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## ARTICLES

### WEAPONIZING EN BANC

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*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 with 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 has ever 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*

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*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 review. 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, “[w]e certainly 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.”<sup>1</sup> This

<sup>1</sup> 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>.

view is pervasive among federal judges and legal scholars alike;<sup>2</sup> it is very much tied to judicial independence and the legitimacy of courts generally.<sup>3</sup> 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 now dominates judicial confirmation politics is a byproduct of the widely shared belief that there are indeed “Trump judges” and “Obama judges.”<sup>4</sup> Less obvious but perhaps more telling, a team mentality could 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 sit together and make a decision for the circuit as a whole.<sup>5</sup> This process mirrors the style of the U.S. Supreme Court: 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.

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<sup>2</sup> See *id.* See generally Dan M. Kahan, David Hoffman, Daniel Evans, Neal Devins, Eugene Lucci & Katherine Cheng, *Ideology or Situation Sense? An Experimental Investigation of Motivated Reasoning and Professional Judgment*, 164 U. PA. L. REV. 349, 355 (2016) (concluding that “judges can in fact be expected to be neutral decision makers in many politically charged cases” but noting that our current system of justice lacks reliable practices for communicating such neutral resolutions to the public); Wendy L. Martinek, *Judges as Members of Small Groups* (arguing that judicial decisions on collegial courts are the product of group choices), in *THE PSYCHOLOGY OF JUDICIAL DECISION MAKING* 73 (David E. Klein & Gregory Mitchell eds., 2010).

<sup>3</sup> See, e.g., RICHARD H. FALLON, JR., *LAW AND LEGITIMACY IN THE SUPREME COURT* 20–46 (2018); see also Tara Leigh Grove, *Book Review: The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240 (2019) [hereinafter Grove, *Legitimacy Dilemma*] (reviewing RICHARD H. FALLON, JR., *LAW AND LEGITIMACY IN THE SUPREME COURT* (2018)).

<sup>4</sup> See Adam Liptak, *Chief Justice Defends Judicial Independence After Trump Attacks 'Obama Judge,'* N.Y. TIMES (Nov. 21, 2018), <https://www.nytimes.com/2018/11/21/us/politics/trump-chief-justice-roberts-rebuke.html> (describing the politicization of the judicial confirmation process).

<sup>5</sup> The circuits vary somewhat in their rules for which judges sit en banc (senior judges, judges sitting by designation, etc.). See Act of 1978, Pub. L. No. 95-486, 95 Stat. 1624 (noting that each court of appeals has its own rules for performing en banc review). Due to its size, the Ninth Circuit rarely sits all together; rather, its en banc courts consist of the Chief Judge and ten non-recused judges who are randomly drawn. See 9TH CIR. R. 35-3. 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) (describing the Act of 1978 as “[t]he most recent evolution in the en banc procedure” because Congress granted circuit courts “considerable leeway in controlling the en banc process”).

En banc decisions are rare, accounting for less than one percent of appellate decisions, and they are uniquely awkward among judicial acts.<sup>6</sup> By definition, a judge sitting en banc is sitting in judgment of a colleague on the same court.<sup>7</sup> 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 lunchroom later that day. Judges thus think of en banc proceedings as divisive and unpleasant; some circuits even tout their low en banc rate as illustrative of a collegial and apolitical culture.<sup>8</sup>

Despite their rarity, en bancs deserve special scholarly attention. En banc review is the one time when lower court judges have the potential to 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.<sup>9</sup> The entire Fourth Circuit, however—comprised of judges the majority of whom were appointed

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<sup>6</sup> See 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.”).

<sup>7</sup> See, e.g., J. WOODFORD HOWARD, JR., COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM: A STUDY OF THE SECOND, FIFTH, AND DISTRICT OF COLUMBIA CIRCUITS 189, 215–19 (1981) (“Group decision making thus ranks . . . as a major potential limit on the personal discretion of circuit judges.”).

<sup>8</sup> See Jon O. 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 in 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*, ON APPEAL (Bar Ass’n for the Third Fed. Cir., Brick, N.J.), Dec. 2010, at 1, 5.

<sup>9</sup> *In re Trump*, 928 F.3d 360, 379 (4th Cir. 2019). The panel consisted of Judges Niemeyer, Shedd, and Quattlebaum, who were appointed by Presidents Reagan, George W. Bush, and Trump, respectively. See *Biographical Directory of Article III Federal Judges, 1789–Present*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/search/advanced-search> (last visited June 13, 2021) (select “Republican” under the “Party of Appointing President” tab).

by Democrats—reversed the panel’s decision en banc.<sup>10</sup> The ultimate decision broke down entirely along 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.”<sup>11</sup>

Even the most optimistic believer in an independent non-partisan judiciary would flinch at these events. It seems at least plausible 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 by Democrats.<sup>12</sup> Take the Fifth Circuit en banc decision denying a remedy for a Mexican teenager shot at the border,<sup>13</sup> the D.C. Circuit en banc decision about whether an immigrant detainee could have an abortion,<sup>14</sup> and the Ninth Circuit decision regarding whether children in deportation hearings have a right to counsel,<sup>15</sup> to name a few.

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.<sup>16</sup> The federal courts of appeals

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<sup>10</sup> *In re Trump*, 958 F.3d 274 (4th Cir. 2020) (en banc).

<sup>11</sup> *Id.* at 287 n.6 (Wilkinson, J., dissenting). Compare *id.* at 289–90 (Wynn, J., concurring) (“[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 *id.* at 292 (Wilkinson, J., dissenting) (“[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.”).

<sup>12</sup> For other recent examples, see *infra* notes 55–61 and accompanying text.

<sup>13</sup> *Hernandez v. United States*, 785 F.3d 117 (5th Cir. 2015) (en banc).

<sup>14</sup> *Garza v. Hargan*, 874 F.3d 735 (D.C. Cir. 2017) (en banc) (reinstating the district court’s order requiring the government to grant access to an abortion).

<sup>15</sup> *C.J.L.G. v. Barr*, 923 F.3d 622 (9th Cir. 2019) (en banc) (finding that certain indigent children have a right to appointed counsel in immigration proceedings).

<sup>16</sup> We elaborate upon our measures for partisan behavior in Part III, *infra*, but in short, we use two: (1) “partisan reversals” are instances in which a circuit dominated by appointments from one party decides 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 the appointing President is not a perfect measure of partisanship, but it is a widely

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 outmuscle 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 review 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 is being used in this "partisan warrior" way—and whether that use is new. Although legal scholars and political scientists have written on en banc decision-making generally,<sup>17</sup> relatively little has been said about the partisan dimensions of going en banc and nobody has comprehensively studied that dynamic over time.<sup>18</sup> 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, LexisNexis, 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 fifty-five years: 1966–1968, 1976–1978, 1986–1988, 1996–1998, 2006–2008, and 2016–2018.<sup>19</sup> We then additionally tracked and coded en banc decisions from 2019–2020 so we

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used measure by political scientists and we think it captures partisanship (not ideology) in an important way.

<sup>17</sup> Important examples include George, *supra* note 5; Michael E. Solimine, *Ideology and En Banc Review*, 67 N.C. L. REV. 29 (1988); Christopher E. Smith, *Polarization and Change in the Federal Courts: En Banc Decisions in the U.S. Courts of Appeals*, 74 JUDICATURE 133 (1990); Micheal W. Giles, Thomas G. Walker & Christopher Zorn, *Setting a Judicial Agenda: The Decision to Grant En Banc Review in the U.S. Courts of Appeals*, 68 J. POL. 852 (2006) [hereinafter Giles et al., *Setting a Judicial Agenda*].

<sup>18</sup> For helpful prior work on specific circuits and specific time periods, see Tom S. Clark, *A Principal-Agent 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, Donald R. Songer & Stefanie A. Lindquist, *Appellate Court Supervision in the Federal Judiciary: A Hierarchical Perspective*, 37 LAW & SOC'Y REV. 143 (2003); Note, *The Politics of En Banc Review*, 102 HARV. L. REV. 864 (1989).

<sup>19</sup> We collected and coded cases from the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits. We left the Federal Circuit out of our study because it differs from the other circuits in terms of its docket and its function.

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 identified 952 en banc decisions sampled over fifty-four years.<sup>20</sup> 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 the 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 (a “partisan reversal”), and/or en banc decisions in which judges vote as a team consistent with the party of the President who appointed them (a “partisan split”). Perhaps most importantly, we also expected to see these patterns align over time with pre-documented periods of polarization, which has grown at a steady clip from the post-Reagan period to today.

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.<sup>21</sup> 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 reveal that partisanship occasionally plays a role in en banc decisions,

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For additional discussion of our research methodology, see *infra* notes 149–52 and accompanying text.

<sup>20</sup> The methodology to identify these cases is described fully in Part III. See *infra* note 149 and accompanying text; see also *supra* note 19 and accompanying text.

<sup>21</sup> The rise of partisan en bancs in the 1980s may also be attributed to a dramatic sixty-three percent increase in federal appeals judgeships from 1978–1984. See *infra* note 75 and accompanying text.

but not usually and not in any predictable pattern.<sup>22</sup> 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, partisan splits within that set of cases hovered at around only nineteen percent of all en banc decisions and partisan reversals stayed around seventeen percent. This is far less than our hypothesis predicted 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-entrenched 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 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 the customs of the courts, collegiality, and the desire not to appear partisan.

But 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 of en banc decisions—more in both categories than we observed in any other time period over six decades. While the rate of going en banc did not change, the level of partisan intensity in the en banc decisions issued did change—at least as reflected by the significantly increased number of partisan splits and partisan reversals. This Trump-era uptick is very striking and calls into question the persistence of norms pushing against partisan judging. Almost 35% of en banc decisions in 2018–2020 involved either a partisan reversal or partisan split. Compare this to 16% in 2016–2017, 19% in 2006–2008, and 20% in 1996–1998. This dwarfs even the previous high point of partisanship

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<sup>22</sup> 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 a 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 only on the cases where the circuits do go en banc. For additional discussion, see *infra* note 152 and accompanying text.

we observed in 1986–1988, which amounted to 25% of all en banc decisions.

Significantly, weaponizing en banc seems to be on the rise in circuits dominated by judges appointed by Democrats, as well as in those dominated by judges appointed 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 included increasing federal courts of appeals judgeships as a way of counterbalancing Trump judicial appointments.<sup>23</sup>

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 review in this partisan way? One day will we say President Trump changed the face of appellate decision-making and quelled the forces of collegiality that up to this point seemed to dominate en banc review? Or will President Biden’s promised “return to normalcy” reinvigorate those forces?<sup>24</sup> 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 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 review and prior studies of the political dynamics involved. Part II tracks the rise of the partisan ideological divide within the federal courts of appeals and explains why we speculated that the use of en banc review 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 of our discoveries. Part IV details the forces at work that seem historically to resist the use of en banc review as a weapon. Part V tries to

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<sup>23</sup> See *infra* note 249 and accompanying text.

<sup>24</sup> Then-candidate Joe Biden promised both a “return to normalcy” and a commitment to appointing progressive judges. See *infra* note 230 and accompanying text.

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.<sup>25</sup> It is rarely used and some say it was never even meant to be part of Article III decision-making below the Supreme Court.<sup>26</sup> 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, and the prevalence of dissenting opinions, just to name a few.<sup>27</sup> 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, that is, what these judges see their role to be: Are they judges who, while often disagreeing with each other, are still jointly committed to an independent judiciary, or are courts just another casualty of partisan polarization in which judges line up in teams and fight it out?<sup>28</sup> This existential question into the very soul of the federal courts deserves a historical lens. We thus undertake a brief tour of the history of en banc and its study by political scientists before unpacking what we found in our longitudinal exploration.

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<sup>25</sup> See Copus, *supra* note 6, at 608.

<sup>26</sup> See BANKS, *supra* note 18, at 91 (noting that “[t]he existence of en banc jurisdiction . . . is the result of a historical accident” and was never contemplated to be part of Article III judging).

<sup>27</sup> See LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* 255, 255–303 (2013) (analyzing “dissent aversion,” when “a judge [opts] not to dissent even when he disagrees with the decision,” and noting that there are several factors at play that influence the final decision).

<sup>28</sup> 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 and are therefore far more likely to be reviewed by the Supreme Court. Tracey E. George & Michael E. Solimine, *Supreme Court Monitoring of Courts of Appeals En Banc*, 9 S. CT. ECON. REV. 171, 197 (2001).

### A. *The 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.<sup>29</sup> 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.<sup>30</sup> Neither the Evarts Act nor the subsequent 1911 Judicial Code<sup>31</sup> 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.<sup>32</sup> 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,” and the Supreme Court affirmed the soundness of that reasoning on review.<sup>33</sup>

The authority to go en banc was recognized officially by Congress in 1948 and now derives from Rule 35 of the Federal Rules of Appellate Procedure (FRAP).<sup>34</sup> 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.”<sup>35</sup>

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<sup>29</sup> Evarts Act, ch. 517, 26 Stat. 826 (1891). Before the Civil War, appellate courts had no real separate identity. They were staffed by Supreme Court justices riding circuit. See Christopher P. Banks, *The Politics of En Banc Review in the “Mini-Supreme Court,”* 13 J.L. & POL. 377, 379 n.16 (1997) (describing the history of en banc review). Following the Civil War, plaintiffs began to bring more cases in the federal court system, putting strain on a system that had not been comprehensively reorganized since the Federal Judiciary Act of 1789. *Id.*

<sup>30</sup> See George, *supra* note 5, at 223.

<sup>31</sup> Act of Mar. 3, 1911, ch. 231, 36 Stat. 1087.

<sup>32</sup> See Douglas H. Ginsburg & Donald Falk, *The Court En Banc: 1981-1990*, 59 GEO. WASH. L. REV. 1008, 1010 (1991) (describing *Comm’r v. Textile Mills Sec. Corp.*, 117 F.2d 62 (3d Cir. 1940)). The Ninth Circuit contemplated the power to sit en banc even earlier, but decided that they did not have the power to do so. See George, *supra* note 5, at 227–28 (referencing *Lang’s Estate v. Comm’r*, 97 F.2d 867 (9th Cir. 1938), in which a Ninth Circuit panel asked the Supreme Court to resolve a conflict between its decision and that of a previous panel on the same issue, rather than overturn the previous panel itself).

<sup>33</sup> Ginsburg & Falk, *supra* note 32, at 1010–11 (describing *Comm’r v. Textile Mills Sec. Corp.*, 117 F.2d 62 (3d Cir. 1940), *aff’d*, 314 U.S. 326 (1941)).

<sup>34</sup> See BANKS, *supra* note 18, at 94–95; George, *supra* note 5, at 229.

<sup>35</sup> FED. R. APP. P. 35; see also Solimine, *supra* note 17, at 34–35 (“In the wake of rule 35, each circuit has re promulgated rules and procedures to govern both litigant and judicial

The first reason to go en banc—clearing up intra-circuit splits—is the one historically considered and traditionally emphasized by judges as the “primary” reason to go en banc.<sup>36</sup> 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.’”<sup>37</sup>

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.”<sup>38</sup> And Judge Newman of the Second Circuit emphasized that en banc decisions outside of the housekeeping function should involve questions, as Rule 35 states, of “exceptional importance.”<sup>39</sup>

The second reason that en banc decisions are authorized—to answer questions of exceptional importance—is the rationale that gives rise to potential partisan dynamics. Judge Frank Coffin of the First Circuit once said that courts sitting en banc “resemble a small legislature more than a court.”<sup>40</sup> Although using en banc review to answer important questions has always had its champions,<sup>41</sup> it is a

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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.”).

<sup>36</sup> George, *supra* note 5, at 234 n.112; *see also* Neil D. McFeeley, *En Banc Proceedings in the United States Courts of Appeals*, 24 IDAHO L. REV. 255, 261 (1987) (“The major reason for the existence of en banc rehearings is to ensure intra-circuit consistency.”).

<sup>37</sup> HOWARD, *supra* note 7, at 217.

<sup>38</sup> Arthur D. Hellman, “*The Law of the Circuit*” Revisited: *What Role for Majority Rule?*, 32 S. ILL. U. L.J. 625, 626 (2008) [hereinafter Hellman, *Majority Rule*] (quoting Judge James R. Browning, Annual Judicial Conference, Second Judicial Circuit of the United States, 106 F.R.D. 103, 162 (1984)).

<sup>39</sup> Newman, *supra* note 8, at 386. *But cf.* A. Lamar Alexander Jr., Note, *En Banc Hearings in the Federal Courts of Appeals: Accommodating Institutional Responsibilities (Part I)*, 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 questionable.”); *id.* at 578 (“[E]n banc proceedings are sometimes the only appropriate method of dealing with serious intra-circuit conflict.”).

<sup>40</sup> FRANK M. COFFIN, ON APPEAL: COURTS, LAWYERING, AND JUDGING 5 (1994).

<sup>41</sup> *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 intra-circuit conflicts, but also to correct and deter panel opinions that are pretty clearly wrong.’”); Ginsburg & Falk, *supra* note 32, at 1034 (“[T]he majority should rule.”); Hellman, *Majority Rule*, *supra* note 38, at 626 (quoting a commission chaired by Supreme Court Justice Byron White as saying “issues of exceptional importance will be determined by all [of] the judges for whom the decision speaks” (citing COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, FINAL REPORT 51 (1998))); *see also* Sadinsky, *supra*

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.”<sup>42</sup>

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.”<sup>43</sup> 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.”<sup>44</sup> Justice Harry Blackmun put it memorably when talking to the Eighth Circuit Judicial Conference: “[W]hen 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 the other way. I am a little bit concerned. Maybe I am more than a little bit concerned.”<sup>45</sup>

### B. *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.<sup>46</sup> Of sixty-one cases, only sixteen were unanimously decided, and six of the non-unanimous cases were decided by just one vote.<sup>47</sup> Similarly, Professor Chris Smith found partisan splits in his study of all circuit court en banc decisions in the 1980s.<sup>48</sup> Smith looked at non-unanimous en banc decisions and categorized which were polarized—meaning, in his terms, which resolved with a bloc of Reagan

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note 6, at 2017–18 (noting that it is more cost-effective for smaller courts, like the First Circuit, to hold en banc hearings or rehearing as compared to larger courts).

<sup>42</sup> 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 32, 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.”).

<sup>43</sup> BANKS, *supra* note 18, at 98.

<sup>44</sup> *Id.* 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.”).

<sup>45</sup> George, *supra* note 5, at 241 (quoting Justice Harry Blackmun, Address at the Eighth Circuit Court of Appeals Judicial Conference, St. Louis, Mo., at 01:04:18 (July 23, 1988), <https://www.c-span.org/video/?3581-1/supreme-court-justices-harry-blackmun>).

<sup>46</sup> Banks, *supra* note 29, at 405 (discussing the Ginsburg & Falk study).

<sup>47</sup> *Id.*; Ginsburg & Falk, *supra* note 32, app. at 1054.

<sup>48</sup> Smith, *supra* note 17, at 137.

appointees on one side against the rest of the court.<sup>49</sup> The results showed that 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.<sup>50</sup>

In 1999, Professor Tracey George was one of the first to test empirically *why* circuit courts went en banc.<sup>51</sup> 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.<sup>52</sup> Professor George endorsed a “hybrid” multifarious theory for why courts go en banc.<sup>53</sup> It was true, she found, that appellate judges went en banc for house-keeping 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 with the court’s decision to grant en banc review.<sup>54</sup>

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 every circuit from 1986 to 1996.<sup>55</sup> He found statistically signifi-

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<sup>49</sup> *Id.* at 135–37.

<sup>50</sup> *Id.* at 137. For a contrary view of lopsided en banc voting, see Professor Michael Solimine’s 1988 study in which he found little cause for concern, *supra* note 17, at 33 (“The study finds only a handful of cases in which Reagan-appointed judges alone provided the votes necessary to overturn a disfavored panel decision.”).

<sup>51</sup> George, *supra* note 5, at 216 (“Surprisingly little is known about why circuit courts select certain cases for en banc rehearing.”). For a detailing of the reasons circuit judges offer each other in favor of or against going en banc, see Stephen L. Wasby, *Why Sit En Banc?*, 63 HASTINGS L.J. 747 (2012).

<sup>52</sup> The circuits Professor George examined were the Second, Fourth, and Eighth Circuits, from 1956 to 1996. See George, *supra* note 5, 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 Decisionmaking on U.S. Courts of Appeals*, 58 OHIO ST. L.J. 1635, 1670 (1998).

<sup>53</sup> George, *supra* note 5, at 219. Ultimately, Professor George concluded that there are three factors which largely account for the cases that go en banc: (1) when a panel has reversed a lower court, (2) when a panel judge dissents, and (3) when the ruling of the panel is liberal. See *id.* at 219–20.

<sup>54</sup> *Id.* at 256–57. 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. See Giles et al., *Setting a Judicial Agenda*, *supra* note 17, at 865. Ultimately, Giles concluded, like Professor George, that the decision to go en banc could not be neatly labeled: “[T]he final vote to grant or deny a full-court rehearing exhibits relatively little in the way of systematic variation.” *Id.* at 864.

<sup>55</sup> Clark, *supra* note 18. 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 grouped together ideologically simpatico Republicans and Democrats, whereas we focus on the growing partisan divide.

cant results indicating some use of en banc as a weapon.<sup>56</sup> 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 disposition”), it was more likely to be reheard en banc.<sup>57</sup> 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.<sup>58</sup>

These prior studies helped inform our instinct that en banc review 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 review has always been used as a partisan weapon nationwide, or whether we were witnessing something new or something regional.<sup>59</sup>

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 to 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.<sup>60</sup> In so doing, as has now become routine, reporters labeled

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<sup>56</sup> *Id.* at 77–78.

<sup>57</sup> *Id.* at 62.

<sup>58</sup> *Id.* For a similar example, focused on the Fourth and Fifth Circuits in the year 1995 to 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, 159 (2000) (finding that panel decisions he classified as “liberal” were reheard more often by the en banc court). See also Michael W. Giles, Virginia A. Hettinger, Christopher Zorn & Todd C. Peppers, *The Etiology of the Occurrence of En Banc in the U.S. Court of Appeals*, 51 AM. J. POL. SCI. 449 (2007) [hereinafter Giles et al., *Etiology*] (arguing that ideology has long influenced the decision to go en banc).

<sup>59</sup> Generalizations regarding partisanship in the 1980s are also complicated by the sixty-three percent growth in the number of federal appeals judgeships from 1978 to 1984. See *infra* note 75. Moreover, 1980s studies are not uniform in their conclusions regarding partisanship. See *supra* note 54.

<sup>60</sup> From 2018 to the beginning of 2021, en banc decision-making was featured in forty-two 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 Memorandum from Canaan Suitt to Neal Devins and Allison Orr Larsen, *Newspaper Coverage of En Banc Decisions* (Jan. 11, 2021) (on file with authors). A similar search of those papers in earlier decades revealed far less interest in en banc decision-making: two from 1966 to 1968, three from 1976 to 1978, two from 1986 to 1988, twenty-seven from 1996 to 1998, and eleven from 2006 to 2008. See *id.*

the federal circuits “Democratic” or “Republican” when deciding the high stakes issues that divide the parties.<sup>61</sup>

Most familiar, perhaps, are the cases addressing what could be called the personal Trump docket—that is, decisions in which President Trump was personally invested, in more than just a defending-policy kind of way. Examples include the D.C. Circuit decision denying relief to former National Security Adviser Michael Flynn (an en banc decision that reversed a panel composed of Trump appointed judges)<sup>62</sup> or a similar en banc move in the Don McGahn subpoena litigation.<sup>63</sup> Likewise, party line voting was on display when the Fourth Circuit ruled en banc against the President in both the emoluments clause litigation<sup>64</sup> and a 2018 challenge to President Trump’s travel ban (a decision that quite unusually bypassed the three judge panel).<sup>65</sup>

But examples of partisan warfare in recent en bancs are not limited to the Trump docket, nor can they easily be 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 by Republican ones, and in cases covering a wide variety of issues.

For example, in the Sixth 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.<sup>66</sup> The panel in that case was comprised of two Democrat-appointed judges and one Trump appointee, who dis-

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<sup>61</sup> For 2020 examples of reporters focusing on the political affiliations of appeals judges, see Sharon LaFraniere, *Appeals Court Allows Emoluments Suit Against Trump to Proceed*, N.Y. TIMES (May 14, 2020), <https://www.nytimes.com/2020/05/14/us/politics/trump-emoluments-clause-fourth-circuit.html>; Jacob Gershman, *Federal Court Says Florida Felons Can’t Vote Until They Pay Fines*, WALL ST. J. (Sept. 11, 2020), <https://www.wsj.com/articles/federal-court-says-florida-felons-cant-vote-until-they-pay-fines-11599849285>; 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>.

<sup>62</sup> *In re Flynn*, 973 F.3d 74, 78 (D.C. Cir. 2020) (en banc).

<sup>63</sup> *Comm. on the Judiciary of the U.S. House of Representatives v. McGahn*, 968 F.3d 755, 760 (D.C. Cir. 2020) (en banc).

<sup>64</sup> *In re Trump*, 958 F.3d 274, 280 (4th Cir. 2020) (en banc).

<sup>65</sup> *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 572 (4th Cir. 2017) (en banc). Another recent partisan en banc ruling from the Fourth Circuit is *Wise v. Circosta*, 978 F.3d 93 (4th Cir. 2020) (en banc), a 2020 decision regarding ballot extension disputes in North Carolina. 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. *Id.* at 117 (Niemeyer, J., dissenting).

<sup>66</sup> *Gary B. v. Whitmer*, 957 F.3d 616, 621 (6th Cir. 2020).

sented;<sup>67</sup> it is an example of what we call a “renegade panel,” where the panel’s partisan composition differs from the composition of the circuit as a whole.<sup>68</sup> 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.<sup>69</sup> 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.<sup>70</sup> Other examples of strictly party-line en banc rulings include a September 2020 Eleventh Circuit ruling upholding limits on felon voting in Florida<sup>71</sup> and a May 2020 Seventh Circuit decision holding a Wisconsin county liable for allowing a male guard to sexually assault female inmates.<sup>72</sup>

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.”<sup>73</sup> Similarly, a December 2020 article revealed dis-

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<sup>67</sup> *Id.* at 620; *see also* FED. JUD. CTR., *supra* note 9 (select “Sixth Circuit” under the “Court” tab).

<sup>68</sup> Partisan behavior can also manifest itself when a court of appeals 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, *see* *New York v. U.S. Dep’t of Justice*, 951 F.3d 84 (2d Cir. 2020), *reh’g denied*, 964 F.3d 150 (2d Cir. 2020) (en banc); a transgender prisoner’s right to sex-reassignment surgery, *see* *Edmo v. Corizon, Inc.*, 935 F.3d 757 (9th Cir. 2019), *reh’g denied*, 949 F.3d 489 (9th Cir. 2020) (en banc); and the Obamacare severability case, *see* *Texas v. United States*, 945 F.3d 355 (5th Cir. 2019), *reh’g denied*, 949 F.3d 182 (5th Cir. 2019) (mem.) (en banc). Another recent Ninth Circuit en banc denial, involving immigration, prompted a stinging dissent from twelve of the circuit’s thirteen Republican judges, effectively accusing the Democratic majority of manipulating the Circuit’s unique en banc process. *See* William Yeatman, *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> (discussing Vega-Anguiano v. Barr, 942 F.3d 945 (9th Cir. 2019), *reh’g denied*, 982 F.3d 542 (9th Cir. 2019) (en banc)).

<sup>69</sup> *See* Gary B. v. Whitmer, 958 F.3d 1216, 1216 (6th Cir. 2020) (mem.) (en banc); Colter Paulson, *Sixth Circuit Vacates Right-to-Literacy Ruling*, NAT’L L. REV. (June 11, 2020), <https://www.natlawreview.com/article/sixth-circuit-vacates-right-to-literacy-ruling>.

<sup>70</sup> *See* Gary B., 958 F.3d at 1216 (vacating panel’s decision); Gary B. v. Whitmer, Nos. 18-1855, 18-1871, 2020 U.S. App. LEXIS 18312, at \*10 (6th Cir. June 10, 2020) (mem.) (en banc) (dismissing case as moot).

<sup>71</sup> *Jones v. Governor of Fla.*, 975 F.3d 1016, 1025, 1028 (11th Cir. 2020) (en banc).

<sup>72</sup> *J.K.J. v. Polk Cnty.*, 960 F.3d 367, 371 (7th Cir. 2020) (en banc).

<sup>73</sup> *Manning v. Caldwell*, 930 F.3d 264, 286 (4th Cir. 2019) (en banc) (Keenan, J., concurring). The Fourth Circuit echoed the same attitude one year later in a partisan en banc decision invalidating predictive policing in high-crime areas. *See* *United States v. Curry*, 965 F.3d 313, 315–16 (4th Cir. 2020) (en banc). Tempers flared as a judge in the

cord 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.”<sup>74</sup>

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 picture of en banc review. 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.<sup>75</sup> We thus assembled the most comprehensive en banc database of which we are aware, covering 952 decisions across six decades and from twelve circuits.<sup>76</sup> We 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-

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majority accused the dissent of “writ[ing] today with a smooth pen and a tin ear.” *Id.* at 344 (Thacker, J., concurring); see also Debra Cassens Weiss, *4th Circuit Spars Over Predictive Policing*, A.B.A. J. (July 16, 2020, 2:45 PM), <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*, 72 S.C. L. REV. 917 (2021).

<sup>74</sup> Yeatman, *supra* note 68.

<sup>75</sup> 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 sixty-three percent growth in the number of federal appeals judgeships from 1978 to 1984. See *U.S. Courts of Appeals: Additional Authorized Judgeships*, U.S. Cts., <https://www.uscourts.gov/sites/default/files/appealsauth.pdf> (last visited June 13, 2021) (noting that ninety-three total appeals court judgeships existed before 1978 and that fifty-nine additional judgeships were authorized between 1978 and 1984).

<sup>76</sup> Another limit on the prior studies that we quickly encountered 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 gather en banc decisions from both the Westlaw database, the Federal Judicial Center, and from citations in subsequent opinions. See *infra* Part III and notes 149–51 and accompanying text.

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.

### A. *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.<sup>77</sup> This was true, of course, not just with appointments to the Supreme Court, but in the lower courts as well.

From 1945 to 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.<sup>78</sup> When appointing lower court judges in states subject to school desegregation lawsuits, for example, Presidents Kennedy and Johnson appointed both integrationists and segregationists.<sup>79</sup> Reflecting the limited salience of ideology during this time, President Eisenhower’s appointees to the federal courts of appeals cast a near identical percentage of liberal votes (fifty-six percent) as did President Kennedy’s appointees (fifty-nine percent) and President Johnson’s appointees (fifty-nine percent).<sup>80</sup>

Appointments to the federal courts of appeals by Presidents Richard Nixon and Gerald Ford further highlight the limited salience of ideology before President Reagan. President Nixon sought to woo conservatives opposed to criminal justice reforms and school bussing;

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<sup>77</sup> See Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. 301, 331–33, 337–38 (2017) [hereinafter Devins & Baum, *Split Definitive*].

<sup>78</sup> See NEAL DEVINS & LAWRENCE BAUM, *THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT* 105 (2019) [hereinafter DEVINS & BAUM, *COMPANY*] (noting that, in 1968, liberal Republicans existed and Democrats ran the ideological gamut).

<sup>79</sup> See Tara Leigh Grove, *Sacrificing Legitimacy in a Hierarchical Judiciary*, 121 COLUM. L. REV. 1555, 1572–74 (2021) (observing that Presidents Kennedy and Johnson deferred to the preferences of home-state Democratic Senators and appointed segregationists).

<sup>80</sup> CASS R. SUNSTEIN, DAVID SCHKADE, LISA M. ELLMAN & ANDRES SAWICKI, *ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY* 114–15 tbl.6-1 (2006).

at the same time, he was careful not to alienate northern liberals who were still a key part of the Republican coalition.<sup>81</sup> “[P]olitics far more than ideology” drove President Nixon’s decision to appoint moderates.<sup>82</sup> A ranking of liberal votes cast by federal court of appeals judges between 1952 and 2008 places President Nixon’s appointees (forty-six percent) and President Ford’s appointees (forty-four percent) smack in the middle—closer to President Bill Clinton’s appointees (forty-eight percent) than to appointees of Republican Presidents Ronald Reagan (thirty-nine percent), George H.W. Bush (thirty-six percent), and George W. Bush (thirty-eight percent).<sup>83</sup>

More telling, there was little opportunity for a significant partisan divide to emerge in the period before President Reagan. Studies of roll call votes in Congress show that there was next to no ideological difference between congressional Democrats and Republicans from 1930 to 1980.<sup>84</sup> Democrats and Republicans alike occupied every ideological niche and there was a significant cohort of moderates.<sup>85</sup>

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 approved with broad bipartisan support.<sup>86</sup> For example, from 1945 to

<sup>81</sup> See KEVIN J. McMAHON, *NIXON’S COURT: HIS CHALLENGE TO JUDICIAL LIBERALISM AND ITS POLITICAL CONSEQUENCES* 2–3, 7–8 (2011) (noting that President Nixon did not expect complete ideological loyalty even from his Supreme Court nominees on those issues of criminal justice and school desegregation).

<sup>82</sup> *Id.* at 6. Of President Nixon’s four Supreme Court appointments, William Rehnquist stood alone as a strong conservative. See *id.* (observing that President Nixon’s other three appointees—Warren Burger, Harry Blackmun, and Lewis Powell—were more moderate).

<sup>83</sup> SUNSTEIN ET AL., *supra* note 80, at 114–15 tbl.6-1. President Jimmy Carter’s court of appeals nominees cast liberal votes fifty-four percent of the time. *Id.*

<sup>84</sup> See NOLAN McCARTY, KEITH T. POOLE & HOWARD ROSENTHAL, *POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES* 30–31 figs.2.8 & 2.9 (2006) (showing high ideological overlap between parties in both the House and Senate from the Great Depression through the mid-1980s and declining thereafter).

<sup>85</sup> See SEAN M. THERIAULT, *PARTY POLARIZATION IN CONGRESS* 26 (2008) (noting that, in the 93rd Congress of 1973 to 1974, “95 percent of Republicans were more liberal than the most conservative Democrat, and 36 percent of Democrats were more conservative than the most liberal Republican”); see also Steven S. Smith & Gerald Gamm, *The Dynamics of Party Government in Congress*, in *CONGRESS RECONSIDERED* 141, 147 fig.7-2, 151 fig.7-4 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 9th ed. 2009) (showing very low differences in ideological scores between the two parties from 1937 to 1977, measured by legislators’ roll-call voting records in Congress).

<sup>86</sup> See Sarah Binder & Forrest Maltzman, *Advice and Consent During the Bush Years: The Politics of Confirming Federal Judges*, *JUDICATURE*, May–June 2009, at 320, 324–25, 325 figs.3A & 3B (showing that confirmation processes from 1947 to 1987 were typically much shorter than confirmation processes from 1987 onwards). 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 courts of appeals judges. See SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT*

1980, the confirmation rate for presidential nominations to the federal circuit courts ranged from approximately eighty to ninety-five percent.<sup>87</sup>

### B. *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 emphasize ideological divisions between the parties.<sup>88</sup> Accordingly, the Reagan administration made ideological considerations “the most important criteria” in the screening of judicial candidates.<sup>89</sup> Critical of the Nixon and Ford administrations’ appointment of Democrats to the federal bench and their related failure to take account of the “philosophical grounding” of judicial candidates,<sup>90</sup> the

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THROUGH REAGAN 134–35 (1997) (noting that state-level Republican Party organizations played a role in judicial selection during the Eisenhower presidency when both home-state Senators were Democrats). This system of “courtesy” also ensured ideological diversity, since both 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 Micheal W. Giles, Virginia A. Hettinger & Todd Peppers, *Picking Federal Judges: A Note on Policy and Partisan Selection Agendas*, 54 POL. RSCH. Q. 623, 631, 638 (2001) [hereinafter Giles et al., *Picking Federal Judges*] (“[T]hese findings suggest that, at a minimum, Presidents under the condition of senatorial courtesy become more responsive to the political milieu of the state . . .”).

<sup>87</sup> See Keith E. Whittington, *Partisanship, Norms, and Federal Judicial Appointments*, 16 GEO. J.L. & PUB. POL’Y 521, 525, 526 fig.2 (2018) (showing that only about five to twenty percent of federal circuit court nominees were not confirmed during the era from the Truman through the Carter administrations).

<sup>88</sup> See David Von Drehle, *Political Split Is Pervasive*, WASH. POST (Apr. 25, 2004), <https://www.washingtonpost.com/archive/politics/2004/04/25/political-split-is-pervasive/aa71188d-303b-4a0f-a199-c533104a9b4e> (“[Reagan] coaxed religious conservatives and Cold Warriors away from the Democratic Party while making it uncomfortable for liberals to remain in the GOP.”); see also Kate O’Beirne, *Rockefeller Republicans Take Manhattan*, NAT’L REV. (July 7, 2004, 12:39 PM), <https://www.nationalreview.com/2004/07/rockefeller-republicans-take-manhattan-kate-obeirne> (reporting that the Republican National Convention during President George W. Bush’s second presidential campaign appealed to swing voters by enlisting speakers considered to be the “mavericks and dissidents who represent[ed] a minority in Ronald Reagan’s GOP”).

<sup>89</sup> DAVID ALISTAIR YALOF, *PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES* 134 (1999).

<sup>90</sup> David M. O’Brien, *Federal Judgeships in Retrospect* (quoting Stephen Markman, one of the Reagan administration officials in charge of judicial selection), in *THE REAGAN PRESIDENCY: PRAGMATIC CONSERVATISM AND ITS LEGACIES* 327, 331 (W. Elliot Brownlee & Hugh Davis Graham eds., 2003), as reprinted in *Why Many Think That Ronald Reagan’s Court Appointments May Have Been His Chief Legacy*, HIST. NEWS NETWORK, <http://www.historynewsnetwork.org/article/10968> (last visited June 6, 2021).

Reagan administration saw the courts as a “primary player in the formulation of public policy.”<sup>91</sup>

The Reagan 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, which was established in 1982,<sup>92</sup> the administration sought to groom well-credentialed, committed conservatives who would eventually become federal courts of appeals judges and Supreme Court Justices.<sup>93</sup> As Federalist Society cofounder and Meese’s special assistant Steve Calabresi put it: “[T]here 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 to hold more important positions.”<sup>94</sup>

The Reagan Revolution transformed federal judicial politics, particularly in the lower federal courts.<sup>95</sup> President Reagan was arguably more committed to ideology than any President before him and he saw federal appellate judges as key players in the emerging Republican-Democrat schism.<sup>96</sup> An analysis of decisions between 1981 and 2004 by Reagan-appointed courts of appeals judges revealed that Reagan appointees were more conservative than appointees of

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<sup>91</sup> *Id.* (quoting Reagan Department of Justice official Bruce Fein).

<sup>92</sup> See STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* 138 (2008) [hereinafter TELES, *RISE*]. Meese became Attorney General in 1985. President Reagan’s first-term Attorney General, William French Smith, was an establishment lawyer who had no plan to advance conservative goals over the long term. See Steven M. Teles, *Transformative Bureaucracy: Reagan’s Lawyers and the Dynamics of Political Investment*, 23 *STUD. AM. POL. DEV.* 61, 66–67 (2009) [hereinafter Teles, *Transformative Bureaucracy*] (noting that while Smith was a conservative, Meese was so centrally connected to the conservative movement that his political and personal identity was always tied to the Federalist Society in some way).

<sup>93</sup> See Teles, *Transformative Bureaucracy*, *supra* note 92, at 69 (“The legacy of the department’s investment in personnel can be found on the bench . . .”); see also TELES, *RISE*, *supra* note 92, at 141–42 (describing the Reagan Justice Department’s hiring of Federalist Society members, signaling that “clear ideological positioning . . . was now an affirmative qualification for appointed office”).

<sup>94</sup> Teles, *Transformative Bureaucracy*, *supra* note 92, 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 70–71 (quoting Reagan Department of Justice official Richard Willard).

<sup>95</sup> See Devins & Baum, *Split Definitive*, *supra* note 77, at 339–42 (documenting the impact Meese and the Federalist Society had on the judiciary, such that half of President George W. Bush’s appointments to the federal courts of appeals were Federalist Society members).

<sup>96</sup> See David M. O’Brien, *If the Bench Becomes a Brawl: Reagan’s Legacy for U.S. Courts*, *L.A. TIMES* (Aug. 23, 1987), <https://www.latimes.com/archives/la-xpm-1987-08-23-op-2934-story.html> (“While all Presidents reward those in their own party, Reagan has surpassed others . . . Judges are regarded by the Reagan Administration as both symbols and instruments of presidential power . . .”).

earlier Republican administrations,<sup>97</sup> and that Reagan appointees became more conservative over time.<sup>98</sup> By appointing eighty-three federal courts of appeals judges from 1981 to 1988 (roughly fifty-five percent of all sitting federal appellate judges by the end of his term),<sup>99</sup> President 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.<sup>100</sup>

### C. *Judicial Appointments in the Age of Party Polarization*

In the years since the Reagan administration, the ideological and partisan divide between Democrats and Republicans has grown and grown. In the 1980s and 1990s, the ideological gap between Democrats and Republicans began to emerge but was still modest.<sup>101</sup> Republicans, for example, were as supportive of abortion rights as Democrats,<sup>102</sup> and several Republican Senators backed abortion rights by voting against Robert Bork's Supreme Court nomination.<sup>103</sup> By 1994, twenty-three percent of Republicans were more liberal than

<sup>97</sup> See SUNSTEIN ET AL., *supra* note 80, at 119–21.

<sup>98</sup> *Id.* at 121–22 (noting that Reagan appointees cast more conservative votes between 1993 to 1996 than they did from 1985 to 1988).

<sup>99</sup> FED. JUD. CTR., *supra* note 9 (select all “U.S. Courts of Appeals” under the “Court” tab and “Ronald Reagan” under the “Appointing President” tab); U.S. CTS., *supra* note 75 (showing that an additional fifty-nine appellate judgeships were created during Reagan's presidency, totaling 152 federal appellate judgeships by 1989).

<sup>100</sup> See, e.g., DEVINS & BAUM, COMPANY, *supra* note 78, at 121–22 (“The growing emphasis on policy considerations in the selection of Justices parallels the growth in partisan polarization, and it is largely an effect of that polarization.”).

<sup>101</sup> See Devins & Baum, *Split Definitive*, *supra* note 77, at 323 (“The rapid rise in partisan sorting began in the 1980s; starting in the 1990s, a surge of southern Republicans substantially propelled the polarization of the parties.”).

<sup>102</sup> See Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 YALE L.J. 2028, 2067–68 (2011) (stating that sixty-eight percent of Republicans and fifty-eight percent of Democrats supported abortion rights); see also 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 (2016) (noting that between *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), “abortion did not sharply divide Democrats and Republicans”).

<sup>103</sup> Linda Greenhouse, *Bork's Nomination Is Rejected, 58-42; Reagan Saddened*, N.Y. TIMES (Oct. 24, 1987), <https://www.nytimes.com/1987/10/24/politics/borks-nomination-is-rejected-5842-reagan-saddened.html> (noting that six out of forty-six Republican Senators voted against Bork); see also Binder & Maltzman, *supra* note 86, at 321 (describing Bork's defeat as a “watershed” in making judicial confirmation politics both partisan and ideological (quoting John Anthony Maltese, *Anatomy of a Confirmation Mess: Recent Trends in the Federal Judicial Selection Process*, JURIST (Apr. 15, 2004), <https://web.archive.org/web/20040430024910/http://jurist.law.pitt.edu/forum/symposium-jc/maltese-printer.php>)).

the median Democrat, and seventeen percent of Democrats were more conservative than the median Republican.<sup>104</sup> That dynamic is a thing of the past. In 2017, those numbers had shrunk to one and three percent, respectively.<sup>105</sup> Similarly, Republican-Democrat differences on political issues more than doubled from 1994 to 2017.<sup>106</sup>

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 “dislike, even loathe, their opponents.”<sup>107</sup> By 2017, research showed that “Americans are less likely to have the kind of interpersonal contact across party lines that can dampen harsh beliefs about each other.”<sup>108</sup> Second, “[e]lite status [no longer] trump[s] ideology and partisanship.”<sup>109</sup> Affluent Democrats now “express liberal attitudes on virtually every issue” and affluent Republicans have an “outsized influence on the GOP coalition.”<sup>110</sup>

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<sup>104</sup> See Jocelyn Kiley, *In Polarized Era, Fewer Americans Hold a Mix of Conservative and Liberal Views*, PEW RSCH. CTR. (Oct. 23, 2017), <https://www.pewresearch.org/fact-tank/2017/10/23/in-polarized-era-fewer-americans-hold-a-mix-of-conservative-and-liberal-views>.

<sup>105</sup> PEW RSCH. CTR., *THE PARTISAN DIVIDE ON POLITICAL VALUES GROWS EVEN WIDER* 13 (2017), <https://www.pewresearch.org/politics/wp-content/uploads/sites/4/2017/10/10-05-2017-Political-landscape-release-updt..pdf>.

<sup>106</sup> *Id.* at 3.

<sup>107</sup> Cf. Shanto Iyengar, Gaurav Sood & Yphtach Lelkes, *Affect, Not Ideology: A Social Identity Perspective on Polarization*, 76 PUB. OP. Q. 405, 405–07 (2012) (arguing that the “mere act of identifying with a political party is sufficient to trigger negative evaluations of the opposition”); see also Cass R. Sunstein, Opinion, *‘Partyism’ Now Trumps Racism*, BLOOMBERG (Sept. 22, 2014, 8:03 AM), <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). 2012 data revealed a huge spike in the unfavorability rating of the opposition party. In 1980, surveyed voters gave the opposition party an average favorability rating of 45 out of 100; in 1992, that rating dropped slightly to 40; in 2012, the rating dropped precipitously to 30. Ezra Klein & Alvin Chang, *“Political Identity Is Fair Game for Hatred”*: How Republicans and Democrats Discriminate, VOX (Dec. 7, 2015, 8:00 AM), <https://www.vox.com/2015/12/7/9790764/partisan-discrimination>.

<sup>108</sup> Emily Badger & 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>.

<sup>109</sup> See Mark A. Graber, *The Coming Constitutional Yo-Yo? Elite Opinion, Polarization, and the Direction of Judicial Decision Making*, 56 HOW. L.J. 661, 688, 694–95 (2013) (observing that prior to this period, affluent Democrats and Republicans agreed with each other on political issues more often than they agreed with less affluent people within their own parties).

<sup>110</sup> PEW RSCH. CTR., *POLITICAL TYPOLOGY REVEALS DEEP FISSURES ON THE RIGHT AND LEFT* 2, 4 (2017), <https://www.pewresearch.org/politics/wp-content/uploads/sites/4/2018/09/10-24-2017-Typology-release.pdf>.

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.<sup>111</sup> Republican judges and judicial candidates demonstrate their conservative bona fides and cement important personal relationships by participating in Federalist Society events, and Democrats frequently look to analogue liberal groups.<sup>112</sup> 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 eight out of forty-two federal courts of appeals judges nominated by President George H.W. Bush were Federalist Society members.<sup>113</sup> By the end of President George W. Bush's first term, approximately half of his judicial appointments were Federalist Society members.<sup>114</sup> And by 2016, the imprint of the Federalist Society on judicial appointments was dramatic. Then-presidential candidate Donald Trump declared that his judicial nominees would be "picked by [the] Federalist

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<sup>111</sup> See Teles, *Transformative Bureaucracy*, *supra* note 92 (describing pervasive liberal and conservative social networks). Like everyone else, a judge's self-esteem is linked to the esteem in which she is held by others, especially those in her social and professional networks. See LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR* 117 (2006).

<sup>112</sup> See Lawrence Baum & Neal Devins, *Federalist Court*, SLATE (Jan. 31, 2017, 10:12 AM), <https://slate.com/news-and-politics/2017/01/how-the-federalist-society-became-the-de-facto-selector-of-republican-supreme-court-justices.html> (pointing out, however, that no progressive group has come close to the Federalist Society's dominance over the judicial nomination process).

<sup>113</sup> See, e.g., Nancy Scherer & Banks Miller, *The Federalist Society's Influence on the Federal Judiciary*, 62 POL. RSCH. Q. 366, 367, 367 tbl.1 (2009); FED. JUD. CTR., *supra* note 9 (select all "U.S. Courts of Appeals" under the "Court" tab and "George H.W. Bush" under the "Appointing President" tab). President Bush's court of appeals nominees who were Federalist Society members included Clarence Thomas, Samuel Alito, and John Roberts. Scherer & Miller, *supra*, at 367 tbl.1.

<sup>114</sup> See Devins & Baum, *Split Definitive*, *supra* note 77, at 342. President George W. Bush's appointees to the federal courts of appeals included John Roberts, Neil Gorsuch, and Brett Kavanaugh. FED. JUD. CTR., *supra* note 9 (select all "U.S. Courts of Appeals" under the "Court" tab and "George W. Bush" under the "Appointing President" tab). The Federalist Society was also instrumental in President George W. Bush's Supreme Court appointments. See Devins & Baum, *Split Definitive*, *supra* note 77, at 342–43 (detailing the Federalist Society's role in forcing the replacement of Harriet Miers, who did not have close ties to the Society, with Federalist Society darling Samuel Alito as the nominee to replace Justice Sandra Day O'Connor in 2005).

Society.”<sup>115</sup> By this time, the consequences of party polarization had metastasized. Conservative-liberal divisions gave way to Republican-Democratic differences.<sup>116</sup> 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.

Within the federal courts of appeals, Thomas Keck measured Republican-Democratic differences from 1993 to 2013 on issues that divided the parties, such as abortion, affirmative action, gun rights, and same-sex marriage.<sup>117</sup> Keck did this by looking at votes cast by courts of appeals judges and found the average difference to be thirty-three percentage points.<sup>118</sup> Cass Sunstein’s examination of federal courts of appeal decisions between 1981 and 2004 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.”<sup>119</sup>

Sunstein’s study of the federal 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 appointees of President Bill Clinton from 1993 to 2004 was nearly identical to the percentage of liberal votes cast by other Democratic appointees.<sup>120</sup> In contrast, there was a much sharper divide between Republican judges appointed before 1981 and judges appointed by Presidents Reagan and the two Bushes.<sup>121</sup> These data highlight the rise of the conservative legal movement and, with it, the growing impact of the Federalist Society. A 2009 study of judicial decision-making by federal courts of

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<sup>115</sup> 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>.

<sup>116</sup> 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, given the apparent role political preferences play in some decisions).

<sup>117</sup> See THOMAS M. KECK, JUDICIAL POLITICS IN POLARIZED TIMES 4, 163 (2014).

<sup>118</sup> *Id.* at 149 tbl.3.5.

<sup>119</sup> SUNSTEIN ET AL., *supra* note 80, at 122–23.

<sup>120</sup> See *id.* at 120–21, 120 tbl.6-3. The Sunstein study looked at the percentage of liberal votes over time and compared President Clinton’s appointees to those of Democratic Presidents Kennedy, Johnson, and Carter. *Id.* at 120 tbl.6-3.

<sup>121</sup> See *id.* (comparing percentage of liberal votes by judges nominated by Presidents Eisenhower, Nixon, and Ford to the percentage of liberal votes by judges nominated by Presidents Reagan and the two Bushes).

appeals judges found that judges with Federalist Society ties were significantly more conservative than other judges.<sup>122</sup>

#### D. “Trump Judges” and “Obama Judges”

When President Donald Trump complained about an “Obama judge” ruling against him in 2018, he was thus stating the obvious, albeit in a controversial way<sup>123</sup>: party polarization by that point had become pervasive and increasingly salient. 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 to 2017, President Obama aimed to reshape the federal courts of appeals by striving for more diversity on the bench. Forty-two percent of President Obama’s appointees to the federal courts were women, compared to twenty-one percent for President George W. Bush and twenty-five percent for President Donald Trump; twenty percent were Black, compared to eight percent for President Bush and five percent for President Trump.<sup>124</sup> President Obama appointed a total of fifty-five judges to

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<sup>122</sup> See Scherer & Miller, *supra* note 113, at 376. This finding tracks the growing ideological divide on the U.S. Supreme Court, where today’s Democratic appointees are no more liberal than earlier Democratic appointees but today’s Republican appointees are far more conservative than earlier Republican appointees. See Lee Epstein, William M. Landes & Richard A. Posner, *Revisiting the Ideology Rankings of Supreme Court Justices*, 44 J. LEGAL STUD. 295, 307 tbl.2 (2015) (showing that Justices appointed in the later twentieth century, like Justices Rehnquist, Scalia, and Roberts, voted more conservatively than their most conservative predecessors, while more recent liberal appointees voted equally as liberally, if not more conservatively, as their ideological predecessors).

<sup>123</sup> 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, 9:08 PM), [https://www.washingtonpost.com/local/immigration/judges-ruling-means-trump-administration-must-allow-illegal-border-crossers-to-seek-asylum/2018/11/20/1aebd608-ec11-11e8-96d4-0d23f2aaad09\\_story.html](https://www.washingtonpost.com/local/immigration/judges-ruling-means-trump-administration-must-allow-illegal-border-crossers-to-seek-asylum/2018/11/20/1aebd608-ec11-11e8-96d4-0d23f2aaad09_story.html).

<sup>124</sup> See Elliot Slotnick, Sara Schiavoni & Sheldon Goldman, *Obama’s Judicial Legacy: The Final Chapter*, 5 J.L. & CTS. 363, 403 tbl.8 (2017); *Trump’s Confirmed Judges*, ALL. FOR JUST. (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 have placed a stronger emphasis on race and gender diversity). By focusing on these alternative criteria, President Obama disappointed progressives who wanted strong liberals; instead, President Obama’s nominees—while liberal—sometimes did not reflect the most progressive values of the Democratic elite. See Charlie Savage, *Obama Lags on Judicial Picks, Limiting His Mark on Courts*, N.Y. TIMES (Aug. 17, 2012), <https://www.nytimes.com/2012/08/18/us/politics/obama-lags-on-filling-seats-in-the-judiciary.html> (noting that President Obama had “largely shied away from nominating assertive liberals” and that his “emphasis on diversity . . . slowed the search” for judicial nominees).

the U.S. courts of appeals—around one-third of all federal courts of appeals judges by the end of his term.<sup>125</sup> Ideological measures of judicial appointments from Presidents Nixon to Trump rank President Obama’s judges as more liberal than any other cohort from that time period.<sup>126</sup>

The Obama era also raised the temperature of confirmation battles by introducing a fundamental shift in Senate confirmation politics. In response to Senate Republicans’ efforts to delay and defeat President Obama’s judicial appointments,<sup>127</sup> Senate Democrats invoked the so-called nuclear option in 2013, allowing the then-majority Democratic Senate to confirm federal district and courts of appeals judges by an up-or-down majority vote.<sup>128</sup> With Republicans in control of the Senate for the final two years of the Obama administration, President Obama was able to fill only two appellate judgeships.<sup>129</sup> More striking, Senate Republicans blocked any consideration of President Obama’s 2016 Supreme Court nominee Merrick Garland.<sup>130</sup> Indeed, the link between party and ideology is now so strong that Mitch McConnell defined his legacy as Senate Majority Leader by his ability to block President Obama’s nominations while pushing through President Trump’s nominations.<sup>131</sup> In so doing,

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<sup>125</sup> See Lawrence Hurley, *Obama’s Judges Leave Liberal Imprint on U.S. Law*, REUTERS (Aug. 26, 2016, 10:49 AM), <https://www.reuters.com/article/us-usa-court-obama/obamas-judges-leave-liberal-imprint-on-u-s-law-idUSKCN1110BC>.

<sup>126</sup> See Jon Green, *The Ideology of Trump’s Judges*, DEMAND JUST. (Jan. 2019), <https://demandjustice.org/reports/ideology-of-trump-judges> (demonstrating that the average ideological score of President Obama’s cohort of judges was more to the left than those of the judges appointed by Presidents Clinton and Carter). 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, 6:00 AM), <https://www.vox.com/2019/1/25/18188541/trump-judges-mcconnell-senate> (discussing the Green study and explaining the Bonica and Sen scoring system).

<sup>127</sup> See Slotnick et al., *supra* note 124, at 370–71 (discussing then-Senate Minority Leader Mitch McConnell’s obstruction of President Obama’s judicial nominees). Senate Democrats similarly sought to defeat President George W. Bush’s judicial nominees. See Binder & Maltzman, *supra* note 86, at 323–25.

<sup>128</sup> See Humberto Sanchez, *A Landmark Change to Filibuster*, CQ WKLY., Dec. 2, 2013, at 1992, 1992.

<sup>129</sup> See Ian Millhiser, *What Trump Has Done to the Courts, Explained*, VOX (Sept. 29, 2020, 10:32 PM), <https://www.vox.com/policy-and-politics/2019/12/9/20962980/trump-supreme-court-federal-judges>. One of those two was appointed to the Federal Circuit. See *id.* (noting that Judge Kara Farnandez Stoll was confirmed to a “highly specialized court that primarily deals with patent law”).

<sup>130</sup> See Slotnick et al., *supra* note 124, at 364 (“However, Garland was not even accorded the courtesy of a Senate hearing much less a vote on the Senate floor.”).

<sup>131</sup> 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

Senate Republicans explicitly linked ideology to political party, claiming that the 2016 presidential election should settle whether a liberal or conservative was to be appointed to the Supreme Court.<sup>132</sup>

Following his election in 2016, President Donald Trump then put his foot on the accelerator to divide judicial appointments in partisan ways. His imprint on the federal courts of appeals was “swift and historic.”<sup>133</sup> President Trump’s judges were ranked most conservative by the ideological measure that ranked President Obama’s judges as most liberal.<sup>134</sup> Under this measure, the ideological gap between President Trump’s and President Obama’s judges is greater than it has ever been.<sup>135</sup>

President Trump’s impact was bolstered by his ability to name an extraordinary number of federal courts of appeals judges.<sup>136</sup> Fifty-four

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generational change in our country . . . .” The Hugh Hewitt Show, *Senate Majority Leader Mitch McConnell on the Federal Judiciary and the Pace of Appointments* [sic], HUGH HEWITT (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, FROM SCALIA’S DEATH TO JUSTICE KAVANAUGH 278–79 (2019) (describing McConnell telling an audience that the most important decision in his political career was to block Merrick Garland’s nomination and push through Neil Gorsuch’s appointment).

<sup>132</sup> See Mitch McConnell & Chuck Grassley, Opinion, *McConnell and 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](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) (arguing that American voters rejected President Obama and his preferences after the 2014 midterm elections shifted control of the Senate to the Republicans).

<sup>133</sup> Rebecca R. Ruiz, Robert Gebeloff, Steve Eder & Ben Protess, *A Conservative Agenda Unleashed on the Federal Courts*, N.Y. TIMES (Mar. 16, 2020), <https://www.nytimes.com/2020/03/14/us/trump-appeals-court-judges.html>.

<sup>134</sup> See Green, *supra* note 126; see also 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> (noting that President Trump’s federal appellate appointees were more consistently conservative, in that they were more likely than past Republican appointees to clash with Democratic appointees).

<sup>135</sup> Green, *supra* note 126. For additional discussion, see *infra* notes 146–47 and accompanying text (highlighting the increasing role of party affiliation in whether a judge is more likely to agree or disagree with same and opposite party judges).

<sup>136</sup> Russell Wheeler, *Judicial Appointments in Trump’s First Three Years: Myths and Realities*, BROOKINGS INST. (Jan. 28, 2020), <https://www.brookings.edu/blog/fixgov/2020/01/28/judicial-appointments-in-trumps-first-three-years-myths-and-realities> (“Trump has appointed more court of appeals judges . . . than any predecessor.”). Senate Republicans did all they could do to help President Trump transform the federal judiciary. They eliminated the minority party’s power to derail both Supreme Court nominees (by filibustering) and federal courts of appeals nominations (by having home-state Senators block judicial nominations through blue slips). See Astead W. Herndon, *Filibuster Broken, Gorsuch Vote Is Set*, BOS. GLOBE (Apr. 6, 2017, 7:36 PM), <https://www.bostonglobe.com/news/nation/2017/04/06/republicans-nuclear-advance-gorsuch-some-warn-dire->

courts of appeals nominees by President Trump were confirmed—thirty percent of all courts of appeals judges.<sup>137</sup> Four circuits flipped from majority Democratic appointees to majority Republican appointees (the Second, Third, Ninth, and Eleventh), four circuits have become more solidly composed of Republican appointees (the Fifth, Sixth, Seventh, and Eighth), and three circuits have remained majority Democrat-appointees—but less so, as there are now more Republican appointees than before (the Fourth, Tenth, and the District of Columbia).<sup>138</sup>

President Trump's judicial appointments also reflect the ascendancy of the conservative legal movement in general, and of the Federalist Society in particular. President Trump's appellate court picks are the most likely to agree with their Republican colleagues (approximately ninety-seven percent) and the most likely to disagree with their Democratic colleagues (approximately eleven percent).<sup>139</sup> All but eight of President Trump's first fifty-one appellate nominees were members of the Federalist Society.<sup>140</sup> When the U.S. Judicial Conference questioned the appropriateness of federal judges being members of the Federalist Society,<sup>141</sup> 210 federal judges (ninety-three

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consequences/cS2ARRztIC3eaTEH1Y2fEP/story.html; Niels Lesniewski, *McConnell: Democratic 'Blue Slips' Won't Block Trump Judges*, ROLL CALL (Oct. 11, 2017, 11:28 AM), <https://www.rollcall.com/2017/10/11/mcconnell-democratic-blue-slips-wont-block-trump-judges>.

<sup>137</sup> 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 President Trump had filled all courts of appeals vacancies as of June 2020, thereby limiting the power of a succeeding administration to reshape the judiciary).

<sup>138</sup> See *Flipping Circuit Courts*, SENATE REPUBLICAN POL'Y COMM. (Dec. 10, 2019), <https://www.rpc.senate.gov/policy-papers/flipping-circuit-courts> [hereinafter *Flipping Circuit Courts*]. The Ninth Circuit flipped in February 2020. See Dolan, *supra* note 61. President Trump did not make any nominations to the First Circuit. FED. JUD. CTR., *supra* note 9 (select "First Circuit" under the "Court" tab and "Donald J. Trump" under the "Appointing President" tab).

<sup>139</sup> Ruiz et al., *supra* note 133. In other words, Trump judges disagreed with Republican colleagues approximately three percent of the time as compared to an approximately eleven percent disagreement rate with Democratic colleagues. This eight-point range was at least twice as large as the agreement-disagreement range of appointees of any other president. *Id.*

<sup>140</sup> *Id.* When White House Counsel Don McGahn was asked about outsourcing judicial appointments to the Federalist Society, he remarked that the selection seemed to have been "insourced," as President Trump's judicial selection team was also made up of Federalist Society members. Jason 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>.

<sup>141</sup> 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),

percent of whom were appointed by Republican presidents, including forty-six of President Trump's then-fifty-one federal court of appeals appointees)<sup>142</sup> 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."<sup>143</sup> This circling of the wagons by Trump and 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 President Reagan was elected in 1980, there was next to no ideological divide between Democratic and Republican judicial appointees. When President Trump took office in 2017, there was a pronounced divide separating Republican and Democratic appointees. Today, Presidents place a "near exclusive focus on ideological compatibility and reliability."<sup>144</sup>

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<https://www.nytimes.com/2020/05/20/opinion/trump-judges-federalist-society.html> (discussing the political ties of both organizations).

<sup>142</sup> See Jacqueline Thomsen, *Congress Scrutinizes Federal Judiciary's Proposed Block on Federalist Society Memberships*, NAT'L L.J. (May 18, 2020, 3:48 PM), <https://www.law.com/nationallawjournal/2020/05/18/congress-scrutinizes-federal-judiciarys-proposed-block-on-federalist-society-memberships>.

<sup>143</sup> See Letter from Gregory G. Katsas, J., U.S. Ct. of Appeals, D.C. Cir., et al., to Robert P. Deyling, Assistant Gen. Couns., Admin. Off. of the U.S. Cts. 5 (Mar. 18, 2020), <https://int.nyt.com/data/documenthelper/6928-judges-respond-to-draft-ethics/53eaddfaf39912a26ae7/optimized/full.pdf>; see also Rebecca R. Ruiz & Ben Protess, *Trump Nominee Is Among Judges Opposed to Banning Membership in Conservative Group*, N.Y. TIMES (Feb. 5, 2021), <https://www.nytimes.com/2020/05/03/us/politics/judges-federalist-society.html> (describing such opposition by judges, including Judge Walker, who was then a judge on the U.S. District Court in Kentucky and now sits on the D.C. Circuit Court of Appeals).

<sup>144</sup> Brandon L. Bartels, *The Sources and Consequences of Polarization in the U.S. Supreme Court*, in AMERICAN GRIDLOCK: THE SOURCES, CHARACTER, AND IMPACT OF POLITICAL POLARIZATION 171, 177 (Thurber & Yoshinaka eds., 2015). It is anticipated that President Biden's judicial appointments will be more liberal than President Obama's and, reportedly, that President Biden will emphasize ideology when nominating judges. See Andrew Kragie, *Biden's Judges Will Likely Be More Liberal than Obama's*, LAW 360 (Nov. 30, 2020, 11:08 PM), <https://www.law360.com/articles/1332634/biden-s-judges-will-likely-be-more-liberal-than-obama-s>; Harper Neidig, *Biden Team Asks Senate Democrats to Recommend Public Defenders, Civil Rights Lawyers for Federal Bench*, HILL (Dec. 30, 2020, 6:31 PM), <https://thehill.com/regulation/court-battles/532164-biden-team-asks-senate-dems-to-recommend-public-defenders-civil> (discussing the Biden administration's commitment to progressive ideology as reflected in efforts to appoint civil rights lawyers and public defenders to the federal bench, in lieu of prosecutors and corporate attorneys); Jacqueline Thomsen, *Public Defender Experience and Diversity Dominates at Biden's Judicial Nominees' Debut Hearing*, NAT'L L.J. (Apr. 28, 2021, 2:34 PM), <https://www.law.com/nationallawjournal/2021/04/28/public-defender-experience-and-diversity-dominates-at-bidens-judicial-nominees-debut-hearing> (reporting on the same).

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 President Trump's initiatives were pursued in the formerly Democrat-controlled Ninth and Second Circuits.<sup>145</sup>

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 courts of appeals judges are increasingly likely to disagree with each other.<sup>146</sup> A randomly assigned panel on a Democrat-dominated circuit is more likely to have at least two Democratic judges, and is thus more likely to back Democratic claims, while Republican claims are more likely to prevail in circuits dominated by Republican appointees.<sup>147</sup> 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.<sup>148</sup> And this is why partisan battle lines have been drawn regarding the process of selecting and confirming federal courts of appeals judges.

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<sup>145</sup> Paul Nolette, *Multistate Lawsuits vs. the Federal Government – Totals*, STATE LITIG. AND AG ACTIVITY DATABASE (Jan. 19, 2021), <https://attorneysgeneral.org/multistate-lawsuits-vs-the-federal-government/statistics-and-visualizations-multistate-litigation-vs-the-federal-government>; see also 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, 12:10 PM), [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-b31dffa77212\\_story.html](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-b31dffa77212_story.html) (reporting on the correlation between dominant circuit ideology and success rates of such lawsuits); Dylan Matthews, *How the 9th Circuit Became Conservatives' Least Favorite Court*, VOX (Jan. 10, 2018, 2:30 PM), <https://www.vox.com/policy-and-politics/2018/1/10/16873718/ninth-circuit-court-appeals-liberal-conservative-trump-tweet> (discussing the liberal reputation of the Ninth and Second Circuits); Madison Alder, *Trump Flips New York-Based 2nd Circuit as Menashi Confirmed*, BLOOMBERG L. (Nov. 14, 2019, 6:32 PM), <https://news.bloomberglaw.com/us-law-week/trump-flips-new-york-based-second-circuit-as-menashi-confirmed> (reporting on the Second Circuit's 2019 flip from a majority of Democratic appointees to a majority of Republican appointees); Dolan, *supra* note 61 (reporting on the same partisan flip in the Ninth Circuit in 2020).

<sup>146</sup> Cf. *supra* note 139 and accompanying text.

<sup>147</sup> See SUNSTEIN ET AL., *supra* note 80, at 45. Correspondingly, when a panel has three judges of the same party, the judges are more likely to “amplify” their partisan ideological positions. *Id.* For additional discussion of so-called “panel effects,” see *infra* notes 185–96 and accompanying text.

<sup>148</sup> See Pauline T. Kim, *Deliberation and Strategy on the United States Court of Appeals: An Empirical Exploration of Panel Effects*, 157 U. PA. L. REV. 1319, 1328 (2009) (hypothesizing that federal circuit judges tend to focus less on the potential of Supreme Court reversal and more on the preferences of the majority of the judges on their circuit).

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 appeals. Today's Democrat and Republican judges are more likely to disagree with each other, and 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 and the D.C. Circuit, although not the Federal Circuit, for the following years: 1966 to 1968, 1976 to 1978, 1986 to 1988, 1996 to 1998, 2006 to 2008, and 2016 to 2018. We then additionally coded en banc decisions from those twelve circuits from 2019 and 2020. This amounted to 952 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 exist), 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 for citations to en banc opinions in subsequent cases. We pursued the following process to collect en banc

cases.<sup>149</sup> 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 and 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*." Second, we extracted from the Federal Judicial Center's Integrated Database (IDB) a list of cases they coded as *en banc*.<sup>150</sup> Finally, we searched Westlaw's federal case law database for citations to *en banc* opinions.<sup>151</sup> We manually verified results from all of our techniques to weed out false positives.

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 name 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 ninety percent 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.<sup>152</sup> Partisan reversals are *en banc* decisions that seem

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<sup>149</sup> This methodology was refined and improved tirelessly by Paul Hellyer, a truly amazing reference librarian from the William & Mary Law Library.

<sup>150</sup> *Federal Court Cases: FJC Integrated Database (IDB) 1970 to Present*, FED. JUD. CTR., <https://www.fjc.gov/research/idb> (last visited June 30, 2021).

<sup>151</sup> 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. Considering how elusive *en banc* opinions can be, we acknowledge that our dataset probably omits a small number of *en banc* opinions from the time periods we studied, but we are confident that any such slight omission would not change our conclusions.

<sup>152</sup> We applied the ninety percent rule to every circuit regardless of the number of judges, but we required there to be at least two judges in each party, 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 ten judges, to qualify as a partisan split, we required voting down perfectly partisan lines. For decisions that involved more than ten judges, there could be one defector and still qualify as a partisan split. One reason for using the ninety percent rule instead of only counting partisan splits is to account for judges, like Judge Gregory of the Fourth Circuit, who were technically nominated and confirmed by a President of one

to target renegade panel opinions for potentially partisan reasons. We identified a partisan reversal if four conditions were met: (1) the panel opinion is reversed, (2) most judges in the panel majority opinion are from the minority party (the party that is not dominant in the circuit at the time), (3) most majority party judges vote to reverse the panel en banc, and (4) most minority party judges dissent en banc.<sup>153</sup>

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 decisions *not* to go en banc.<sup>154</sup> Second, we did not code for “reasons to go en banc,” largely because judges do not always speak to this in the opinion, (or often they do not 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. First, 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. Second, 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.

### A. *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

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party, but were originally nominated (but not confirmed) by a President of the opposite party. See *Gregory, Roger L.*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/gregory-roger-l> (last visited June 13, 2021) (explaining that Judge Gregory was nominated to a recess appointment by President Clinton, and then re-nominated to the same position by President Bush and confirmed by the Senate).

<sup>153</sup> “Party” refers to the party of the nominating President. “Majority party” means the party, if any, with the most en banc judges appointed by a President of that party.

<sup>154</sup> It is worth noting that we found this impossible to do—judges do not always explain why they do go en banc, and they practically never explain when they do not. For an examination of published dissents to denials en banc, see Jeremy D. Horowitz, *Not Taking No for an Answer: An Empirical Assessment of Dissents from Denial of Rehearing En Banc*, 102 GEO. L. J. 59 (2013). For further discussion, see *supra* note 22 and accompanying text.

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 published decisions.<sup>155</sup> 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 same time period.<sup>156</sup> No surprise there: We already knew en banc decisions are rare.<sup>157</sup>

FIGURE 1. NUMBER OF EN BANC CASES 1966–2020

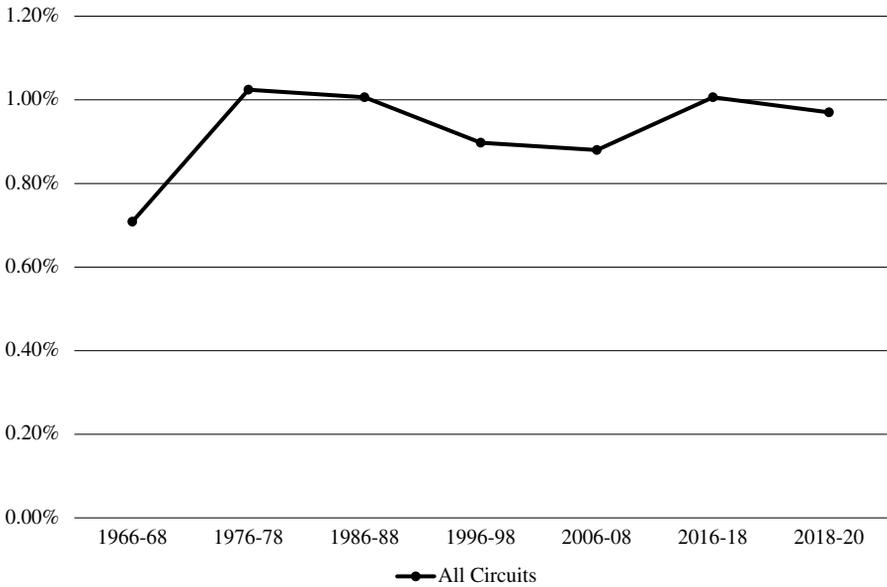


<sup>155</sup> Indeed, while the number of en banc cases rose in the 1980s, the overall percentage of en banc cases declined. The simple explanation for this phenomenon is that, in conjunction with the dramatic expansion of the number of federal courts of appeals judgeships from 1978 to 1984, there was a notable increase in the number of federal courts of appeals decisions, such that the number of en banc cases could rise while the overall percentage of en banc cases could decline. *See supra* note 75 and accompanying text.

<sup>156</sup> 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.

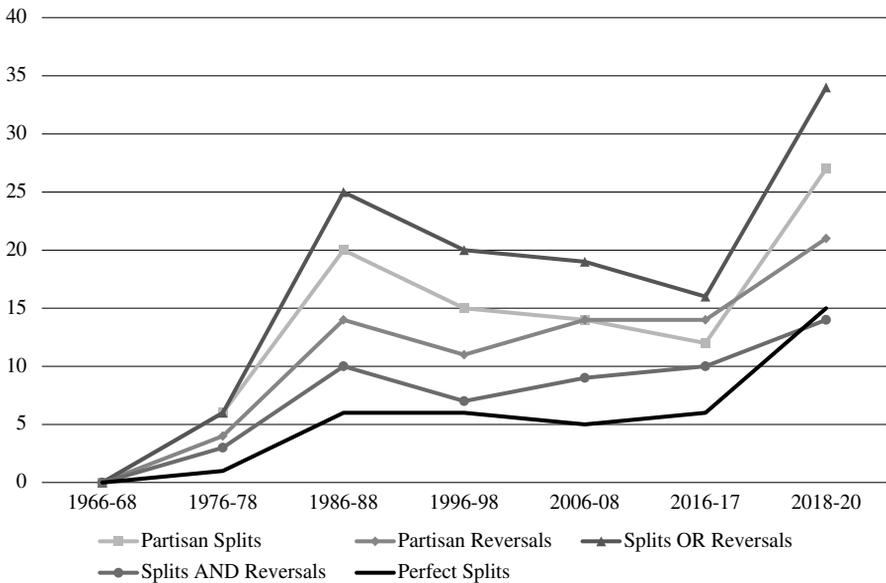
<sup>157</sup> En banc review would seem even rarer if we considered unpublished as well as published opinions in calculating the percentage of cases that go en banc. Over the past fifty years, there has been an exponential growth in the relative percentage of unpublished opinions by the federal courts of appeals. *See* Merritt E. McAlister, “Downright Indifference”: Examining Unpublished Decisions in the Federal Courts of Appeals, 118 MICH. L. REV. 533, 549 (2020) (noting that the percentage of unpublished federal appellate merits decisions rose from 59.4 to 88.7 between 1985 and 2016).

FIGURE 2. PERCENTAGE OF CASES DECIDED EN BANC 1966–2020



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 II, 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:

FIGURE 3. PERCENTAGE OF PARTISAN ACTIVITY IN EN BANC DECISIONS 1966–2020



Notice right away that the steadily increasing line we expected to see did not materialize. Although there is a spike in the 1986 to 1988 time period, which we expected,<sup>158</sup> the rate of partisan splits and partisan reversals dropped in the 1990s and then continued to drop through the post-2000 years until very recently.<sup>159</sup>

Significantly, setting aside the 2018 to 2020 data for a moment, the rate of partisan reversals never crept above fourteen percent. 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 majority courts (circuits with more Republican appointees than Democratic ones at any given time) actually reviewed more Republican panels en banc (143) than Democratic panels (133) prior to 2018. Likewise, circuits with Democratic en banc majorities during this same time reviewed sixty-nine Republican

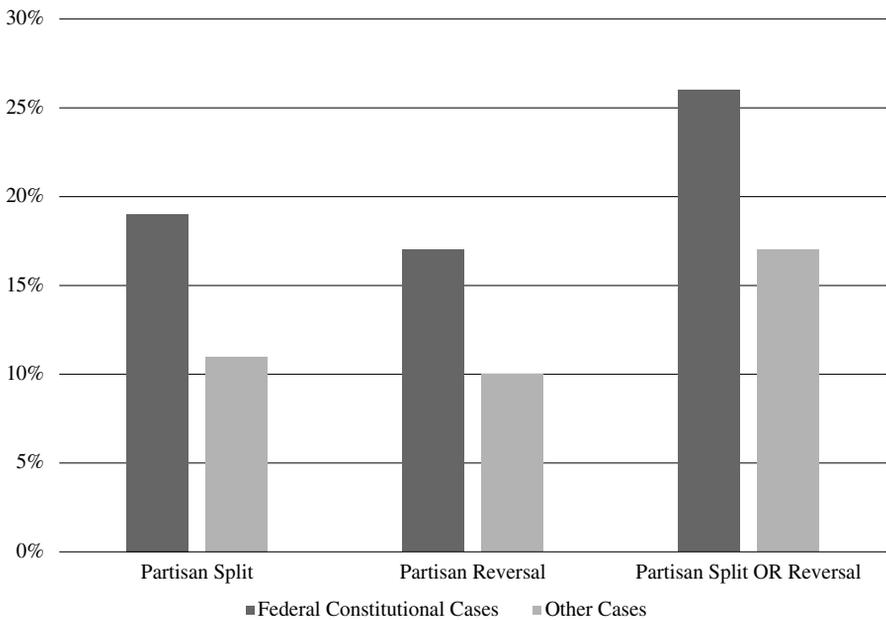
<sup>158</sup> We attribute this spike to two interrelated phenomena: the dramatic increase in the number of federal courts of appeals judgeships and the advent of the Reagan administration and, with it, the injection of ideology in judicial appointments. See *supra* note 75 and accompanying text (detailing growth in courts of appeals judgeships); *supra* Section II.B (discussing President Reagan's judicial appointments).

<sup>159</sup> 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 calculating percentages of cases with partisan activity.

panels and seventy-seven 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 does not vary depending on which party is in control.

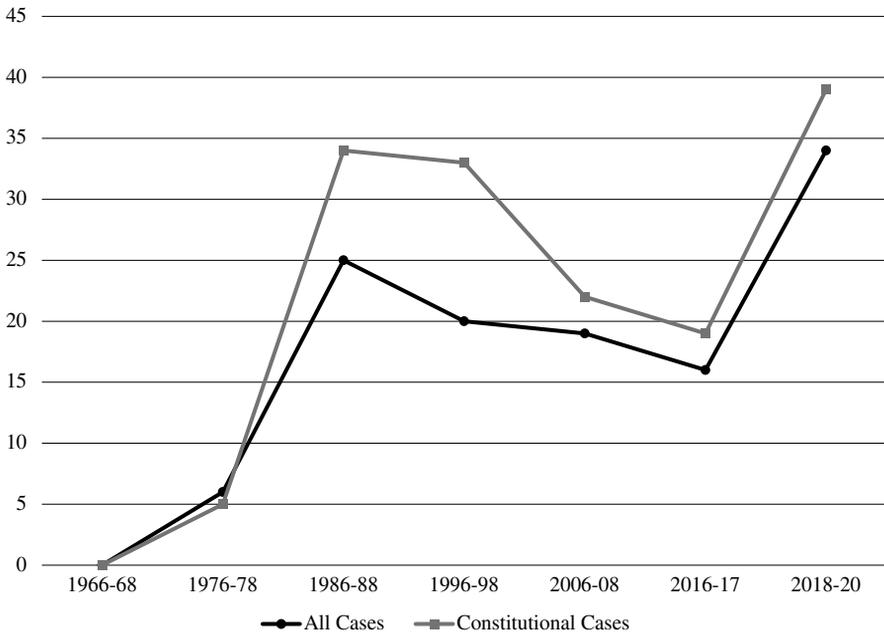
Surprised by this finding—but undeterred—we decided to sort for constitutional cases, on the assumption that the increase in partisan behavior we were looking for might occur more often in the cases that often make headlines.<sup>160</sup> We found that to be true, but we still did not find the pattern we anticipated.

FIGURE 4. PERCENTAGE OF PARTISAN ACTIVITY IN CONSTITUTIONAL AND NON-CONSTITUTIONAL CASES



<sup>160</sup> To be clear, we did not code for political salience. We instead coded for cases that decided a federal constitutional issue.

FIGURE 5. PERCENTAGE OF CONSTITUTIONAL CASES AND ALL CASES WITH PARTISAN SPLITS OR PARTISAN REVERSALS 1966–2020



As reflected in Figure 4, we did find a statistically significant increase of partisan splits and partisan reversals in constitutional cases.<sup>161</sup> Nineteen percent of all constitutional cases ended in a partisan split, compared to eleven percent of non-constitutional cases. Similarly, seventeen percent of all constitutional cases fit our definition of a partisan reversal, compared to ten percent of non-constitutional cases.

Significantly, however, partisan behavior for constitutional cases reflects the same stability over time as the non-constitutional cases. Looking across time, as displayed in Figure 5, 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 partisan reversals for the constitutional cases stayed relatively constant even if, as one would expect, the constitutional cases generally

<sup>161</sup> Statistical tests were run in R version 4.0.2. Under this test, the alpha value is 0.05 and the p value (for a result to be found statistically significant) is less than or equal to 0.05. For Table 4, the p value is 0.007 for the one-sided test and 0.013 for the two-sided test. Nick Bednar, a Ph.D. student in the Vanderbilt Department of Political Science, completed this analysis. Memorandum from Nick Bednar to Neal Devins and Allison Orr Larsen, Statistical Analysis of *Weaponizing En Banc* (May 10, 2021) (on file with author) [hereinafter Bednar Memorandum].

showed more partisan behavior than the non-constitutional cases.<sup>162</sup> Indeed, starting in the 2000s, constitutional cases do not stand apart as having many more partisan splits or partisan reversals than their non-constitutional counterparts. Consistent with Figure 5, there is no statistically significant difference between the growth in partisan splits or reversals for constitutional cases as compared to the growth in partisan splits or reversals for nonpartisan cases.<sup>163</sup>

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 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 twenty 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.

### B. 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 to 2020—contained the most evidence of partisan en banc behavior seen over the past six decades.<sup>164</sup>

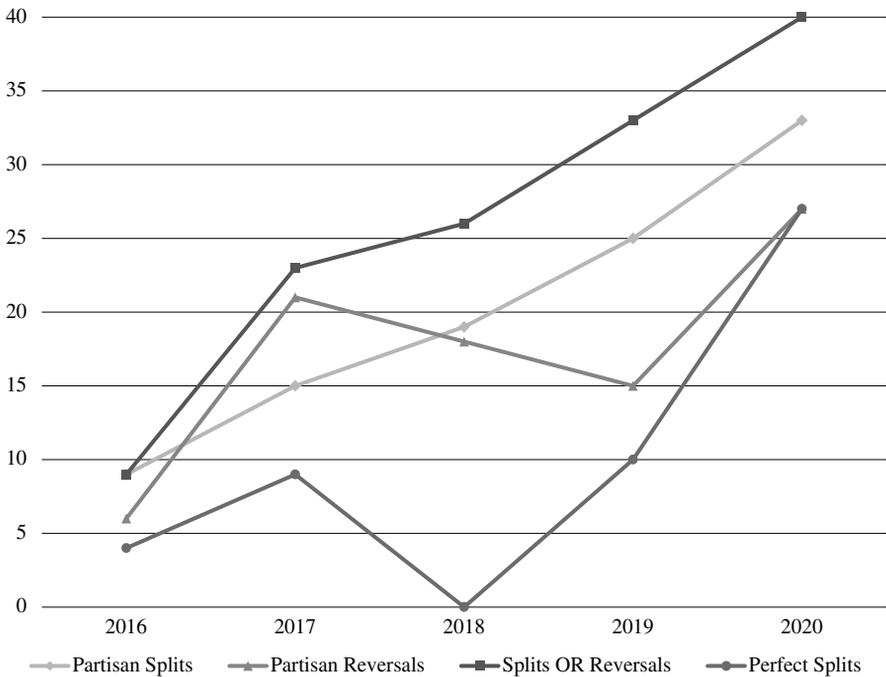
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<sup>162</sup> One clarification for careful readers: the chart above seems to show that in 1976 to 1978, constitutional cases were actually less likely to be partisan. In fact, however, that is just a sample size problem. We have only two constitutional partisan cases from 1976 to 1978. 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 constitutional cases during this period. As we discussed in Part II, there was no Democrat-Republican divide in judicial appointments before the Reagan era; that there are only two relevant cases underscores that fact.

<sup>163</sup> A Wald test was performed to examine whether the difference between the growth in constitutional and nonconstitutional cases is not statistically significant. See Bednar Memorandum, *supra* note 161, at 4–5. The p value for the combined years is 0.36. See *id.*

<sup>164</sup> 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: President Trump's first appellate nominee was confirmed in May 2017, and there were only four court of appeals judges appointed by President Trump and confirmed before October 2017. See FED. JUD. CTR., *supra* note 9 (select all “U.S. Courts of Appeals” under the “Court” tab, “Donald J. Trump” under the “President” tab, and “on or before 2017-10-01” under the “Senate Confirmation Date” tab).

FIGURE 6. PERCENTAGE OF CASES WITH PARTISAN ACTIVITY  
2016–2020



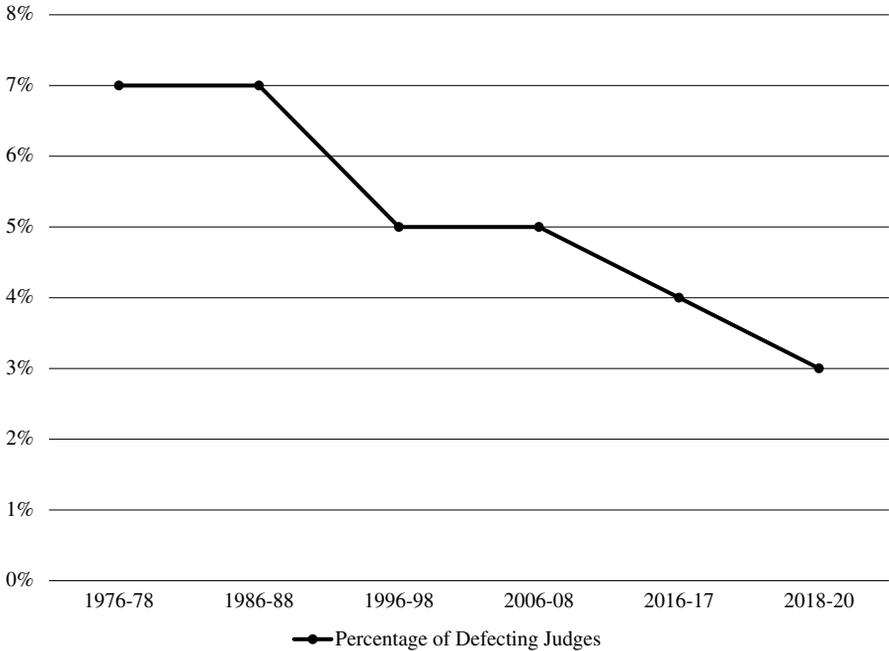
Notice how the percentage of cases that we labeled either a partisan split or a partisan reversal (the top line above) rose steadily from 2016 to 2020. From 2018 to 2020, there was a statistically significant spike in both partisan splits and partisan reversals—more in both categories than we observed in any other time period over six decades.<sup>165</sup> Further, referring back to Figure 3 above, the rates 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.

Cases from 2018 to 2020 are different for another reason. We tallied the split en banc decisions that had defecting judges, meaning decisions with odd bedfellows, in which one Democrat-appointed judge votes with Republican-appointed judges and against all other Democrat-appointed judges, or vice versa. The rate of defection, perhaps a sign of judicial independence or non-partisanship, is dropping

<sup>165</sup> We made use of two separate measures to find the spike statistically significant: the Fisher's Exact Test and the Chi-Squared test. The spike was strongly statistically significant under either measure. For both tests, we used the alpha (significance) level of 5% (0.05). The p value for the Fisher Exact Test is 0.02881. The p value for the Chi-Squared test is 0.03606. Thanks to our colleague Eric Kades for running the tests.

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 years, 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.

FIGURE 7. PERCENTAGE OF DEFECTING JUDGES  
IN PARTISAN SPLITS WITH 10 OR MORE JUDGES 1976–2020



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 from 2018 to 2020. As you can see in Figure 3, twenty-seven percent of all en banc decisions from 2018 to 2020 were decided in nearly perfect blocs divided by appointing party (“partisan splits”). Compare that to twelve percent in 2016 to 2017, fourteen percent in 2006 to 2008, fifteen percent in 1996 to 1998, and even twenty percent during the previous high point, 1986 to 1988. Put most starkly, the rate of partisan en banc splits nearly doubled from the Obama, Bush, and Clinton eras to the Trump era, and is far higher now than in any of the years we studied over six decades. From our data, therefore, it seems judges are lining up in en banc teams now more than ever before.

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 OF 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 Part, we will try to make sense of our findings pre-2018. They are counter-intuitive. After all, many political scientists believe that federal court of appeals judges—like Supreme Court Justices—are driven by their desire to advance their legal policy preferences.<sup>166</sup> Why then was en banc review somewhat impervious to a growing partisan divide?

Our principal claim is that federal court of 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

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<sup>166</sup> For “attitudinalists,” policy preferences are all that matter. See generally JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002). With respect to en banc review, attitudinalists argue that “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.” Giles et al., *Etiology*, *supra* note 58, at 451. 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, 350 (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) (arguing that “whistleblower” dissents, which expose a court’s apparent disregard of established doctrine, prevent judges and panels from straying too much from established law); 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, 491–92 (2016) (discussing appellate judges’ strategy of writing dissents to panel opinions to signal to the full circuit that the panel majority’s decision is worthy of review). 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. See Giles et al., *Etiology*, *supra* note 58, 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.”).

data indicate. 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 review pre-2018: first, collegiality concerns; second, entrenched circuit en banc workarounds and customs; and third, general rule of law and 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.

### A. 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."<sup>167</sup> More than ninety-seven percent of federal court of appeals panel decisions are unanimous and less than one percent of panel decisions are vacated and reconsidered en banc.<sup>168</sup> To reach consensus, judges engage in "a continual quest to reduce conflict through holding conferences, circulating draft opinions and memoranda, and conducting private meetings between individual judges or groups of judges."<sup>169</sup> These substantial efforts are undermined by en banc reversals and splits that fall on party lines.

Collegiality may be desirable for many reasons. Judges, for example, may be motivated to do a "good job of judging."<sup>170</sup> For D.C. Circuit Judge Harry T. Edwards, a collegial court is one where "judges have a common interest, as members of the judiciary, in getting the law right."<sup>171</sup> Collegiality thus "plays an important part in mitigating

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<sup>167</sup> Frank B. Cross, *Collegial Ideology in the Courts*, 103 Nw. U. L. REV. 1399, 1413 (2009); see also *supra* note 8 and accompanying text. For this very reason, a consensus model, including the cost of dissent in the judicial utility function, was a better predictor of court of appeals decision-making than the standard model that focuses on preferred outcomes. See Joshua B. Fischman, *Estimating Preferences of Circuit Judges: A Model of Consensus Voting*, 54 J.L. & ECON. 781, 782 (2011).

<sup>168</sup> For data on rates of dissent in the U.S. Courts of Appeals, see EPSTEIN ET AL., *supra* note 27, at 264–65. For information on rates of en banc grants, see Sadinsky, *supra* note 6, at 2015 n.128.

<sup>169</sup> Sheldon Goldman & Charles M. Lamb, *Prologue to JUDICIAL CONFLICT AND CONSENSUS: BEHAVIORAL STUDIES OF AMERICAN APPELLATE COURTS 1* (Sheldon Goldman & Charles M. Lamb eds., 1986).

<sup>170</sup> Lynn A. Stout, *Judges as Altruistic Hierarchs*, 43 WM. & MARY L. REV. 1605, 1607 (2002).

<sup>171</sup> Edwards, *supra* note 44, at 1645; see also Alex Kozinski, *What I Ate for Breakfast and Other Mysteries of Judicial Decision Making*, 26 LOY. L.A. L. REV. 993, 994 (1993) ("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." (quoting Senator

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.”<sup>172</sup>

Judges also pursue collegiality for the simple reason that “appellate court decisions are inherently collective products”<sup>173</sup> 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.”<sup>174</sup> 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.<sup>175</sup>

All judges know that dissent comes at a price. “In all the courts of appeal,” explained D.C. Circuit Judge Douglas Ginsburg, “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.”<sup>176</sup> Correspondingly, circuit judges are repeat players with each other and, as such, “anticipated future interactions” may be the driving force behind the norm of consensus.<sup>177</sup>

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Strom Thurmond at Judge Kozinski’s investiture as Chief Judge of the United States Court of Federal Claims in 1982)).

<sup>172</sup> Edwards, *supra* note 44, 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 id.* at 1640–41 (claiming that collegiality actually mitigates judges’ ideological preferences and enables them to find common ground); Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1900 (2008) (presenting a comprehensive analysis of the flaws in such legal models). For critiques of Judge Edwards’s view, see EPSTEIN ET AL., *supra* note 27, at 54–63; Gregory C. Sisk & Michael Heise, *Judges and Ideology: Public and Academic Debates About Statistical Measures*, 99 NW. U. L. REV. 743, 747–51 (2005).

<sup>173</sup> BAUM, *supra* note 111, at 51; *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) (discussing the impact of collegiality on opinion writing).

<sup>174</sup> BAUM, *supra* note 111, at 54.

<sup>175</sup> Patricia M. Wald, *Thoughts on Decisionmaking*, 87 W. VA. L. REV. 1, 10 (1984).

<sup>176</sup> Ginsburg & Falk, *supra* note 32, at 1016. Furthermore, as suggested by theories of cognitive dissonance, court of appeals judges “seek to reduce the psychic discomforts of standing alone.” HOWARD, *supra* note 7, at 193; *see also* Steven A. Peterson, *Dissent in American Courts*, 43 J. POL. 412, 417–18, 427–29 (1981) (noting that judges desire unanimity and seek to avoid dissent because of its potential to cause “interpersonal tension and animosity” between them).

<sup>177</sup> Rachel K. Hinkle, Michael J. Nelson & Morgan L.W. Hazelton, *Deferring, Deliberating, or Dodging Review: Explaining Counterjudge Success in the US Courts of Appeals*, 8 J.L. & CTS. 277, 282 (2020); *see also* Cross, *supra* note 167, at 1416 (tying dissent

There are other costs to dissent as well. “Most people value leisure time, and there is little reason to think judges are different”;<sup>178</sup> writing separate opinions takes “time and energy [and that] obviously translates into less time for other activities.”<sup>179</sup> In addition to the “effort cost” of writing a dissent, there is a “collegiality cost” too.<sup>180</sup> 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.<sup>181</sup> For nearly all judges, it makes sense to avoid “the ill will of one’s judicial colleagues—wrangles with colleagues make for a harder job . . . .”<sup>182</sup>

Judges highly value collegiality, and they give it more than just lip service. As others have demonstrated, federal court of 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.”<sup>183</sup>

Former Seventh Circuit Judge Richard Posner provided an extreme example of the willingness of court of appeals judges to forsake their preferred outcome in order to accommodate another panel member. “[I]n 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.”<sup>184</sup> 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

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aversion to norms of reciprocity “such that a judge’s dissent from an opinion may cost him votes in his future opinions”).

<sup>178</sup> DAVID E. KLEIN, *MAKING LAW IN THE UNITED STATES COURTS OF APPEALS* 17 (2002).

<sup>179</sup> VIRGINIA A. HETTINGER, STEFANIE A. LINDQUIST & WENDY L. MARTINEK, *JUDGING ON A COLLEGIAL COURT: INFLUENCES ON FEDERAL APPELLATE DECISION MAKING* 112 (2007).

<sup>180</sup> EPSTEIN ET AL., *supra* note 27, at 261.

<sup>181</sup> *See id.* at 261–63 (discussing the costs of dissents).

<sup>182</sup> *Id.* at 42.

<sup>183</sup> Cross, *supra* note 167, at 1401; *see also* Giles et al., *Setting a Judicial Agenda*, *supra* note 17, at 865 (agreeing with the contention that “legal goals have far greater operative effect in the lower courts than in the Supreme Court” (quoting LAWRENCE BAUM, *THE PUZZLE OF JUDICIAL BEHAVIOR* 88 (1997))).

<sup>184</sup> RICHARD A. POSNER, *OVERCOMING LAW* 123 (1995).

other members.<sup>185</sup> Numerous panel effect studies have been conducted,<sup>186</sup> most considering the ideological diversity of panel members and some considering the impact of race and gender diversity on a panel decision.<sup>187</sup> In particular, these studies link panel effects to the high rates of unanimity on federal courts of appeals. “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.”<sup>188</sup>

Cass Sunstein, for example, found that a judge’s ideological tendency is likely to be dampened if she is sitting with two judges appointed by a different political party and, correspondingly, that a judge’s ideological tendency is likely to be amplified if she is sitting with two judges appointed by the same political party.<sup>189</sup> A striking example of both dampening and amplification is affirmative action. A Republican-appointed judge sitting on a panel with two Democratic appointees is more likely to uphold affirmative action programs (sixty-five percent of votes) than a Democrat-appointed judge sitting on a panel with two Republican appointees (sixty-one percent).<sup>190</sup> On all

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<sup>185</sup> See Hinkle et al., *supra* note 177, at 277–79 (describing the phenomenon and recounting its exploration by scholars); Jonathan P. Kastellec, *Hierarchical and Collegial Politics on the U.S. Courts of Appeals*, 73 J. POL. 345, 348–49 (2011) (analyzing the panel effect). In addition to panel effects that result from the collegial environment, panel effects may also result from strategic decision-making. See *supra* note 166 (discussing the “whistleblower” theory of panel effects).

<sup>186</sup> For a good summary, see FRANK B. CROSS, *DECISION MAKING IN THE U.S. COURTS OF APPEALS* 148–77 (2007).

<sup>187</sup> See generally 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) (assessing the impact of panels’ gender and race composition on decision-making dynamics); Jennifer L. Peresie, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759 (2005) (exploring panel effects with respect to gender); Stephen B. Burbank & Sean Farhang, *Politics, Identity, and Class Certification on the U.S. Courts of Appeal*, 119 MICH. L. REV. 231 (exploring panel effects with respect to race).

<sup>188</sup> 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).

<sup>189</sup> SUNSTEIN ET AL., *supra* note 80, 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, Kristin E. Hickman & Emerson H. Tiller, *Panel Effects in Administrative Law: A Study of Rules, Standards, and Judicial Whistleblowing*, 71 SMU L. REV. 445, 447 (2018).

<sup>190</sup> See SUNSTEIN ET AL., *supra* note 80, 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 Democrat-appointed and Republican-appointed judges and found clear evidence of a link between party affiliation and ideology. See *id.* at 19–24, 113–22.

Democrat-appointed panels, eighty-one percent of votes support affirmative action programs; on all Republican-appointed panels, thirty-four percent of votes support such programs.<sup>191</sup>

The willingness of court of appeals judges to trade off ideology for other ends, demonstrated in the panel effects literature, among other places, is very 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.<sup>192</sup> 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 manners that most judges expect as routine.<sup>193</sup> 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 is 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.”<sup>194</sup> Judge Jon 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

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<sup>191</sup> See 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).

<sup>192</sup> 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 186, at 108; see also EPSTEIN ET AL., *supra* note 27, at 269–70 (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,” likely more so than from “strangers, such as the Justices of the Supreme Court”); SMITH, *supra* note 17, at 134 (noting that en banc decisions “most clearly illustrate the issue cleavages” among circuit judges).

<sup>193</sup> Recall the *Manning* case in the Fourth Circuit and the tone of the opinions between the dissent and majority. See *supra* note 73 and accompanying text.

<sup>194</sup> Ginsburg & Falk, *supra* note 32, at 1021.

of an [e]n banc court.”<sup>195</sup> 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.<sup>196</sup>

### B. *Mini En Bancs and Other Work-Arounds*

Most circuits have embraced these collegiality pressures by creating several institutionalized workarounds that serve to limit en banc review. 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.

Most notably, nine of the thirteen circuits have adopted some form of the “mini en banc” procedure.<sup>197</sup> Mini en bancs are elusive and have various pseudonyms including “junior en banc,” “informal en banc,” and the “quasi en banc.”<sup>198</sup> The Second Circuit has engaged

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<sup>195</sup> Martin Flumenbaum & Brad S. Karp, *The Rarity of En Banc Review in the Second Circuit*, N.Y.L.J., Aug. 24, 2016.

<sup>196</sup> Colter Paulson, *Judge Sutton Explains Why En Banc Review Is So Rare*, SIXTH CIR. APP. BLOG (Dec. 10, 2010) (quoting *Mitts v. Bagley*, 626 F.3d 366, 370 (2010)), <https://www.sixthcircuitappellateblog.com/recent-cases/judge-sutton-explains-why-en-banc-review-is-so-rare>.

<sup>197</sup> See Amy E. 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) (describing these circuits: the First, Second, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and the District of Columbia); Steven Bennett & Christine Pembroke, *Mini in Banc Proceedings: A Survey of Circuit Practices*, 34 *CLEV. ST. L. REV.* 531, 544–57 (1985) (providing an overview of the “mini en banc” procedure). 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 twenty-nine judges. Instead, the court uses what is known as a “limited” en banc, or sometimes a “mini” one. See Pamela Ann Rymer, *The “Limited” En Banc: Half Full, or Half Empty?*, 48 *ARIZ. L. REV.* 317, 317 (2006). The “mini en banc” to which we refer is the kind used outside the Ninth Circuit to avoid full en banc review, not the limited en banc routinely used in the Ninth.

<sup>198</sup> Bennett & Pembroke, *supra* note 197, at 547 n.77; Sloan, *supra* note 197, at 715; Solimine, *supra* note 17, at 36.

in the practice since at least 1966, but the procedure is rarely documented and hard to define.<sup>199</sup>

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 an opinion is published tentatively suggesting that a precedent should be overruled.<sup>200</sup> 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 not, a circuit precedent can be overruled by a panel decision on the (safe) assumption that en banc will be avoided.<sup>201</sup> All of this typically happens behind the scenes. The goal of the mini en banc is to prevent a real en banc.

Even outside this version of the mini en banc, other circuits, including the Fourth and Tenth, have a policy by which every draft opinion is circulated to every judge on the circuit, and the Third circulates draft opinions to every active judge on the circuit.<sup>202</sup> The Seventh Circuit has a rule by which one panel can veer from circuit precedent if the draft opinion has been circulated to all the judges first.<sup>203</sup> All of these circulating practices have many justifications, surely, but one known consequence is the lack of divisive partisan en banc decisions.<sup>204</sup>

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. The Second Circuit, for example, touts this tradition vocally: Judge Robert Katzmann explained that the circuit has 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

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<sup>199</sup> See Sloan, *supra* note 197, at 730–31. Currently, it seems that the First, Second, Seventh, Tenth, and D.C. Circuits are those that have most consistently used mini en bancs, while the Fourth, Fifth, Sixth, and Eighth Circuits have also used some type of mini en banc on occasion. See *id.* at 726–30; Sadinsky, *supra* note 6, at 2025–27.

<sup>200</sup> See Bennett & Pembroke, *supra* note 197, at 547–50.

<sup>201</sup> See *id.*

<sup>202</sup> *Id.* at 552, 555.

<sup>203</sup> Michael S. Kanne, *The “Non-Banc En Banc”*: *Seventh Circuit Rule 40(e) and the Law of the Circuit*, 32 S. ILL. UNIV. L.J. 611, 611 (2008) (citing Seventh Circuit Rule 40(e)).

<sup>204</sup> See *id.* at 614 (describing the likelihood that circulations infrequently result in rehearings en banc); see also Bennett & Pembroke, *supra* note 197, at 557 (detailing the extent to which mini en banc proceedings result in unanimous opinions, especially in comparison to full en banc opinions). The D.C. Circuit has a similar policy whose authority is referred to as the “Irons footnote.” Kanne, *supra* note 203, at 618. Aside from the impulse to minimize divided en banc decisions, several other considerations merit circulation of panel opinions to the entire court, including the need to spot intra-circuit splits and the desire for the circuit to speak with one voice.

disposition of the matter before it.”<sup>205</sup> Judge Jon Newman has further boasted that “[i]t is no coincidence that the Second Circuit, which has the lowest rate of rehearings [e]n banc of all the circuits, is also the most efficient circuit.”<sup>206</sup> According to Judge Newman, “[d]espite 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.”<sup>207</sup>

One can almost see the “no I in team” on the back of the Second Circuit’s 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, her party loyalty may be 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,”<sup>208</sup> as the Third Circuit calls itself, one is expected to act like a member of the Mighty Third.

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.”<sup>209</sup> In the Sixth Circuit, for example—a circuit with a comparatively more robust en banc practice—a dramatic shift in personnel in the 80s and 90s was linked to “increased disagreement” and decreased collegiality.<sup>210</sup>

But, despite their potential fragility, the sheer existence and variety of these formal and informal mechanisms in the courts of

<sup>205</sup> Sadinsky, *supra* note 6, at 2015.

<sup>206</sup> Newman, *supra* note 8, at 382.

<sup>207</sup> *Id.* at 384.

<sup>208</sup> Martin, *supra* note 8, at 5.

<sup>209</sup> Patricia M. Wald, *Changing Course: The Use of Precedent in the District of Columbia Circuit*, 34 CLEV. ST. L. REV. 477, 517 (1986).

<sup>210</sup> J. Bret Treier, *Increased En Banc Activity by the Sixth Circuit*, 19 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 currently with the Sixth Circuit.”); *see also* Harry W. Wellford, Anna M. Vescovo & Lundy L. Boyd, *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.”).

appeals to avoid en banc review provides insight into our thwarted hypothesis. Presumably en banc has been treated uniquely for decades by courts of appeals judges—precisely because those 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.

### C. 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 court of appeals judges have multiple goals. As scholars have demonstrated, ideology is certainly an important goal, but there are others too.<sup>211</sup> In particular, we believe federal court of appeals judges care a great deal about the esteem in which they are held, especially in the professional and social networks that they inhabit.<sup>212</sup> Accepting a federal judgeship typically means giving up future income and agreeing to significant constraints on one's personal activities; those who find this tradeoff desirable are likely to care a great deal about their reputation in the communities they value.<sup>213</sup> 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.”<sup>214</sup> In the Chief Justice's view, “[w]e 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.”<sup>215</sup> 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

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<sup>211</sup> See Neal Devins & Will Federspiel, *The Supreme Court, Social Psychology, and Group Formation*, in *THE PSYCHOLOGY OF JUDICIAL DECISION MAKING*, *supra* note 2, at 85, 90.

<sup>212</sup> See RICHARD A. POSNER, *HOW JUDGES THINK* 36 (2008) (listing numerous goals of judges, including “power, prestige, reputation, self-respect”).

<sup>213</sup> BAUM, *supra* note 111, at 32–33.

<sup>214</sup> See Liptak, *supra* note 4.

<sup>215</sup> *Id.* (quoting Chief Justice Roberts).

embraced by several Supreme Court Justices and federal court of appeals judges, including President Trump's appointees.<sup>216</sup>

This well-entrenched and widely-shared embrace of an independent judiciary is fundamental 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 [their] decisions . . . as grounded truly in principle, not as compromises with social and political pressures . . ." <sup>217</sup>

As has been recognized by judicial leaders since the time of Chief Justice John Marshall, if courts are merely pawns of politicians, then courts lose their power and authority.<sup>218</sup> Chief Justice John Roberts spoke out to defend judicial independence because it is the central nervous 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 draw of "my team-your team" thinking in en banc decision-making.

Closely related to judicial independence norms is a commitment to the rule of law: "[T]here is perhaps 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."<sup>219</sup> This commitment to the rule of law is "woven tightly into the fabric of legal education and the legal profession."<sup>220</sup> Law-oriented decision-making cuts against ideological decision-

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<sup>216</sup> See Devins & Baum, *Split Definitive*, *supra* note 77, at 306 (describing how the Justices' "embrace of the norm of judicial independence" allows them to adopt ideological positions contrary to those of their partisan constituencies); see also Bravin, *supra* note 1 (discussing frustration among federal judges, including now-Justice Amy Coney Barrett, about the popular perception that they are "extensions of the presidents who appointed them"); Richard L. Hasen, *More and More Republican Officials Are Standing Up to Trump and His Effort to Overturn the Election*, SLATE (Dec. 1, 2020, 2:58 PM), <https://slate.com/news-and-politics/2020/12/republican-officials-who-have-gone-against-trump-barr-ducey-kemp.html> (recounting the refusal of federal and state judges of all ideological inclinations to maintain President Trump's meritless election-related lawsuits).

<sup>217</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 865 (1992).

<sup>218</sup> See FALLON, *supra* note 3, at 45 (arguing that a judicial decision rendered on the basis of "whim, caprice, or personal like or dislike for the parties" would lack legal and moral legitimacy); Grove, *Legitimacy Dilemma*, *supra* note 3, at 2245-46 (describing the ways in which the Supreme Court's legitimacy turns on "the behavior of political actors" and the ways in which that behavior can, in turn, "undermine the Court's reputation").

<sup>219</sup> Martinek, *supra* note 2, at 77.

<sup>220</sup> *Id.*

making, including the formation of competing partisan ideological blocs.<sup>221</sup>

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 decisionmaking” by fixing a judge’s attention on “decision-relevant features of a case.”<sup>222</sup> By demonstrating that legal training and experience inform professional judgment, this study underscores the centrality of rule-of-law norms both to judges and to their social and professional networks.<sup>223</sup> Perhaps more telling, the refusal of Republican-appointed 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.<sup>224</sup>

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 decisions on their political views to a great or moderate extent.<sup>225</sup> This behavior cuts against the strong pull of rule-of-law and judicial independence norms. Put another way, it reinforces President Trump’s view of judging at the expense of Chief Justice Roberts’s view. And that internal self-image warfare may be the best explanation of what put the brakes on en banc partisan warfare . . . at least historically.

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<sup>221</sup> In other words, like everyone else, federal court of 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).

<sup>222</sup> Dan M. Kahan, David Hoffman, Danieli Evans, Neal Devins, Eugene Lucci & Katherine Cheng, “*Ideology*” or “*Situation Sense*”? *An Experimental Investigation of Motivated Reasoning and Professional Judgment*, 164 U. PA. L. REV. 349, 354–55 (2016).

<sup>223</sup> See LEARY, *supra* note 221, at 67.

<sup>224</sup> See Hasen, *supra* note 216 (describing the refusal of judges of both parties to lend credence to President Trump’s meritless election-related lawsuits); John O. McGinnis, *Constitutional Fidelity*, CITY J. (Dec. 9, 2020), <https://www.city-journal.org/in-election-lawsuits-trump-judges-follow-the-law> (arguing that Trump-appointed judges “have turned out to be singularly uncooperative conspirators” in Trump’s efforts to put “democracy at risk”).

<sup>225</sup> KATHLEEN HALL JAMIESON, ANNENBERG PUB. POL’Y CTR., *PUBLIC UNDERSTANDING OF AND SUPPORT FOR THE COURTS* (2007), [https://cdn.annenbergpublicpolicycenter.org/Downloads/20071017\\_JudicialSurvey/Judicial\\_Findings\\_10-17-2007.pdf](https://cdn.annenbergpublicpolicycenter.org/Downloads/20071017_JudicialSurvey/Judicial_Findings_10-17-2007.pdf).

## V

## EXPLAINING THE RECENT UPTICK IN PARTISAN EN BANC

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 to 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 to 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 Part II, 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.<sup>226</sup>

On the other hand, rather than represent a precursor of what lies ahead, the Trump presidency may stand alone. In the view of many, President Trump challenged “the basic norms and institutions of democracy”<sup>227</sup> and thereby “test[ed] the institution of the presidency unlike any of his [forty-three] predecessors.”<sup>228</sup> Correspondingly, more than any administration before it, the Trump administration and its opponents turned to the federal courts to advance their agenda.<sup>229</sup> Federal judges are necessarily in the middle of bitterly partisan disputes involving presidential initiatives and the personal dealings of the President. In administrations after President Trump’s, federal judges may not be called into service in such overtly partisan disputes. Indeed, then-candidate Joe Biden repeatedly spoke of “[t]he country

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<sup>226</sup> See *supra* Part II.

<sup>227</sup> Michael J. Klarman, *Foreword: The Degradation of American Democracy—And the Court*, 134 HARV. L. REV. 1, 7 (2020).

<sup>228</sup> Jack Goldsmith, *Will Donald Trump Destroy the Presidency?*, ATLANTIC (Sept. 12, 2017), <https://www.theatlantic.com/magazine/archive/2017/10/will-donald-trump-destroy-the-presidency/537921>.

<sup>229</sup> See *infra* notes 257–63 and accompanying text; see also Reid Wilson, *States Sue Trump Administration at Record Pace*, HILL (Feb. 12, 2020, 6:00 AM), <https://thehill.com/homenews/state-watch/482620-states-sue-trump-administration-at-record-pace> (detailing state lawsuits against President Trump and his administration).

[being] sick of the division,” “sick of the fighting,” and promised a return to normalcy.<sup>230</sup>

Let us first consider the possibility that the Trump era is a harbinger of things to come. To start, President Trump tapped into entrenched polarization. His election was “a symptom of polarization rather than a cause of it.”<sup>231</sup> 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.”<sup>232</sup> 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.<sup>233</sup>

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.”<sup>234</sup> During the COVID-19 pandemic, for example, “[r]ampant partisanship” was the largest obstacle to social distancing, mask wearing, and other practices critical to limiting the spread of the virus.<sup>235</sup> Today, polarization is seen as intractable because of the “alignment between other social identities and partisanship.”<sup>236</sup> More than during 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 . . . .”<sup>237</sup>

Most relevant to our project, President Trump tapped into and accelerated a bitter fight between Democrats and Republicans

<sup>230</sup> Ezra Klein, *Joe Biden’s Promise: A Return to Normalcy*, Vox (May 20, 2019, 8:00 AM), <https://www.vox.com/policy-and-politics/2019/5/20/18631452/joe-biden-2020-presidential-announcement-speech>.

<sup>231</sup> Ashton Yount, *Donald Trump’s Election Did Not Increase Political Polarization*, ANNENBERG SCH. FOR COMM’N (Oct. 11, 2019), <https://www.asc.upenn.edu/news-events/news/trump-did-not-increase-polarization> (quoting Professor Yphtach Lelkes).

<sup>232</sup> Thomas B. Edsall, Opinion, *The Audacity of Hate*, N.Y. TIMES (Feb. 19, 2020), <https://www.nytimes.com/2020/02/19/opinion/trump-anger-fear.html>.

<sup>233</sup> See ALAN I. ABRAMOWITZ, *THE GREAT ALIGNMENT: RACE, PARTY TRANSFORMATION, AND THE RISE OF DONALD TRUMP* 170 (2018) (“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.”).

<sup>234</sup> Edsall, *supra* note 232.

<sup>235</sup> Joshua Clinton, Jon Cohen, John S. Lapinski & Marc Trussler, *Partisan Pandemic: How Partisanship and Public Health Concerns Affect Individuals’ Social Mobility During COVID-19*, 7 SCI. ADVANCES 1, 1 (2021).

<sup>236</sup> Thomas B. Edsall, Opinion, *How Could Human Nature Have Become This Politicized?*, N.Y. TIMES (July 8, 2020), <https://www.nytimes.com/2020/07/08/opinion/trump-politics-psychology.html> (quoting political scientists Sean Westwood and Erik Peterson).

<sup>237</sup> *Id.*

regarding judges.<sup>238</sup> Unlike earlier presidential races, in which judicial nominations were not particularly important to candidates or voters,<sup>239</sup> judicial vacancies, particularly the power to appoint a Supreme Court Justice, were a key issue in the 2016 election.<sup>240</sup> Then-candidate Trump boosted his electoral prospects by partnering with the Federalist Society to release a list of potential Supreme Court candidates.<sup>241</sup>

By capitalizing on longstanding trends regarding polarization and judicial selection, President Trump's election further elevated the salience of judicial appointments. In so doing, the link between party and ideology became clearer. If the President's party controls the Senate, nominations will receive swift action and ultimate confirmation; if the President's party is in the minority, nominations will languish.<sup>242</sup> This type of winner-take-all politics may well outlast the Trump administration.

Indeed, further buttressing this prediction is the fact that the courts once again played a figural role in the 2020 election. President Trump initially sought to rally his base with an updated list of possible Supreme Court nominees;<sup>243</sup> he likewise sought an electoral advantage by nominating Amy Coney Barrett to the Supreme Court mere weeks before Election Day.<sup>244</sup> Then-candidate Joe Biden followed

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<sup>238</sup> See *supra* notes 133–43 and accompanying text.

<sup>239</sup> Consider, for example, the 2004 presidential election. One week before the election, then U.S. Supreme Court Chief Justice William Rehnquist announced that he underwent a tracheotomy for thyroid cancer. 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 John Kerry or George W. Bush, the major party candidates in the 2004 presidential election, used that announcement to focus attention on the Supreme Court. For voters, too, the Supreme Court was a low priority—only one percent ranked the Supreme Court as the most important issue. Press Release, PEW RSCH. CTR., Moral Values: How Important? Voters Liked Campaign 2004, But Too Much ‘Mud-Slinging’ 15 (Nov. 11, 2004), [https://www.pewtrusts.org/-/media/legacy/uploadedfiles/wwwpewtrustsorg/reports/public\\_opinion\\_and\\_polls/prcnov04postelectpdf.pdf](https://www.pewtrusts.org/-/media/legacy/uploadedfiles/wwwpewtrustsorg/reports/public_opinion_and_polls/prcnov04postelectpdf.pdf).

<sup>240</sup> See PEW RSCH. CTR., TOP VOTING ISSUES IN 2016 ELECTIONS 4 (2016), <https://www.pewresearch.org/politics/2016/07/07/4-top-voting-issues-in-2016-election> (reporting that sixty-five percent of voters deemed Supreme Court appointments a “very important factor” in their voting decision in the 2016 presidential election).

<sup>241</sup> Alan Rappaport & 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/conquerors-of-the-courts>.

<sup>242</sup> See *supra* notes 130–38 and accompanying text.

<sup>243</sup> Eric Bradner, *In Repeat of 2016 Strategy, Trump Pledges New List of Justices After Two Stinging Supreme Court Losses*, CNN (June 18, 2020, 6:28 PM), <https://www.cnn.com/2020/06/18/politics/2020-election-trump-list-supreme-court/index.html>.

<sup>244</sup> See Nancy Cook & Gabby Orr, *Trump Taps Barrett, Launching Brawl Over Supreme Court's Future*, POLITICO (Sept. 26, 2020, 7:00 AM), <https://www.politico.com/news/2020/>

suit, initially promising to release a list of potential Supreme Court nominees, and then promising that his first pick would be a Black woman.<sup>245</sup> 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.<sup>246</sup>

Judicial nominees, at least on the Supreme Court, are now explicitly told they are expected to advance the causes of the party that backed them.<sup>247</sup> That may have been true before President Trump, but it is now conventional wisdom.<sup>248</sup> The 2020 Democratic Party platform specifically called for “structural” changes to the federal courts, including adding seats to the federal courts of appeals.<sup>249</sup> The

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09/26/trump-scotus-coney-barrett-easy-choice-422019 (describing the potential boost in support for Trump among evangelicals and Catholics, as well as the diversion from “more negative headlines about issues potentially damaging to Trump,” as a result of Barrett’s nomination).

<sup>245</sup> Quint Forgey, *Biden Says He’ll Release List of Black Women as Potential SCOTUS Nominees*, POLITICO (June 30, 2020, 3:10 PM), <https://www.politico.com/news/2020/06/30/biden-black-female-supreme-court-nominees-345622>.

<sup>246</sup> 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>.

<sup>247</sup> The most recent example of this development was President Trump’s public statements, shortly before the 2020 election, that he wanted then-Judge Amy Coney Barrett to join the Supreme Court as soon as possible in order for her to hear any disputes that arose out of the election. Lawrence Hurley & Jeff Mason, *Trump Celebrates at White House as Supreme Court Nominee Confirmed*, REUTERS (Oct. 26, 2020, 6:09 AM), <https://www.reuters.com/article/us-usa-court-barrett/trump-celebrates-at-white-house-as-supreme-court-nominee-confirmed-idUSKBN27B143>.

<sup>248</sup> For an examination of how public and elected government perspectives of results-oriented decision-making have created a legitimacy dilemma for the Supreme Court, see FALLON, *supra* note 3, at 39–41 (naming *Bush v. Gore*, 531 U.S. 98 (2000), and *Roe v. Wade*, 410 U.S. 113 (1973), as examples of decisions that many have criticized as illegitimately political); Grove, *Legitimacy Dilemma*, *supra* note 3, at 2245 (discussing pressure on the Justices “to sacrifice the legal legitimacy of their judicial decisions in order to preserve the sociological legitimacy of the Court as a whole”).

<sup>249</sup> 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>; see also Leah Litman, *Opinion, How to Fix the Supreme Court: Expand the Lower Courts*, N.Y. TIMES (Oct. 27, 2020), <https://www.nytimes.com/interactive/2020/10/27/opinion-supreme-court-reform.html> (arguing that Congress should exercise its power to expand the lower federal courts for the “health and well-being of our constitutional democracy”). Following the election of Joe Biden, these calls continued. See Madison Alder, *Liberals Push Congress for ‘Robust’ Lower Court Expansion*, BLOOMBERG (Dec. 7, 2020, 4:51 AM), <https://news.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 younger successors. Zoe Tillman, *Trump Transformed the Federal Courts. Here’s What Biden Could Do.*, BUZZFEED NEWS (Dec. 17, 2020, 4:26 PM), <https://www.buzzfeednews.com/article/zoetillman/trump-judges-appoint-biden-courts>; see also Marin K. Levy, *The Promise of Senior Judges*, 115 Nw. U. L. REV. 1227, 1233 (2021) (advocating for active judges to take

Republican Policy Committee (RPC) went so far as to formally embrace partisan en banc overrulings. As stated by the RPC, “[i]ncreasing 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.”<sup>250</sup> Needless to say, the spike in partisan en banc overrulings suggests that court of appeals judges—both Democrat-appointed and Republican-appointed—increasingly see en banc review as a partisan tool.<sup>251</sup> This seems particularly true of circuits in which multiple judges are confirmed at the same time, including the D.C. Circuit and the Ninth Circuit.<sup>252</sup> More telling, appointees of President Trump to the federal courts of appeals “were nearly four times as likely to clash with colleagues appointed by Democratic presidents as those appointed by Republicans,” around double the rate of judges appointed by other Republican presidents.<sup>253</sup>

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 court of appeals judges in general, and Trump appointees in particular.<sup>254</sup> As noted in Part II, 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.<sup>255</sup> Democratic

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senior status to create new vacancies and expand the court’s capacity). For additional discussion of Congress’s power to pursue ideological objectives through its control of the lower courts, see John M. De Figueiredo & Emerson H. Tiller, *Congressional Control of the Courts: A Theoretical and Empirical Analysis of Expansion of the Federal Judiciary*, 39 J.L. & ECON. 435 (1996).

<sup>250</sup> *Flipping Circuit Courts*, *supra* note 138.

<sup>251</sup> On the D.C. Circuit, this practice dates back to the Obama years. After flipping the D.C. Circuit, judicial appointees of President Obama backed Obama administration requests for en banc review to vacate Republican-dominated panel decisions. See Jeffrey Toobin, *The Obama Brief*, NEW YORKER (Oct. 20, 2014), <https://www.newyorker.com/magazine/2014/10/27/obama-brief>.

<sup>252</sup> See *id.* (discussing Democrat-appointed judges taking control of the D.C. Circuit after multiple appointments in 2013); Dolan, *supra* note 61 (discussing the Republican transformation of the Ninth Circuit through the appointment of ten judges from 2018 to 2020).

<sup>253</sup> Ruiz & Gebeloff, *supra* note 134.

<sup>254</sup> See *supra* Section II.D.

<sup>255</sup> 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

interest groups, too, are advocating that—starting immediately with President Biden—Democratic Presidents steal a page from the Republican playbook by giving greater emphasis to ideology in judicial appointments.<sup>256</sup> This us-versus-them dynamic will further divide federal court of 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 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 costs and value of en bancs should be reassessed.

Of course, the other explanation for the spike in partisan en bancs is also a genuine possibility. There are ways in which the Trump presidency is *sui generis*, such that the spike in partisan en banc decision-making may prove to be tied more to President Trump himself, and not to 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 on ways in which President Trump capitalized on longstanding trends in the nation at large and in the Republican Party. But legal disputes may occupy a uniquely preferred position in President Trump's orbit.

President Trump used the courts to advance his administration's goals as well as his personal interests—and his opponents used the courts to combat him. As Peter Baker reported in 2019, “[a]lways 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 gen-

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141 (arguing that, contrary to statements on its website, the Federalist Society is “a powerful and partisan organization that plays a large role in selecting federal judges who will then reliably rule for Republican Party and conservative interests”). More significantly, the Democratic Policy Committee issued a fifty-four page report in May 2020 regarding the role of the Federalist Society and dark money in reshaping the federal courts. See DEBBIE STABENOW, CHUCK SCHUMER & SHELDON WHITEHOUSE, DEMOCRATIC POL’Y & COMM’NS COMM., CAPTURED COURTS: THE GOP’S BIG MONEY ASSAULT ON THE CONSTITUTION, OUR INDEPENDENT JUDICIARY, AND THE RULE OF LAW (2020).

<sup>256</sup> Jess Bravin, *Biden Aims to Appoint Liberal Judges After Trump’s Conservative Push*, WALL ST. J. (Nov. 28, 2020, 5:30 AM), <https://www.wsj.com/articles/biden-aims-to-appoint-liberal-judges-after-trumps-conservative-push-11606559402>.

erally results in more talk than tort, since he routinely fails to follow through.”<sup>257</sup> For Shannen Coffin, former counsel to Vice President Dick Cheney, President Trump was more willing than other Presidents to fight the opposition in court.<sup>258</sup>

And, in his rhetoric, President Trump has often combined talk of positive outcomes for himself with the need for conservative judges who will be faithful to the Constitution.<sup>259</sup> In his failed effort to overturn the 2020 election in several swing states, President Trump filed more than fifty lawsuits and spoke of his hopes that Republican-appointed judges would back his unsubstantiated claims of voter fraud.<sup>260</sup>

Beyond his own legal filings, President Trump was a magnet for lawsuits and prosecutors.<sup>261</sup> For example, by November 2020, states had filed 138 separate lawsuits against the Trump administration (around thirty-five per year).<sup>262</sup> By comparison, states filed seventy-eight multi-state suits in the eight years of President Obama’s administration (around ten per year), and seventy-six multi-state suits during President George W. Bush’s eight years in office (also around ten per year).<sup>263</sup>

This means our recent data may be picking up differences on the docket as opposed to differences on the bench. A comparison of 2018 to 2020 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 partic-

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<sup>257</sup> 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>.

<sup>258</sup> *Id.*

<sup>259</sup> See *id.* (describing President Trump’s rhetoric that the liberal judiciary, which had ruled against him in numerous lawsuits, was undertaking an assault on the Constitution).

<sup>260</sup> Pete Williams & Nicole Via y Rada, *Trump’s Election Fight Includes Over 50 Lawsuits. It’s Not Going Well.*, NBC NEWS (Nov. 23, 2020, 9:06 AM), <https://www.nbcnews.com/politics/2020-election/trump-s-election-fight-includes-over-30-lawsuits-it-s-n1248289>; Michelle Lee, *Trump Says He Is Counting on the Supreme Court to Settle Disputes over Mail-in Ballots*, WASH. POST (Sept. 29, 2020, 10:47 PM), <https://www.washingtonpost.com/elections/2020/09/29/presidential-debate-live-updates/#link-P2LX2W45Q5BSLKTRU4BYO6CRK4> (describing President Trump’s quip that he was counting on the Supreme Court, including his not-yet-confirmed nominee Amy Coney Barrett, “to look at the ballots”).

<sup>261</sup> Baker, *supra* note 257 (quoting Michael Waldman, president of the Brennan Center for Justice at New York University School of Law).

<sup>262</sup> Erik Ortiz, *State AG Lawsuits Against Trump Continue to Mount, Far More Than in Recent Years*, YAHOO NEWS (Nov. 16, 2020), <https://www.yahoo.com/news/state-ags-sued-trump-admin-103036490.html>; see also Wilson, *supra* note 229 (describing data indicating that states filed 103 multi-state lawsuits against the Trump administration in its first three years). Ninety-six of these lawsuits were led by Democratic Attorneys General. *Id.*

<sup>263</sup> Wilson, *supra* note 229.

ular, the Trump docket had far more cases directly involving the President or his signature policy initiatives.<sup>264</sup>

We identified 120 en banc decisions dating from 2018 to 2020. Among those, nineteen cases (sixteen 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.<sup>265</sup> In another eighteen cases (fifteen percent), courts of appeals used en banc review for ideologically polarized issues;<sup>266</sup> in twenty-eight cases (twenty-three percent), the federal government was a party.<sup>267</sup>

For the sake of comparison, in 2016 under the Obama administration, there were forty-seven en banc decisions in our database.<sup>268</sup> Unlike under President Trump, there were no cases that involved either President Obama directly or major policy initiatives pursued by the Obama administration.<sup>269</sup> Eleven (twenty-three percent) involved politically charged issues;<sup>270</sup> in another eleven cases (twenty-three percent), the federal government was a party.<sup>271</sup> For the George W. Bush administration, we reviewed forty-one en banc decisions in 2008.<sup>272</sup> No case involved President Bush directly and only two cases (five percent) involved major policy initiatives associated with the war

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<sup>264</sup> We compared the en banc docket of the Trump era (2018 to 2020) to the en banc docket of the final year of both 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 indeed that stark.

<sup>265</sup> See Memorandum from Brandon Goldstein to Neal Devins and Allison Orr Larsen, En Banc Review Under Presidents George W. Bush, Barack Obama, and Donald Trump (on file with author) [hereinafter Goldstein Memorandum].

<sup>266</sup> Five of these cases 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.*

<sup>267</sup> See *id.*

<sup>268</sup> We chose 2016 because it was the last year of the Obama administration, so President Obama's influence on judicial selections at that time would be at its apex.

<sup>269</sup> See Goldstein Memorandum, *supra* note 265.

<sup>270</sup> Three cases involved the Second 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.*

<sup>271</sup> See *id.*

<sup>272</sup> As with selecting 2016 for President Obama, we chose 2008 for George W. Bush's administration because it was the last year of his presidency, so President Bush's influence on judicial selections at that time would be at its apex.

on terror.<sup>273</sup> Three cases involved politically charged issues (seven percent);<sup>274</sup> the federal government was a party in fourteen cases (thirty-four percent).<sup>275</sup>

To summarize: For both Presidents Bush and Obama, no en banc decision directly involved the President and next to no en banc decisions involved the signature policy initiatives (at least during the final year of their administrations); but for President Trump, the President and his signature policy initiatives were regularly subject to en banc review.<sup>276</sup>

No doubt, en banc review in the age of President 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 to 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 review should at least serve as a warning of the fragility of those norms and the need to nurture and protect non-partisan norms in the future.

## CONCLUSION

Going en banc involves a complex mix of ideology, rule-of-law and collegiality concerns. By taking the long view of en banc decisions 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 1966 to 2017 strongly suggest 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.

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<sup>273</sup> See Goldstein Memorandum, *supra* note 265.

<sup>274</sup> The politically charged cases included two cases about abortion and one about elections and voting laws. See *id.*

<sup>275</sup> See *id.*

<sup>276</sup> State lawsuits against Presidents Trump, Obama, and George W. Bush tell a similar story. President Trump and his most visible policy initiatives were the subject of thirty-four lawsuits per year; Obama and Bush were subject to ten per year. See *supra* notes 257–64. Earlier administrations were subject to even fewer state lawsuits. See PAUL NOLETTE, FEDERALISM ON TRIAL: STATE ATTORNEYS GENERAL AND NATIONAL POLICYMAKING IN CONTEMPORARY AMERICA 20–21 (2015) (discussing data on state lawsuits since 1980).

Data from 2018 to 2020, however, underscore that we could be in a season of change. There are significant red flags to indicate that longstanding rule-of-law and collegiality norms on the federal bench are eroding and there may come a day when en banc review 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 review and the dramatic spike in partisan en banc decision-making raise basic questions both about the desirability of en banc review and the legitimacy of the 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 court of 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 the demise of the rule of law.