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ABSTRACT

The federal courts of appeals embrace the ideal that judges are committed to rule of law norms, collegiality, and judicial independence. Whatever else divides them, these judges generally agree that partisan identity has no place on the bench. Consequently, when a court of appeals sits “en banc,” (i.e. collectively) the party affiliations of the three-judge panel under review should not matter. Starting in the 1980s, however, partisan ideology has grown increasingly important in the selection of federal appellate judges. It thus stands to reason (and several high-profile modern examples illustrate) that today’s en banc review could be used as a weapon by whatever party has appointed the most judges on any particular circuit. A weaponized en banc reflects more than just ideological differences between judges. We define the phrase to capture a “team mentality” on the courts of appeals – an us versus them – where the judges vote in blocs aligned by the party of the President who appointed them and use en banc review to reverse panels composed of members from the other team.

In this article, we test whether en banc review is now or ever has been weaponized. We make use of an original data set – the most comprehensive one of which we are aware – that tracks en banc decisions over six decades. Our findings are surprising in two very different ways. The bulk of our data indicates that rule of law norms are deeply embedded. From the 1960s through 2017, en banc review seems to have developed some sort of immunity from partisan behavior over time, and we unpack potential reasons why. But that important and long-lasting immunity could now be in danger. Our data from 2018-2020 show a dramatic and statistically significant surge in behavior consistent with the weaponizing of en banc. It is too soon to tell whether this is a temporary change or an inflection point indicating a more permanent shift. We consider both possibilities and, in so doing, highlight the critical role that en banc review plays in ascertaining judicial commitment to rule of law norms. The time may soon be upon us to confront the cost of en banc review in a regime where party identity frequently trumps other judicial impulses.

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Introduction

Believers in an independent federal judiciary are battle-weary. A familiar refrain used to comfort them is that partisanship at least among lower court judges is not tolerated. As Judge Bibas of the Third Circuit recently explained, “we are not viewing ourselves as members of teams or camps or parties. . . . My boss is not my appointing president, my boss is the Constitution and the laws.”¹ This view is pervasive among federal judges and legal scholars alike; it is very much tied to judicial independence and the legitimacy of courts generally.² The idea is simple but powerful: even if judges have ideological preferences and methodological differences that continue to separate them from one another, partisan loyalties fade away after investiture to reveal a judiciary of men and women bound together by collegiality norms and the rule of law.

This vital sentiment is being challenged regularly today. Most visibly, the incendiary vitriol that is judicial confirmation politics is a byproduct of the widely-shared belief that there are indeed “Trump judges” and “Obama judges.”³ Less obvious but

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¹ Jess Bravin, *No Obama or Trump Judges Here, Appointees of Both Declare*, WALL ST. J. (Sept. 15, 2019), <https://www.wsj.com/articles/judges-say-they-arent-extensions-of-presidents-who-appointed-them-11568566598>.

² See, e.g. RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT (2018); Tara Grove, *The Supreme Court’s Legitimacy Dilemma*, 132 HARV. L. REV. 2240 (2019).

³ See Adam Liptak, *Chief Justice Defends Judicial Independence After Trump Attacks ‘Obama Judge,’* N.Y. TIMES (Nov. 21, 2018),

perhaps more telling, a team mentality seems to be emerging in the courts of appeals and it is a dynamic most visible when the judges sit all together in something called *en banc* review. Going *en banc* (as it is said colloquially) generally means all active members of a U.S. Court of appeals will sit together and make a decision for the circuit as a whole.⁴ This process mirrors a U.S. Supreme Court style: the judges hear argument in a big room, often write separately, air disagreements publicly, and authoritatively decide the law that will govern a large jurisdiction for the foreseeable future.

En banc decisions are rare (they account for less than 1 % of appellate decisions), and they are uniquely awkward among judicial acts.⁵ By definition a judge sitting *en banc* is sitting in judgment of a colleague on the same court.⁶ This makes it different from standard vertical appellate review or even Supreme Court review of prior precedent. An *en banc* decision literally nullifies a prior decision made by members of the same court -- people you might pass in the lunch room later that day. Judges thus think of *en banc* proceedings as divisive and unpleasant; some circuits even tout their rare *en banc* rate as illustrative of a collegial and apolitical culture.⁷

<https://www.nytimes.com/2018/11/21/us/politics/trump-chief-justice-roberts-rebuke.html>.

⁴ The circuits vary somewhat in their rules for who gets to sit *en banc* (senior judges, judges sitting by designation, etc.), and the Ninth Circuit – due to its size – rarely sits together entirely. *En banc* courts in the Ninth Circuit consist of the Chief Judge, and ten non-recused judges who are randomly drawn. See An Act of 1978, Pub. L. No. 95-486. For more on this variation and other important *en banc* observations, see Tracey E. George, *The Dynamics and Determinants of the Decision to Grant En Banc Review*, 74 WASH. L. REV., 213, 231 (1999).

⁵ Ryan W. Copus, *Statistical Precedent: Allocating Judicial Attention*, 73 VAND. L. REV. 605, 608 (2020) (“The courts now review a mere 0.19% of decisions *en banc*, down from 1.5% in 1964.”); Alexandra Sadinsky, Note, *Redefining En Banc Review in the Federal Courts of Appeals*, 82 FORDHAM L. REV. 2001, 2004 (2014) (“*En banc* hearings consistently make up less than 1 percent of the caseload of the federal circuit courts.”).

⁶ See, e.g., J. WOODFORD HOWARD, COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM: A STUDY OF THE SECOND, FIFTH, AND DISTRICT OF COLUMBIA CIRCUITS 190, 215-219 (1981).

⁷ See Jon Newman, *In Banc Practice in the Second Circuit: The Virtues of Restraint*, 50 BROOK. L. REV. 365, 382 (1984) (“The Second Circuit’s self-discipline in holding to a minimum the number of appeals reheard *en banc* is, in my view, a distinct benefit to the court, the bar and the development of the law.”). The Third Circuit also prizes itself on collegiality and apparently – at least internally – goes by the nickname “the Mighty Third.” See James C. Martin, *From the President’s Desk*, 4 ON APPEAL 1 (2010) http://thirdcircuitbar.org/newsletters/ThirdCircuitBarAssociationNewsletter_4-3_December_2010.pdf.

Despite their rarity, en bancs deserve special scholarly attention. En banc review is the one time when lower court judges can truly line up in teams – all those appointed by Democrats versus all those appointed by Republicans. En banc decisions thus provide valuable and critical insight into the potential erosion of the nonpartisan norm in federal judicial decision-making. And these days it is hard to ignore the warning signs of the en banc partisan team spirit, especially on high visibility issues that divide the parties.

Consider the following recent example. When a lawsuit accusing President Trump of violating the Constitution by accepting foreign government money through his luxury hotels reached the Fourth Circuit Court of Appeals, it was randomly assigned to a panel of judges all appointed by Republican Presidents. These three judges decided that the lawsuit could not proceed.⁸ The entire Fourth Circuit, however, (comprised of judges the majority of whom were appointed by Democrats) reversed the panel decision en banc. The ultimate decision broke down entirely on party lines; all judges voted consistently with the ideology of their respective appointing presidents, leading each side to make cutting accusations regarding the political behavior of judges and the future of the rule of law with Judge Wilkinson complaining that they had all been reduced to “partisan warriors.”⁹

Even the most optimistic believer in an independent non-partisan judiciary would flinch at these events. It seems plausible at least that the Fourth Circuit went en banc to bring in a renegade panel that differed from the majority composition of the Circuit as a whole: put bluntly, “you don’t speak for the Fourth Circuit, we speak for the Fourth Circuit.”

There are several other recent en banc decisions that fit this mold – from circuits dominated by judges appointed by Republicans as well as Democrats.¹⁰ Take the Fifth Circuit en banc decision denying a remedy for a Mexican teenager shot at the border, the D.C.

⁸ *In re Trump*, 928 F.3d 360 (4th Cir. 2019) (panel opinion decided by Niemeyer and Quattlebaum, Circuit Judges, and Shedd).

⁹ *In re Trump*, 958 F.3d 274 (4th Cir. 2020) (en banc). Compare Judge Wynn (concurring at 289) (“[T]he public’s confidence and trust in the integrity of the judiciary suffer greatly when judges who disagree with their colleagues’ view of the law accuse those colleagues of abandoning their constitutional oath of office.”) with Judge Wilkinson (dissenting at 292) (“...[W]e invite the judiciary to assemble along partisan lines in suits that seek to enlist judges as partisan warriors in contradiction to the rule of law that is and should be our first devotion.”).

¹⁰ Other recent examples can be found *infra* notes 54 to 60.

Circuit en banc decision about whether an immigrant detainee could have an abortion, and the Ninth Circuit decision about whether children in deportation hearings have a right to counsel, to name a few.¹¹

These headline-grabbing examples stood out to us as disturbing on a very fundamental level. Partisan en bancs – by which we mean en banc decisions that are more than ideologically divided but exhibit my-party-versus-your-party warning signs – run counter to the core notion of an independent judiciary.¹² The federal courts of appeals make use of a randomly-assigned three judge panel system precisely because any group of three (whatever their partisan affiliation) is seen as able to render justice in any case and therefore the equal of any other group of three. Partisan en bancs, however, present the possibility that cases are resolved not because of disagreements on the law or even diverging ideological priors, but because one side can out-muscle the other side. Judge Wilkinson’s warning about “partisan warriors” is chilling. It starkly invokes the fear that courts will become simple power brokers. It is very difficult to agree with Chief Justice Roberts that there are no “Trump judges” or “Obama judges” if appellate judges use en banc as a weapon against each other when they have the numbers to do so.

And so we set out on a quest to dig into the en banc tool and its history in order to determine if en banc decision-making was being used in this “partisan warrior” way – and whether that was new. Although legal scholars and political scientists have written on en banc decision-making generally,¹³ relatively little has been said about the partisan dimensions of going en banc and nobody has

¹¹ *C.J.L.G. v. Barr*, 923 F.3d 622 (9th Cir. 2019); *Garza v. Hargan*, 874 F.3d 735 (D.C. Cir. 2017); *Hernandez v. United States*, 785 F.3d 117 (5th Cir. 2015).

¹² Our measures for partisan behavior are elaborated upon in part III *infra*, but in short we use two: (1) “partisan reversals” are instances where a circuit dominated by appointments from one party reaches out to reverse a panel composed of judges appointed by the other party and (2) “partisan splits” are en banc decisions that divide the judges almost entirely based on the party of the President who appointed them. We recognize of course that using the appointing President as a measure of partisanship is not a perfect measure, but it is a widely-used measure by political scientists and we think it captures partisanship (not ideology) in an important way.

¹³ Important examples include George, *supra* note 4; Michael E. Solimine, *Ideology and En Banc Review*, 67 N.C. L. REV. 29 (1988); Christopher Smith, *Polarization and Change in the Federal Courts: En Banc Decisions in the U.S. Courts of Appeals*, 74 JUDICATURE 133 (1990); Michael Giles et al., *Setting a Judicial Agenda: The Decision to Grant En Banc Review in the U.S. Court of Appeals*, 68 J. Pol. 852 (2006).

comprehensively studied that dynamic over time.¹⁴ We quickly discovered that what we wanted – a large collection of en banc decisions from every circuit over generations – did not yet exist (and that Westlaw, Lexis, and other search engines did not formally separate en banc cases from other decisions).

We thus assembled what we believe to be the most comprehensive en banc database to date. We gathered en banc decisions from twelve circuits (all circuits except the Federal Circuit) for three year periods over the last sixty years: 1966-1968, 1976-1978, 1986-1988, 1996-1998, 2006-2008, 2016-2018.¹⁵ We then additionally tracked and coded en banc decisions from 2019-2020 so we could take a harder look at the Trump era to see whether it fit the pattern or was an outlier. Using primarily a combination of Westlaw research and data from the Federal Judicial Center, our research produced 950 en banc decisions sampled over fifty-four years.¹⁶ This was a heavy research lift but it was the only way to use a long lens and explore the changes to partisan en bancs over time – a question critical to the current existential debate about the judicial independence of federal courts.

What we found surprised us. With the above anecdotal examples in mind, we fully expected to find a connection between ever-growing ideological polarization since 1980 and evidence of “en banc as a partisan weapon,” by which we mean the willingness of a circuit to check renegade panels that differ from the composition of the court as a whole (based on appointing President) and / or en banc decisions where judges vote as a team consistent with the party of the President who appointed them. Perhaps most importantly, we also expected to see these patterns align over time with pre-documented periods of polarization – growing at a steady clip from the post-Reagan period to today.

¹⁴ For helpful prior work on specific circuits and specific time periods see Tom S. Clark, *A Principal Agency Theory of En Banc Review*, 25 J. L. ECON. & ORG. 55 (2008); CHRISTOPHER P. BANKS, *JUDICIAL POLITICS IN THE D.C. CIRCUIT* (1999); Susan B. Haire, Stefanie A. Lindquist, & Donald R. Songer, *Appellate Court Supervision in the Federal Judiciary: A Hierarchical Perspective*, 37 L. & SOC’Y REV. 143 (2003). See also Note, *The Politics of En Banc Review*, 102 HARV. L. REV. 864 (1989).

¹⁵ We collected and coded cases from the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th and the D.C. Circuit. We left the Federal Circuit out of our study because it differs from the other Circuits in terms of its docket and its function. For additional discussion of our research methodology, see *infra* notes 131-143 and accompanying text.

¹⁶ The methodology to identify these cases is described fully *infra* note 131 and accompanying text.

What we did find, however, was far more complicated than what our hypothesis suggested. We were correct in our guess that there would be next to no evidence of partisan en banc decision-making in the 1960s and 1970s—reflecting the lack of a significant ideological divide between Democrats and Republicans at that time. And we were likewise correct in our hunch that partisan en bancs would make their first real appearance in the 1980s.¹⁷ But we were wrong in our prediction of what would come next. Our data largely show stability and a lack of partisan en banc behavior from the end of the Reagan administration to the start of the Trump administration. Of course there was some variance from circuit to circuit – a variance we plan to explore in a subsequent paper. Our expectation, however, was to find a general increasing trend of partisan splits and partisan reversals nationally across time starting in the 1980s ...and that expectation was not met.

Instead, our data from the 1990s, 2000s, and much of the 2010s reveals that partisanship occasionally plays a role in en banc decisions, but not usually and not in any predictable pattern.¹⁸ These results hold true even for constitutional cases, which we used as a proxy for cases that one might consider “high profile.” While we did find more partisan behavior in constitutional en banc decisions, the partisan splits in those cases hovered around only 19% of all en banc decisions and the partisan reversals stayed around 16%. This is far less than our hypothesis suggested and runs counter to the pattern we thought we would see over time.

Thus, the long view suggests an encouraging story. Significant forces seem to be pushing against the en banc partisan impulse – forces like rule-of-law norms, collegiality, and judicial independence. These norms seem particularly well-trenched and durable in en banc decision-making. The bulk of our data thus highlights a hopeful note in the debate about judicial independence. There are institutionalized incentives and norms pushing courts to act like courts, notwithstanding polarization and the growing

¹⁷ The rise of partisan en bancs in the 1980s may also be attributed to a dramatic 64 percent increase in federal appeals judgeships from 1978-1984. See *infra* note 62 and accompanying text.

¹⁸ It is possible, of course, that judges might vote to go en banc for ideological reasons related to suspicion of the panel’s leanings, but when they do vote at the en banc stage, other factors outweigh those ideological considerations. But since there is no consistent record of which judges vote to rehear the case en banc (let alone a record of the reasons why they vote to go en banc), it is very difficult to analyze how partisanship enters into the decision to grant en banc review. For that reason, our study focuses on the cases where the circuits do go en banc. For additional discussion, see *infra* note 134 and accompanying text.

ideological divide in judicial appointments and panel decisions. Once a person takes the oath, dons the robe, and speaks as a “we” with colleagues across time and ideology, she becomes bound by different norms and seems to behave in a way that celebrates customs of the courts, collegiality, and the desire not to appear partisan.

Rather than herald the triumph of an apolitical judiciary, however, there is also reason to suspect we are living in a moment of change. From 2018-2020 there was a dramatic and strongly statistically significant spike in both partisan splits and partisan reversals – more in both categories than we observed in any other time period over sixty years. This Trump-era uptick is very striking and calls into question the persistence of norms pushing against partisans judging. Almost 35% of en banc decisions in 2018-2020 involved either a partisan reversal or partisan split. Compare this to 16.5% in 2016-2017, 19% in 2006-2008, and 20% in 1996-1998. This dwarfs even the previous high point of partisanship we observed in 1986-1988 (which amounted to 25% of all en banc decisions). And – significantly – weaponizing en banc seems to be on the rise in circuits dominated by judges appointed by Democrats and also those dominated by Republicans. For their part, the political parties have backed this kind of us-them partisanship: the Republican Policy Committee formally embraced weaponizing en banc review in 2019 while the 2020 Democratic Party Platform includes increasing federal courts of appeals judgeships as a way of counterbalancing Trump judicial appointments.¹⁹

What does this mean? Are we at an inflection point where partisan forces are so strong and divisive that appellate courts are more likely to go en banc as a partisan weapon whatever the costs? Are judges appointed today somehow different in terms of their resistance to using en banc in this partisan way? One day will we say President Trump changed the face of appellate decision-making and quelled the collegiality forces that up to this point seemed to dominate en banc review? Or will Joe Biden’s promised “return to normalcy” invigorate those collegiality forces?²⁰ For reasons we will detail, it is simply too soon to draw definitive conclusions. What we can show is that the costs of en banc review devolving into straightforward partisan politics are great—so great that there is reason to question the continuing use of en banc review if the Trump-era pattern persists. Consequently, the historically

¹⁹ See *infra* notes 220 to 221 and accompanying text

²⁰ Then-candidate Joe Biden promised both a “return to normalcy” and a commitment to appointing progressive judges. See *infra* note 202.

entrenched en banc forces we unpack in this article are all the more vital to assess.

Part I of this Article explains why en banc decision-making is a particularly valuable lens to study the persistence of rule of law norms such as judicial independence and collegiality. It briefly describes the history of en banc and prior studies of the political dynamics involved. Part II tracks the rise of the partisan ideological divide on the federal courts of appeals and explains why we speculated that the use of en banc as a partisan weapon would increase over time as polarization also increased. Part III describes our data and what we did find – the absence of this suspected uptick in partisan behavior, at least until very recently, and then a concerning spike in it from 2018-2020. And finally Parts IV and V discuss implications from our discoveries. Part IV details the forces at work that seem historically to resist the use of en banc as a weapon. Part V tries to make sense of the Trump era uptick and, with it, assesses what could be lost if we are in fact at a point of no return.

I. WHY STUDY EN BANCS? HISTORY & PRIOR STUDIES

En banc review is an unusual feature of judicial decision-making.²¹ It is rarely used and some say it was never even meant to be part of Article III decision-making below the Supreme Court.²² When judges sit en banc they are literally sitting for the purpose of evaluating one another; an en banc decision typically vacates a prior decision from a panel of judges on the same court. Only federal courts of appeals judges are asked to review their colleagues this way. It is unpleasant and often contentious business. Its rarity, moreover, amplifies its significance. All aspects of en banc decision-making are unique—the decision to go en banc, the nature of the oral arguments, the prevalence of dissenting opinions, just to name a few.²³ Put simply, judges interface with each other in fundamentally different ways throughout the en banc process.

En banc decisions, therefore, give us unique insight into the self-image of the federal appellate courts, i.e. what these judges see their role to be: will they be judges who, while often disagreeing with each other, are still jointly committed to an independent

²¹ Copus, *supra* note 5, at 608.

²² Banks, *supra* note 14, at 91.

²³ See LEE EPSTEIN, WILLIAM LANDES, & RICHARD POSNER, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* 269-70 (2013).

judiciary or will courts be just another casualty of partisan polarization in which judges line up in teams and fight it out?²⁴ This existential question into the very soul of the federal courts deserves an historical lens. It is thus worth doing a brief tour of the history of en banc and its study by political scientists before unpacking what we found in our longitudinal exploration.

1. History of En Banc Review

Intermediate appellate courts began in earnest (outside of justices riding circuit) with the Evarts Act of 1891, a statute passed in light of an increased federal court caseload after the Civil War.²⁵ The law established three-judge panels for intermediate appellate review but relied heavily on judges from the district courts and Supreme Court to staff those panels.²⁶ Neither the Evarts Act nor the subsequent 1911 Judicial Code endorsed en banc decision-making, but they did not forbid it either.

The first example of an en banc decision from a U.S. Court of Appeals came from the Third Circuit in 1941 shortly after that court grew beyond three full-time members.²⁷ The Court resolved the ambiguity in the Evarts Act by reasoning that “each of the five circuit judges was a member of the court, that the court must comprise all of its members, and that the power to decide a case through a panel of three judges did not deprive the full court of the power to decide the case.”²⁸

²⁴ En banc review is also an important bridge between federal courts of appeals and the Supreme Court. En banc cases are “inherently more significant” and “serve as a signal” to the Supreme Court as they are far more likely to be reviewed by the Supreme Court. Tracey E. George & Michael E. Solomine, *Supreme Court Monitoring of Courts of Appeals En Banc*, 9 S. CT. ECON. REV. 171, 197 (2001).

²⁵ Before the Civil War, appellate courts had no real separate identity. They were staffed by Supreme Court justices riding circuit. Christopher P. Banks, *The Politics of En Banc Review in the “Mini-Supreme Court”*, 13 J. L. & POL. 377, 379 n.16 (1997). Following the Civil War, plaintiffs began to bring more cases in the federal court system, putting strain on a system that hadn’t been comprehensively reorganized since the Federal Judiciary Act of 1789. *Id.* at 379.

²⁶ George, *supra* note 4, at 223.

²⁷ Douglas H. Ginsburg & Donald Falk, *The Court En Banc: 1981-1990*, 59 GEO. WASH. L. REV. 1008, 1034 (1991). The Ninth Circuit contemplated earlier the power to sit en banc but decided that they did not have the power to do so. *See* George, *supra* note 4, at 227 (citing *Bank of America v. Commissioner*, 90 F.2d 981 (9th Cir. 1937)).

²⁸ Ginsburg & Falk, *supra* note 27, at 1010 (citing *Commissioner v. Textile Mills Sec. Corp.*, 117 F.2d 62 (3d Cir. 1940), *aff’d*, 314 U.S. 326 (1941) (affirming the ability of the circuit courts to sit en banc)); *see Cold Metal Process Co. v.*

The authority to go en banc was recognized officially by Congress in 1948 and now comes from Rule 35 of the Federal Rules of Appellate Procedure (FRAP).²⁹ 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.”³⁰

The first reason to go en banc – clearing up intra-circuit splits – is the one traditionally emphasized by judges and historically thought of as the “primary” reason to go en banc.³¹ The general judicial sentiment is that going en banc is a housekeeping chore, or in the colorful words of one judge, “the truth is that most circuit judges regard en bancs as a ‘damned nuisance.’”³²

Indeed there are plenty of judges on record stating that striving for uniformity within a circuit (the clean-up rationale) is the *only* reason to go en banc. Judge Browning of the Ninth Circuit, for example, explained that “it is not the purpose of the en banc process to assure that cases are decided in the way the majority of the whole court would have decided them.”³³ And Judge Newman on the Second Circuit emphasized that en banc decisions outside of the house-keeping function should be “extremely few in number.”³⁴

Carnegie-Illinois Steel Corp., 115 F.2d 33 (3d Cir. 1940) (en banc order vacating panel decision as moot).

²⁹ See Banks, *supra* note 14, at 94; George, *supra* note 4, at 229 (explaining that Congress ratified a court decision in 1948 and decided to authorize en banc review).

³⁰ Fed. R. App. P. 35. See Solimine, *supra* note 13, at 34-35 (“In the wake of rule 35, each circuit has repromulgated rules and procedures to govern both litigant and judicial procedures for determining whether a panel decision should be en banc. The circuit rules largely replicate the language in rule 35 and do not provide greater specificity regarding the substantive criteria.”).

³¹ George, *supra* note 4, at 234. See also Neil D. McFeeley, *En Banc Proceedings in the United States Courts of Appeals*, 24 IDAHO L. REV. 255, 261 (1987) (“[T]he major reason for the existence of en banc rehearings is to ensure intra-circuit consistency.”).

³² Howard, *supra* note 6, at 215-220.

³³ Arthur Hellman, *The Law of the Circuit Revisited*, 32 S. ILL. U. L.J. 625, 626 (quoting Judge Browning, Annual Judicial Conference, Second Judicial Circuit of the United States, 106 F.R.D. 103, 162 (1984)).

³⁴ Newman, *supra* note 7 at 370. See also Lamar Alexander, Note, *En Banc Hearings in the Federal Courts of Appeals: Accommodating Institutional Responsibilities (Part 1)*, 40 N.Y.U. L. REV. 563, 590 (1965) (“[T]he propriety of using ‘importance’ as an independent reason for considering a case en banc is

The second reason en banc decisions are authorized – to answer questions of exceptional importance – is the rationale that gives rise to potential partisan dynamics. Indeed, Judge Frank Coffin of the First Circuit once said that courts sitting en banc “resemble more a small legislature rather than a court.”³⁵ Although using en banc review to answer important questions has always had its champions,³⁶ it is a move that has gained popularity in recent years. By the year 2000, according to one count, “the importance cases [had] eclipsed the uniformity cases as the primary justification for en banc scrutiny.”³⁷

As en banc decisions on questions of national importance grew, so too did the warnings that going en banc for this reason can lead to “everything that is supposedly wrong with courts.”³⁸ As political scientist Christopher Banks explains, “[s]ince granting en banc review is at bottom an exercise of raw judicial discretion, the decision to meet as one can be politically manipulated by a majority of result-oriented judges in active service.”³⁹ Justice Harry Blackmun put it memorably when talking to the Eighth Circuit Judicial Conference: “when I see in en banc hearings, all the appointees of the present administration voting one way and all the appointees of prior administrations, Democrat or Republican, voting

questionable.”); *id.* at 578 (“[E]n banc proceedings are sometimes the only appropriate method of dealing with serious intra-circuit conflict.”).

³⁵ FRANK M. COFFIN, ON APPEAL: COURTS, LAWYERING, AND JUDGING 5 (1994).

³⁶ See, e.g., Arthur D. Hellman, *Getting It Right: Panel Error and the En Banc Process in the Ninth Circuit Court of Appeals*, 34 U.C. DAVIS L. REV. 425, 430 (2000) (“Justice Scalia wrote: “[T]he function of en banc hearings ... is not only to eliminate intracircuit conflicts, but also to correct and deter panel opinions that are pretty clearly wrong.”); Ginsburg & Falk, *supra* note 27, at 1034 (“[T]he majority should rule.”); Hellman, *supra* note 33, at 625 (quoting Supreme Court Justice Byron White as saying “issues of exceptional importance will be determined by all of the judges for whom the decision speaks”).

³⁷ Pierre H. Bergeron, *En Banc Practice in the Sixth Circuit: An Empirical Study, 1990-2000*, 68 TENN. L. REV. 771, 782-83 (2001). See also Ginsburg & Falk, *supra* note 27, at 1051 (“Sometimes the court must convene en banc because that is the only way to maintain uniformity in the law. More often it is because the case involves a question of exceptional importance to the public, to the court, or to the parties, and a majority think that the panel probably erred.”).

³⁸ Banks, *supra* note 14, at 98.

³⁹ Banks, *supra* note 14, at 90. See also Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1680 (2003) (“In an uncollegial environment at its worst, decisions to rehear cases en banc can result in disastrous judicial decision making—ideologically driven and result-oriented.”).

the other way. I am a little bit concerned. Maybe I am more than a little bit concerned.”⁴⁰

2. *Prior Studies and Recent Examples*

Prior studies to test this political dynamic have found cause for Blackmun’s concern. For example, a study of the D.C. Circuit in the 1980s by D.C. Circuit judge Douglas Ginsburg (with Donald Falk) found plenty of “conflict and disharmony” in en banc decisions.⁴¹ Of 61 cases only 16 were unanimously decided and 6 of the non-unanimous cases were decided by just one vote.⁴² Similarly, Professor Chris Smith found partisan splits in his study of all circuit court en banc decisions in the 1980s.⁴³ Smith looked at non-unanimous en banc decisions and categorized which ones were polarized—meaning, in his terms, which ones resolved with a bloc of Reagan appointees on one side against the rest of the court.⁴⁴ The results showed that the polarization was more evident in circuits with more Reagan appointees (such as the D.C. Circuit and the Eighth Circuit) and that there were more polarized decisions as Reagan filled more vacancies across the courts of appeals.⁴⁵

In 1999, Professor Tracey George was one of the first to empirically test *why* circuit courts went en banc.⁴⁶ She compared 305 cases heard en banc by three circuits with a random sample of cases from those same circuits that were not reheard en banc.⁴⁷ Professor George endorsed a “hybrid” multifarious theory for why

⁴⁰ George, *supra* note 4, at 241 (quoting Blackmun).

⁴¹ Banks, *supra* note 25, at 405 (discussing Ginsburg & Falk, *supra* note 27).

⁴² *Id.*; Ginsburg & Falk, *supra* note 27, at 1038.

⁴³ Smith, *supra* note 13.

⁴⁴ *Id.* at 135-137. Smith defined “polarized” to mean cases resolved with a bloc of Reagan appointees on one side against the rest of the court, or, alternatively, cases with a bloc of Reagan appointees joined by another judge or two to form a bloc.

⁴⁵ *Id.* For a contrary view on lopsided en banc voting, see Professor Michael Solimine’s 1988 study in which he found little cause for concern. See *supra* note 13.

⁴⁶ George, *supra* note 4; *id.* at 216 (“Surprisingly little is known about why circuit courts select certain cases for en banc rehearing.”).

⁴⁷ The circuits she examined were the Second, Fourth and Eighth circuits from the time period of 1956 to 1996. *Id.* at 250. In prior work, Professor George also studied the Fourth Circuit extensively from 1962 to 1996 and found a clear pattern of ideological voting. See Tracey E. George, *Developing a Positive Theory of Decision-making on U.S. Courts of Appeals*, 58 OHIO ST. L.J. 16 (1998).

courts go en banc.⁴⁸ It was true, she found, that appellate judges went en banc for housekeeping reasons (to resolve splits), but it was also true that the ideological direction of a panel's decision (particularly when it was liberal) was strongly correlated to the court's decision to grant en banc review.⁴⁹

Other studies of particular circuits or particular time periods confirm that there is some indication of ideological behavior in en banc decisions. Political scientist Tom Clark looked at en banc decisions from all the circuits during the period of 1986-1996.⁵⁰ He found statistically significant results indicating some use of en banc as a weapon. When, for example, a panel that was more liberal than the full circuit made a conservative decision, it was not likely to be reheard en banc—but if the panel made a liberal decision (conforming to its perceived bias, what Clark labeled an “ideological decision”) it was more likely to be reheard en banc. In fact, Clark observed, the chances of an ideological decision being reheard increased as the ideological distance between a panel and the full circuit increased.⁵¹

These prior studies helped inform our instinct that en banc could be used as a partisan weapon in the courts of appeals, but they stopped short of answering our ultimate long-view question. Because these studies considered either only a few circuits or only a specific moment in time (generally the 1980s), they could not speak to the big-picture: whether en banc has always been used as a

⁴⁸ Ultimately Professor George concludes that there are three factors which largely account for the cases that go en banc: (1) when a lower court is being reversed, (2) when a panel judge dissents, and (3) when the ruling of the panel is liberal. See George, *supra* note 4, at 216.

⁴⁹ *Id.* at 255, 257. More recently, in 2006 Professor Michael Giles – studying the Fifth Circuit in the 1980s – also found that the decision to “go en banc” was a complicated one. Ultimately Giles concluded – like Professor George – that the decision to go en banc could not be neatly labeled: “the final vote to grant or deny a full-court rehearing exhibits relatively little in the way of systematic variation.” Giles et al., *supra* note 13 at 859-864

⁵⁰ Clark, *supra* note 14. In addition to studying different time periods, Clark's important study differs from ours in another respect: his focus was on ideological divisions, not partisan identity and, as such, he groups together ideologically simpatico Republicans and Democrats whereas we focus on the growing partisan divide.

⁵¹ *Id.* at 62-63. For a similar example – focused on the Fourth and Fifth Circuits in the year 1995-1996 – see Phil Zarone, *Agenda Setting in the Courts of Appeals: The Effect of Ideology on En Banc Rehearings*, 2 J. APP. PRAC. & PROCESS 157, 161 (2000) (finding that panel decisions he classified as “liberal” were reheard more often by the en banc court).

partisan weapon nation-wide or whether we were witnessing something new / something regional.⁵²

And it is no mystery what sparked our interest in the question. Over the past few years, partisan en banc showdowns peppered newspaper headlines with some regularity. From 2018-2020, a Westlaw search of “en banc” reveals that newspapers throughout the country covered these partisan en banc fights – far more than in previous time periods.⁵³ In so doing, as has now become routine, reporters labeled the federal circuits “Democratic” or “Republican” when deciding the high stakes issues that divide the parties.

Most familiar perhaps are the cases on what could be called the personal Trump docket – i.e. decisions in which President Trump was personally invested, in more than just a defending-policy kind of way. Examples here include the DC Circuit decision denying relief to former National Security Adviser Michael Flynn (an en banc decision that reversed a panel composed of Trump appointed judges), or a similar en banc move in the Don McGahn subpoena litigation.⁵⁴ Likewise, party line voting was on display when the Fourth Circuit ruled en banc against the president in both the emoluments clause litigation and in a 2018 challenge to Trump’s travel ban (a decision that quite unusually bypassed the three judge panel).⁵⁵

⁵² Generalizations regarding partisanship in the 1980s are also complicated by the 64 percent growth in the number of federal appeals judgeships from 1978-1984. *See infra* note 62. Moreover, 1980s studies are not uniform in their conclusions regarding partisanship. *See supra* note 49.

⁵³ From 2018-2020, en banc decision-making was featured in 42 news stories from *The New York Times*, *The Washington Post*, *The Boston Globe*, *The Chicago Tribune*, *The Houston Chronicle*, *The Los Angeles Times*, and the *Philadelphia Inquirer*. *See* Memo from Canaan Suitt, Newspaper Coverage of En Banc Decisions, January 11, 2021. A similar search of those papers in earlier decades revealed far less interest in en banc decision-making—2 in 1966-1968, 3 in 1976-1978, 2 in 1986-1988, 27 in 1996-1998, 11 in 2006-2008. *See id.*

⁵⁴ *In re Michael Flynn*, No. 20-5143 (DC Cir. 2020); *Committee v. Don McGahn*, No. 19-5331 (DC Cir 2020).

⁵⁵ Another recent partisan en banc ruling from the Fourth Circuit is *Wise v. Cirstosta*, a 2020 decision regarding ballot extension disputes in North Carolina. *Wise v. Cirstosta*, 978 F.3d 93 (2020). In this case, the Fourth Circuit took the unusual step of taking the case en banc after the panel had voted but before the panel opinion had been drafted.

But examples of partisan warfare in recent en bancs are not limited to the Trump docket, nor can they be easily labeled as part of Democratic “resistance.” Indeed, partisan en banc reversals and partisan en banc splits arise in circuits dominated by Democrat appointees as well as Republican ones and in cases covering a wide variety of issues.

For example, in the Sixth Circuit, (a circuit where the majority of the judges were appointed by Republicans), a panel of three judges held in 2020 that the Fourteenth Amendment protected a fundamental right to a “basic minimum education” and that right was being violated by Detroit public schools.⁵⁶ The panel in that case was comprised of two Democratically-appointed judges and one Trump-appointee (who dissented); it is an example of what we call a “renegade panel,” where the panel partisan composition differs from the composition of the circuit as a whole.⁵⁷ Sure enough, several months later the entire Sixth Circuit (the majority of whom were appointed by Republicans) voted *sua sponte* to take the case en banc even after being apprised that the parties had reached a settlement. The en banc court vacated the prior panel opinion nullifying the work of the panel and then dismissed the case as moot due to the settlement.⁵⁸ Other examples of strictly party line en banc rulings include a September 2020 Eleventh Circuit ruling upholding limits on felon voting in Florida and a May 2020 Seventh Circuit decision holding a Wisconsin county liable for allowing a male guard to sexually assault female inmates.⁵⁹

⁵⁶ Gary B. v. Whitmer, 957 F.3d 616 (6th Cir. 2020).

⁵⁷Partisan behavior can also manifest itself when an appeals court refuses to hear a case en banc (typically in circuits where the three judge panel and circuit majority come from the same political party). Recent examples of this dynamic come from the Second, Fifth, and Ninth Circuits in cases involving sanctuary cities (Second Circuit 2020), a transgender prisoner’s right to sex-reassignment surgery (Ninth Circuit, 2019), and the Obamacare severability case (Fifth Circuit, 2020). See *N.Y. v. U.S. Dep’t of Justice*, No. 19-267 (2d Cir. 2020); *Edmo v. Corizon, Inc.*, 935 F.3d 757 (9th Cir. 2019); *Texas v. United States*, 949 F.3d 182 (5th Cir. 2019). Another 2020 Ninth Circuit en banc denial (involving immigration) prompted a stinging dissent from 12 of the circuit’s 13 Republican judges—effectively accusing the Democratic majority of manipulating the Circuit’s unique en banc process. See William Yeaman, *Ninth Circuit Review-Reviewed: Is CA9’s En Banc Process Driving Disagreement*, YALE J. REG., Dec. 10, 2020, <https://www.yalejreg.com/nc/ninth-circuit-review-reviewed-is-ca9s-en-banc-process-driving-disagreement-by-william-yeatman/>.

⁵⁸ *Sixth Circuit Vacates Right to Literacy Ruling*, NAT’L L. REV. (June 2020), <https://www.natlawreview.com/article/sixth-circuit-vacates-right-to-literacy-ruling>.

⁵⁹ *Jones v. Governor of Fla.*, 975 F.3d 1016 (11th Cir. 2020); *J.K.J. v. Polk City*, 960 F.3d 367 (7th Cir. 2020).

Moreover – and significantly – the tone of many of these recent en banc decisions is devolving into my team-your team accusations. In a particularly contentious 2019 en banc decision from the Fourth Circuit concerning Virginia’s habitual drunkard law, for example, the judicial gloves came off to reveal accusations of partisan behavior leading Judge Keenan to bemoan that they had lost their “cherished tradition of civility.”⁶⁰ And a December 2020 article revealed discord at a new level among the Ninth Circuit judges and voiced concern that en banc review there had “become a driver of dysfunction and disharmony.”⁶¹

Aware both of the seeming rise of partisan en banc rulings and the limits of earlier studies, we set out on a quest for the big en banc picture. No previous study looked at changes in en banc review over decades for all the circuits. By considering only one or two circuits, these studies do not take into account differences in the dockets and practices of the circuits. And no previous study considered the possible connection of rising party polarization and partisan en banc decision-making.⁶² We thus assembled the most comprehensive en banc database of which we are aware – covering 950 decisions across six decades and from twelve circuits.⁶³ We

⁶⁰ *Manning v. Caldwell*, 930 F.3d 264 (4th Cir. 2019) (Judge Keenan, dissenting), reversing *Hendrick v. Caldwell*, 232 F.3d 868 (W.D. Va. 2017). One year later, the Fourth Circuit was at it again in a partisan en banc decision invalidating predictive policing in high-crime areas. Tempers were not held in check as the majority accused the dissent of “writ[ing] today with a smooth pen and a tin ear.” See Debra Cassens Weiss, *4th Circuit Spars Over Predictive Policing*, ABA J. (July 16, 2020), <https://www.abajournal.com/news/article/4th-circuit-spars-over-policing-dissenter-said-to-write-with-a-smooth-pen-and-a-tin-ear>. For more on the Fourth Circuit and the implications of the tone of the discourse, see H. Jefferson Powell, *Judges as Superheroes: The Danger of Confusing Constitutional Decisions with Cosmic Battles* (currently on SSRN).

⁶¹ See Yeaman, *supra* note 57.

⁶² By largely focusing on partisanship in the 1980s, moreover, earlier studies do not consider whether 1980s decision-making is representative. More to the point, generalizations regarding partisanship in the 1980s are complicated by the 64 percent growth in the number of federal appeals judgeships from 1978 to 1984. See *U.S. Court of Appeals – Additional Authorized Judgeships*, <http://www.uscourts.gov/sites/default/files/appealsauth.pdf> (noting that 93 total appeals court judgeships were authorized before 1978 and that 59 judgeships were authorized in the 1978-1984)

⁶³ Another limit on the prior studies that we quickly encountered ourselves was the difficulty in actually finding all en banc decisions in the first place. Because many en banc cases are not labeled “en banc” or are not labeled in a place that is easy to find, there is no quick way to collect them all (Westlaw alone is insufficient). Thus another advantage to the database we assembled is that we are the first to use a three-part method to gathering en banc decisions from both the

wanted to know whether judges were changing over time in their use of the *en banc* mechanism. And, more specifically, we were suspicious that weaponizing *en banc* would rise as polarization in the politics of judicial appointments increased.

II. OUR HYPOTHESIS: EN BANC AS A WEAPON?

We thought *en banc* review over time would track the rise of polarization elsewhere; we were wrong. In understanding the implications of what we *did* find over time, it is necessary to understand the rise of polarization and its impact on the appointment and decision-making of federal judges. In other words, the implications of our thwarted hypothesis are lost without understanding where our hunch came from. Evaluating the linkage between partisanship and *en banc* review requires a solid foundational understanding of partisan dynamics as they relate to judicial decision-making; so it is to that history that we now turn.

1. *Federal Judicial Appointments Before Ronald Reagan*

Before the election of Ronald Reagan, ideology was simply not the controlling factor in federal judicial appointments. Presidents, instead, gave principal attention to other considerations, such as rewarding political allies, appealing to voters, and avoiding confirmation battles in the Senate.⁶⁴ This was true of course not just with appointments to the Supreme Court but in the lower courts as well.

From 1945-1968, Democratic presidents saw no political gain in linking party to ideology for judicial appointments. Liberal “Rockefeller Republicans” were important to the Republican party and the Democratic base was then a hodgepodge that included Northern liberals and Southern conservatives. When appointing lower court judges in states subject to school desegregation lawsuits, for example, Kennedy and Johnson appointed both integrationists and segregationists.⁶⁵ Reflecting the limited salience of ideology during this time, Eisenhower appointees to the federal courts of appeal cast a near identical percentage of liberal votes (56 percent)

Westlaw database, the Federal Judicial Center, and from citations in subsequent opinions. See *infra* part III at note 131.

⁶⁴ See Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. 301, 331-338 (2017).

⁶⁵ See Tara Leigh Grove, *Sacrificing Legitimacy in a Hierarchical Judiciary*, 121 COLUM. L. REV. _ (2021) (SSRN pp 13-16).

as did Kennedy appointees (59 percent) and Johnson appointees (59 percent).⁶⁶

Appointments to the federal courts of appeals by Richard Nixon and Gerald Ford further highlight the limited salience of ideology before Reagan. Nixon sought to woo conservatives opposed to criminal justice reforms and school bussing; at the same time, Nixon was careful not to alienate northern liberals who were still a key part of the Republican coalition.⁶⁷ “Politics far more than ideology” drove Nixon’s decision to appoint moderates.⁶⁸ A ranking of liberal votes cast by federal court of appeals judges (1952-2008) places Nixon (46 percent) and Ford (44 percent) appointees smack in the middle—closer to Bill Clinton (48 percent) appointees than Republican presidents Ronald Reagan (39 percent), George H.W. Bush (36 percent), and George W. Bush (38 percent).⁶⁹

More telling, there was little opportunity for a significant partisan divide to emerge in the period before Reagan. Studies of roll call votes in Congress show that there was next-to-no ideological difference between congressional Democrats and Republicans from 1930-1980.⁷⁰ Democrats and Republicans alike occupied every ideological niche and there was a significant cohort of moderates.⁷¹

Further, under the norm of senatorial courtesy, home state Senators from the President’s political party were instrumental in judicial appointments and most judicial nominations were quickly

⁶⁶ See SUNSTEIN ET AL., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 114-115 (2006).

⁶⁷ See KEVIN MCMAHON, NIXON’S COURT: HIS CHALLENGE TO JUDICIAL LIBERALISM AND ITS POLITICAL CONSEQUENCES 8 (2011).

⁶⁸ *Id* at 6. Of Nixon’s four Supreme Court appointments, William Rehnquist stood alone as a strong conservative.

⁶⁹ See Sunstein et al., *supra* note 66, at 114-115. Jimmy Carter appeals court nominees cast liberal votes 54% of the time. *Id.*

⁷⁰ See NOLAN MCCARTY, KEITH T. POOLE, & HOWARD ROSENTHAL, POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES 30-31 (2006) (showing high ideological overlap between parties in both the House and Senate from the Great Depression through the mid-1980s and declining thereafter).

⁷¹ See SEAN THERIAULT, PARTY POLARIZATION IN CONGRESS 26 (2008); Steven S. Smith & Gerald Gamm, *The Dynamics of Party Government in Congress*, in CONGRESS RECONSIDERED 141 (Lawrence C. Dodd & Bruce I. Oppenheimer eds, 9th ed. 2009).

approved with broad bipartisan support.⁷² From 1945 to 1980, the confirmation rate for presidential nominations was close to 90 percent.⁷³

2. *The Reagan Revolution*

Everything started to change in 1981. By reaching out to conservative Southern Democrats and abandoning moderate-to-liberal “Rockefeller Republicans,” the *raison-d’être* of “Ronald Reagan’s GOP” was to sow ideological divisions between the parties.⁷⁴ Accordingly, the Reagan administration made ideological considerations “the most important criteria” in the screening of judicial candidates.⁷⁵ Critical of the Nixon and Ford administrations’ appointment of Democrats to the federal bench and their related failure to take account of the “philosophical foundations” of judicial candidates,⁷⁶ the Reagan administration saw the courts as a “primary player in the formulation of public policy.”⁷⁷

The administration also laid the seeds for the growth of the conservative legal network. Through Attorney General Edwin Meese’s embrace of the nascent Federalist Society (established in

⁷² See Sarah Binder & Forrest Maltzmann, *Advice and Consent During the Bush Years: The Politics of Confirming Federal Judges*, 92 JUDICATURE 320, 324 (2009). When there was no home state Senator from the president’s party, high ranking state officials from the president’s party would play a role in the selection of federal appeals judges. SHELDON GOLDMAN, *PICKING FEDERAL JUDGES* 135 (1997) This system of “courtesy” also ensured ideological diversity; liberal northern Republicans and conservative Southern Democrats helped select nominees. Indeed, the role of state officials was so important that ideological rankings of judges were based on home state Senators and not the president’s political party. See Michael W. Giles, Virginia A. Hettinger, & Todd Peppers, *Picking Federal Judges: A Note on Policy and Partisan Selection Agendas*, 54 POL. RES. Q. 623, 631, 638 (2001).

⁷³ Keith E. Whittington, *Partisanship, Norms, and Federal Judicial Appointments*, 16 GEO. J. L. & PUB. POL. 521, 525-26 (2018).

⁷⁴ See David Von Drehle, *Political Split is Pervasive: Clash of Cultures is Driven by Targeted Appeals and Reinforced by Geography*, WASH. POST, April 25, 2004 at A-1; Kate O’Beirne, *Rockefeller Republicans Take Manhattan*, NAT’L REV. ONLINE (July 7, 2004), www.nationalreview.com/kob/obeirne200407070839.asp.

⁷⁵ DAVID ALISTAIR YALOF, *PURSUIT OF JUSTICES* 134 (2001).

⁷⁶ David M. O’Brien, *Why Many Think Ronald Reagan’s Court Appointments May Have Been His Chief Legacy*, HISTORY NETWORK NEWS, <http://www.historynewsnetwork.org/article/10968> (quoting Steven Markman, one of the Reagan administration officials in charge of judicial selection).

⁷⁷ *Id.* (quoting Reagan DOJ official Bruce Fein).

1982),⁷⁸ the administration sought to groom well-credentialed, committed conservatives who would eventually become federal appeals judges and Supreme Court Justices.⁷⁹ As Federalist Society cofounder and Meese special assistant Steve Calabresi put it: “There was a real desire to train a generation of people—a farm team—who might go on later on in future Republican administrations to have an impact and hold more important positions.”⁸⁰

The Reagan Revolution transformed federal judicial politics – particularly in the lower federal courts.⁸¹ Reagan was more committed to ideology than any president before him and he saw federal appellate judges as key players in the emerging Republican-Democrat schism. An analysis of 1981-2004 decisions by Reagan court of appeals judges revealed that Reagan appointees were more conservative than earlier Republican administrations,⁸² and that Reagan appointees became more conservative over time.⁸³ By appointing 83 federal courts of appeals judges from 1981-1988 (52 percent of all federal appellate judges),⁸⁴ Reagan made a huge impact on the federal judiciary. In particular, judicial appointments began to be seen as partisan and ideological, a tool that would reinforce the growing divide separating Republicans from Democrats.

3. *Judicial Appointments in the Age of Party Polarization*

⁷⁸ Meese became Attorney General in 1985. Reagan’s first term Attorney General was an establishment lawyer who had no plan to advance conservative goals over the long term. Steven M. Teles, *Transformative Bureaucracy: Reagan’s Lawyers and the Dynamics of Political Investment*, 23 *STUD. AM. POL. DEV.* 61, 66–67 (2009).

⁷⁹ *See id.* at 69; STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* (2008).

⁸⁰ Teles, *supra* note 78, at 73. At the same time, the Reagan administration was somewhat limited in its ability to nominate reliable conservatives to the bench. The Federalist Society was just getting off the ground so “it was hard to find” competent, credentialed, conservative lawyers. *Id.* at 70.

⁸¹ *See* Devins & Baum, *supra* note 64, at 339-342.

⁸² *See* Sunstein et al., *supra* note 66, at 116-117.

⁸³ *Id.* at 120-121.

⁸⁴ *See* Federal Judicial Center, *Biographical Directory of Article III Federal Judges, 1789-Present* (Filters: Courts of Appeals, Appointing President Ronald Reagan) <https://www.fjc.gov/history/judges/search/advanced-search>; United States Courts, *Additional Authorized Judgeships – Since 1960* (Appeals) <https://www.uscourts.gov/sites/default/files/appealsauth.pdf>

In the years since Reagan, the ideological and partisan divide between Democrats and Republicans has grown and grown. From 1980-1992, the ideological gap between Democrats and Republicans began to emerge but was still modest. Republicans, for example, were as supportive of abortion rights as Democrats⁸⁵ and several Republican Senators backed abortion rights by voting against Robert Bork’s Supreme Court nomination.⁸⁶ By 1994, 23 percent of Republicans were more liberal than the median Democrat and 17 percent of Democrats were more conservative than the median Republican. That dynamic is a thing of the past. In 2017, those numbers had shrunk to 1 and 3 percent, respectively.⁸⁷ Similarly, Republican-Democrat differences on political issues more than doubled from 1994 to 2017.⁸⁸

This partisan sorting also spurred two related developments—each of which fundamentally transformed social and professional interactions between Democrats and Republicans. First, Republicans and Democrats increasingly feel a sense of rivalry towards each other and “increasingly dislike, even loathe, their opponents.”⁸⁹ By 2017, research showed that “Americans are less likely to have the kind of interpersonal contact across party lines that

⁸⁵ Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v Wade: New Questions About Backlash*, 120 YALE L. J. 2028, 2067-68 (2011); Neal Devins, *Rethinking Judicial Minimalism: Abortion Politics, Party Polarization, and the Consequences of Returning the Constitution to Elected Government*, 69 VAND. L. REV. 935, 953-962 (2016).

⁸⁶ See Linda Greenhouse, *Bork Nomination is Rejected, 58-42, Reagan Saddened*, N.Y. TIMES, (Oct 24, 1987) (noting 6 out of 46 Republicans voted against Bork); Binder & Maltzmann, *supra* note 72, at 321 (describing Bork’s defeat as a “watershed” in making judicial confirmation politics both partisan and ideological).

⁸⁷ *The Partisan Divide on Political Values Grows Even Wider*, PEW RESEARCH CENTER 13 (Oct. 5, 2017), <https://www.people-press.org/2017/10/05/1-partisan-divides-over-political-values-widen/>.

⁸⁸ *Id.* at 3.

⁸⁹ Shanto Iyengar et al., *Affect, Not Ideology: A Social Identity Perspective on Polarization*, 76 PUB. OPINION Q. 405 (2011). 2012 data revealed a huge spike in the unfavorability rating of the opposition party. In 1980, the opposition party was rated 45 out of 100; in 1992, that rating dropped slightly to 40; in 2012, the rating dropped precipitously to 20. Erza Klein and Alvin Chang, *Political Identity is Fair Game for Hatred*, VOX (Dec. 7, 2015), <https://www.vox.com/2015/12/7/9790764/partisan-discrimination>. See also Cass R. Sunstein, *Partyism Now Trumps Racism*, BLOOMBERG (Sept. 22, 2014), <https://www.bloomberg.com/opinion/articles/2014-09-22/partyism-now-trumps-racism> (noting that Democrats and Republicans increasingly disapprove of a family member marrying outside of their political party).

can dampen harsh beliefs about each other.”⁹⁰ Second, “elite status [no longer] trumped ideology and partisanship.”⁹¹ The most liberal Americans were affluent and well-educated Democrats; the most conservative Americans were affluent and well-educated Republicans.⁹²

This ideological and social sorting of elite Democrats and Republicans is profoundly important to judicial selection and decision-making. The pool of Democrats who might be nominated for a federal judgeship is now uniformly liberal, just as the Republican pool is uniformly conservative. Correspondingly, the liberalism or conservatism of judges and prospective judges is continually reinforced by the social networks they inhabit.⁹³ Republican judges and judicial candidates demonstrate their conservative bona fides and cement important personal relationships by participating in Federalist Society events; Democrats do much the same with liberal groups.⁹⁴ In this way, the polarization of elite social networks cements the ideological predispositions of judges and potential judges.

The rise of the Federalist Society as the de facto screener of Republican judges is particularly instructive in this regard. Just nine out of 42 federal appeals judges nominated by George H.W. Bush were Federalist Society members.⁹⁵ By 2001 when George W. Bush took office, one-third of his 62 appointments to the federal courts of

⁹⁰ Emily Badger and Niraj Chokshi, *How We Became Bitter Political Enemies*, N.Y. TIMES (June 15, 2017), <https://www.nytimes.com/2017/06/15/upshot/how-we-became-bitter-political-enemies.html>.

⁹¹ Mark A. Graber, *The Coming Constitutional Yo-Yo? Elite Opinion, Polarization, and the Direction of Judicial Decision Making*, 56 HOW. L.J. 661, 688 (2013).

⁹² 2017 Pew, *supra* note 87.

⁹³ See Teles, *supra* note 78 (describing pervasive liberal and conservative social networks). Like everyone else, a judge’s self-esteem is linked to the esteem in which they are held by others, especially those in their social and professional networks. See LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES 26–29, 117 (2006).

⁹⁴ See Lawrence Baum & Neal Devins, *Federalist Court*, SLATE (Jan. 31, 2017), <https://slate.com/news-and-politics/2017/01/how-the-federalist-society-became-the-de-facto-selector-of-republican-supreme-court-justices.html>.

⁹⁵ See Scherer & Miller, *The Federalist Society’s Influence on the Federal Judiciary*, POL. RSCH. Q. 366, 367 (June 2009); Federal Judicial Center, *supra* note 84 (filtered for George H.W. Bush appeals nominees). Bush appeals court nominees and Federalist Society members included Clarence Thomas, Sam Alito, and John Roberts.

appeals were Federalist Society members.⁹⁶ And by 2016, the imprint of the Federalist Society on judicial appointments was dramatic. Republican presidential candidate Donald Trump declared that his judicial nominees would be “picked by [the] Federalist Society.”⁹⁷ By this time, the consequences of party polarization had metastasized. Conservative-liberal divisions gave way to Republican-Democratic differences.⁹⁸ Party and ideology were now inextricably linked and the ideological divide on the federal courts of appeals and Supreme Court was now a partisan split.

On the federal courts of appeals, Thomas Keck measured Republican-Democratic differences from 1993-2013 on issues that divided the parties (abortion, affirmative action, gun rights, and same-sex marriage).⁹⁹ Keck did this by looking at votes cast by appeals court judges and found the average difference to be 33 percentage points.¹⁰⁰ Cass Sunstein’s examination of 1981-2004 federal courts of appeal decisions likewise found a “significant difference between Republican and Democratic appointees, and as the relative proportion changes, the ideological orientation of the federal courts will change as well.”¹⁰¹

⁹⁶ George W. Bush, *Remarks by the President on Judicial Accomplishments and Philosophy*, FEDERALIST SOCIETY (2008), <https://fedsoc.org/commentary/publications/remarks-by-the-president-on-judicial-accomplishments-and-philosophy>. The Federalist Society was also instrumental in George W. Bush Supreme Court appointments. See Devins & Baum, *supra* note 64, at 342. See also Rebecca R. Ruiz, et al., *A Conservative Agenda Unleashed on the Federal Courts*, N.Y. TIMES (Mar. 14, 2020), <https://www.nytimes.com/2020/03/14/us/trump-appeals-court-judges.html> (noting Trump has appointed nearly double the number of Federalist Society members that George W. Bush did). George W. Bush appointees to the federal courts of appeals included John Roberts, Neil Gorsuch, and Brett Kavanaugh. See Federal Judicial Center, *supra* note 84.

⁹⁷ Jason Zengerle, *How the Trump Administration is Remaking the Courts*, N.Y. TIMES MAG. (Aug. 22, 2018), <https://www.nytimes.com/2018/08/22/magazine/trump-remaking-courts-judiciary.html> (“In an interview with Breitbart in June 2016, Trump pledged, ‘We’re going to have great judges, conservative, all picked by Federalist Society.’”).

⁹⁸ See Adam Liptak, *Politicians in Robes? Not Exactly but. . .*, N.Y. TIMES (Nov. 26, 2012), <https://www.nytimes.com/2012/11/27/us/judges-rulings-follow-partisan-lines.html> (suggesting that journalists should sometimes reveal the political affiliation of federal judges).

⁹⁹ See THOMAS M. KECK, JUDICIAL POLITICS IN POLARIZED TIMES (2014).

¹⁰⁰ *Id.* at 149.

¹⁰¹ Sunstein, et al., *supra* note 66, at 122-123.

Sunstein's data on the courts of appeals is particularly relevant to our hypothesis. It speaks to a growing ideological gap between Republican and Democratic appointees (based on a comparison of liberal votes cast over time) and attributes this divide principally to the increasing conservatism of Republican appointees. In particular, the percentage of liberal votes cast by Bill Clinton appointees from 1993-2004 was nearly identical to the percentage of liberal votes cast by other Democratic judicial appointees.¹⁰² In contrast, there was a much sharper divide between Republican judges appointed before 1981 and judges appointed by Reagan and the two Bushes.¹⁰³ This data highlights the rise of the conservative legal movement and, with it, the growing impact of the Federalist Society. A 2008 study of judicial decision-making by federal appeals judges found that judges with Federalist Society ties were much more conservative than other judges.¹⁰⁴

4. “Trump Judges” and “Obama Judges”

When Donald Trump complained about an “Obama judge” ruling against him in 2018, he was thus stating the obvious (albeit in a controversial way):¹⁰⁵ party polarization by that point had become pervasive and increasingly salient in federal court decision-making. Today, the ever-growing divide between Democrats and Republicans has led to an increasing emphasis on ideology in judicial appointments (especially by Republicans) and to winner-take-all politics in the U.S. Senate (by both parties). Judicial appointment partisan politics has now reached a fever pitch.

During the Obama Administration (from 2009-2016), President Obama aimed to reshape the federal courts of appeals by

¹⁰² See *id.* at 120-121. The Sunstein study looked at the percent of liberal votes over time and compared Clinton appointees to other Democrats (appointed by Kennedy/Johnson/Carter). *Id.* at 120.

¹⁰³ See *id.*

¹⁰⁴ See Scherer & Miller, *supra* note 95. This finding tracks the growing ideological divide on the U.S. Supreme Court—where today's Democratic appointees are no more liberal than earlier Democrats but today's Republicans are far more conservative than earlier Republican appointees. See Lee Epstein, William M. Landes, & Richard A. Posner, *Revisiting the Ideological Rankings of Supreme Court Justices*, 44 J. LEG. STUD. 313-14 and Table 3.2 (2015).

¹⁰⁵ See Maria Sacchetti & Sarah Kinoshian, *Trump lashes out at judge after order to allow illegal border crossers to seek asylum*, WASH. POST (Nov. 20, 2018), https://www.washingtonpost.com/local/immigration/judges-ruling-means-trump-administration-must-allow-illegal-border-crossers-to-seek-asylum/2018/11/20/1aebd608-ecc1-11e8-96d4-0d23f2aaad09_story.html.

striving for more diversity on the bench. Forty-two percent of Obama's appointees to federal courts were women, compared to 21 percent for George W. Bush and 24 percent for Donald Trump; 20 percent were African Americans, compared to 8 percent for Bush and 4 percent for Trump.¹⁰⁶ He appointed a total of 55 appointees to the U.S. Court of appeals – 32.7 percent of all federal appeals judges.¹⁰⁷ Ideological measures of judicial appointments from Nixon to Trump rank Obama's judges as more liberal than any other cohort.¹⁰⁸

The Obama era also raised the temperature of confirmation battles by introducing a fundamental shift in Senate confirmation politics. In response to Senate Republican efforts to delay and defeat Obama judicial appointments,¹⁰⁹ Senate Democrats invoked the so-called nuclear option in 2013—allowing the then-majority Democratic Senate to confirm federal district and appeals court judges by an up-or-down majority vote.¹¹⁰ With Republicans in control of the Senate for the final two years of the Obama administration, Obama was only able to fill 2 appellate judgeships.¹¹¹ More striking, Senate Republicans blocked any

¹⁰⁶ Elliot Slotnick et al., *Obama's Judicial Legacy: The Final Chapter*, 5 J. L. & CTS. 413 (2017). By focusing on “group interests,” Obama disappointed progressives who wanted strong liberals; instead, Obama nominees—while uniformly liberal—did not reflect the leftward shift of Democratic elite. *Trump's Confirmed Judges*, ALLIANCE FOR JUSTICE (May 3, 2020), <https://www.afj.org/wp-content/uploads/2020/01/Confirmed-5.3.20.pdf>. See also MARK TUSHNET, *IN THE BALANCE: LAW AND POLITICS ON THE ROBERTS COURT* 74 (2013) (noting that Democratic presidents prioritize race and gender diversity).

¹⁰⁷ See Lawrence Hurley, *Obama's Judges Leave Liberal Imprint on U.S. Law*, REUTERS (Aug. 26, 2019), <https://www.reuters.com/article/us-usa-court-obama/obamas-judges-leave-liberal-imprint-on-u-s-law-idUSKCN1110BC>.

¹⁰⁸ Jon Green, *The Ideology of Trump's Judges*, DEMAND JUSTICE (Jan. 2019), <https://demandjustice.org/reports/ideology-of-trump-judges/>. This study used the donor-based scoring method developed by Adam Bonica and Maya Sen. See Adam Bonica & Maya Sen, *A Common-Space Scaling of the American Judiciary and Legal Profession*, 25 POL. ANALYSIS 114 (2017). See also Li Zhou, *Study: Trump's judicial appointees are more conservative than those of past Republican presidents*, VOX (Jan. 25, 2019), <https://www.vox.com/2019/1/25/18188541/trump-judges-mconnell-senate>.

¹⁰⁹ See Slotnick et al., *supra* note 106, at 370. Senate Democrats similarly sought to defeat George W Bush judicial nominees. See Binder & Maltzmann, *supra* note 72, at 324-25.

¹¹⁰ See Humberto Sanchez, *A Landmark Change to the Filibuster*, CQ WEEKLY, Dec. 2, 2013 at 1992.

¹¹¹ See Ian Millhiser, *What Trump has done to the courts, explained*, VOX (Feb. 4, 2020), <https://www.vox.com/policy-and-politics/2019/12/9/20962980/trump->

consideration of Obama's 2016 Supreme Court nominee Merrick Garland.¹¹² Indeed, the link between party and ideology is so strong that Senate majority leader Mitch McConnell defined his legacy by his ability to block Obama nominations while pushing through Trump nominations.¹¹³ In so doing, Senate Republicans explicitly linked ideology to political party, claiming that the 2016 presidential election should settle whether a liberal or conservative was appointed to the Supreme Court.¹¹⁴

Following his election in 2016, Donald Trump then put his foot on the accelerator to divide judicial appointments in partisan ways. His imprint on the federal courts of appeal "has been swift and historic."¹¹⁵ Trump judges were ranked most conservative by the ideological measure that ranked Obama judges as most liberal.¹¹⁶ Under this measure, the ideological gap between Trump and Obama judges is greater than it has ever been.¹¹⁷

Trump's impact has been bolstered by his ability to name an extraordinary number of federal appeals judges.¹¹⁸ Fifty-four Trump

[supreme-court-federal-judges](#). One of these two was appointed to the Federal Circuit. *See id.*

¹¹² See Slotnick et al, *supra* note 106, at 364 ("However, Garland was not even accorded the courtesy of a Senate hearing much less a vote on the Senate floor.").

¹¹³ McConnell put it this way: "What I want to do is make a lasting contribution to the country. . . I believe working in conjunction with the administration, we're making a generational change in our country." Hugh Hewitt, *Senate Majority Leader Mitch McConnell on the Federal Judiciary and the Pace of Appointments*, HUGHHEWITT (May 3, 2018), <https://www.hughhewitt.com/senate-majority-leader-mitch-mcconnell-on-the-federal-judiciary-and-the-pace-of-appointments/>. *See also* CARL HULSE, CONFIRMATION BIAS: INSIDE WASHINGTON'S WAR OVER THE SUPREME COURT (2019).

¹¹⁴ See Mitch McConnell & Chuck Grassley, *Democrats Shouldn't Rob Voters of Chance to Replace Scalia*, WASH. POST (Feb. 18, 2016), https://www.washingtonpost.com/opinions/mcconnell-and-grassley-democrats-shouldnt-rob-voters-of-chance-to-replace-scalia/2016/02/18/e5ae9bdc-d68a-11e5-be55-2cc3c1e4b76b_story.html.

¹¹⁵ Ruiz et al., *supra* note 96; 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?referringSource=articleShare>.

¹¹⁶ See Green, *supra* note 108.

¹¹⁷ *Id.* For additional discussion, see *infra* note 129 and accompanying text (highlighting increasing role of party affiliation with whether a judge is more likely to agree/disagree with same and opposite party judges).

¹¹⁸ Senate Republicans did all they could do to help Trump transform the federal judiciary. They eliminated the minority party's power to derail both Supreme Court nominees (by filibustering) and federal appeals court nominations (by

appeals court nominees were confirmed (30 percent of all appeals judges).¹¹⁹ Four Circuits have flipped from Democratic to Republican control (2d, 3d, 9th, 11th), four circuits have become more solidly Republican (5th, 6th, 7th, 8th), and three circuits remain Democratic—but less so as there are now more Republican appointees (4th, 10th, D.C.).¹²⁰

Donald Trump's judicial appointments also reflect the ascendancy of the conservative legal movement in general and the Federalist Society in particular. Trump appellate court picks are the most likely to agree with their Republican colleagues (97 percent) and are the most likely to disagree with their Democratic colleagues (11 percent).¹²¹ Forty-three of Trump's first 51 appellate nominees are members of the Federalist Society.¹²² When the U.S. Judicial Conference questioned the appropriateness of federal judges being

having home state Senators block judicial nominations through blue slips). See Astead W. Hendron, *Filibuster Broken, Gorsuch Vote is Set*, BOS. GLOBE A-1, April 7 2017; Niels Lesniewski, *McConnell: Democratic Blue Slips Won't Block Trump Judges*, ROLL CALL, October 11 2017 <https://www.rollcall.com/2017/10/11/mcconnell-democratic-blue-slips-wont-block-trump-judges/>.

¹¹⁹ See Carl Hulse, *With Wilson Confirmation, Trump and Senate Republicans Achieve a Milestone*, N.Y. TIMES (June 24, 2020), <https://www.nytimes.com/2020/06/24/us/trump-senate-judges-wilson.html> (noting that Trump has filled all 53 appeals vacancies – as of June 2020 --and thereby limited the power of a successor administration to reshape the judiciary by filling available appeals court vacancies); Chris Cioffi, *Trump Judicial Nominees Getting Committee Approval This Week Might Be His Last*, ROLL CALL, Dec. 8, 2020, <https://www.rollcall.com/2020/12/08/trump-judicial-nominees-getting-committee-approval-this-week-might-be-his-last/> (noting that Trump will secure a 54th appeals court confirmation but that two appeals court vacancies will roll over to the Biden administration).

¹²⁰ See Republican Policy Committee, *Flipping Circuit Courts* (Dec. 10, 2019), <https://www.rpc.senate.gov/policy-papers/flipping-circuit-courts>. There were no Trump appointees to the First Circuit as of December 2019. The 9th Circuit flipped in February 2020. See Maura Dolan, *Trump has Flipped the 9th Circuit—and Some New Judges are Causing a Shock Wave*, L.A. TIMES (Feb 22, 2020), <https://www.latimes.com/california/story/2020-02-22/trump-conservative-judges-9th-circuit>.

¹²¹ See Ruiz et al, *supra* n 96. This 8-point range was at least twice as large as the agreement-disagreement range of any other president. *Id.*

¹²² See *id.* When White House Counsel Don McGahn was asked about outsourcing judicial appointments to the Federalist Society, McGahn said it was “insourcing” as Trump's judicial selection team was made up of Federalist Society members. Jazon Zengerle, *How the Trump Administration is Remaking the Courts*, N.Y. TIMES (Aug. 22, 2018), <https://www.nytimes.com/2018/08/22/magazine/trump-remaking-courts-judiciary.html>.

members of the Federalist Society,¹²³ 210 federal judges (93 percent of whom were appointed by Republican presidents, including 46 of Trump’s then-51 federal court of appeals appointees)¹²⁴ defended the Federalist Society and accused the Judicial Conference both of favoring left-leaning organizations like the American Bar Association and of engaging in “rank discrimination based on its erroneous perception of a Federalist Society viewpoint.”¹²⁵ This circling of the wagons by Trump and other Republican appointees further underscores the ever-growing linkage between partisanship and ideology.

In sum, the partisan divide on today’s courts of appeals is wider than it has ever been. When Ronald Reagan was elected president in 1980, there was next-to-no ideological divide between Democratic and Republican judicial appointees. When Donald Trump became president in 2017, there was a pronounced divide separating Republican and Democratic appointees. Today, presidents place “near exclusive focus on ideological compatibility and reliability.”¹²⁶

¹²³ The Judicial Conference draft recommendation extended to other ideological groups, including the American Constitution Society. See Caroline Fredrickson & Eric J. Segall, *Trump Judges or Federalist Society Judges? Try Both*, N.Y. TIMES (May 20, 2020), <https://www.nytimes.com/2020/05/20/opinion/trump-judges-federalist-society.html>.

¹²⁴ See Jacqueline Thomsen, *Congress Scrutinizes Federal Judiciary’s Proposed Block on Federalist Society Memberships*, NAT’L. L. J. (May 18, 2020), <https://www.law.com/nationallawjournal/2020/05/18/congress-scrutinizes-federal-judiciarys-proposed-block-on-federalist-society-memberships/>.

¹²⁵ See Hon. Gregory G. Katsas, et al., *Letter to Robert P. Deyling Regarding Advisory Opinion No. 117* (Mar. 18, 2020), <https://int.nyt.com/data/documenthelper/6928-judges-respond-to-draft-ethics/53eaddf39912a26ae7/optimized/full.pdf#page=1>. See also Rebecca R. Ruiz & Ben Protess, *Trump Nominee is Among Judges Opposed to Ban on Conservative Group*, N.Y. TIMES (May 3, 2020), <https://www.nytimes.com/2020/05/03/us/politics/judges-federalist-society.html>.

¹²⁶ Brandon 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 (Thurber & Yoshida eds. 2015). It is anticipated that Biden judicial appointments will be more liberal than Obama’s and, relatedly, that Biden will emphasize ideology when nominating judges. See Andrew Kragie, *Biden Judges will be More Liberal than Obama’s*, LAW 360 (Nov. 30, 2020), <https://www.law360.com/articles/1332634/biden-s-judges-will-likely-be-more-liberal-than-obama-s>.

In today's hyper-polarized world, Democrat-dominated circuits are expected to advance liberal causes and Republican-dominated circuits are expected to advance conservative causes. For this very reason, lawsuits challenging Obama administration initiatives were typically launched in the Republican-dominated Fifth Circuit while the majority of lawsuits challenging Trump initiatives have been pursued in the formerly Democrat-controlled Ninth and Second Circuits.¹²⁷

More to the point, the balance of Democrats and Republicans on a circuit is hugely consequential. On issues that divide the parties, Democratic and Republican appeals judges are increasingly likely to disagree with each other.¹²⁸ A randomly assigned panel on a Democrat-dominated circuit is more likely to have at least two Democratic judges; it is thus more likely to back Democratic claims.¹²⁹ And, of course, Republican claims are more likely to prevail in circuits dominated by Republican appointees. Presidents know this, Senators know this, and litigants know this. This, of course, is why the flipping of party control of a circuit is a big deal.¹³⁰ And this is why partisan battle lines have been drawn

¹²⁷ Fred Barbash, *Litigation against executive branch by coalitions of states grows in response to unilateral actions by president and gridlocked Congress*, WASH. POST (Aug. 24, 2019), https://www.washingtonpost.com/national-security/litigation-against-executive-branch-by-coalitions-of-states-grows-in-response-to-unilateral-actions-by-president-and-gridlocked-congress/2019/08/24/34267560-c5bf-11e9-b72f-b31d77212_story.html. See also *Multistate Lawsuits vs. the Federal Government – Totals*, STATE LITIGATION AND AG ACTIVITY DATABASE (June 19, 2020), <https://attorneysgeneral.org/multistate-lawsuits-vs-the-federal-government/statistics-and-visualizations-multistate-litigation-vs-the-federal-government/>. On the liberal reputation of the 9th and 2nd Circuits, see Dylan Matthews, *How the 9th Circuit became conservatives' least favorite court*, VOX (Jan. 10, 2018), <https://www.vox.com/policy-and-politics/2018/1/10/16873718/ninth-circuit-court-appeals-liberal-conservative-trump-tweet>. On Trump flipping the 2nd Circuit, see Madison Alder, *Trump Flips New York-Based 2nd Circuit as Menashi Confirmed*, BLOOMBERG LAW (Nov. 14, 2019), <https://news.bloomberglaw.com/us-law-week/trump-flips-new-york-based-second-circuit-as-menashi-confirmed>. On Trump flipping the 9th Circuit, see Dolan, *supra* note 120.

¹²⁸ Ruiz & Protess, *supra* note 125.

¹²⁹ Correspondingly, when a panel has three judges of the same party, the judges are likely to “amplify” their partisan ideological positions. Sunstein et al., *supra* note 66. For additional discussion of so-called “panel effects,” see *infra* notes 163-69 and accompanying text.

¹³⁰ See Pauline Kim, *Deliberation and Strategy on the United States Court of Appeals*, 157 U. PENN. L. REV. 1319 (2009) (noting that federal circuit judges do

regarding the process of selecting and confirming federal appeals court judges.

By now our original en banc hypothesis should seem quite obvious. Party control of a circuit means that the majority party can advance its agenda through en banc review. Specifically, when the minority party has two or more members on the panel, the majority party can use en banc review to vacate the panel decision and put in place a decision that comports with the majority party's view. This type of majority-party discipline seems likely to track the rise of ideological polarization on the courts of appeal. Today's Democrat and Republican judges are more likely to disagree with each other; Democratic and Republican judges increasingly see themselves as members of competing ideological and social networks. Partisan divisions therefore seem more likely to occur, and en banc review is more likely to be seen as a weapon to advance majority party preferences.

That, at least, is what we expected to find in our review of en banc decisions – perfectly consistent with the larger story of polarization and the salience of ideology to judicial decision-making. What we did find, as described below, is far more interesting. Sometimes being wrong has its benefits.

III. EN BANC REALITY: DESCRIPTION OF DATA

The unique descriptive contribution in this paper is longitudinal: we offer the first study of en banc decisions over the entire United States for an extended period of time. We gathered en banc decisions from the First through Eleventh Circuits (including the D.C. Circuit but not including the Federal Circuit) for the following years: 1966-1968, 1976-1978, 1986-1988, 1996-1998, 2006-2008, 2016-2018. We then separately coded en banc decisions from those twelve circuits from 2019 and 2020. This amounted to 950 total en banc decisions – significantly larger than any other en banc database.

Collecting the en banc cases was more challenging than we first anticipated because many en banc cases are not labeled as such or are not labeled in a place that is easy to find. It turns out we were unable to locate any comprehensive single method of collecting the cases (which likely explains why the database we wanted did not

not consider a potential Supreme Court reversal; instead, they are more apt to consider the preferences of the majority of judges on their circuit).

exist), and so we used three different techniques to obtain as many en banc decisions as possible: (1) a text search of case synopses on Westlaw verified by manually checking the number of judges participating, (2) a search of the Federal Judicial Center's Integrated Database, and (3) a search of citations to en banc opinions in subsequent cases.¹³¹

¹³¹ Below is more detail on our process of collecting en banc decisions -- a methodology that was refined and improved tirelessly by Paul Hellyer, a truly amazing reference librarian from the William & Mary Law Library.

First, we used Westlaw's caselaw database for the U.S. Courts of Appeals, and found that the search query PR,SY(banc) offered the best balance of accuracy and recall. It searches the case name/preliminary and synopsis fields, where the word banc will appear if an en banc opinion has been clearly labeled as such, and it avoids the spelling variation between "in banc" and "en banc." But many en banc cases aren't clearly labeled as such. Often the "en banc" reference is buried elsewhere in the text of the opinion, sometimes in a concurring or dissenting opinion. And in many opinions, there is simply no textual identification at all—the term banc might appear only in reference to other en banc cases, or the term banc might not appear anywhere at all in the text. A full-text search for the term "banc" anywhere in an opinion would return an overwhelming number of false hits but would still miss many en banc opinions. We found that the number of judges was the only reliable indication of en banc status, and this had to be verified manually after retrieving an initial set of results. We also noticed that older en banc opinions are less likely to be clearly labeled, which poses a particular problem for any en banc study that seeks to gather comparable data for different time periods.

Second, our next most important source was the Federal Judicial Center's Integrated Database (IDB). The IDB's appeals data is divided into two parts, one covering 1971 through 2007, and the other covering 2008 to present. In the 1971-2007 dataset, we looked in the OPINION field for entries coded as 9. In the more recent dataset, we looked in the EnBanc field for entries coded as Y. When we found relevant entries, we used the docket number(s) provided by the IDB to retrieve the cases in Westlaw. We found many en banc cases through the IDB that were not responsive to our full-text PR,SY(banc) search, but we also noticed that the IDB failed to identify many en banc cases we had already found through our full-text search.

Finally, we searched in Westlaw's federal case law database for citations to en banc opinions. When a court cites an en banc opinion, it typically identifies it as such with a parenthetical, thereby highlighting certain en banc opinions that had evaded both our PR,SY(banc) search and the IDB. We used the search query banc /5 cir., modifying it to search for particular years or circuits as needed. For example, we used banc /5 "1st cir." /5 (1966 1967 1968) to find citations to First Circuit en banc cases that were decided between 1966 and 1968. We found several dozen additional cases this way, but we also saw that the vast majority of cited en banc opinions were ones that we already had, which bolstered our confidence. Nonetheless, we acknowledge that we probably failed to identify a small number of en banc opinions for our time periods. [Note to Editors: Using this methodology, there may be a few more decisions issued at the end of December that come to our attention during the publication time window. This will not impact our results and we will make necessary updates before the start of the production process.]

Our goal was to get “the long view” – to track patterns of en banc decisions over time. We coded, *inter alia*, the following attributes of each case: the year of the en banc decision; the names and appointing President of each panel judge, with any dissenters listed separately; the name and appointing President of each participating en banc judge, with any dissenters listed separately; a summary of the issue and holding and the effect on the panel if any (i.e. reversed or affirmed). We also coded for whether the ultimate decision included the resolution of a federal Constitutional claim (our proxy for high salience), whether the en banc review was requested by a party or by a judge, and whether the Supreme Court ultimately took the case.

As described above, we relied on two main measures to capture the use of en banc as a weapon: partisan splits and partisan reversals. Partisan splits are divided en banc decisions where at least 90% of the judges vote in line with other judges appointed by Presidents of the same political party and against those nominated by the other party.¹³² Partisan reversals are en banc decisions that seem to target renegade panel opinions for potentially partisan reasons. We identified a partisan reversal if four conditions were met: (1) the panel opinion was reversed, (ii) most judges in the panel majority opinion are from the minority party (the party that is not dominant in the circuit at the time), (iii) most majority party judges vote to reverse the panel en banc, and (iv) most minority party judges dissent en banc.¹³³

Although comprehensive in scope, our data is still subject to several important limitations. First and most importantly, we only collected and studied decisions that actually went en banc; we do not have any observations to offer about the decisions *not* to go en

¹³² We applied the 90% rule to every circuit regardless of the number of judges, but we required there to be at least two judges in each party (this is to account for circuits with a small number of judges sitting at any given time). Our definition means, however, that in decisions with less than 10 judges, to qualify as a partisan split we required voting down perfectly partisan lines. For decisions that involved more than ten judges there can be one defector and still qualify as a partisan split. One reason for using the 90% rule instead of only counting partisan splits is to account for judges (like Judge Gregory on the Fourth Circuit) technically appointed by one President but a hold-over from the prior one.

¹³³“Party” refers to the party of the nominating President. “Majority party” means the party (if any) with the most en banc judges.

banc.¹³⁴ Second, we did not code for “reasons to go en banc” largely because the judges do not always speak to this in the opinion (or often they don’t agree on what the reason was) and, after several false starts, we found it difficult to consistently label the rationale. Third, we make no causation claims. We can count how many times a circuit goes en banc and reverses a renegade minority panel and we can count how often the judges vote in lock-step with other judges appointed by Presidents of the same party. But of course we cannot say for sure why the judge voted one way or the other, and we leave any regression analysis to others.

What we did find, however, by taking this long view of en bancs is rather striking on two levels: (1) As noted, our hypothesis was thwarted – we did not find evidence that partisan reversals and partisan splits tracked the pre-documented history of polarization in judicial appointments, and (2) we may be at a turning point -- the most recent data (since 2018) indicates more partisan splits or partisan reversals in en banc decisions than ever before.

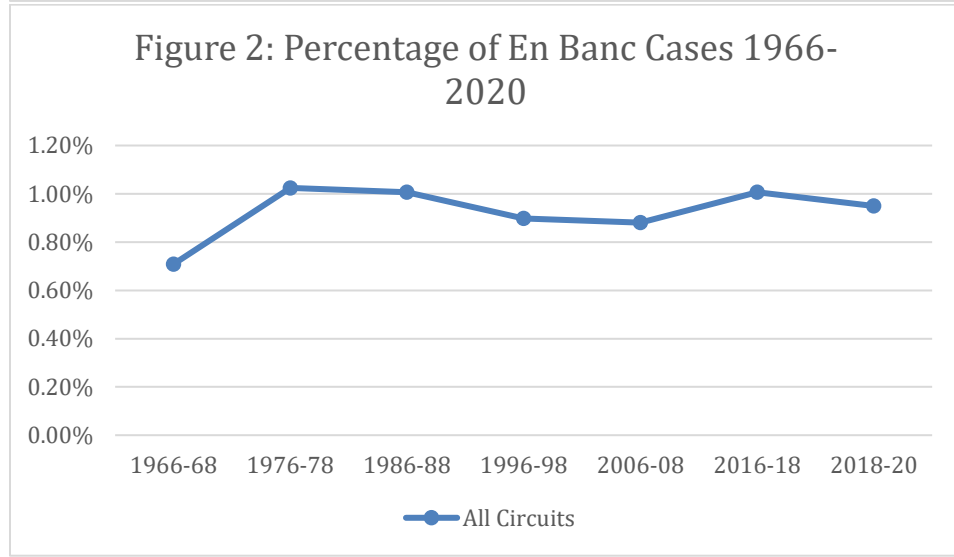
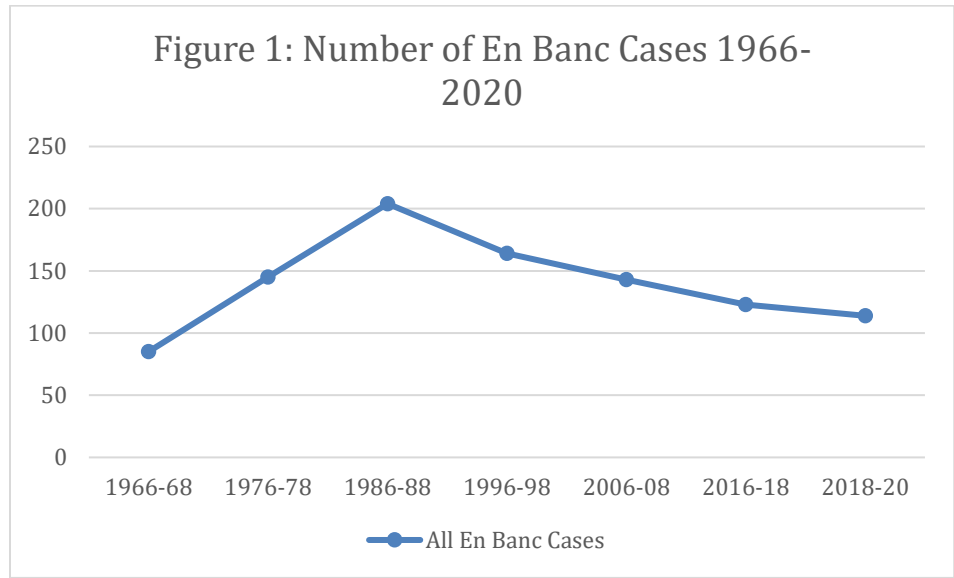
1. Partisan Splits and Partisan Reversals Over Time

First, some basics. As you can see in the two figures below, the number of en banc decisions rose in the 1980s and leveled off in the more modern era. When accounting for caseload variation, however, the level of en banc decision-making stayed relatively stable over time and maintained the previously-observed rate of around one percent of all cases decided.¹³⁵ Figure 1 below shows the number of en banc decisions we collected and how frequently they were decided over time, and Figure 2 shows that number divided by the number of published opinions decided during the

¹³⁴ It is worth noting we found this impossible to do – judges do not always explain why they do go en banc and they practically never explain when they don’t. For further discussion see *supra* note 18 and accompanying text.

¹³⁵ Indeed, while the number of en banc cases rose in the 1980s; the overall percentage of en banc cases declined. The simple explanation for this phenomenon is that—in conjunction with Congress dramatically expanding the number of federal courts of appeals judgeships from 1978-1984—there was a notable increase in the number of federal courts of appeals decisions (so that the number of en banc cases could rise while the overall percentage of en banc cases could decline). See *supra* note 62 and accompanying text.

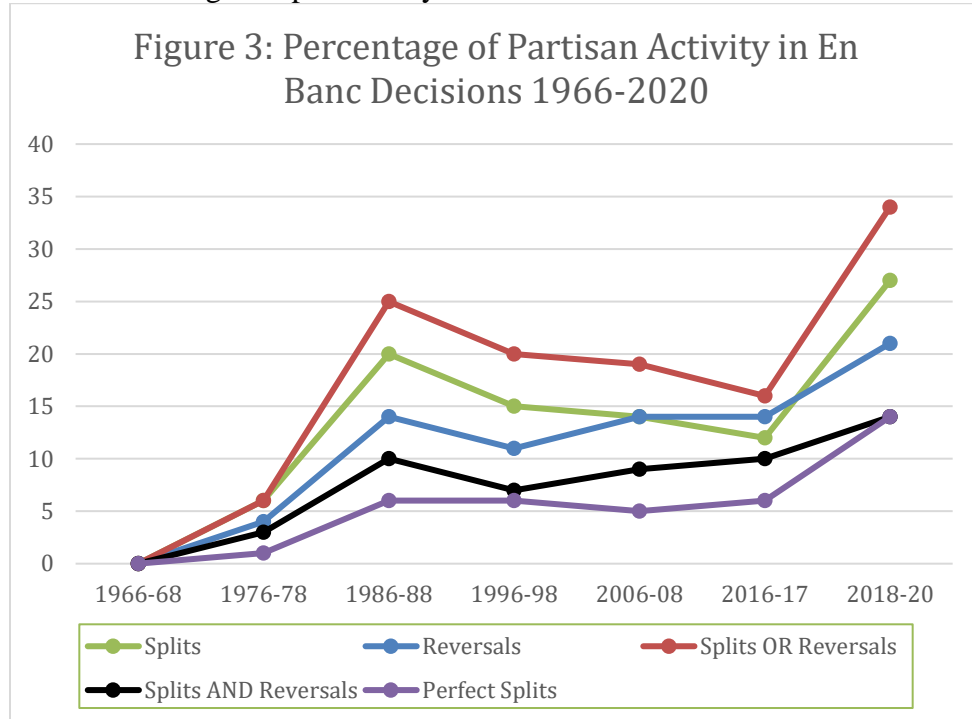
same time period.¹³⁶ No surprise there; we already knew en banc decisions are rare.¹³⁷



¹³⁶ There was, of course, significant circuit variation in terms of en banc activity. Some circuits have a far more active en banc practice than others do, and even the heavy-users of en banc fluctuate in their use of the tool over time. We plan to discuss that variation in a subsequent paper.

¹³⁷ En banc review would seem even rarer if we considered unpublished as well as published opinions in calculating the percentage of cases that go en banc. Over the past fifty years, there has been an exponential growth in the relative percentage of unpublished opinions by the federal courts of appeals. See Merritt E. McCalister, “Downright Indifference”: Examining Unpublished Opinions in the Federal Courts of Appeals, 119 MICH. L. REV. 533 (2020).

Since our goal was to explore potential partisan behavior we needed to focus on the subset of en banc decisions that fell into our definitions of partisan splits (when Judges appointed by one party or another vote in lock-step with each other) and partisan reversals (when a renegade panel gets reversed by a circuit dominated by judges appointed by opposite party Presidents). Given what we explained in part two, we fully expected to see very few partisan divisions in the 1960s and 1970s followed by a growing line starting in 1986 that tracked partisan splits and partisan reversals increasing over time through the present day. What we found instead was this:



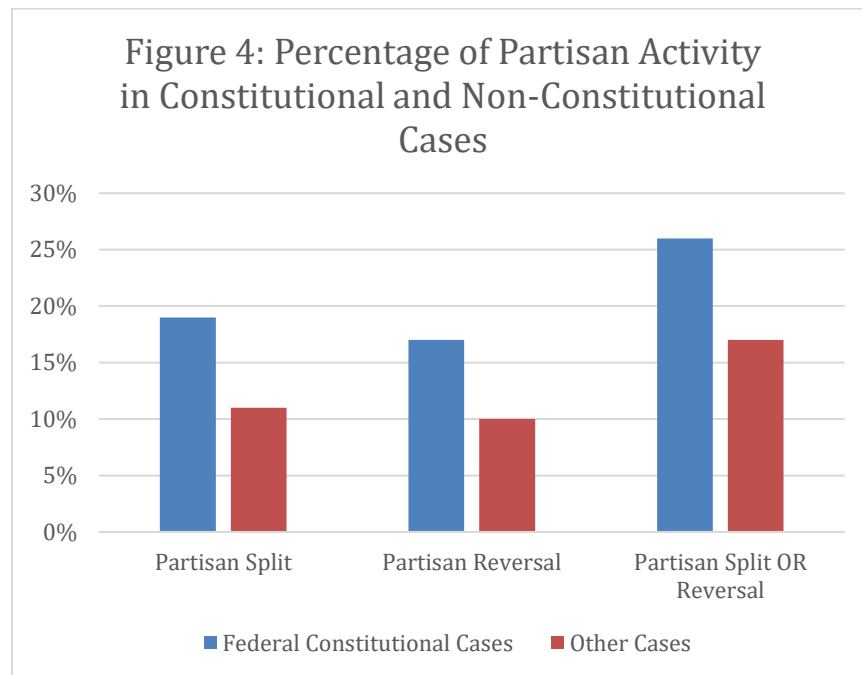
Notice right away that the steadily increasing line we expected to see did not materialize. Although there is a spike in the 1986-1988 time period (which we expected),¹³⁸ the number of partisan splits and partisan reversals (reflected in the percentage of total en banc decisions) held steady in the 1990s and then dropped in the post-2000 years – until very recently.¹³⁹

¹³⁸ We attribute this spike to two interrelated phenomenon: the dramatic increase in the number of federal courts of appeals judgeships and the advent of the Reagan administration and, with it, the injection of ideology in judicial appointments. See *supra* note 52 (detailing growth in appeals judgeships); Part II.2 (discussing Reagan judicial appointments).

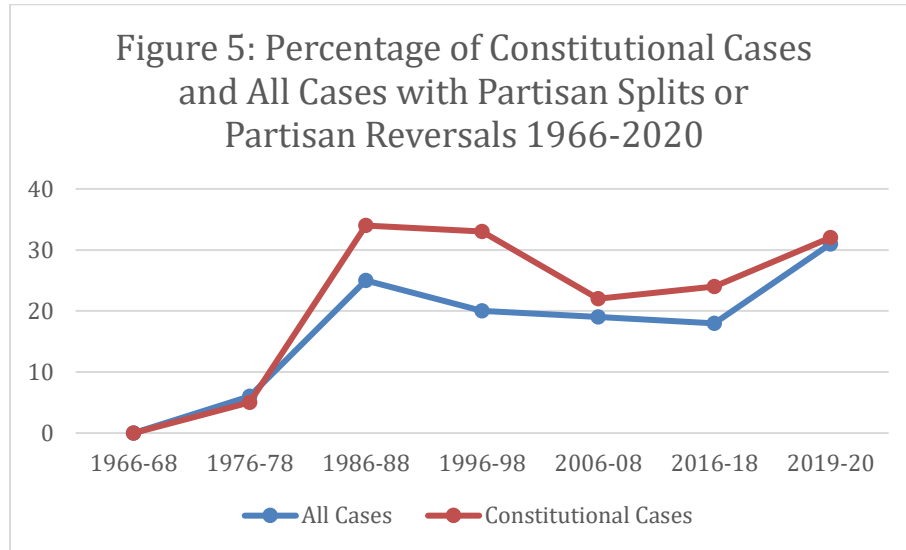
¹³⁹ One technical note on the percentage figures: there were a few en banc decisions where we were missing complete information on, for example, the identity of the panel judges. We did not include those cases in the denominator when figuring out our percentages of cases with partisan activity.

Significantly, setting aside the 2018-2020 data for a moment, the rate of partisan reversals never crept above 14%. It is also noteworthy that—looking across all time periods up to 2018—there is no clear indication that minority panels were especially targeted for review or that either party is more apt to engage in partisan behavior than the other. Republican en banc majorities (a circuit with more Republican appointees than Democratic ones) actually reviewed more Republican panels (143) than Democratic ones (133) prior to 2018. Likewise circuits with Democratic en banc majorities during this same time reviewed 69 Republican panels and 77 Democratic panels. Majority panels, of course, outnumber minority panels so it may be that a higher percentage of minority panels are subject to en banc review overall. But it seems as if the difference isn't very striking and does not vary depending on which party is in control.

Surprised by this finding -- but undeterred -- we decided to sort for constitutional cases, on the assumption that the increase in partisan behavior we were looking for might occur more often in the high profile cases, the ones that often make headlines.¹⁴⁰ We found that to be true, but still did not find the pattern we anticipated.



¹⁴⁰ To be clear we did not code for political salience. We instead just coded for cases that decided a federal constitutional issue.



As reflected in Figure 4, we did find an increase of partisan splits / reversals in constitutional cases. 19 percent of all constitutional cases ended in a partisan split compared to 11 percent of non-constitutional cases. Similarly, 16 percent of all constitutional cases fit our definition of a partisan reversal, compared to 10 percent of non-constitutional cases.

Significantly, partisan behavior for constitutional cases reflects the same stability over time as the non-constitutional cases. Looking across time (as displayed in figure five), one can see that there are next to no partisan splits and partisan reversals in the 1960s and 1970s. Moreover, after the spike in the 1980s, the partisan splits and the partisan reversals for the constitutional cases stayed relatively constant even if (as one would expect) the constitutional cases generally showed more partisan behavior than the non-constitutional ones.¹⁴¹ Indeed starting in the 2000s, constitutional cases do not stand apart as having more partisan splits or partisan reversals than their non-constitutional counterparts.

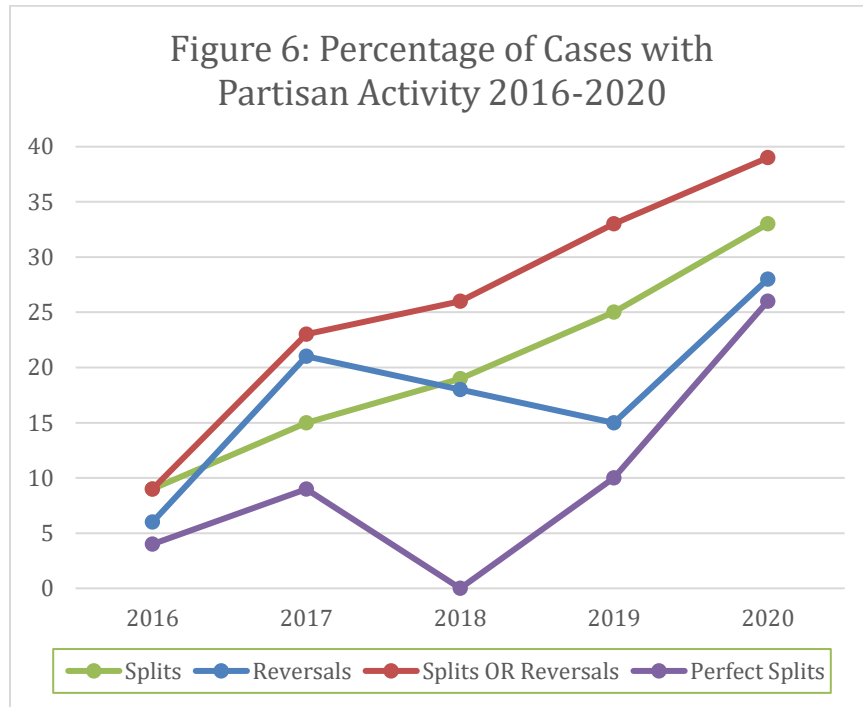
At this point it seems clear that our hypothesis was incorrect: *en banc* decisions in the courts of appeals were not weaponized over time in a way that would reflect increased partisanship and

¹⁴¹ One clarification for careful readers: the chart above seems to show that in 1976-78, constitutional cases were actually less likely to be partisan. In fact, however that's just a sample size problem. We have only two constitutional partisan cases from 1976-78. We thus hesitate to put too much meaning on that drop. At the same time, we are not surprised that there are only two partisan cases during this period. As we discussed in Section Two, there was no Democrat-Republican divide in judicial appointments before the Reagan era; the fact that there are only two relevant cases underscores that fact.

polarization in judicial appointments and other documented judicial behavior. In fact, prior to 2018 neither the rate of partisan splits or partisan reversals ever climbed over 20 percent of all en banc decisions. And – perhaps most surprising to us – there was no sustained increase of these partisan decisions over time as we expected. Instead, there seem to be forces at work that resist the temptation to use en banc as a partisan weapon and these forces – which we unpack below – appear relatively constant over time.

2. A closer look at the Trump era

There is, however, a very important twist to our story. When one looks at the most recent data, there is a noticeable change. The most recent time period we studied – 2018-2020 – contained the most evidence of partisan en banc behavior we saw over the past six decades.¹⁴²

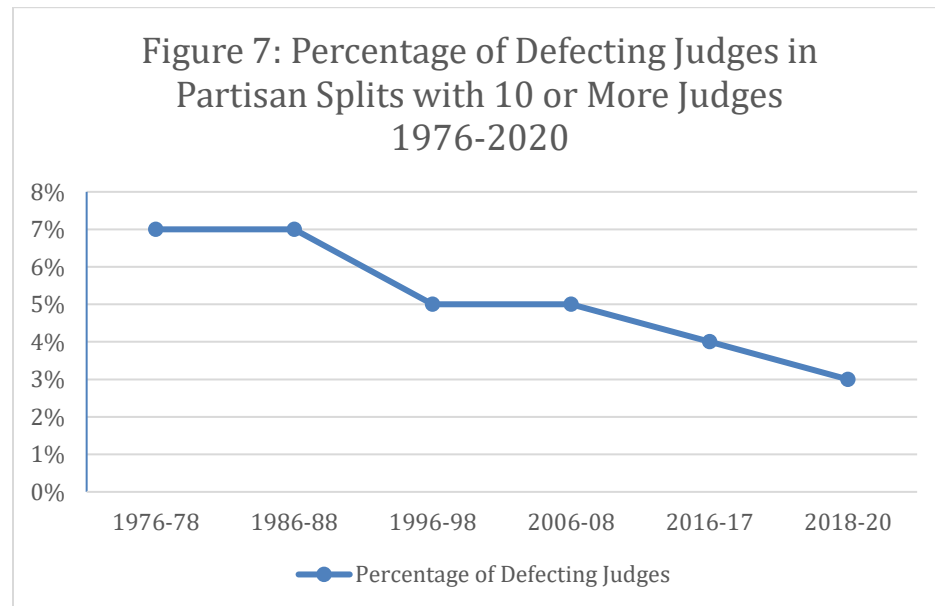


Notice how the percentage of cases that we labeled either a partisan split or a partisan reversal (the red line above) rose steadily from 2016 to 2020. From 2018-2020 there was a statistically

¹⁴² Donald Trump became president in 2017 but it was not until 2018 that the Trump era began (at least with respect to en banc decision-making). There were only three cases in 2017 in which a Trump appointed judge sat en banc. The reason is clear: Trump’s first appellate nominee was confirmed in May 2017 and there were only four Trump appeals court judges confirmed before October 2017.

significant spike in both partisan splits and partisan reversals – more in both categories than we observed in any other time period over sixty years.”¹⁴³ Further, referring back to Figure 3 above, the rate of partisan reversals and partisan splits in 2019 and 2020 are higher than at any other time period we recorded – including the spike in the 1980s we expected to see.

2018-2020 cases are different for another reason. We tallied the decisions with defecting judges – meaning decisions with odd bedfellows, where one Democratically-appointed judge votes with Republicans and against all other Democratically-appointed judges or vice versa. The rate of defection (perhaps a sign of judicial independence or non-partisanship) is dropping significantly at the present moment in time – lower than any other time period before in our study. This is true of both Republican-appointed judges and Democrat-appointed judges: in recent months these judges are less willing than in the past to part ways with their cohorts en banc and more willing than in the past to vote along party lines and rein in panels from the other team.



Relatedly, the number of partisan splits (where the judges align in near perfect teams according to the party of their appointing President) also rose dramatically in 2018-2020. As you can see in Figure 3, 27% of all en banc decisions in 2018-2020 were decided

¹⁴³ We made use of two separate measures to find the spike statistically significant, the Fishers Exact Test and the Chi-Squared test. The spike was strongly statistically significant under either measure. Thanks to our colleague Eric Kades for running the tests.

in nearly perfect blocs divided by appointing party. Compare that to 12% in 2016-17, 14% in 2006-08, 15% in 1996-1998 and even 20% in the previous high point, 1986-88. Put most starkly, the rate of partisan en banc splits nearly doubled from the Obama / Bush / Clinton eras to the Trump era and is far higher now than in any of the years we studied over six decades.

We thus find ourselves with a bit of a cliffhanger: are the past three years an outlier or an omen of what the future holds? We now attempt to answer this question and also to explore why we did not see the expected rise over time in partisan en banc decisions for most of the time period we studied.

IV. IMPLICATIONS FROM THE LONG VIEW OF EN BANC: THE POWER OF NON-PARTISAN FORCES

During a period of time (1988-2017) where party polarization among judicial appointees metastasized what explains the failure of federal courts of appeals to weaponize en banc review? In this section, we will try to make sense of our findings pre-2018. They are counter-intuitive. After all, the dominant view within law and political science is that federal court of appeals judges—like Supreme Court Justices—are driven by their desire to advance their legal policy preferences.¹⁴⁴ Why then was en banc review somewhat impervious to this growing partisan divide?

¹⁴⁴ For “attitudinalists,” policy preferences are all that matter. JEFFREY A. SEGAL AND HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2001). With respect to en banc review, attitudinalists see “the decision to grant en banc review reflects the desire of a majority of the judges on a circuit to move a panel outcome closer to its preferred policy position.” Michael W. Giles et al., *Etiology of the Occurrence of En Banc Review in the U.S. Court of Appeals*, 51 AM. J. POL. SCI. 449 (2004). For “strategic” judges, the advancement of policy preferences might require compromise; for example, if the three judges on a panel do not agree, those in the majority might compromise to avoid a potential en banc reversal. See Lee Epstein & Tonja Jacobi, *The Strategic Analysis of Judicial Decisions*, 6 ANN. REV. L. & SOC. SCI. 341 (2010); Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L. J. 2155, 2158-59 (1998); Deborah Beim, Alexander V. Hirsch, & Jonathan P. Kastellec, *Signaling and Counter-Signaling in the Judicial Hierarchy: An Analysis of En Banc Review*, 60 AM. J. POL. SCI. 490 (2016). In addition to placating a potential dissenter, panel judges—especially those who have served long enough to know the preferences and practices of other circuit judges—will calibrate their decision-making to avoid the risks of an en banc overruling. Giles et al., *supra* note 144, at 461 (“[J]udges in the minority on a circuit – given good information about the preferences of the majority – modify their panel behavior in response to avoid en banc rehearing.”).

Our principal claim is that federal appeals judges are committed to more than just advancing their legal policy preferences; they also care deeply about their reputations regarding judicial independence, collegiality, and other rule-of-law norms. En banc gives us a unique window into these concerns and how they operate on judicial decision-making. This does not, of course, mean that judges never use en banc review for partisan purposes. On occasion they do, as our data indicates. At the same time, the frequency of partisan en banc behavior seems to be mitigated by something else and it is worth unpacking what those forces could be.

We articulate three such forces pushing against the impulse to weaponize en banc pre-2018: (1) collegiality concerns, (2) entrenched circuit en banc workarounds and customs, and (3) general rule of law / judicial independence norms. Understanding these forces is not just critical to speculating why our initial hypothesis was thwarted, but also to understanding what is vulnerable to change in the future.

1. *Norms of Collegiality*

Perhaps the most obvious dynamic pushing against the en banc partisan impulse is the pressure to get along with one's colleagues. Scholars agree that "conventional wisdom favors judicial consensus and discourages dissent."¹⁴⁵ More than 97 percent of federal appeals court panel decisions are unanimous and less than one percent of panel decisions are vacated and reconsidered en banc.¹⁴⁶ To reach consensus, judges engage in "a continual quest to reduce conflict through holding conferences, circulating draft opinions and memorandums, and conducting private meetings between individual judges or groups of judges."¹⁴⁷

¹⁴⁵ Frank B. Cross, *Collegial Ideology in the Courts*, 103 NW. U. L. REV. 1399, 1413 (2009). For this very reason, a consensus model (including the cost of dissent in the judicial utility function) was a better predictor of appeals court decision-making than the standard model that focuses on preferred outcomes. See Joshua Fischman, *Estimating Preferences of Circuit Judges: A Model of Consensus Voting*, 54 J.L. & ECON. 781 (2011).

¹⁴⁶ For data on rates of dissent in the U.S. Courts of Appeal, see Epstein et al., *supra* note 23 at 264-265. For information on rates of en banc grants, see Sadinsky, *supra* note 5, at 2015 n.128.

¹⁴⁷ See Sheldon Goldman & Charles M. Lamb, Prologue to JUDICIAL CONFLICT AND CONSENSUS: BEHAVIORAL STUDIES OF AMERICAN APPELLATE COURTS 1 (Sheldon Goldman and Charles M. Lamb eds., 1986).

These substantial efforts are undermined by en banc reversals and splits that fall on party lines.

Collegiality may be pursued for many reasons. Judges, for example, may be motivated to do a “good job of judging.”¹⁴⁸ For D.C. Circuit judge Harry Edwards, a collegial court is one where “judges have a common interest, as members of the judiciary, in getting the law right.”¹⁴⁹ Collegiality thus “plays an important part in mitigating the role of partisan politics and personal ideology by allowing judges of differing perspectives and philosophies to communicate with, listen to, and ultimately influence one another in constructive and law-abiding ways.”¹⁵⁰

Collegiality is also pursued for the simple reason that “appellate court decisions are inherently collective products”¹⁵¹ and, consequently, judges want to be held in high regard by their colleagues. Specifically, judicial colleagues are “a true peer group, people who share the same position and work in the same situation.”¹⁵² Perhaps for this reason, D.C. Circuit judge Patricia Wald pointed to “the respect of our fellow judges” as an important limit on judicial discretion.¹⁵³

All judges know that dissent comes at a price. “In all the courts of appeal,” explained D.C. Circuit judge Douglas Ginsburg,

¹⁴⁸ Lynn A. Stout, *Judges as Altruistic Hierarchs*, 43 WM. & MARY L. REV. 1605, 1607 (2002).

¹⁴⁹ Edwards, *supra* note 39, at 1644-45. For Alex Kozinski, then a 9th Circuit judge: “You are in a different world when you put a robe on. It is something that just makes you feel that you have got to do what is right, whether you want to or not.” Alex Kozinski, *What I Ate for Breakfast and Other Mysteries of Judicial Decision Making*, 26 LOY. L.A. L. REV. 993, 994 (1993).

¹⁵⁰ Edwards, *supra* note 39, at 1645. For Judge Edwards, empirical scholars go too far in embracing models that suggest that judges are motivated principally by ideology at the expense of collegiality and other legal principles. *See* Edwards, *supra* note 39; Harry T. Edwards & Michael Livermore, *Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895 (2008). For critiques of Edwards, see Epstein et al., *supra* note 23 at 54-63; Gregory C. Sisk & Michael Heise, *Judges and Ideology: Public and Academic Debates About Statistical Measures*, 99 NW. U. L. REV. 743 (2005).

¹⁵¹ Baum, *supra* note 93, at 54. *See also* Stephen M. Bainbridge & G. Mitu Gulati, *How Do Judges Maximize? (The Same Way Everyone Else Does—Boundedly): Rules of Thumb in Securities Fraud Opinions*, 52 EMORY L.J. 83, 108 (2002).

¹⁵² Baum, *supra* note 93, at 54.

¹⁵³ Patricia M. Wald, *Thoughts on Decisionmaking*, 87 W. VA. L. REV. 1, 10 (1984).

“the judges must value collegiality, if only because an individual circuit judge has little authority when acting alone; any substantive decision requires the concurrence of at least two judges.”¹⁵⁴ Correspondingly, circuit judges are repeat players with each other and, as such, “anticipated future interactions” is the driving force behind the norm of consensus.¹⁵⁵

There are other costs to dissent as well. “Most people value leisure time, and there is little reason to think judges are different;”¹⁵⁶ writing separate opinions takes “time and energy [and that] obviously translates into less time for other activities.”¹⁵⁷ In addition to the “effort cost” of writing a dissent, there is a “collegiality cost” too.¹⁵⁸ Dissenters may be less well-liked, in part, because judges in the majority may resent criticism or may resent the extra workload of answering the dissenter’s objections in their opinion.¹⁵⁹ For nearly all judges, it makes sense to avoid “the ill will of one’s judicial colleagues—wran[gl]ing with colleagues make[s] for a harder job.”¹⁶⁰

Judges highly value collegiality, and they give it more than just lip service. As others have demonstrated, federal appeals judges (at least before the Trump era) were willing to trade off ideology for other ends, including collegiality. A 2003 study by Frank Cross found that “ideological preferences [were statistically significant but] not overpowering. For all judges, ideology explained only a little over five percent of the differing outcomes, leaving considerable room for other influences.”¹⁶¹

¹⁵⁴ Ginsburg & Falk, *supra* note 27, at 1017. Furthermore, as suggested by theories of cognitive dissonance, appeals judges “seek to reduce the psychic discomforts of standing alone.” HOWARD, *supra* note 6, at 193. *See also* Steven A. Peterson, *Dissent in American Courts*, 43 J. POL. 412 (1981).

¹⁵⁵ Rachel K. Hinkle, Michael J. Nelson, & Morgan L.W. Hazelton, *Deferring, Deliberating, or Dodging Review? Examining the Mechanisms Behind Panel Effects*, J. LAW & COURTS (Fall 2020). *See also* Cross, *supra* note 145, at 1416 (tying dissent aversion to norms of reciprocity “such that a judge’s dissent from an opinion may cost him votes in his future opinions.”).

¹⁵⁶ DAVID E. KLEIN, MAKING LAW IN THE UNITED STATES COURTS OF APPEAL 17 (2002).

¹⁵⁷ Hettinger et al., *supra* note 72, at 112.

¹⁵⁸ *See* Epstein et al., *supra* note 23 at 261.

¹⁵⁹ *See id.*

¹⁶⁰ *Id.* at 42.

¹⁶¹ Cross, *supra* note 145, at 1401 (discussing Cross’s 2003 study published in the *California Law Review*). *See also* Giles et al., *supra* note 13 (concluding that that

Former Seventh Circuit judge Richard Posner provided an extreme example of the willingness of appeals judges to forsake their preferred outcome in order to accommodate another panel member. “In a three judge panel,” Posner explained, if “one judge has a strong opinion on the proper outcome of the case. . . the other judges, if not terribly interested in the case, may simply cast their vote with the opinionated judge.”¹⁶² Indeed, so long as one of the indifferent judges goes along, the other indifferent judge will likely go along rather than write a dissenting opinion.

Judge Posner refers to what others have called “panel effects,” that is, the influence that each member of a circuit panel has on the other members.¹⁶³ Numerous panel effect studies have been done,¹⁶⁴ most considering the ideological diversity of panel members and some considering the impact of race and gender diversity on a panel decision.¹⁶⁵ In particular, these studies link panel effects to the high rates of unanimity on federal courts of appeal. “Liberal and conservative judges tend to vote differently in many areas of the law; if they voted sincerely, in most cases we would not observe panel effects—we would observe far more dissents.”¹⁶⁶

Cass Sunstein, for example, found that a judge’s ideological tendency is likely to be dampened if she is sitting with two judges of a different political party and, correspondingly, that a judge’s

“legal goals have far greater operative effect in the lower courts than in the Supreme Court”).

¹⁶² RICHARD A. POSNER, *OVERCOMING LAW* 123 (1995).

¹⁶³ See Hinkle et al., *supra* note 155; Jonathan P. Kastellec, *Hierarchical and Collegial Politics on the U.S. Courts of Appeals*, 73 J. POL. 345 (2011). In addition to panel effects that result from the collegial environment, panel effects may also be a result of strategic decision-making. See *supra* note 144 (discussing “whistleblower” theory of panel effects).

¹⁶⁴ For a good summary, see FRANK B. CROSS, *DECISION MAKING IN THE U.S. COURTS OF APPEALS* 148-177 (2007).

¹⁶⁵ See Sean Farhang & Gregory Wawro, *Institutional Dynamics on the U.S. Court of Appeals: Minority Representation Under Panel Decision-making*, 20 J. L. ECON. & ORG. 299 (2004); Jennifer L. Peresie, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759 (2005) (finding panel effects with respect to gender); Stephen Burbank & Sean Farhang, *Politics, Identity, and Class Certification on the U.S. Courts of Appeal*, 119 MICH. L. REV. (finding panel effects with respect to race).

¹⁶⁶ Deborah Beim & Jonathan P. Kastellec, *The Interplay of Ideological Diversity, Dissents, and Discretionary Review in the Judicial Hierarchy: Evidence from Death Penalty Cases*, 76 J. POL. 1074, 1076 (2014).

ideological tendency is likely to be amplified if she is sitting with two judges of the same political party.¹⁶⁷ A striking example of both dampening and amplification is affirmative action. A Republican judge sitting on a panel with two Democratic appointees is more likely to uphold affirmative action programs (65 percent of votes) than a Democratic judge sitting on a panel with two Republican appointees (61 percent).¹⁶⁸ On all Democrat panels, 81 percent of votes support affirmative action programs; on all Republican panels, 34 percent of votes support.¹⁶⁹

The willingness of appeals judges to trade off ideology for other ends (demonstrated in the panel effects literature, among other places) is particularly relevant to en banc decision-making. In particular, collegiality norms are an important backstop to majority party judges setting aside a minority-dominated panel ruling in order to put in place the ideological preferences of the majority party.¹⁷⁰ The alternative—separating judges into two partisan warring camps—would fundamentally undermine collegiality norms.

The very nature of en banc review therefore raises the specter of this kind of my-team-versus-your-team dynamic: It brings all of the judges together, often presents them with a high-stakes controversy, and risks lining them up in “teams.” Going en banc can bring out the nastiness of judging and undermine the good

¹⁶⁷ Sunstein, *supra* note 66 at 8-13. The phenomenon of dampening or amplifying is based on “group cohesion theory where a unified group of judges (that is three judges with the same political-ideological make-up) is more likely to make an ideologically extreme unchecked decision than if the group had more ideological balance.” Morgan Hazelton, Kristen Hickman, & Emerson H. Tiller, *Panel Effects in Administrative Law*, 71 S.M.U. L. REV. 445, 447 (2018).

¹⁶⁸ Sunstein *supra* note 66 at 24-25. Sunstein uses political party affiliation as a gauge of ideology (where Republican appointees are less liberal than Democratic appointees); Sunstein separately measured the voting patterns of Democrats and Republican judges and found clear evidence of a link between party affiliation and ideology. *Id.* at 19-24, 113-122.

¹⁶⁹ Cass R. Sunstein, David Schkade, & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 319 (2004).

¹⁷⁰ Collegiality norms are also threatened in non-partisan en banc cases as the en banc process necessarily “involves reviewing and reversing one’s fellow circuit court judges.” Cross, *supra* note 194, at 108. *See also* Epstein et al., *supra* note 23 at 269-270 (noting that en banc review takes a “heavy toll on collegiality,” for panel judges are “highly sensitive to the rejection of their decisions by their colleagues” as distinct from “strangers such as the Justices of the Supreme Court.”); Smith, *supra* note 13, at 134 (noting that en banc decisions “most clearly illustrate issue cleavages” among circuit judges).

manners that most judges expect as routine.¹⁷¹ And while a judge on a panel may be willing to find common ground with another panelist to avoid conflict, the willingness of judges to trade off ideology for other ends are far more complicated when the whole circuit is involved. Put simply, *en banc* comes at a high cost – a tax on collegiality – and the judges are aware of the price and not often willing to pay it.

Judges see the collegiality tax as more than just ruffled feathers. D.C. Circuit judge Douglas Ginsburg warned of the risk of undermining the panel system altogether for a system where panel members would not seek to find common ground but, instead, would “stake out an adventuresome position.”¹⁷² Judge John Newman of the Second Circuit likewise spoke of *en banc* review as a “threat” to collegiality and attributed the lack of vitriol in Second Circuit decisions to “the infrequency of the occasions when we confront each other as members of an *en banc* court.”¹⁷³ When voting to deny an *en banc* rehearing of a panel decision he disagreed with, Judge Jeffrey Sutton of the Sixth Circuit put it this way: “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 delegation of decision-making authority to panels of three as nothing more than an audition. Saving *en banc* review for ‘the rarest of circumstances,’ . . . thus ‘reflects a sound, collegial attitude,’ one worth following here.”¹⁷⁴

2. *Mini En Bancs and Other Work-Arounds*

Most circuits have embraced these collegiality pressures by creating several institutionalized workarounds that serve to limit *en bancs*. The variation they embody from circuit to circuit is fascinating and is our subject for another day, but the point for this article is that collectively they offer further explanation for the lack of *en banc* partisan behavior historically.

¹⁷¹ See, e.g., the *Manning* case in the Fourth Circuit and tone of the opinions between the dissent and majority.

¹⁷² Ginsburg & Falk, *supra* note 27, at 1021.

¹⁷³ Martin Flumenbaum & Brad S. Karp, *The Rarity of En Banc Review in the Second Circuit*, 256 N. Y. L. J. 2 (Aug. 24, 2016).

¹⁷⁴ Colter Paulson, *Judge Sutton Explains Why En Banc Review Is So Rare*, SIXTH CIRCUIT APPELLATE BLOG (Dec. 10, 2010), <https://www.sixthcircuitappellateblog.com/recent-cases/judge-sutton-explains-why-en-banc-review-is-so-rare/>.

Most notably nine of the thirteen circuits have adopted some form of the “mini en banc” procedure.¹⁷⁵ Mini en bancs are elusive and have various pseudonyms including “junior en banc,” “informal en banc,” and the “quasi en banc.”¹⁷⁶ At least the Second Circuit has engaged in the practice since 1966, but the procedure is rarely documented and hard to define.¹⁷⁷

Under the most familiar version of the mini en banc (pioneered by the Second Circuit), the original three-judge panel circulates a draft opinion to all judges on the entire circuit before the opinion is published tentatively suggesting that a precedent should be overruled.¹⁷⁸ The judges then exchange memos or emails and the draft opinion may be revised if the wind is blowing towards the possibility of an en banc hearing, but if it is not then a circuit precedent can be overruled by a panel decision on the (safe) assumption that en banc will be avoided.¹⁷⁹ All of this typically happens behind the scenes. The goal of the mini en banc is to prevent a real en banc.

Even outside of this version of the mini en banc, other circuits (at least the Third, Fourth, and Tenth) have a policy where every draft opinion is circulated to every active judge.¹⁸⁰ The

¹⁷⁵ Amy Sloan, *The Dog that Didn't Bark: Stealth Procedures and the Erosion of Stare Decisis in the Federal Courts of Appeals*, 78 *FORDHAM L. REV.* 713, 715, 728 (2009); Steven Bennet & Christine Pembroke, *Mini In Banc Proceedings: A Survey of Circuit Practices*, 34 *CLEV. ST. L. REV.* 531, 544-57 (1985).

The phrase “mini en banc” is used multiple ways across the country and can sometimes generate confusion. It is used on occasion to describe the en banc process in the Ninth Circuit which is mini (or “limited”) because it is a subset of all the active judges. Given that en banc rehearings are already notorious for being time-consuming and unwieldy, it is perhaps no surprise that the Ninth Circuit does not rehear en banc cases with the full circuit of 29 judges. Instead, the court uses what is known as a “limited” en banc or sometimes a “mini” one. Pamela Ann Rymer, *The “Limited” En Banc: Half Full, Or Half Empty?*, 48 *ARIZ. L. REV.* 317, 317 (2006). The “mini en banc” we are referring to is the one used outside the Ninth Circuit to avoid full en banc review, not the limited en banc routinely used in the Ninth.

¹⁷⁶ Bennet & Pembroke, *supra* note 175, at 547 n.77; Sloan *supra* note 175, at 715; Solimine, *supra* note 13, at 36.

¹⁷⁷ Currently it seems the First, Second, Seventh, Tenth, and D.C. Circuits are the circuits who have most consistently used mini en bancs, while the Fifth, Fourth, Sixth, and Eighth Circuits have also used some type of mini en banc on occasion. Sloan, *supra* note 175, at 726-30; Sadinsky, *supra* note 5, at 2025-27.

¹⁷⁸ Bennet & Pembroke, *supra* note 175, at 532.

¹⁷⁹ *Id.* at 547.

¹⁸⁰ Bennett & Pembroke, *supra* note 175, at 552, 555.

Seventh Circuit has an even more onerous version of this rule: under their rules, a majority of the entire circuit is asked to *approve* any opinions rendered by three-judge panels that conflict with existing circuit precedent or precedent from another circuit.¹⁸¹ All of these circulating practices have many justifications, surely, but one known side effect is the lack of divisive partisan *en banc* decisions.¹⁸²

Finally, many of the circuits share an unwritten practice and tradition of avoiding *en bancs* in the spirit of collegiality, and this circuit-specific custom is passed on from one generation of judges to the next. For example, the Second Circuit is one that touts this tradition vocally. Judge Robert Katzmann has explained “we have a longstanding tradition of general deference to panel adjudication – a tradition which holds whether or not the judges of the Court agree with the panel’s disposition of the matter before it.”¹⁸³ This pro-collegiality tradition is a point of pride for the judges of the Second Circuit. As Judge Jon Newman boasts, “it is no coincidence that the Second Circuit, which has the lowest rate of rehearings in *banc* of all the circuits, is also the most efficient circuit... Despite the occasions when each of us has read a panel opinion with which we profoundly disagree, we have been able, to a remarkable degree, to submerge our individual judicial convictions in the interest of the proper functioning of our court.”¹⁸⁴

One can almost see the “no I in team” on the back of the Second Circuit judicial softball jersey. But these traditions bring more than just warm words and bragging rights. These traditions have power -- power that is transformative and long-lasting. Before becoming a judge, a person who was known for (or even selected because of) party loyalty may feel pressure to acclimate to the traditions of the new job and an obligation to carry on traditions of the circuit created by her predecessors. Over time, the party loyalty is supplemented and perhaps even replaced by a new kind of loyalty: membership in a different elite group with different pressures and cultures. Once one becomes a member of “the Mighty Third,” (as the Third Circuit calls itself) one is expected to act like a member of the Mighty Third.

¹⁸¹ Michael S. Kanne, *The Non-Banc En Banc: Seventh Circuit and the Law of the Circuit*, 32 S. ILL. U. L.J. 611, 611 (2008) (citing Seventh Circuit Rule 40e).

¹⁸² *Id.* at 614; Bennet & Pembroke, *supra* note 175, at 552. The DC Circuit has a similar policy whose authority is referred to as the “Irons footnote.” Kanne, *supra* note 181, at 618.

¹⁸³ Sadinsky, *supra* note 5, at 2015 (quoting Judge Katzmann).

¹⁸⁴ Newman, *supra* note 7, at 382, 384.

Of course these traditions are not infallible. Judge Patricia Wald of the D.C. Circuit once explained that rapid personnel turnover on a court can unwind resistance to en bancs: “The appointment of a new majority of judges in a circuit in only a few years can strain that accommodation. Under such circumstances, normal tensions increase.”¹⁸⁵ In the Sixth Circuit, for example -- a circuit with a comparatively more robust en banc practice -- a dramatic shift in personnel has been linked to “increased disagreement” and decreased collegiality.¹⁸⁶

But despite their potential fragility, the sheer existence and variety of these formal and informal mechanisms in the courts of appeals to avoid en banc review provide insight into our thwarted hypothesis. Presumably en banc has been treated uniquely for decades by courts of appeals judges -- precisely because appeals judges are committed to avoiding conflict. As such, en banc review seems to have developed a quasi and at least partial immunity from partisan behavior.

3. Norms of Judicial Independence

Finally, perhaps the best explanation for resistance to en banc partisan decision-making is the historic strength of judicial independence norms.

Federal appeals judges have multiple goals. Ideology is certainly a very important goal, as judges will not act in ways that undermine their ideological priorities.¹⁸⁷ But there are other goals too. In particular, we think federal appeals judges care a great deal about the esteem in which they are held, especially in the

¹⁸⁵ Patricia M. Wald, *The Changing Course: The Use of Precedent in the District of Columbia Circuit*, 34 CLEV. ST. L. REV. 477, 478 (1985).

¹⁸⁶ J. Bret Trier, *Increased En Banc Activity by the Sixth Circuit*, 19 U. TOL. L. REV. 277, 282 (1988) (“Although such a dynamic is present in any appellate court, the intensity is heightened when the balance between majority and minority views is in a state of flux ... as it is in the Sixth Circuit.”); Harry W. Wellford et al., *Sixth Circuit En Banc Procedures and Recent Sharp Splits*, 30 U. MEM. L. REV. 479, 513 (2000) (“We can only hope that this tendency toward personal expression, rather than judicial expression, may subside in the Sixth Circuit.”).

¹⁸⁷ See Neal Devins & Will Federspiel, *The Supreme Court, Social Psychology, and Group Formation*, in THE PSYCHOLOGY OF JUDICIAL DECISION MAKING 85, 90 (David Klein & Gregory Mitchell eds., 2010).

professional and social networks that they are a part of.¹⁸⁸ Accepting a federal judgeship typically means giving up future income and agreeing to significant constraints on their personal activities; those who find this tradeoff desirable are likely to care a great deal about their reputation in the communities they care about.¹⁸⁹ And that esteem is inextricably linked with norms of judicial independence. Judicial independence at the very least means that judges are not under the thumb of any political party or actor.

Consider, for example, the now notorious exchange between Chief Justice Roberts and President Trump regarding the President calling a federal district judge who ruled against him an “Obama judge.” For the Chief Justice, “We do not have Obama judges or Trump judges, Bush judges or Clinton judges What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them. That independent judiciary is something we should all be thankful for.”¹⁹⁰ For the Chief Justice to take on the President of the United States publicly like that was nothing short of remarkable. Motivating him was the need to defend an “independent judiciary” – a commitment that has been embraced by several Supreme Court Justices and federal appeals judges, including Trump appointees.¹⁹¹

This well-entrenched and widely-shared embrace of an independent judiciary is critical on several levels, all of which speak to the costs of weaponizing en banc review in order to advance partisan, ideological goals. First, as is often said, the judiciary’s power is tied to its legitimacy and, as such, federal judges “must take care to speak and act in ways that allow people to accept decisions. . . as grounded truly in principle, not as compromises with social and political pressures.”¹⁹²

¹⁸⁸ See RICHARD A. POSNER, *HOW JUDGES THINK* 36 (2008) (listing numerous goals of judges, including “power, prestige, reputation, self-respect”).

¹⁸⁹ See Baum, *supra* note 93, at 32-33.

¹⁹⁰ Liptak, *supra* note 3 (quoting President Trump and Chief Justice Roberts).

¹⁹¹ See Devins & Baum, *supra* note 64, at 141; Jess Bravin, *No Obama or Trump Judges Here, Appointees of Both Declare*, WALL ST. J. (Sept. 15, 2019), <https://www.wsj.com/articles/judges-say-they-arent-extensions-of-presidents-who-appointed-them-11568566598>. See also Richard L. Hasen, *More and More Republican Officials are Standing Up to Trump and his Efforts to Overturn the Election*, SLATE (Dec. 1, 2020), <https://slate.com/news-and-politics/2020/12/republican-officials-who-have-gone-against-trump-barr-ducey-kemp.html>.

¹⁹² *Planned Parenthood of Southeast Pennsylvania v. Casey*, 505 U.S. 833 (1992).

As has been recognized by judicial leaders since John Marshall, if courts are just pawns of politicians then courts lose their power and authority. Chief Justice John Roberts spoke out to defend judicial independence because it is the central nerve system of the federal courts. He, and every other federal judge (regardless of the President who appointed her), is keenly aware of this fact. It is this same impulse, we think, that counters the “my team-your team” draw in en banc decision-making.

Closely related to judicial independence norms are commitments to the rule of law: “there is no other norm that has a stronger prima facie claim on judges than the norm that the decision making of judges should be governed by a consideration of the relevant legal factors.”¹⁹³ This norm is “woven tightly into the fabric of legal education and the legal profession.”¹⁹⁴ Law-oriented decision-making cuts against ideological decision-making, including the formation of competing partisan ideological blocs.¹⁹⁵

Indeed, this norm is embedded in legal education and practice. For example, a 2016 study comparing the general public to lawyers and judges showed that legal training and experience furthers “impartial legal decision-making” by fixing a judge’s attention on “decision-relevant features of a case.”¹⁹⁶ By showing that legal training and experience informs professional judgment, this study underscores the centrality of rule-of-law norms both to judges and to their social and professional networks.¹⁹⁷ Perhaps more telling, the refusal of Republican judges—some appointed by President Trump—to back the president’s unproven claims of a stolen election was a testament to the power of these norms.¹⁹⁸

¹⁹³ See Wendy Martinek, *Judges as Members of Small Groups*, in Klein & Mitchell eds., *supra* note 187, at 73, 77.

¹⁹⁴ *Id.*

¹⁹⁵ In other words, like everyone else, federal appeals judges try to “project images of themselves that are consistent with the norms in a particular social setting and with the roles they occupy.” MARK R. LEARY, SELF-PRESENTATION: IMPRESSION MANAGEMENT AND INTERPERSONAL BEHAVIOR 67 (1996).

¹⁹⁶ Dan M. Kahan et al., *Ideology or Situation Sense? An Experimental Investigation of Motivated Reasoning and Professional Judgment*, 164 U. PENN. L. REV. 349, 354-355 (2016).

¹⁹⁷ MARK R. LEARY, SELF-PRESENTATION: IMPRESSION MANAGEMENT AND INTERPERSONAL BEHAVIOR 67 (1996).

¹⁹⁸ See Hasen, *supra* note 191; John O. McGinnis, *Constitutional Fidelity*, CITY J., Dec. 9, 2020, <http://www.city-journal.org/in-elecion-lawsuits-trump-judges-follow-the-law>.

The flip side of this coin is the cost of the partisan weaponizing of en banc review. When the dominant political party uses en banc review to overturn a minority panel decision, the en banc decision reinforces the popular belief (embraced by three-quarters of Americans) that judges base their decisions on “personal political views.”¹⁹⁹ This behavior cuts against the strong pull of rule of law and judicial independence norms. Put another way, it reinforces the Trump view of judging at the expense of the Chief Justice’s view. And that internal self-image warfare may be the best explanation of what puts the brakes on en banc partisan warfare...at least historically.

V. EXPLAINING THE RECENT UPTICK IN PARTISAN EN BANCS

There is one last mystery on our plate. Not only did our data surprise us by showing a lack of partisan behavior in en banc decision-making over-time, but that immunity to partisanship appears to stop or at least significantly erode in 2018. What explains the dramatic increase in partisan splits and partisan reversals from 2018-2020?

We see two possibilities. Either we are now at an inflection point where circuit judges see themselves as Democrats or Republicans and partisan warfare en banc will become the norm. Or, the 2018-2020 data is an anomaly associated with President Trump and anti-partisan rule-of-law forces will once again come to dominate en banc decision-making. Both scenarios are possible, and each would have different implications for en banc review going forward.

On the one hand, there certainly are warning signs that en banc review has been weaponized and that this change is here to stay. As we discussed in Section Two, the partisan divide has widened, judicial confirmation politics is increasingly nasty and increasingly salient, and the social and professional networks of judges are increasingly balkanized.

On the other hand, rather than be a precursor of what lies ahead, the Trump presidency may stand alone. Trump has

¹⁹⁹ See Kathleen Hall Jamieson & Bruce Hardy, *Public Understanding of and Support for the Courts*, ANNENBERG PUB. POL’Y CENT. (Oct 17, 2007), https://cdn.annenbergpublicpolicycenter.org/Downloads/20071017_JudicialSurvey/Judicial_Findings_10-17-2007.pdf.

challenged “the basic norms and institutions of democracy” and thereby “tested the institution of the presidency unlike any of his 43 predecessors.”²⁰⁰ Correspondingly, more than any administration before it, the Trump administration and its opponents have turned to the federal courts to advance their agenda.²⁰¹ Federal judges are necessarily in the middle of these bitterly partisan disputes involving presidential initiatives and the personal dealings of the president. In future administrations, federal judges may not be called into service in such overtly partisan disputes. Indeed, then-candidate Joe Biden repeatedly spoke of “the country being sick of the division. . . of the fighting;” and promised a “return to normalcy.”²⁰²

Let us first consider the possibility that the Trump era is a harbinger of things to come. To start, Donald Trump tapped into entrenched polarization. His election was “a symptom of polarization rather than a cause of it.”²⁰³ Understanding “the intense hatred among legions of Republican voters of liberal elites and of the so-called meritocracy,” Trump was “willing to go where no other presidential candidate would venture.”²⁰⁴ Specifically, by playing into the identities, biases, and fears of large segments of the American electorate, Trump intensified these trends but he did not create them.²⁰⁵

²⁰⁰ Michael J. Klarman, *Foreword: The Degradation of American Democracy—And the Court*, 134 HARV. L. REV. 1, 7 (2020); Jack Goldsmith, *Will Donald Trump Destroy the Presidency?*, THE ATLANTIC (Sept. 12, 2017), <https://www.theatlantic.com/magazine/archive/2017/10/will-donald-trump-destroy-the-presidency/537921/>.

²⁰¹ See *infra* notes 228-34 and accompanying text. See also Reid Wilson, *States Sue Trump Administration at Record Pace*, THE HILL (Feb. 12, 2020), <https://thehill.com/homenews/state-watch/482620-states-sue-trump-administration-at-record-pace> (detailing state lawsuits against Trump and the Trump administration).

²⁰² Erza Klein, *Joe Biden’s Promise: A Return to Normalcy*, VOX (May 20, 2019), <https://www.vox.com/policy-and-politics/2019/5/20/18631452/joe-biden-2020-presidential-announcement-speeches>

²⁰³ *Donald Trump’s Election Did Not Increase Political Polarization*, ANNENBERG SCHOOL OF COMMUNICATIONS NEWS (Oct. 11, 2019), <https://www.asc.upenn.edu/news-events/news/trump-did-not-increase-polarization>.

²⁰⁴ Thomas B. Edsall, *The Audacity of Hate*, N.Y. TIMES (Feb. 19, 2020), <https://www.nytimes.com/2020/02/19/opinion/trump-anger-fear.html>.

²⁰⁵ As Alan Abramowitz noted: “Perhaps more than any major party candidate in the past sixty years, Donald Trump reinforced some of the deepest social and cultural divisions within the American electorate.” ALAN ABRAMOWITZ, *THE GREAT ALIGNMENT: RACE, PARTY TRANSFORMATION, AND THE RISE OF TRUMP* 170 (2018).

For this very reason, political scientists studying the Trump era “are pessimistic about both the short- and long-term prospects for amelioration of hostile partisan division.”²⁰⁶ During the COVID-19 pandemic, for example, “rampant partisanship” was the largest obstacle to social distancing, mask wearing, and other practices critical to limiting the spread of the virus.²⁰⁷ Today, polarization is seen as “intractable” because of the “alignment of many of our social identities.”²⁰⁸ More than any other period, the electorate has been “divided into two separate camps based on voters’ preference for key foundational moral principles and the policies that derive from them.”²⁰⁹

Most relevant to our project, Trump tapped into and accelerated a bitter fight between Democrats and Republicans regarding judges.²¹⁰ Unlike earlier presidential races (where judicial nominations were not particularly important to candidates or voters),²¹¹ judicial vacancies (particularly the power to appoint a Supreme Court Justice) were a key issue in 2016.²¹² Trump boosted

²⁰⁶ See Edsall, *supra* note 204.

²⁰⁷ Joshua Clinton et al, *Partisanship Pandemic: How Partisanship and Public Health Concerns Affect Individuals’ Social Distancing During COVID-19*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3633934

²⁰⁸ Thomas B. Edsall, *How Could Human Nature Become This Politicized?*, N.Y. TIMES (July 8, 2020) (quoting Jaime Settle), <https://www.nytimes.com/2020/07/08/opinion/trump-politics-psychology.html>.

²⁰⁹ *Id.*

²¹⁰ See, e.g., Jeffrey M. Jones, *Trump Third Year Sets New Standard for Party Polarization*, GALLUP (Jan. 21, 2020), <https://news.gallup.com/poll/283910/trump-third-year-sets-new-standard-party-polarization.aspx>.

²¹¹ Consider, for example, the 2004 presidential elections. One week before the elections, then Chief Justice William Rehnquist announced that he underwent a tracheotomy for thyroid cancer. See David G. Savage, *Chief Justice Has Thyroid Cancer*, L.A. TIMES (Oct. 26, 2004), <https://www.latimes.com/archives/la-xpm-2004-oct-26-na-rehnquist26-story.html> Neither presidential candidate John Kerry or George W. Bush used that announcement to focus attention on the Supreme Court. For voters, the Supreme Court too was a low priority issue—only 1 percent ranked the Supreme Court as the most important issue. Press Release, Pew Research Center., *Moral Values: How Important? Voters Liked Campaign 2004, but Too Much Mud-Slinging* 15 (Nov. 11, 2004), <http://people-press.org/reports/pdf/233.pdf>.

²¹² See Pew Research Center, *Top Voting Issues in 2016 Elections*, <https://www.people-press.org/2016/07/07/4-top-voting-issues-in-2016-election/>.

his electoral prospects by partnering with the Federalist Society to release a list of potential Supreme Court candidates.²¹³

By capitalizing on longstanding trends regarding polarization and judicial selection, Trump's election further elevated the saliency of judicial appointments. In so doing, the link between party and ideology is clear. If the president's party controls the Senate, nominations will be pushed through; if the president's party is the minority party, nominations will languish. This type of winner-take-all politics may well persist and out-last Trump.

Indeed, further buttressing this prediction is the fact that the courts once again played a figural role in the 2020 elections. Trump initially sought to rally his base with an updated list of possible Supreme Court nominees;²¹⁴ Trump likewise sought electoral advantage by nominating Amy Coney Barrett to the Court.²¹⁵ Joe Biden followed suit, initially promising to release a list of potential Supreme Court nominees and then promising that his first pick would be an African American woman.²¹⁶ More tellingly, proposals to add Justices to the Supreme Court were suddenly in vogue after the September 2020 death of Ruth Bader Ginsburg and subsequent Barrett nomination.²¹⁷

²¹³ Alan Rappaport and Charlie Savage, *Donald Trump Releases List of Possible Supreme Court Picks*, N.Y. TIMES (May 18, 2016), <https://www.nytimes.com/2016/05/19/us/politics/donald-trump-supreme-court-nominees.html>; David Montgomery, *Conquerors of the Courts*, WASH. POST MAG. (Jan. 2, 2019), <https://www.washingtonpost.com/news/magazine/wp/2019/01/02/feature/conquerrors-of-the-courts/>.

²¹⁴ See Eric Bradner, *Trump Pledges New List of Justices After Two Stinging Supreme Court Losses*, CNN (June 18, 2020), <https://www.cnn.com/2020/06/18/politics/2020-election-trump-list-supreme-court/index.html>.

²¹⁵ Nancy Cook & Gabby Orr, *Trump Taps Barrett, Launching Brawl Over the Supreme Court's Future*, POLITICO (Sept. 24, 2020), <https://www.politico.com/news/2020/09/26/trump-scotus-coney-barrett-easy-choice-422019>.

²¹⁶ Quint Forgey, *Biden says he'll release list of Black women as potential SCOTUS nominees*, POLITICO (June 30, 2020), <https://www.politico.com/news/2020/06/30/biden-black-female-supreme-court-nominees-345622>.

²¹⁷ See Astead W. Herndon & Maggie Astor, *Ruth Bader Ginsburg's Death Revives Talk of Court Packing*, N.Y. TIMES (Sept. 19, 2020), <https://www.nytimes.com/2020/09/19/us/politics/what-is-court-packing.html>

Judicial nominees are now explicitly told they are expected to advance the causes of the party that backed them.²¹⁸ That may have been true before Trump but it is now conventional wisdom.²¹⁹ The 2020 Democratic Party Platform specifically called for “structural” changes to the federal courts, including adding seats to the federal courts of appeals.²²⁰ The Republican Policy Committee (RPC) went so far as to formally embrace partisan en banc overrulings. For the RPC: “Increasing the number of Republican-appointed circuit judges increases the chances of Republican-appointed judges hearing a given case. Flipping the court’s majority also increases the chances of conservative rulings in cases reheard by all the judges of that circuit—so-called en banc rehearings.”²²¹ Needless to say, the spike in partisan en banc overrulings suggests that appeals judges—both Democrat and Republican—increasingly see en banc review as a partisan tool.²²² This seems particularly true

²¹⁸ The most recent example of this is President Trump nominating Judge Amy Barrett and publicly stating that he wanted her on the Supreme Court to hear any disputes that arose out of the 2020 election.

²¹⁹ For an examination of how public and elected government perspectives of result-oriented decision-making has created a legitimacy dilemma for the Supreme Court, see RICHARD H. FALLON, JR., *LAW AND LEGITIMACY IN THE SUPREME COURT* (2018); Tara Leigh Grove, *The Supreme Court’s Legitimacy Dilemma*, 132 HARV. L. REV. 2240 (2019).

²²⁰ See Carl Hulse, *Countering G.O.P. on Courts, Democrats Will Call for ‘Structural’ Change*, N.Y. TIMES (July 31, 2020), <https://www.nytimes.com/2020/07/31/us/democrats-judiciary-reform.html>; Leah Littman, *Expand the Lower Courts*, N.Y. TIMES (Oct. 27, 2020), <https://www.nytimes.com/interactive/2020/10/27/opinion/supreme-court-reform.html>. Following the election of Joe Biden, these calls continued. See Madison Alder, *Liberals Push Congress for Robust Lower Court Expansion*, BLOOMBERG (Dec. 7, 2020), <http://bloomberglaw.com/us-law-week/liberals-push-congress-for-robust-lower-court-expansion?context=search&index=1>.

Other proposals include Democratic circuit judges taking senior status so that they can still hear cases while paving the way for the Biden administration to appoint their successors. See Zoe Tillman, *Trump Transformed the Federal Courts Here’s What Biden Could Do*, BUZZFEED (Dec. 17, 2020), <https://www.buzzfeednews.com/article/zoetillman/trump-judges-appoint-biden-courts>; Marin K. Levy, *The Promise of Senior Judges* 115 Nw. U. L. Rev. 1227 (2021). For additional discussion of Congress’s power to pursue ideological objectives through its control of the lower courts, see John M. DeFigueiredo & Emerson H. Tiller, *Congressional Control of the Courts: A Theoretical and Empirical Analysis of the Expansion of the Federal Judiciary*, 39 J. L. & ECON. 435 (1996).

²²¹ See Senate Republican Policy Committee, *Flipping the Courts*, <https://www.rpc.senate.gov/policy-papers/flipping-circuit-courts>.

²²² On the D.C. Circuit, this practice dates back to the Obama years. By flipping the D.C. Circuit, Obama judicial appointees backed Obama administration requests for en banc review to vacate Republican-dominated panel decisions. See

of circuits where multiple judges are confirmed at the same time, including the D.C. Circuit and the Ninth Circuit.²²³ More telling, Trump appointees to the federal courts of appeal “were nearly four times as likely to clash with colleagues appointed by Democratic presidents as those appointed by Republicans” (around double the rate of Republican judges appointed by other presidents).²²⁴

Further suggesting that we are at an inflection point are recent efforts to limit the power of the Federalist Society and the pushback to those efforts by Republican appeals judges in general and Trump appointees in particular.²²⁵ As noted in Section Two, the Federalist Society now serves as the de facto screener and groomer of Republican judicial nominees. The Society also serves as a critical social and professional network for judges and would-be judges. Future Republican administrations are likely to turn to the Society as well; for their part, Democratic lawmakers and interest groups will seek to limit the power and influence of the Society.²²⁶ Democratic interest groups too are advocating that—starting immediately with Joe Biden—Democratic presidents steal a page from the Republican playbook by giving greater emphasis to ideology in judicial appointments.²²⁷ This us-versus-them dynamic will further divide federal appeals judges into competing camps of Democrats and Republicans.

If we are indeed at an inflection point, en banc review deserves a critical evaluation. To the extent the en banc process becomes weaponized as a matter of course, it also becomes a threat to an independent judiciary. At the very least this merits a

Jeffrey Toobin, *The Obama Brief*, NEW YORKER (Oct. 20, 2014), <http://www.newyorker.com/magazine/2014/10/27/obama-brief>.

²²³ See *id.* (discussing Democrats controlling the D.C. Circuit through multiple appointments in 2013); Donal, *supra* note 120 (discussing the Republican’s transformation of the 9th Circuit through the appointment of 10 judges from 2018-2020).

²²⁴ Ruiz & Gebeloff, *supra* note 115.

²²⁵ See *supra* Part II.4.

²²⁶ The former head of the American Constitution Society, for example, has taken direct aim at supposed Federalist Society political activism. See Fredrickson & Segall, *supra* note 123. More significant, the Democratic Policy Committee issued a 54 page report in May 2020 regarding the role of the Federalist Society and dark money in reshaping the federal courts. See Democratic Policy Committee, *Captured Courts* (May 2020), <https://www.hsdl.org/?view&did=839500>.

²²⁷ Jess Bravin, *Biden Aims to Appoint Liberal Judges After Trump’s Conservative Push*, WALL ST. J. (Nov. 28, 2020), <https://www.wsj.com/articles/biden-aims-to-appoint-liberal-judges-after-trumps-conservative-push-11606559402>

conversation on reform. Perhaps en banc should be limited to intra-circuit conflicts? Perhaps en bancs should be subject to a super-majority requirement? Perhaps we are comfortable with en bancs being used to discipline judges from the minority party and thus no change is necessary? In any event if this is the new normal the cost and value of en bancs should be re-assessed.

Of course the other explanation for the spike in partisan en bancs is also a genuine possibility. There are ways that the Trump presidency is *sui generis*—so that the spike in partisan en banc decision-making may prove to be tied more to Trump himself and not broader Democrat-Republican differences. In answering the question of whether collegiality and judicial independence norms will survive the Trump presidency, our focus thus far has been ways in which Trump capitalized on the longstanding trends in the nation at large and in the Republican party. But legal disputes may occupy a uniquely preferred position in Trump’s orbit.

Trump has used the courts to advance his administration’s goals as well as his personal interests – and his opponents have the courts to combat him. As Peter Baker reported in 2019, “Always litigious in private business, [Trump] has brought his penchant for the legal process to the presidency as he regularly threatens to sue perceived adversaries, unlike most of his predecessors — although it generally results in more talk than tort, since he routinely fails to follow through.”²²⁸ For Shannen Coffin, former counsel to Vice President Dick Cheney, Trump has been more willing than other presidents to take the fight to the opposition in court.²²⁹

And in his rhetoric, Trump often combines talk of positive outcomes for himself with the need for conservative judges who will be faithful to the Constitution.²³⁰ In his failed effort to overturn the 2020 election in several swing states, Trump filed more than 50 lawsuits and spoke of his hopes that Republican judges would back his unsubstantiated claims of voter fraud.²³¹

²²⁸ Peter Baker, *Trump Is Fighting So Many Legal Battles, It’s Hard to Keep Track*, N.Y. TIMES (Nov. 6, 2019), <https://www.nytimes.com/2019/11/06/us/politics/donald-trump-lawsuits-investigations.html>.

²²⁹ *Id.*

²³⁰ *See id.*

²³¹ *See* Pete Williams & Nicole Via y Rada, *Trump’s Election Fight Includes Over 50 Lawsuits*, NBC NEWS (Dec. 10, 2020), <https://www.nbcnews.com/politics/2020-election/trump-s-election-fight-includes-over-30-lawsuits-it-s-n1248289>.

Beyond his own legal filings, Trump was a magnet for lawsuits and prosecutors.²³² For example, states have filed 138 separate lawsuits against the Trump administration (around 35 per year).²³³ By comparison, states filed seventy-eight multi-state suits in the eight years of President Obama's administration (around 10 per year) and seventy-six multi-state suits during President George W. Bush's eight years in office (around 10 per year).²³⁴

This means our recent data may be picking up differences on the docket as opposed to differences on the bench. A comparison of 2018-20 Trump-era en banc decisions with en banc decision-making during the Obama and George W. Bush administrations suggests that the Trump docket is different than earlier administrations. In particular, the Trump docket had far more cases directly involving the president or his signature policy initiatives.²³⁵

We identified 120 en banc decisions dating from 2018-2020. Among those, 19 cases (16 percent) involve President Trump or his most controversial policies: eleven are immigration-related, two involve executive privilege, two involve emoluments, two involve abortion through federal Title X funding, one involves financial deregulation, and one involves a new oil pipeline.²³⁶ In another 18 cases (15 percent), courts of appeals used en banc review for

²³² See Baker, *supra* note 228.

²³³ See Erik Ortiz, *State AG Lawsuits Against Trump Continue to Mount*, YAHOO NEWS (Nov. 16, 2020), <https://www.yahoo.com/news/state-ags-sued-trump-admin-103036490.html>; Reid Wilson, *States sue Trump administration at record pace*, THE HILL (Feb. 12, 2020), <https://thehill.com/homenews/state-watch/482620-states-sue-trump-administration-at-record-pace>. Ninety-six of these lawsuits were filed by Democratic state Attorneys General. *Id.*

²³⁴ *Id.*

²³⁵ We compared the en banc docket of the Trump era (2018-2020) to the final year of the Bush and Obama presidencies. Recognizing that this comparison is not comprehensive, our focus was to see whether the Trump docket was fundamentally and unequivocally different—so much so that partisanship during the Trump-era could be linked to differences between the Trump-era docket and the dockets of earlier presidents. For reasons detailed in the next two paragraphs, we think the differences are that stark.

²³⁶ See Brandon Goldstein, *Subject Matter of En Banc Review Under Presidents George W Bush, Barack Obama, and Donald Trump* (copy on file with X).

ideologically polarized issues;²³⁷ in 28 cases (23 percent), the federal government was a party.²³⁸

For the Obama administration, we reviewed 2016 *en banc* decision-making (47 cases).²³⁹ Unlike Trump, there were no cases that involved either President Obama directly or major policy initiatives pursued by the Obama administration. Eleven (23 percent) involved politically-charged issues;²⁴⁰ in another 11 cases (23 percent), the federal government was a party.²⁴¹ For the George W. Bush administration, we reviewed 2008 *en banc* decision-making (41 cases).²⁴² No case involved President Bush directly and 2 cases (5 percent) involved major policy initiatives associated with the war on terror.²⁴³ Three cases involved politically-charged issues (7 percent); the federal government was a party in 14 cases (34 percent).²⁴⁴

To summarize: for both Presidents Bush and Obama, no *en banc* decision directly involved the president and next-to-no *en banc* decision involved the signature policy initiatives of their administration; for President Trump, the president and his signature policy initiatives are regularly subject to *en banc* review.²⁴⁵

²³⁷ Five of these involve excessive use of force by police and qualified immunity, four involve discrimination in the workplace, two involve new Ohio state abortion laws, one involves an EPA deregulation policy, one involves voting procedures in Arizona, and one involves a First Amendment challenge to a federal campaign finance law. The fifteenth case involves Florida's "pay-to-vote" scheme for newly released felons, and was granted an initial *en banc* hearing on appeal. *See id.*

²³⁸*See id.*

²³⁹ We chose 2016 because it was the last year of the Obama presidency—so that Obama's influence on judicial selections would be at its apex.

²⁴⁰ Three cases involved the 2nd Amendment, three involved elections and voting laws, three involved immigration, one involved a state death sentence, and one involved police use of force. *See id.*

²⁴¹ *Id.*

²⁴² 2008 was selected because it was the last year of the Bush presidency—so that Bush's influence on judicial selection would be at its apex.

²⁴³ *See id.*

²⁴⁴ Politically-charged cases included two cases about abortion and one about elections and voting laws.

²⁴⁵ State lawsuits against Presidents Trump, Obama, and George W. Bush tell a similar story. President Trump and his most visible policy initiatives are the subject of 34 lawsuits per year; Obama and Bush were subject to 10. *See supra* notes 228-34. Earlier administrations were subject to even fewer state lawsuits.

No doubt, en banc review in the age of Trump was fundamentally different. Those differences may become the new normal or, instead, may reveal that the Trump era was an outlier. Without a crystal ball, the ultimate fate of rule-of-law norms and the potential weaponizing of en banc review remains to be seen.

One thing we know for sure though: 2018-2020 was a period of time marked by the erosion of well-entrenched norms of judicial independence and collegiality. Whatever the explanation, the current spike in en banc should at least serve as a warning on the fragility of those norms and the need to nurture and protect non-partisan norms in the future.

CONCLUSION

Going en banc is a complex mix of ideology, rule-of-law and collegiality concerns. By taking the long view of en banc decision-making across time and circuits, this article has reached the surprising and important conclusion that rule of law and judicial independence norms have played a significant role in mitigating the partisan weaponizing of en banc review. Data from 1988-2017 strongly suggests that forces beyond ideology and party loyalty affect en banc judicial decision-making. In particular, during the very period where party polarization took hold of the judicial nomination and confirmation process, en banc decision-making remained stable. There was no meaningful change in the rates of partisan splits or partisan reversals.

2018-2020 data, however, underscore that we could be in a season of change. There are significant red flags to indicate that long-standing rule-of-law and collegiality norms on the federal bench are eroding and there may come a day when en banc is purely seen as a numbers game for one party to use against the other. Recent Republican and Democratic party efforts to “flip” control of and “restructure” the circuits further suggest that the political branches will push federal courts of appeals to advance partisan goals by trading off rule of law norms.

These calls for weaponizing en banc and the dramatic spike up in partisan en banc decision-making raise basic questions both about the desirability of en banc review and the legitimacy of the

See PAUL NICOLETTE, *FEDERALISM ON TRIAL: STATE ATTORNEYS GENERAL AND NATIONAL POLICYMAKING IN CONTEMPORARY AMERICA* (2015).

federal courts of appeals. Partisan overrulings come at a substantial cost, chipping away at the very rule of law norms that underlie the three judge panel system and en banc review. Indeed, partisan en banc review reinforces a destructive “us versus them” mentality and, consequently, may well spill over to the decision-making of three judge panels and other interactions between appeals judges.

Time will soon tell whether the Trump era is an inflection point or an aberration. And while the future is a cliffhanger, this article also highlights the importance of the past. By answering the question whether historically en banc has been used as a partisan tool with a resounding no, this article demonstrates the heretofore durability of rule of law norms. Consequently, before assuming that the Trump era is the new normal, we should first allow the dust of the Trump presidency to settle. Only then will we know if en banc is ultimately the story of the triumph or demise of the rule of law.