need to secure two votes as obstacles to work around in the pursuit of favored legal policy goals.[147]

Often overlooked in this literature, however, is the fact that federal appeals judges also care deeply about their reputations—reputations regarding not just outcomes but also judicial independence, collegiality, and other rule-of-law norms. By examining the motivations of federal appeals judges, we can better appreciate whether and how circuit personalities matter.

We start with Judge Posner's observation that judges have multiple goals including harmonious relations with colleagues as well as "money[,] income, leisure, power, prestige, reputation, self-respect, the intrinsic pleasure (challenge, stimulation) of the work, and the other satisfactions that people seek in a job."[148] This common-sense observation recognizes that judges are humans and, as such, want to be liked and respected by those who matter to them. That, of course, is not to say that appeals judges will not act in ways that are inconsistent with

[145] See supra notes 14–16 (noting recent studies that highlight upticks in anti-collegial partisanship, most notably in dissents and en banc overrulings).

[146] See Lee Epstein & Tonja Jacobi, The Strategic Analysis of Judicial Decisions, 6 Ann. Rev. L & Soc. Sci. 341, 347–49 (2010) (summarizing research analyzing both the Supreme Court's and Appellate Courts' strategic behavior); Michael W. Giles, Virginia A. Hettinger, Christopher Zorn & Todd C. Peppers, The Etiology of the Occurrence of En Banc Review in the U.S. Court of Appeals, 51 Am. J. Pol. Sci. 449, 461 (2007) (drawing links between ideological considerations and the en banc reviews at the appellate level).

[147] Political scientists argue that judges calibrate their decision making to advance their policy goals as far as possible—so that there are "panel effects" where a liberal judge will take a strongly liberal position on a panel with like-minded judges but will moderate that position in order to avoid a dissenting opinion that might set in motion en banc review. See Giles et al., supra note 146, at 461 (judges in the minority of a circuit will "modify their panel behavior" to avoid en banc); Cass R. Sunstein, David Schkade, Lisa M. Ellman & Andres Swakicki, Are Judges Political? 8–13 (2006) (discussing how judges will "amplify" or "dampen" their positions based on ideological preferences of other panel judges). See generally Frank B. Cross, Decision Making in the U.S. Courts of Appeals 148–77 (2007) (examining "panel effects," where an appellate judge's vote is swayed by the other two judges on the panel).

[148] Richard A. Posner, How Judges Think 36 (2008).

their core beliefs;[149] it is to say that, unlike single-minded, "Spock-like" automatons that care only about legal policy goals, appellate judges also care about their reputations with others in their circles.[150]

In fact, there is good reason to think that appeals judges care a great deal about their reputations.[151] Accepting such a judgeship imposes numerous costs: a potentially significant pay cut, a draining appointments and confirmation process, a loss of privacy, and other constraints on personal activities. Aside from power, judges gain in reputation and the esteem in which they are held by the individuals and groups that matter to them. Correspondingly, through their activities both inside the court (oral argument, opinion writing) and outside the court (speeches, teaching, interviews) appeals judges—like other humans—take pains to "project images of themselves that are consistent with the norms in a particular social setting and with the roles they occupy."[152] Through this process of "self-presentation," judges seek to enhance their status among social and professional networks that matter to them.[153]

Like other people, judges too are members of multiple groups and networks, possessing complex social identities. When engaging in self presentation, federal appeals judges "have a wide array of potential audiences."[154] Against the backdrop of ideological polarization and the attendant confirmation wars, attention is now focused on the growing role of national policy groups. And while the affiliation of appeals judges with

[149] Holly Arrow, Joseph E. McGrath & Jennifer L. Berdahl, Small Groups as Complex Systems 70–77 (2000). For appeals judges with strong ideological leanings, legal policy preferences are particularly important (but are still counterbalanced by other motivations). See Baum, supra note 11, at 54–55 (highlighting continuing relevance of a judge's interest in interpreting the law well regardless of their policy preferences).

[150] See Baum, supra note 11, at 60; Lawrence Baum & Neal Devins, Why the Supreme Court Cares About Elites, Not the American People, 98 Geo. L.J. 1515, 1532–33 (2010).

[151] See Baum & Devins, supra note 150, at 1532–36; Thomas J. Miceli & Metin M. Coşgel, Reputation and Judicial Decision-making, 23 J. Econ. Behav. & Org. 31, 49 (1994).

[152] Mark R. Leary, Self-Presentation: Impression Management and Interpersonal Behavior 67 (1996).

[153] Like other humans, judges engage in "impression management" by seeking to control how they are "perceived by other people." Id. at 2; see also Barry R. Schlenker & Michael F. Weigold, Interpersonal Processes Involving Impression Regulation and Management, 43 Ann. Rev. Psych. 133, 134 (1992) (explaining that people engage in impression management by regulating information they present to audiences).

[154] Baum, supra note 11, at 50.

those groups is certainly consequential,[155] we think it important to recognize that other audiences matter too—including audiences that bring together ideologically disparate appeals judges. For this reason, we think that circuit personalities are highly significant; they create common ground for judges interested in their reputations to build those reputations with court colleagues and the legal community at large. Two aspects of such reputation-building are particularly noteworthy.

First, lawyers generally embrace the norm that judicial decision making is not just raw power brokering but instead is "governed by a consideration of the relevant legal factors."[156] Judges—like all lawyers—come to the bench already well inculcated with this norm; indeed, this notion that the law matters is "woven tightly into the fabric of legal education and the legal profession" generally.[157] Consider, for example, the fact that not one Trump-appointed judge backed the President's claim of a stolen election; instead, these judges castigated the President for failing to make specific allegations or provide proof.[158] This rebuke was certainly a triumph for the rule of law. But it was also a triumph of the elite social and professional networks that these judges inhabit. Of the fifty-four federal appeals judges who were appointed by President Donald Trump, forty-three had clerked on the federal courts of appeals (twenty of whom also clerked at the Supreme Court); ten had been full-time law professors (with sixteen others teaching as adjuncts); and fifteen regularly argued before federal courts of appeals (ten of whom had also argued before the Supreme Court).[159] In short, these judges had strong incentive

[155] See infra notes 269–74 and accompanying text (noting the ties between the Federalist Society and the Republican-appointed judges in the Fifth Circuit, which has backed various conservative causes).

[156] Wendy L. Martinek, Judges as Members of Small Groups, *in* The Psychology of Judicial Decision Making 73, 77 (David Klein & Gregory Mitchell eds., 2010).

[157] Id. For a 2016 study (that one of us coauthored) demonstrating how legal training and norms enabled lawyers and judges (but not the general public) to overcome ideological priors, see Dan Kahan et al., "Ideology" or "Situation Sense"? An Experimental Investigation of Motivated Reasoning and Professional Judgment, 164 U. Pa. L. Rev. 349, 370 (2016).

[158] John O. McGinnis, Constitutional Fidelity, City J.: Eye on the News (Dec. 9, 2020), https://www.city-journal.org/in-election-lawsuits-trump-judges-follow-the-law [https://perma.cc/N3EK-5BUV].

[159] See Memo from Jon Suttile to Neal Devins, Circuit Personalities, Jan. 8, 2022 (on file with author) (data set obtained by compiling biographical information from the Federal Judicial Center on Trump appointees to the U.S. Courts of Appeals). To find the biographical information for individual judges, see Biographical Directory of Article III Federal Judges, 1789–present, Fed. Jud. Ctr., https://www.fjc.gov/node/7946 [https://perma.cc/V6JL-6ZR9].

to protect the integrity of a judicial system that rewarded both them and the law-oriented audiences that mattered to them.

Second, in addition to their commitment to law-based decision making, federal court of appeals judges—even those with competing legal policy preferences—care about their reputation among their judicial colleagues, particularly judges on their own court. "[A]necdotal and systematic evidence make clear that there is an affective component to the interactions between and among judges" who sit on the same circuit.[160] Colleagues, as Larry Baum put it, "function as a true peer group, people who share the same position and work in the same situation. In appellate courts, they are especially well situated to assess each other's work."[161] Not only are appellate court decisions "inherently collective," appellate judges are "behaviorally interdependent" because they adhere to circuit personalities and must follow circuit precedent.[162]

Our interviews repeatedly reinforced how much appeals judges cared about their interface with colleagues. This was particularly true of circuits with fewer judges; these judges frequently sit on panels with each other as compared to larger courts "where the number of judges makes it more difficult to develop or sustain personal relationships."[163] It is also true of courts where nonresidential judges converge to hear cases away from home; these judges "work, eat and sleep in the same buildings, a situation that keeps them all in almost constant contact."[164]

While largely tied to a judge's relation to other judges in their circuit, this commitment to collegiality was also tied to the desire of judges in one circuit (most notably the chief judge)[165] to demonstrate the

[160] Martinek, supra note 156, at 75.

[161] Baum, supra note 11, at 54.

[162] Martinek, supra note 156, at 75 (quoting Baum, supra note 11, at 51). For a thorough-going examination of whether and when federal appeals judges prioritize circuit precedent, see David E. Klein, Making Law in the United States Courts of Appeals 57–61 (2002).

[163] Hettinger et al., supra note 2, at 35; Interview with 1st Cir. Judge (Mar. 12, 2021) (notes on file with editors); Interview with 8th Cir. Judge (Mar. 12, 2021) (notes on file with editors); Interview with 11th Cir. Judge (Jan. 27, 2021) (notes on file with editors); see also Patricia M. Wald, Thoughts on Decisionmaking, 87 W. Va. L. Rev. 1, 10 (1984) (identifying "the respect of our fellow judges" as a constraint on a judge's decisions).

[164] Daniel Egler, Hallowed Chambers, Chi. Trib., Mar. 12, 1984 (§ 2), at 8 (explaining analogous experiences of a non-resident state supreme court justice). In our interviews, several judges highlighted how out-of-town sittings facilitated collegiality. See Interview with 5th Cir. Judge (Mar. 26, 2021) (notes on file with editors); Interview with 11th Cir. Judge (Apr. 1, 2021) (notes on file with editors).

[165] For an understanding of why the chief judge has a different set of incentives than her colleagues, see Levy & Newman, supra note 2, at 2442.

professionalism of their court to the judges in other circuits.[166] Institutional reputation matters too. "Court culture teaches that a court that presents a unified face has fewer fragmented opinions, has a higher degree of civility among its judges, speaks with a higher degree of moral authority, and enjoys a higher degree of legitimacy."[167] As one judge we interviewed put it, dividing up on partisan grounds too often is, frankly, a "bad look."[168]

Appeals judges also abide by rule-of-law norms in order to earn the respect of the larger legal community. Law-oriented behavior is a powerful expectation in the legal community. Larry Baum wrote:

> Because of their socialization and experience, lawyers appreciate a judge's commitment to legal reasoning and skill in interpreting the law. For this reason, judges who want the respect of practicing lawyers, legal academics, and other judges have an incentive to be perceived as committed to the law and skilled in its interpretation.[169]

All of this to say that the very nature of a U.S. Court of Appeals judge (one's motivations, one's norms fostered by legal education, one's desire to enhance reputation) is enhanced by belonging to a smaller group with sticky traditions and cultures. The circuit personalities matter, in other words, because they are central to forming and supporting how an appellate judge sees herself and the work she does on a daily basis.

[166] See Interview with D.C. Cir. Judge (Apr. 19, 2021) (notes on file with editors); Interview with 6th Cir. Judge (Apr. 30, 2021) (notes on file with editors); Interview with 7th Cir. Judge (Mar. 1, 2021) (notes on file with editors). For an explanation of why judges on other courts are an important reference group, see Baum, supra note 11, at 103–04 (emphasizing that these judges have similar status and do similar work). It should also be noted that judges on appeals courts compete with each other for promotions to the U.S. Supreme Court and for invitations to conferences, advisory boards, etc. See id. at 81–82.

[167] Jonathan Matthew Cohen, Inside Appellate Courts: The Impact of Court Organization on Judicial Decision Making in the United States Courts of Appeals 173 (2002). Learned Hand (who sat on the Second Circuit from 1924 to 1961) went so far as to suggest that dissent fosters the view that law is political by canceling "the impact of monolithic solidarity on which the authority of a bench of judges so largely depends." Hettinger et al., supra note 2, at 19 (quoting Learned Hand, The Bill of Rights 72 (1958)); see also James Oakes, Personal Reflections on Learned Hand and the Second Circuit, 47 Stan. L. Rev. 387, 387–89 (1995) (discussing Learned Hand's influence on the Second Circuit's prestige and his "commanding presence both in and out of the courtroom").

[168] Interview with 11th Cir. Judge (Jan. 27, 2021) (notes on file with editors).

[169] Baum, supra note 11, at 106.

III. THE THREAT TO CIRCUIT PERSONALITIES: CENTRALIZED NATIONAL POLITICS OF JUDICIAL APPOINTMENTS

Standing in sharp contrast to circuit personalities is the nationalization of American politics and American life.[170] Just as circuit personalities are a kind of superglue that bonds the judges of a circuit together, nationalization works as a counterweight: it calls on circuit judges to eschew that which makes their circuit unique and look, instead, to a different common measure.[171] In today's hyperpolarized world, nationalization also calls for judges to identify with a political party. In other words, rather than see themselves as judges on a unique circuit, the threat is that appeals judges will see themselves as Trump judges or Biden judges.

In this section, we will explore this threat to circuit personalities, detailing the rise and reach of divisive partisan nationalization. Our principal concern, of course, is the rise of centralized national politics in the appointment and confirmation of appeals judges. But judicial appointments are a manifestation of a much larger phenomenon. State and local connections matter far less to Americans now than ever before. Americans instead look to national politics as a proxy for all politics.[172] We increasingly see ourselves as Democrats or Republicans locked in battle with the other.[173] By disassociating from the communities where we reside, ideology plays an increasingly large role in defining new nationwide communities as the communities that matter to us.[174]

[170] See David J. Hopkins, The Increasingly United States: How and Why American Political Behavior Nationalized 2 (2018); Oriana Schwindt, The Unbearable Sameness of Cities, N.Y. Mag., https://nymag.com/urbanist/article/the-unbearable-sameness-of-cities.html [https://perma.cc/NDQ5-W5AQ] (last visited Mar. 19, 2022) (observing the similarities of coffee shops, bars, restaurants, and architecture in different American cities).

[171] This tug and pull between national and local was likewise critical to the constitutional design. "For the framers, citizens' state-level loyalties were a critical counterweight to the centralizing tendencies inherent in a federal system." Hopkins, supra note 170, at 5.

[172] See David Schleicher, Federalism and State Democracy, 95 Tex. L. Rev. 763, 765 (2017) (noting that voters tended to choose state legislators based on their national party affiliation).

[173] See Cass R. Sunstein, Going to Extremes: How Like Minds Unite and Divide 4–7 (2009).

[174] Schleicher, supra note 172, at 767 (citing Christopher S. Elmendorf & David Schleicher, Informing Consent: Voter Ignorance, Political Parties, and Election Law, 2013 U. Ill. L. Rev. 363, 397–98).

A. The Rise of Nationalization

Before the 1980s Reagan Revolution, ideological diversity was a hallmark of both Democrats and Republicans; at this time, Southern Democrats and liberal Rockefeller Republicans were integral members of their respective parties.[175] This allowed each state to see themselves as a "distinct societ[y]" associated with a unique character and unique values.[176] Dwight Eisenhower put it this way: "There is not one Republican Party, there are 48 state Republican parties."[177] Accordingly, for Democrats and Republicans alike, state-level politics could run the liberal-to-conservative gamut.

Consider, for example, state abortion politics.[178] From 1973 to 1989, forty-eight states had passed 306 abortion measures in response to *Roe v. Wade*.[179] "Challenger" states took the lead challenging the boundaries of *Roe* by, for example, enacting waiting period and informed consent requirements; "supporter" states backed abortion rights through state funding and greater abortion access.[180] Unlike today's red-blue national divide, challenger states and supporter states were neither overwhelmingly Democratic nor overwhelmingly Republican.[181] Challenger states, for example, included Illinois, Massachusetts, and

[175] See Richard H. Pildes, Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America, 99 Calif. L. Rev. 273, 288–89 (2011). By 1994, 23% of Republicans were more liberal than the median Democrat and 17% of Democrats were more conservative than the median Republican; in 2017, the median Republican was more conservative than 97% of Democrats—so essentially a perfect partisan/ideological division. The Partisan Divide on Political Values Grows Even Wider, Pew Rsch. Ctr. (Oct. 5, 2017), https://www.pewresearch.org/politics/2017/10/05/1-partisan-divides-over-political-values-widen/ [https://perma.cc/72DA-U4MB].

[176] Daniel J. Elazar, Foreword: The Moral Compass of State Constitutionalism, 30 Rutgers L.J. 849, 861 (1999).

[177] Lee Drutman, America Has Local Political Institutions but Nationalized Politics. This Is a Problem., Vox (May 31, 2018), https://www.vox.com/polyarchy/2018/5/31/17406590/local-national-political-institutions-polarization-federalism [https://perma.cc/A2TU-88KJ].

[178] See generally Mary Ziegler, Abortion and the Law in America 1–10 (2020) (outlining the legal battles surrounding abortion); Neal Devins, Rethinking Judicial Minimalism: Abortion Politics, Party Polarization and the Consequences of Returning the Constitution to Elected Government, 69 Vand. L. Rev. 935, 938 (2016) (arguing that the issue of abortion rights was not as deeply divisive a matter between Democrats and Republicans as it is in the current politically polarized society).

[179] 410 U.S. 113 (1973); Neal Devins, Shaping Constitutional Values 60 (1996).

[180] See Glen Halva-Neubauer, Abortion Policy in the Post-*Webster* Age, 20 Publius 27, 32–33 (1990).

[181] See Devins, supra note 178, at 956 (citing Halva-Neubauer, supra note 180, at 32–41).

Minnesota; supporter states included Alaska, Kansas, and New Hampshire.[182]

In today's polarized world, of course, there is a sharp Republican-Democrat divide on a broad spectrum of issues—abortion being one of them.[183] Party leaders and lawmakers at all levels embrace so-called "message politics," that is, party efforts to differentiate their party from the other by using the legislative process to make symbolic statements to voters and other constituents.[184] More than that (and key to our concerns), the Democratic and Republican parties have taken steps to advance a distinctive national message and for that message to permeate local, state, and national politics.[185]

Today, state legislatures increasingly outsource the drafting of legislation to national interest groups (which draft model legislation)[186] or look to sister states with similar politics.[187] More telling, national politics drive state legislative elections.[188] A study of policy divergence between

[182] See Halva-Neubauer, supra note 180, at 32.

[183] Starting in the 1990s, Democrat and Republican voters began to diverge on abortion; needless to say, red state and blue state politics reflected that divergence. See Devins, supra note 178, at 964–82.

[184] See C. Lawrence Evans, Committees, Leaders, and Message Politics, *in* Congress Reconsidered 217, 219–20 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 7th ed. 2001).

[185] For this reason, Ed Rubin and Malcolm Feeley argue that "the American people . . . have a unified political identity . . . [wherein they] identify themselves primarily as Americans." Malcolm M. Feeley & Edward Rubin, Federalism: Political Identity & Tragic Compromise 115 (2008). This nationalization of state politics arguably has resulted in states (dominated by the party not in the White House) serving as the principal check on presidential power. See Jessica Bulman-Pozen, Partisan Federalism, 127 Harv. L. Rev. 1077, 1105–08 (2014).

[186] Most states, for example, look to organizations like the American Legislative Exchange Council ("ALEC") to see if there is relevant draft legislation in their data base. See Molly Jackman, ALEC's Influence Over Lawmaking in State Legislatures, Brookings (Dec. 6, 2013), https://www.brookings.edu/articles/alecs-influence-over-lawmaking-in-state-legislatures/ [https://perma.cc/AT45-JCJX]. ALEC is an organization devoted to conservative policies; it works with conservative state legislators/legislatures. See id.

[187] Copycat legislation is particularly common on divisive issues like abortion, immigration, and religion. See Amber Phillips, 14 States Have Passed Laws This Year Making it Harder to Get an Abortion, Wash. Post (June 1, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/06/01/14-states-have-passed-laws-making-it-harder-to-get-an-abortion-already-this-year/ [https://perma.cc/BMT3-QFCR]; June Kim, Tara Kearns & Gerald P. López, Arizona and National Immigration Crisis, https://libguides.law.ucla.edu/c.php?g=183374&p=1208481 [https://perma.cc/RN3T-ZP94] (last visited Apr. 1, 2022); Jonathan Griffin, Religious Freedom Restoration Acts, 23 Nat'l Conf. of State Legislatures: LegisBrief (May 20, 2015), https://www.ncsl.org/research/civil-and-criminal-justice/religious-freedom-restoration-acts-lb.aspx [https://perma.cc/5XDG-XNTY].

[188] David N. Schleicher, Federalism is in a Bad State, Harv. L. Rev. Blog (Oct. 12, 2018), https://blog.harvardlawreview.org/federalism-is-in-a-bad-state/ [https://perma.cc/4JHU-A87

the home district and national party of a congressional candidate found that "when candidates . . . balance the broad policy views of the local district and the national party, the national party dominates."[189] Correspondingly, national issues that divide the parties now dominate state politics and state elections.

In our home state of Virginia, for example, the 2017 and 2021 gubernatorial races turned on health care, abortion, critical race theory in the schools, and Donald Trump.[190] In 2021, moreover, the gubernatorial race was widely viewed as a referendum on the Biden presidency.[191]

B. What Nationalization Means

Nationalization has two significant manifestations. First, local identity, local customs, and local norms give way as we increasingly look to national political parties, national media, and the like to shape our

Q]; see also Hopkins, supra note 170, at 2–4 (noting "gubernatorial voting and presidential voting have become increasingly indistinguishable"); Schleicher, supra note 172, at 763 (referring to voter behavior in state elections as "second order" because it "reflect[s] voter preferences about the President and Congress"); James A. Gardner, The Myth of State Autonomy: Federalism, Political Parties, and the National Colonization of State Politics, 29 J.L. & Pol. 1, 3 (2013) ("The electorate . . . has become increasingly oriented toward national politics at the expense of state and local politics.").

[189] Stephen Ansolabehere, James M. Snyder, Jr. & Charles Stewart, III, Candidate Positioning in U.S. House Elections, 45 Am. J. Pol. Sci. 136, 136 (2001). A comparable study of candidates for state office similarly found that—in the aggregate—"the states appear to follow the national pattern of high and growing [party] polarization." Boris Shor & Nolan McCarty, The Ideological Mapping of American Legislatures, 105 Am. Pol. Sci. Rev. 530, 549–50 (2011).

[190] See John Sides, 4 Important Takeaways from the Virginia Governor's Race, Wash. Post: The Monkey Cage (Nov. 8, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/11/08/4-important-takeaways-from-the-virginia-governors-race/ [https://perma.cc/WM56-2NBM]; Jeff Greenfield, One Lesson of Virginia? The Culture War Still Works, Politico (Nov. 3, 2021, 12:35 AM), https://www.politico.com/news/magazine/2021/11/03/virginia-election-culture-wars-518701 [https://perma.cc/9QVY-SEJ2].

[191] See Dan Balz, A Sobering Reality Hits Democrats After Election Losses, Wash. Post (Nov. 3, 2021, 3:05 PM), https://www.washingtonpost.com/politics/a-sobering-reality-hits-democrats-after-tuesdays-elections-losses/2021/11/03/7c6e988e-3ca5-11ec-a493-51b0252dea0c_story.html?request-id=c86506d6-dc80-4ddc-92ac-e4bf29a1e36d&pml=1 [https://perma.cc/GQJ7-9A9U]. Indeed, national politicians (Stacy Abrams, Barack Obama, Kamala Harris, Joe and Jill Biden) actively campaigned for Democratic gubernatorial candidate Terry McAuliffe. See Jill Colvin, In Virginia, McAuliffe Brings Big Names, Youngkin Goes Solo, AP (Oct. 29, 2021), https://apnews.com/article/campaigns-michael-pence-virginia-election-2020-terry-mcauliffe-e5f5e08ce998ddd9456716e373bf5151 [https://perma.cc/T5MY-STG2]. For other examples of out-of-state politicians and celebrities, see Jessica Bulman-Pozen, States of the Union, Harv. L. Rev. Blog (Oct. 17, 2018), https://blog.harvardlawreview.org/states-of-the-union/ [https://perma.cc/WYA5-QKQ5].

communities—meaning the people we spend time with and listen to daily. Second, to the extent that political parties and other nationwide groups are divided, individuals too will identify with one or another national group as opposed to regional ones.[192]

As is well-known, people now get their news and opinion programming from outlets that reinforce pre-existing ideological commitments.[193] This means conservatives and liberals alike—no longer exposed to competing viewpoints—shift to the dominant position in their ideological group.[194] Inevitably, this echo chamber transcends politics and spills over to public attitudes regarding members of their own party and especially the opposition party. As social science research makes clear, "partisan identities have become more closely aligned with social, cultural, and ideological divisions in American society."[195] Democrats and Republicans alike "say that the other party's members are hypocritical, selfish, and closed-minded, and they are unwilling to socialize across party lines."[196] They inform pollsters that they do not want their children to marry an opposing partisan;[197] they grade the opposing party as thirty on a hundred point scale;[198] a majority would even support a candidate from their party who "openly violat[es] democratic principles like electoral fairness, checks and balances, or civil liberties."[199] The upshot:

[192] See Ansolabehere et al., supra note 189, at 137; Shor & McCarty, supra note 189, at 549–50.

[193] See generally Neal Devins & Lawrence Baum, The Company They Keep: How Partisan Divisions Came to the Supreme Court 115–18 (2019) (tracing the "increasing polarization in the media, the academy, and the bar" since the 1980s).

[194] Cass R. Sunstein, Republic.com 2.0, at 65 (2007) ("[P]eople want to be perceived favorably by other group members, and also to perceive themselves favorably.").

[195] Alan I. Abramowitz & Steven Webster, The Rise of Negative Partisanship and the Nationalization of U.S. Elections in the 21st Century, 41 Electoral Stud. 12, 12 (2016).

[196] Shanto Iyengar, Yphtach Lelkes, Matthew Levendusky, Neil Malhotra & Sean J. Westwood, The Origins and Consequences of Affective Polarization in the United States, 22 Ann. Rev. Pol. Sci. 129, 130 (2019), https://www.annualreviews.org/doi/abs/10.1146/annurev-polisci-051117-073034 [https://perma.cc/3BPP-GJGC].

[197] Cass R. Sunstein, Partyism Now Trumps Racism, Bloomberg: BloombergView (Sept. 22, 2014, 8:03 AM), https://www.bloomberg.com/opinion/articles/2014-09-22/partyism-now-trumps-racism [https://perma.cc/DU2H-PNGS].

[198] Ezra Klein & Alvin Chang, "Political Identity is Fair Game for Hatred": How Republicans and Democrats Discriminate, Vox (Dec. 7, 2015, 8:00 AM), http://www.vox.com/2015/12/7/9790764/partisan-discrimination [https://perma.cc/6WKV-WNDR].

[199] Thomas B. Edsall, How Much Does How Much We Hate Each Other Matter?, N.Y. Times (Sept. 29, 2021), https://www.nytimes.com/2021/09/29/opinion/political-polarization-partisanship.html [https://perma.cc/VN6V-ZBL8] (quoting Eli J. Finkel et al., Political Sectarianism in America, 370 Sci. 533, 534 (2020)).

"Republicans and Democrats increasingly dislike, even loathe, their opponents."[200]

This shift away from geographic identification and towards ideological identification is quite evident in the legal world. It is reinforced by the emergence of ideological social networks that pit conservative legal thinkers against liberal legal thinkers. Most notably (for our purposes), membership in local bar groups has given way to membership in either the conservative Federalist Society or liberal groups such as the American Constitution Society (both national organizations).[201]

Law school chapters of the Federalist Society, for example, provide opportunities for conservative law students to socialize with each other, to secure judicial clerkships with conservative judges, and to meet (and potentially forge relationships with) prominent conservative academics and lawyers.[202] For practicing lawyers, local chapters of the Federalist Society (and the Society's annual lawyers' convention in Washington, D.C.) likewise provide conservative lawyers with opportunities to network and socialize with each other.[203]

For liberal law students and lawyers, the American Constitution Society (ACS) fills a similar purpose: "200 student and lawyer chapters in 48 states" make up "[t]he engine that drives ACS's work."[204] This means that from the beginning of their legal careers, the job opportunities and friendship circles of budding lawyers are now being shaped by national organizations with specific ideological bents.

[200] Shanto Iyengar, Gaurav Sood & Yphtach Lelkes, Affect, Not Ideology: A Social Identity Perspective on Polarization, 76 Pub. Op. Q. 405, 405 (2012).

[201] A particularly telling example of the demise of local bar groups and rise of ideologically based groups is the nomination and eventual withdrawal of Supreme Court candidate Harriet Miers. Miers (a former head of the Texas state bar) was assailed by conservatives for her lack of Federalist Society "credentials" and for being too closely tied to bar groups. Amanda Hollis-Brusky, Ideas with Consequences: The Federalist Society and the Conservative Counterrevolution 153 (2015).

[202] See Hollis-Brusky, supra note 201, at 153–54.

[203] Id. at 2. Wesley Hodges, the Fed Soc Debate Turns Inward, Am. Conservative (Nov. 19, 2021), https://www.theamericanconservative.com/articles/the-fed-soc-debate-turns-inward/ [https://perma.cc/S7QH-6DFH].

[204] American Constitution Society Chapters, Am. Const. Soc'y, https://www.acslaw.org/acs-chapters/ [https://perma.cc/R6KV-UN3P].

C. Nationalization and the U.S. Courts of Appeals

Needless to say, the courts of appeals are subject to the same great nationalizing tides and currents which engulf the rest of society.[205] In particular, beginning with Ronald Reagan in 1981, ideology has played an ever-increasing role in the appointment of federal appeals judges.[206] Moreover, senators from states where there is an appeals court vacancy have less power to influence either the appointments or confirmation process.[207] Finally, nationalization is fueled by basic changes in technology (computer-driven research), federal appeals practice (the rise of practice groups in national law firms), and the hiring and placement of federal appeals clerks (the rise of ideological credentialing).[208]

We start with the 1981 shift to ideology in judicial appointments. From 1945–1980, there was no partisan ideological divide, and neither party sought political advantage by linking party to ideology for judicial appointments.[209] Indeed, the percentage of liberal votes cast by Eisenhower appointees (56%) is nearly identical to Kennedy (59%) and Johnson appointees (59%);[210] likewise, liberal votes cast by Nixon (46%) and Ford (44%) appointees more closely track Democrat Bill Clinton (48%) than Republicans Ronald Reagan (39%) and George W. Bush (38%).[211]

With the Reagan Revolution, however, courts were seen as a "primary player in the formulation of public policy," and ideological considerations became dominant in judicial selections.[212] Republican appeals court nominees became more conservative, and an increasingly large partisan gap emerged between Republican and Democratic nominees.[213] Consider,

[205] This sentence is drawn from Benjamin N. Cardozo, The Nature of the Judicial Process 168 (1921).

[206] See Devins & Larsen, supra note 8, at 1391–95.

[207] See infra text accompanying notes 231–37.

[208] See infra text accompanying notes 238–55.

[209] See supra text accompanying note 175.

[210] See Sunstein et al., supra note 147, at 114–15.

[211] Id. Jimmy Carter's nominees cast liberal votes 54% of the time. See id.

[212] David M. O'Brien, Why Many Think that Ronald Reagan's Court Appointments May Have Been His Chief Legacy, Hist. Network News, http://www.historynewsnetwork.org/article/10968 [https://perma.cc/2VUD-Q3EV] (last visited Mar. 10, 2022) (quoting Reagan Department of Justice official Bruce Fein); see also David Alistair Yalof, Pursuit of Justices: Presidential Politics and the Selection of Supreme Court Nominees 134 (1999) (explaining that ideological considerations were "the most important criteria" for Reagan's judicial selections).

[213] See Sunstein et al., supra note 147, at 122–23.

for example, the ascendancy of the Federalist Society in nationalizing Republican judicial picks. Starting with Ronald Reagan, Federalist Society membership has effectively become the *sine qua non* of Republican judicial nominees.[214] In particular, membership is seen as a reliable proxy for conservativism: Federalist Society judges are more conservative than other judges[215] and their shared embrace of originalism and textualism provides a roadmap of how to decide cases.[216] Federalist Society judges, moreover, were the most likely to disagree with their Democrat-appointed colleagues.[217] And, Federalist Society judges are loyalists. When the U.S. Judicial Conference questioned the appropriateness of federal judges being members of the Federalist Society, forty-six of Trump's first fifty-one appeals court nominees were part of a group of 210 federal judges (93% of whom were appointed by Republican presidents) that accused the Conference of engaging in "rank discrimination based on its erroneous perception of a Federalist Society viewpoint."[218]

For their part, Democrats have increasingly "borrowed the Federalist Society's tactics."[219] In particular, ideology has become "the near exclusive focus" and "less deference to the wishes of home state senators [is now afforded] than was traditionally offered."[220] Correspondingly,

[214] During the Reagan and George H.W. Bush administrations (1981–1993), the Federalist Society (formed in 1982) was too new to play a dominant role in the cultivation and vetting of judges. See Devins & Baum, supra note 193, at 117, 126. During those years, Society membership was not critical to judicial appointments; in sharp contrast, 85% of Donald Trump's 2017–2020 appeals nominees were Federalist Society members. See Nancy Scherer & Banks Miller, The Federalist Society's Influence on the Federal Judiciary, 62 Pol. Rsch. Q. 366, 367 (2009); Ruiz et al., supra note 14.

[215] See Scherer & Miller, supra note 214, at 370–71 (finding that membership in Federalist Society was a statistically significant factor in predicting the likelihood of a judge's tendency to decide that "state government's rights prevail over the federal government's rights," which they used as a proxy for conservatism).

[216] See Hollis-Brusky, supra note 201, at 54–56.

[217] See Ruiz et al., supra note 14.

[218] Letter from D.C. Circuit Judge Katsas et al., to Robert P. Deyling, Assistant Gen. Couns., Admin. Off. U.S. Cts. (Mar. 18, 2020), https://s.wsj.net/public/resources/documents/ResponsetoAdvisoryOpinion117.pdf [https://perma.cc/PG5X-TRV7] (calculations performed by authors).

[219] Dahlia Lithwick, Biden Borrowed the Federalist Society's Tactics. Good., Slate (Mar. 30, 2021, 2:25 PM), https://slate.com/news-and-politics/2021/03/biden-judges-nominations-federalist-society-tactics.html [https://perma.cc/9H5W-BDJ6].

[220] Id.; Brandon L. Bartels, The Sources and Consequences of Polarization in the U.S. Supreme Court, *in* American Gridlock: The Sources, Character, and Impact of Political Polarization 171, 177 (James A. Thurber & Antoine Yoshinaka eds., 2015).

Demand Justice and other national interest groups have also "double[d] down on pressuring" home-state senators to advance liberal objectives by promoting public defenders, civil rights attorneys, and others likely to share progressive beliefs.[221] Not surprisingly, Democratic appeals picks are both more liberal than and more likely to be at odds with their Republican-appointed counterparts.[222]

This relatively new sorting of Republican- and Democrat-appointed judges by ideology and methodology pervades all aspects of judicial decision making, including the hiring and placement of law clerks. A 2017 study correlating ideology rankings for federal appeals judges with ideology rankings for former law clerks (based on campaign contributions) found that the "judges with the more extreme [ideology] scores—either liberal or conservative—hire clerks that exhibit less ideological diversity than do judges with more moderate [ideology] scores."[223] Correspondingly, during the very period when party polarization exploded (1975–1998), Supreme Court Justices increasingly

[221] See Lithwick, supra note 219; Carl Hulse, Progressive Groups Urge Biden to Move Quickly on Diverse Slate of Judges, N.Y. Times (Dec. 11, 2020), https://www.nytimes.com/2020/12/11/us/progressive-groups-biden-judges.html [https://perma.cc/U258-JGT8].

[222] For more about Trump's judicial picks and the rise in party-line dissents, see Ruiz et al., supra note 14 (finding Trump appointees were more consistent in voting along party lines and that their involvement on a panel resulted in more dissents); Rebecca R. Ruiz & Robert Gebeloff, As Trump Leaves the White House, His Imprint on the Judiciary Deepens, N.Y. Times (Dec. 17, 2020), https://www.nytimes.com/2020/12/17/us/politics/trump-judges-appeals-courts.html [https://perma.cc/HB76-G794] (same); Memorandum from Jon Green, Co-Founder of Data for Progress, The Ideology of Trump's Judges, https://www.filesforprogress.org/memos/Trump%20Judges%20Memo%20-%20Demand%20Justice%20-Final.pdf [https://perma.cc/39GA-7QPF] (finding Trump appointees more polarized than appointees of other recent presidents based on campaign finance data). For ideology and Biden nominees, see Lithwick, supra note 219 (stating that President Biden's nominations have "satisfied progressive groups" and that the Biden administration may pay less attention to the relatively "conservative" preferences of Democratic senators); Jess Bravin, Biden Aims to Appoint Liberal Judges After Trump's Conservative Push, Wall St. J. (Nov. 28, 2020, 5:30 AM), https://www.wsj.com/articles/biden-aims-to-appoint-liberal-judges-after-trumps-conservative-push-11606559402 [https://perma.cc/8ESZ-MJUS] (discussing President Biden's liberal "judicial philosophy"); Andrew Kragie, Biden's Judges Will Likely Be More Liberal Than Obama's, Law360 (Nov. 30, 2020, 11:08 PM), https://www.law360.com/articles/1332634/biden-s-judges-will-likely-be-more-liberal-than-obama-s [https://perma.cc/876W-U8EJ] (explaining that Biden would likely focus on ideology and to a greater extent than Obama).

[223] Adam Bonica, Adam S. Chilton, Jacob Goldin, Kyle Rozema & Maya Sen, Measuring Judicial Ideology Using Law Clerk Hiring, 19 Am. L & Econ. Rev. 129, 130–31, 138, 144 (2017); see also Adam Bonica, Adam S. Chilton, Jacob Goldin, Kyle Rozema & Maya Sen, The Political Ideologies of Law Clerks, 19 Am. L. & Econ. Rev. 96, 123 (2017) ("[T]he more conservative a judge, the more conservative his or her clerks tend to be.").

turned to ideologically simpatico federal appeals judges to find law clerks.[224] Former Fourth Circuit Judge Luttig put it this way: "[I]t should come as no surprise to learn that the more liberal judges tend . . . to hire clerks from other judges who would . . . self-describe themselves as Democrats, and vice versa for the more conservative judges."[225]

Another byproduct of this sorting was to shift power away from home-state senators. Up until 1980, Presidents would look to home-state senators from their party when appointing federal appeals judges; when there was no home-state senator from the president's party, high-ranking state officials from the President's party would play a similar role.[226] During this time, nominations to the courts of appeals were not recognized as touchstones of ideological controversy; instead, they were a "component of presidential and senatorial patronage."[227] Indeed, presidents would reward political loyalists for their support by shifting an appeals court seat from another state in the circuit.[228]

Notwithstanding its emphasis on geography and not ideology, this patronage system was hugely consequential. Judicial outcome studies have shown "that the relationship between the party of the appointing President and judicial outcomes is stronger among judges appointed

[224] Corey Ditslear & Lawrence Baum, Selection of Law Clerks and Polarization in the U.S. Supreme Court, 63 J. Pol. 869, 869, 872, 875–76 (2001). A study of the post-clerkship careers of Supreme Court clerks likewise suggests that, as partisan divisions among the Justices became common place, law clerks too sorted themselves out into competing ideological camps. See generally William E. Nelson, Harvey Rishikof, I. Scott Messinger & Michael Jo, The Liberal Tradition of the Supreme Court Clerkship: Its Rise, Fall, and Reincarnation?, 62 Vand. L. Rev. 1749 (2009) (describing the "politicization" of the hiring of Supreme Court clerks).

[225] Adam Liptak, A Sign of the Court's Polarization: Choice of Clerks, N.Y. Times (Sept. 6, 2010), https://www.nytimes.com/2010/09/07/us/politics/07clerks.html [https://perma.cc/QV5L-WAF4]. This ideological sorting of clerks and judges extends past the clerkship itself and further reinforces the nationalization of the federal courts of appeals. For example, several leading law firms recruit clerks from either liberal or conservative chambers. See id. (noting that liberal Supreme Court clerks go to Wilmer, Cutler, Pickering, Hale & Dorr, and Jenner & Block whereas conservatives go to Kirkland & Ellis, Sidley Austin, and Jones Day); Nelson et al., supra note 224, at 1784–86 (same).

[226] See generally Sheldon Goldman, Picking Federal Judges (1997) (exploring the role of home senators in selecting federal judges). By implication, senatorial "courtesy" also came to mean that "senators will give serious consideration to and be favorably disposed to support an individual senator of the president's party who opposes a nominee." Harold W. Chase, Federal Judges: The Appointing Process 7 (1972).

[227] Kevin M. Scott & R. Sam Garrett, Assessing Changes in State Representation on the U.S. Courts of Appeals, 41 Pres. Stud. Q. 777, 778 (2011).

[228] See id. at 782.

where senatorial courtesy was not in play (i.e., no senator of the President's party from the state) than among judges appointed under the condition of senatorial courtesy."[229] Likewise, some ideological rankings of federal appeals judges use the ideological ranking of a home state senator to rank the federal appeals judges whenever senatorial courtesy is extended.[230]

By empowering national interest groups at the expense of home-state senators, this shift to ideology "placed a strain" on Senate confirmations. "While opposition senators were willing to defer to [ideologically diverse] patronage-based nominees, they became increasingly unwilling to defer to ideologically based nominees."[231] Home-state senators from the opposition party, for example, "saw that they could use blue slips to promote their own policy goals as well."[232] Blue slips allowed home-state senators of either party to block a disfavored nominee to a high federal office in her state.[233] A vestige of the patronage system, blue slips preserved the "prestige and political power" of home-state senators by assuring that the president could only "make such appointments as would be palatable to them."[234]

Blue slips, however, could not withstand the crush of party polarization. Senators had every reason to back the policy goals of their

[229] Michael W. Giles, Virginia A. Hettinger & Todd Peppers, Picking Federal Judges: A Note on Policy and Partisan Selection Agendas, 54 Pol. Rsch. Q. 623, 624 (2001) (referencing 1980s and 1990s studies). Giles, Hettinger, and Peppers likewise found that "the linkage between presidential preferences and judicial outcomes disappears" when "senatorial courtesy is in play." Id. at 623.

[230] See id. at 623–24; Donald R. Songer & Martha Humphries Ginn, Assessing the Impact of Presidential and Home State Influences on Judicial Decisionmaking in the United States Courts of Appeals, 55 Pol. Rsch. Q. 299, 299 (2002) (finding preferences of home-state senators of the president's party "significantly related to judges' votes").

[231] Donald E. Campbell, To "Advice and ~~Consent~~Delay": The Role of Interest Groups in the Confirmation of Judges to the Federal Courts of Appeal, 8 Nw. J.L. & Soc. Pol'y 1, 8–9 (2012); see also Nancy Scherer, Scoring Points: Politicians, Activists, and the Lower Federal Court Appointment Process 108–09 (2005) (describing how partisan activists began influencing senators to oppose the confirmation of disfavored nominees).

[232] Scherer, supra note 231, at 142. In addition to blue slips, opposition party senators made use of holds, filibusters, and (when in the majority) scheduling powers. See Sarah A. Binder & Forrest Maltzman, Advice and Dissent: The Struggle to Shape the Federal Judiciary 56–57 (2009).

[233] See Sarah A. Binder, Where Do Institutions Come From? Exploring the Origins of the Senate Blue Slip, 21 Stud. Am. Pol. Dev. 1, 2 (2007); Mitchel A. Sollenberger, The Blue Slip: A Theory of Unified and Divided Government, 1979–2009, 37 Cong. & Presidency 125, 125, 138 (2010).

[234] Chase, supra note 226, at 7.

party and no reason to empower their political opponents.[235] In 2018, Senate Republicans rejected blue slips submitted by opposition party senators;[236] in 2021, Senate Democrats also repudiated opposition party blue slips.[237] With the demise of blue slips, ideology and national party identity have now fully eclipsed patronage and home-state power.

* * *

Although one may be tempted to conclude that this is a story about party polarization in the appointments of federal judges, the take-home point is larger than that. This shift to nationalization on the federal courts of appeals is about more than ideology and partisanship. Nationalization is also about where we eat, work, and shop; how we access information; and so much more. We close this section by noting four critical, interrelated changes in federal courts of appeals decision making—changes that push toward nationalization but have nothing to do with ideology. While it is unclear how much each of these changes impacted appeals court decision making, we feel confident that as a group they have contributed to the nationalizing of the federal courts of appeals.[238]

[235] For this very reason, Senate Democrats eliminated the filibuster of lower federal court nominees in 2013. See Paul Kane, Reid, Democrats Trigger 'Nuclear' Option; Eliminate Most Filibusters on Nominees, Wash. Post (Nov. 21, 2013), https://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c_story.html [https://perma.cc/Q2G5-EBBN].

[236] Seung Min Kim, Grassley Rips up 'Blue Slip' for a Pair of Trump Court Picks, Politico (Nov. 16, 2017, 6:16 PM), https://www.politico.com/story/2017/11/16/chuck-grassley-trump-court-picks-245367 [https://perma.cc/AA5U-H8QU].

[237] See Marianne Levine, Senate Dems Take a Page from GOP in Judicial Nominee Battles, Politico (Feb. 17, 2021, 5:38 PM), https://www.politico.com/news/2021/02/17/court-nominees-democrats-469500 [https://perma.cc/H9P6-8B52]. At the same time, President Biden initially sought to fast-track nominees from states where there were no Republican senators. Russell Wheeler, Biden is Appointing Judges Faster than Trump, and Most Everyone Else—for Now, Brookings (Sept. 2, 2021), https://www.brookings.edu/blog/fixgov/2021/09/02/biden-is-appointing-judges-faster-than-trump-and-most-everyone-else-for-now/ [https://perma.cc/DJC3-KXE2]. By November 2021, however, Biden had advanced a nominee to a Sixth Circuit seat in Tennessee without the support of either of Tennessee's two Republican senators. See Madison Adler, Tennessee Senators Unhappy with Consultation on Judge Pick, Bloomberg L.: US L. Week (Nov. 18, 2021, 6:48 PM), https://news.bloomberglaw.com/us-law-week/tennessee-senators-decry-lack-of-consultation-on-judge-nominee [https://perma.cc/X432-PUKS].

[238] Nor do we think this list is exhaustive. When hiring law clerks, for example, federal appeals judges seek to hire top students from top national law schools. In our interviews, we heard from several judges that they compete with other judges for the same students and rarely give priority to students from their home-state law school. This process, as noted *supra*, often reinforces ideological nationalization—for conservative and liberal judges may seek out

First, legal research: lawyers and law clerks now look at keywords in large databases when doing legal research (think Google-style word search instead of old-school Shepardizing). Electronic researchers "access a far greater number of cases" with the result that "fewer people read full cases."[239] One likely result of this shift is that there is less emphasis on analogical reasoning related to expanding or distinguishing the law of the circuit and more emphasis on existing cases (perhaps from other circuits) whose keywords match the facts of the case.[240]

Second, judicial reliance on law clerks: judges increasingly turn to law clerks to write opinions.[241] Today, federal appeals judges can hire as many as four law clerks (as compared to two in 1980);[242] not surprisingly, judges' reliance on law clerks has grown as the ratio of clerks to judges increases.[243] Schooled in keyword searches and fresh out of law school,[244] law clerks typically look for precedential support in opinions from higher courts (rather than seek to distinguish or challenge judicial rulings).[245] "Indeed, studies have found that the rise of law clerks has resulted in a dramatic upswing in the number of cited cases in judicial opinions."[246]

Third, the dramatic growth of the appeals court docket: the rise of the importance of law clerks is very much linked to the explosive growth in cases now resolved by the federal courts of appeals.[247] From 1980 to

students who belong to national groups like the Federalist Society or American Constitution Society. Cf. supra notes 223–25 and accompanying text (explaining that some judges hire clerks with similar ideologies).

[239] Allison Orr Larsen, Factual Precedents, 162 U. Pa. L. Rev. 59, 74–76 (2013).

[240] Neal Devins & David Klein, The Vanishing Common Law Judge?, 165 U. Pa. L. Rev. 595, 621–22 (2017); see also Peter M. Tiersma, The Textualization of Precedent, 82 Notre Dame L. Rev. 1187, 1189–90 (2007) (discussing the "shift from legal reasoning to close reading" and the "textualization of precedent").

[241] See Jonathan S. Masur & Lisa Larrimore Ouellette, Deference Mistakes, 82 U. Chi. L. Rev. 643, 665 (2015).

[242] See Todd C. Peppers, Michael W. Giles & Bridget Tainer-Parkins, Surgeons or Scribes? The Role of United States Court of Appeals Law Clerks in "Appellate Triage", 98 Marq. L. Rev. 313, 315–16 (2014).

[243] See Richard A. Posner, The Federal Courts: Challenge and Reform 141 (1996).

[244] See Albert Yoon, Law Clerks and the Institutional Design of the Federal Judiciary, 98 Marq. L. Rev. 131, 140–41 (2014) (claiming that clerks tend to be in their late twenties).

[245] See Devins & Klein, supra note 240, at 622–23.

[246] See id. at 622 (discussing by analogy Frank B. Cross, James F. Spriggs II, Timothy R. Johnson & Paul J. Wahlbeck, Citations in the U.S. Supreme Court: An Empirical Study of Their Use and Significance, 2010 U. Ill. L. Rev. 489, 539–40).

[247] See Nadine J. Wichern, A Court of Clerks, Not of Men: Serving Justice in the Media Age, 49 DePaul L. Rev. 621, 649 (1999) ("Over the years, the clerk-author has been accepted

2020, the number of cases appealed each year to the federal courts of appeals more than doubled (from 23,200 to 48,205).[248] During about the same period, the number of judgeships increased 25% (from 132 in 1978 to 167 in 2021).[249] Remarkably, over the past three decades, there were no additional judgeships created.[250] The inevitable result of this mismatch of judicial resources to judicial needs is that judges have less time to participate in the development of law and are more apt to rely on precedent—so that judges tackling similar issues will rely on the same body of precedent.[251] This phenomenon is reinforced by the rise of law clerks (who are particularly interested in citing higher court precedent) and computer-driven research (where keyword searches yield the same cluster of cases).

Fourth, the rise of the national appellate bar: starting in 1985 (when Reagan's Solicitor General Rex Lee established a Supreme Court and appellate practice at Sidley Austin), national law firms have established federal appellate practice groups.[252] Typically headed by lawyers from the Solicitor General's office, these appellate shops have transformed

as somewhat of a necessary band-aid for an overworked judiciary. Echoing throughout the chambers of our courts are the cries and moans of docket strain.").

[248] For 1980, see Fed. Jud. Ctr., Caseloads: U.S. Courts of Appeals, 1892–2017, https://www.fjc.gov/history/courts/caseloads-us-courts-appeals-1892-2017 [https://perma.cc/MH4L-L7ZZ] (last visited Mar. 15, 2022). For 2020, we relied on the Federal Judicial Center's Integrated Database, see Fed. Jud. Ctr., Appellate Cases Fiscal Year 2020, https://www.fjc.gov/research/idb/appellate-cases-filed-terminated-and-pending-fy-2008-present [https://perma.cc/P2JU-HZND] (last visited Mar. 15, 2022) (SAS dataset). See also Devins & Klein, supra note 240, at 623–24 (describing increases in the number of cases filed in federal district courts).

[249] See U.S. Cts., U.S. Courts of Appeals Additional Authorized Judgeships, https://www.uscourts.gov/sites/default/files/appealsauth.pdf [https://perma.cc/TG2R-S5YX] (last visited Jan. 12, 2022). This calculation excludes the Federal Circuit, created in 1982. See id.

[250] See id. (noting that 1990 was the last year that Congress enacted legislation creating additional federal judgeships).

[251] Another inevitable result of this distribution of judicial resources is that appeals courts make use of unpublished opinions and other "procedural shortcuts" that permit them to prioritize which cases receive judicial attention. For an examination of the costs of such shortcuts and a related call to increase the numbers of appeals court judges, see Merritt McAlister, Rebuilding the Federal Circuit Courts, 116 Nw. U. L. Rev. 1137, 1137, 1150 (2022).

[252] Allison Orr Larsen & Neal Devins, The Amicus Machine, 102 Va. L. Rev. 1901, 1916 (2016); see also Deepak Gupta, Leveling the Playing Field on Appeal: The Case for a Plaintiff Side Appellate Bar, 54 Duq. L. Rev. 383, 386 (2016) (discussing the rise of dedicated appellate practices since 1985); Thomas G. Hungar & Nikesh Jindal, Observations on the Rise of the Appellate Litigator, 29 Rev. of Litig. 511, 512–17, 520 (2010) (same).

Supreme Court and federal appeals court advocacy.[253] In particular, appellate specialists are now handling cases that were once managed by trial lawyers or in-house counsel.[254] These specialists, moreover, are now repeat players before the federal courts of appeals (so much so that some federal appeals judges told us about the increasing frequency of hearing from a well-regarded appeals lawyer).[255] In other words, law practice in the regional circuits is often dominated by national lawyers with similar pedigrees (often based in Washington, D.C.).

The upshot of all of this is that today's nationalization is an outgrowth of changes in politics, culture, markets, and technology. It is not at all surprising that the American judicial system would reflect these broader societal changes. This does not necessarily mean that all roads lead to Rome and, as such, the federal courts of appeals will simply mirror nationalization in politics and other spheres. As we will now explain, circuit personalities serve as an important counterweight to nationalization. But the challenge is formidable.

CONCLUSION: WHY CIRCUIT PERSONALITIES ARE OUR BEST PATH FORWARD

Finally, we turn now to connect the dots and explain how investing in circuit personalities is the best path towards mitigating nationalizing partisan forces in the judiciary. To do so, we accept certain realities, explore what is at stake, and lay out some best practices we learned from our interviews.

First, a reality check. The nationalizing and polarizing forces described above are not likely to change any time soon. We recognize that judges are part of a national process and are connected to national groups. Relatedly, we recognize that judges have normative and methodological commitments and that those priors also mean that there will sometimes

[253] See Hungar & Jindal, supra note 252, at 521–25 (noting that appellate practice groups were created so that law firms could compete in a national market for clients who increasingly wanted a federal appellate specialist).

[254] See id. at 524; see also Larsen & Devins, supra note 252, at 1931 (noting that some large corporations switched law firms in order to ensure high-quality appellate representation).

[255] See Interview with 3d Cir. Judge (Feb. 8, 2021) (notes on file with editors). Moreover, since there are so many of these shops and so few merits cases before the Supreme Court, the bread and butter of these practice groups is federal appeals court litigation. See Larsen & Devins, supra note 252, at 1929–30 (quoting former Solicitors General Greg Garre and Neal Katyal regarding the marquee value of having a Supreme Court practice while the lion's share of cases are federal appeals cases).

be an inevitable partisan divide on the bench. This is particularly true with respect to the most visible and divisive issues.

At the same time and while accepting that reality, it is imperative to recognize that judges are members of multiple networks, including their circuits. Circuit personalities are a mechanism by which judges build attachment to those smaller networks—networks which are distinctively local and bipartisan. Needless to say, judges who care a great deal about their reputation among other judges will be more mindful of their colleagues than judges with thin attachment to their circuits and stronger attachment to national ideological audiences.[256]

Furthermore, and often overlooked, commitment to a circuit personality is also a mechanism by which judges can advance the vision of an appeals judge laid out at the start of Part II.[257] As we explained, there is an integrity to the court of appeals model of judging. It involves largely anonymous actors in randomly assigned panels of three committed to the idea of decision by deliberation and the assumption that any panel of them can get a case right.[258] This model of judging is premised on two principles: (1) that any judge can work with any other judge, and (2) that there is law to apply separate and apart from the ideological priors every judge necessarily brings to the bench. Under this view, federal appeals judges are more akin to interchangeable widgets than to attention-seeking ideological warriors.

Keeping this model of judging in the forefront brings to light what is truly at stake in this battle between nationalizing partisan forces and circuit personalities. Nobody denies that there will be some highly divisive cases in the courts of appeals (dealing with a President's tax records, or abortion, or affirmative action, for example) that will almost inevitably result in dividing the judges by the party of the President who appointed them. That reality cannot be changed.

[256] Through a process known as identity salience, judges must prioritize—determining which social identity matters most. See Philip S. Brenner, Richard T. Serpe & Sheldon Stryker, The Causal Ordering of Prominence and Salience in Identity Theory: An Empirical Explanation, 3 Soc. Psych. Q. 231, 232 (2014).

[257] See supra notes 135–39 and accompanying text.

[258] Ferroli, supra note 67, at 16 (quoting Judge Sutton as saying all circuit judges "agree to follow the same judicial oath, making them all equally susceptible to error." Mitts v. Bagley, 626 F.3d 366, 370 (6th Cir. 2010) (Sutton, J., concurring)).

But in the 95% of cases that do not neatly divide by politics or ideology, the judges have seen—and must see—past their partisan stripes.[259] It is the decision making in *those* cases (the ones that do not make headlines) that is truly at risk today. So even if there is no escaping the partisan divide in nationally salient cases, it is nonetheless imperative that those bread-and-butter cases feature "a collective process in which judges reason their way together to the right answer."[260] There is a social glue in the nature of circuit personalities—a glue that allows Democrat and Republican appointed judges to reason together and look for common ground. That glue will dissolve if the judges see each other as "partisan warriors" committed to national causes.[261]

To appreciate the stakes, consider the following dystopia. If judges value their national networks over their local ones, every case becomes a battleground. This means more focus on the cases that divide by party lines (and a desire to find such cases, as they would become the lifeblood of ideologically driven judges). That also brings the inevitable uptick in en bancs and more dissents and concurrences. As a consequence, this increase means a slower pace to decision which will result in more screening and far fewer cases being heard. That slowdown, in turn, means that a litigant's purported right to appeal would be watered down—there would be fewer oral arguments, fewer published opinions, more focus on the cases that divide by party lines. Before long the lower appellate courts would start to look a lot like the U.S. Supreme Court: with a virtually discretionary docket, less anonymity, more attention-seeking, headline-grabbing dissents, and certainly fewer cases decided on a common ground. Put simply (albeit dramatically), the "my team / your team" national dynamic would destroy the courts of appeals as we know them.

[259] Ninety-five percent comes from then-Senator Barack Obama who—when voting against the confirmation of Chief Justice John Roberts—drew a distinction between the "95 percent of cases" decided by law and the "5 percent of cases that are truly difficult." Editorial, Why Obama Voted Against Roberts, Wall St. J. (June 2, 2009, 12:01 AM), https://www.wsj.com/articles/SB124390047073474499 [https://perma.cc/33Q8-LSY7]; see also Edwards, supra note 4, at 61 ("The majority of cases in the circuit courts admit of a right or a best answer," regardless of ideological differences); Harry T. Edwards, Public Misperceptions Concerning the "Politics" of Judging: Dispelling Some Myths About the D.C. Circuit, 56 U. Colo. L. Rev. 619, 622–25 (1985) (arguing that although "there are certain sorts of cases in which a judge's moral and political views unavoidably come into play," most circuit court decision making is non-partisan).

[260] Harris, supra note 9, at 77.

[261] In re Trump, 958 F.3d 274, 292 (4th Cir. 2020) (Wilkinson, J., dissenting).

And this worry is not hypothetical. Two examples stand out as highlighting the challenges judges face in the battle between national commitments and commitments to their circuits: the liberalism of the Ninth Circuit in the early 2000s[262] and the conservatism of today's Fifth Circuit.[263]

From 2000 to 2015, the Ninth Circuit reached liberal outcomes more than any other circuit; this liberalism was at odds with increasing Supreme Court conservativism, and the Ninth Circuit reversal rate was at 83.6%, "the outer bounds" of all circuits.[264] Progressive icon Judge Reinhardt said at the time: "I follow the law the way it used to be, before the Supreme Court began rolling back a lot of people's rights."[265] Judge Reinhardt's views were shared by many of his Ninth Circuit colleagues during this time period. These judges were not just part of the same circuit but also part of the same social and professional communities whose members "applaud[ed] judges for liberal stands on civil liberties issues."[266] This support might have been "sufficient to outweigh any damage to judges' reputations from other quarters," because the Ninth Circuit's liberalism persisted through at least 2018.[267] When Donald Trump took office in 2017, national civil rights and liberties organizations

[262] In 2000, eighteen of the twenty-five active judges on the Ninth Circuit were Democrat-appointees (eleven of whom were nominated by Bill Clinton during the increasingly polarized 1990s). See Kevin M. Scott, Supreme Court Reversals of the Ninth Circuit, 48 Ariz. L. Rev. 341, 350–51 (2006); The Need for New Lower Court Judgeships, 30 Years in the Making: Hearing Before the Subcomm. on Cts., Intell. Prop., & the Internet of the H. Comm. on the Judiciary, 117th Cong. 1 (2021) (statement of Brian T. Fitzpatrick, Milton R. Underwood Chair in Free Enterprise and Professor of Law, Vanderbilt Law School). For a discussion of some conflicting evidence on this subject, see Linda Qui, Does the Ninth Circuit Have the Highest Reversal Rate in the Country?, N.Y. Times (Nov. 26, 2018), https://www.nytimes.com/2018/11/26/us/politics/fact-check-trump-ninth-circuit.html [https://perma.cc/MEH7-ZH5J]. From 2017–2020 (with nine Trump appointees), the Ninth Circuit became less liberal. See Susan Luthi, How Trump is filling the liberal Ninth Circuit with conservatives, Politico (Dec. 22, 2019, 7:04 AM), https://www.politico.com/news/2019/12/22/trump-judges-9th-circuit-appeals-court-088833 [https://perma.cc/646A-82D8].

[263] See infra notes 269–77 and accompanying text.

[264] Timothy B. Dyk, Thoughts on the Relationship between the Supreme Court and the Federal Circuit, 16 Chi. Kent J. Intell. Prop. 67, 71–72 (2016) (calculating reversal rates among circuits); see also Qui, supra note 262 (discussing the Ninth Circuit's reversal rate); Brian T. Fitzpatrick, Disorder in the Courts, L.A. Times (July 11, 2007, 12:00 AM), https://www.latimes.com/archives/la-xpm-2007-jul-11-oe-fitzpatrick11-story.html [https://perma.cc/6YMK-V9BG].

[265] William Carlsen, Frontier Justice, S.F. Chron., Oct. 6, 1996, at 1–5.

[266] Baum, supra note 11, at 112.

[267] Id.; see also infra note 268 (identifying challenges to Trump's policies in the Ninth Circuit).

regularly turned to the Ninth Circuit to block the Trump administration's initiatives on immigration, the border wall, the Keystone Pipeline, and much more.[268]

Today's conservative Fifth Circuit tells a similar tale. With a lopsided divide of twelve Republican-appointed judges (all of whom have Federalist Society ties) and five Democrat-appointed judges,[269] the Fifth Circuit has been the go-to circuit for conservative challenges to progressive policies.[270] Not only has the Fifth Circuit backed conservative causes (sometimes disregarding Supreme Court precedent[271]), it has also sought to push out the boundaries of its jurisdiction, and, in so doing, it has made a mark for itself.[272] In November 2021, for example, it issued an opinion nullifying Biden administration COVID regulations.[273] More striking than its legal analysis, the appeals court rushed the decision out—knowing that its decision would shortly be nullified as a well-established

[268] See Adam Liptak, Trump Takes Aim at Appeals Court, Calling it a Disgrace, N.Y. Times (Nov. 20, 2018), https://www.nytimes.com/2018/11/20/us/politics/trump-appeals-court-ninth-circuit.html [https://perma.cc/QA82-UKYA] (discussing Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec., 908 F.3d 476 (9th Cir. 2018) (immigration), East Bay Sanctuary Covenant v. Trump, 349 F. Supp. 3d 838 (N.D. Cal. 2018) (same), Indigenous Env't Network v. U.S. Dep't of State, 347 F. Supp. 3d 5661 (D. Mont. 2018) (Keystone Pipeline), and Hawaii v. Trump, 859 F.3d 741 (travel ban)); Sierra Club v. Trump, 929 F.3d 670 (2019) (border wall). For a discussion of whether the Ninth Circuit remains out of step with an increasingly conservative Supreme Court, see David Savage, With Trump Appointees Supreme Court Delivers 9th Circuit Another Year of Reversals, L.A. Times (July 13, 2021), https://www.latimes.com/politics/story/2021-07-13/with-trump-appointees-9th-circuit-suffers-another-year-of-reversals-at-supreme-court [https://perma.cc/7QBS-FB4W].

[269] All Fifth Circuit Republican-appointed judges have spoken at Federalist Society events; several are active members who regularly speak at both local and national events. See Memo from Jon Suttile to Neal Devins, supra note 159 (using the Federalist Society's website to identify speaking events with Fifth Circuit judges).

[270] See Brent Kendall, Conservative Appeals Court is Prime Venue for Biden-Era Litigation, Wall St. J. (Oct. 22, 2021, 6:43 PM), https://www.wsj.com/articles/conservative-appeals-court-is-prime-venue-for-biden-era-litigation-11634907602 [https://perma.cc/QY2D-S47P].

[271] That, at least, is how Chief Justice Roberts saw the Fifth Circuit's 2018 approval of a Louisiana abortion restriction that was nearly identical to a Texas restriction that the Supreme Court had declared unconstitutional in 2016. June Med. Servs. v. Russo, 140 S. Ct. 2103, 2133–34 (2020) (Roberts, C.J., concurring).

[272] See Linda Greenhouse, What Happens When a Court Goes Rogue?, N.Y. Times (Nov. 18, 2021), https://www.nytimes.com/2021/11/18/opinion/abortion-covid19-supreme-court.html [https://perma.cc/SP5U-DHRD].

[273] See id. (discussing the Fifth Circuit's decision in BST Holdings, L.L.C. v. OSHA, 17 F.4th 604 (5th Cir. 2021)).

procedure was already underway to transfer control of the case to another circuit.[274]

Indeed, the Fifth Circuit's recent dynamics have made headlines with blistering dissents, accusations of lawlessness, and even a resignation. Judge Jerry Smith, a Reagan appointee, accused two of his Republican-appointed colleagues of committing an "orgy of jurisprudential violence" when they held (over Judge Smith's dissent and in an unpublished opinion) that judges can block a private company's vaccine mandate on the grounds of religious discrimination.[275] And Judge Costas, a 2014 Obama appointee, resigned his post on the Fifth Circuit, explaining that he thinks that the "increased polarization that is afflicting society" is extending to the courts.[276] In the words of Judge Jerry Smith, "the good ship Fifth Circuit is afire . . . . We need all hands on deck."[277]

It is not lost on us that there are structural similarities in these two circuits. The Fifth and Ninth Circuits are the two largest circuits in the country, and there was/is a lack of ideological diversity on these courts.[278]

[274] See Andrea Hsu, 6th Circuit Court "Wins" Lottery to Hear Lawsuits Against Biden's Vaccine Rule, NPR (Nov. 16, 2021, 4:07 PM), https://www.npr.org/2021/11/16/1056121842/biden-lawsuit-osha-vaccine-mandate-court-lottery [https://perma.cc/M5ET-423T]. One more example: on January 17, 2022, the Fifth Circuit divided two (Republican appointees) to one (Democrat appointee) on whether to return the Texas fetal heartbeat case to the district court that had earlier ruled against the state or, instead, to ask the Texas Supreme Court to provide guidance on the statute (and effectively keep the statute in place—at least until the state court acted). See Alicia Miranda Ollstein & Josh Gerstein, Appeals Court Detours Texas Abortion Ban Case to State Supreme Court, Politico (Jan. 17, 2022, 7:30 PM), https://www.politico.com/news/2022/01/17/appeals-court-texas-abortion-527256 [https://perma.cc/EN5U-GTHM].

[275] Sambrano v. United Airlines, Inc., No. 21-11159, 2022 WL 486610, at *28 (5th Cir. Feb. 17, 2022).

[276] See Debra Cassens Weiss, 5th Circuit Judge Resigns to Focus on Trial Work as an Attorney, ABA J. (Feb. 11, 2022, 8:47 AM), https://www.abajournal.com/news/article/5th-circuit-judge-resigns-to-focus-on-trial-work-as-an-attorney [https://perma.cc/63WP-XD5H].

[277] Daniel Conrad, Fifth Circuit Opinion in United Airlines Vaccine Mandate Case Conjures Fiery Dissent, Courthouse News Serv. (Feb. 17, 2022), https://www.courthousenews.com/fifth-circuit-opinion-in-united-airlines-vaccine-mandate-case-conjures-fiery-dissent/ [https://perma.cc/T3K2-AG5K] (citing *Sambrano*, 2022 WL 486610, at *38 n.95 (Smith, J., dissenting).

[278] Commentators and judges alike have proposed splitting the Ninth Circuit, in part because of concerns related to nonrepresentative panels. See generally Diarmuid F. O'Scanlain, A Decade of Reversal: The Ninth Circuit's Record in the Supreme Court Through October Term 2010, 87 Notre Dame L. Rev. 2165 (2012) (offering the perspective of one Ninth Circuit judge); see also The Case for Restructuring the Ninth Circuit: An Inevitable Response to an Unavoidable Problem: Hearing on Oversight of the Structure of the Federal Courts Before the Subcomm. on Oversight, Agency Action, Fed. Rts. & Fed. Cts. of the Sen. Comm. on the Judiciary (2018) (Statement of Judge Diarmuid F. O'Scanlain), https://www.judiciary.senate

But it is also hard to deny that these examples illustrate the possibility of branding one's circuit as a poster child for a cause. In so doing, the ability of judges to work collegially across party lines is threatened. Indeed, consistent with our dystopian scenario, Republican-appointed judges on the Ninth Circuit are increasingly calling for en banc review and writing fiery dissents when it is denied.[279]

Nationalization is a grave threat to the ability of federal courts of appeals to perform their most basic functions. And while circuit personalities will not negate the growing ideological divide between judges appointed by Democrats and by Republicans, circuit personalities provide a shared path for *all* judges to travel. By reinforcing local bonds, judges can see themselves, not as partisan adversaries, but as colleagues committed to the rule of law.

* * *

Quite clearly, we are at an inflection point. As noted at the start of this Article, there is abundant evidence of a turn to divisive partisanship on the federal courts of appeals.[280] And, as Part III shows, "my team / your team" nationalizing is now part and parcel of American life. To avoid federal appeals judges succumbing to these nationalizing forces by fighting for their "team" at every turn, it clearly is time to invest in circuit personalities. Circuit personalities may not be a panacea but certainly provide an important counterweight to divisive polarization.

So what does such an investment look like? We do not offer a blueprint of the perfect circuit personality. As our recounting of the experiences of the Sixth and D.C. Circuits makes clear,[281] appeals judges must chart their own paths in finding ways to come together to buttress their commitment to collegiality and, with it, bipartisan decision making and the rule of law. Nonetheless, we did learn a lot from our interviews, and certain best

.gov/imo/media/doc/07-31-18%20O'Scannlain%20Testimony.pdf [https://perma.cc/AY3W-SN76] (same).

[279] See Andrew Wallender & Madison Alder, Ninth Circuit Conservatives Use Muscle to Signal Supreme Court, Bloomberg L. (Dec. 8, 2021, 4:45 AM), https://news.bloomberglaw.com/us-law-week/ninth-circuit-conservatives-use-muscle-to-signal-supreme-court [https://perma.cc/5P7S-VH9F]. The problem of ideological nationalization would be exacerbated if, in fact, appeals judges used dissents to en banc denials to signal the Supreme Court. Specifically, the appeals judges would effectively become ideologically driven agents to like-minded Justices, reinforcing national ties at the expense of circuit collegiality.

[280] See supra notes 13–16 and accompanying text.

[281] See supra notes 114–31.

practices did stand out to us as critical to reinforcing collegiality and the commitment to the current model of appellate decision making.

First, socializing and face-to-face contact with one another matters (and matters a lot). Especially important are lunches and dinners that bring together Democrat and Republican appointees and give them opportunities to interact as humans and not as adversaries. This face time is perhaps easier in circuits where the judges travel to hear argument (and thus naturally dine out together), but with a little creativity, it is also possible in circuits that do not. Whether it is regular lunches, judicial retreats, or even annual trips to baseball games, the judges we spoke to universally reported more collegiality and thus better decisions when they embraced their similarities and meet socially with one another.

Equally, if not more important, is the other side of the coin: circuit judges should avoid that which divides them into competing partisan camps. Although partisan dissents and en bancs may be impossible to avoid completely, appeals judges should do what they can to limit them, particularly the ones that fall on partisan lines. This move may sound Pollyanna-like, but it is entirely possible to build traditions and rules devoted to limiting partisan conflict. Avoiding en bancs through full-court circulation or "paper en bancs" and the growing norm of greater discussion pre-argument in an attempt to seek consensus from the start are both examples of routes circuits can take to limit the temptation to fall into warring camps.[282] Likewise, we learned that "flashy" language should be avoided, panels should be shuffled so everyone sits with everyone else as much as possible, and circuit judges should defer to the authoring judge on a panel on style and opinion structure. Further, getting decisions done on time and not tripping each other up waiting on dissents seems to help buttress collegiality and rule of law norms.

Like family traditions, these features of circuit personalities cannot be handed down from a national center if they are to be effective. They must be organically grown from within the circuit, a reflection of commitment to one another and to the local traditions that bond them together.

The good news is that the pull of circuit personalities—and the desire to strengthen circuit bonds—seems quite strong. Federal appellate judges care a great deal about their status and reputation among judges on their own courts.[283] Every judge we interviewed cared very much about

[282] See supra notes 50–72.
[283] See supra notes 160–64.

collegiality, about their reputation with colleagues, and about the mutual commitment to the rule of law. Perhaps this is one reason why in our prior study we found six decades of en banc decisions (up until 2018) that resisted partisan impulses.[284] Indeed, earlier studies of appeals court decision making emphasize a similar commitment to collegial decision, including the disfavoring of dissent and a related commitment to the law of the circuit.[285]

The path to preserving the current model of federal appellate judging is thus right in front of our noses and has been there all along: judges must invest in and reinforce the local ties that bind them together as a circuit. And while today's judges will inevitably also be drawn to the national networks that they are also a part of, they must never forget that there's no place like home.[286]

[284] Devins & Larsen, supra note 8, at 1380.
[285] See Hettinger et al., supra note 2, at 40; Klein, supra note 162, at 32.
[286] Thanks to Dorothy for this critical insight.